

Northwestern Access to Health Project

the **Access to Health Project**



Northwestern Pritzker School of Law  
Kellogg School of Management  
Feinberg School of Medicine

# TRANSGENDER HEALTH CARE IN CHINA

## Final Report & Recommendations

Prepared for:

Psychological Team for Trans People in China

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## EXECUTIVE SUMMARY

This report investigates transgender people’s access to healthcare in China. Our partner is the Psychological Team for Trans People in China, a non-profit established in 2018 which provides direct mental health services to transgender people, including counseling and operating a hotline. This report is aimed at supporting the organization in its advocacy effort towards shedding light on the poor health outcomes of transgender people in China.

Stigmatization of and discrimination against transgender people in China is a human rights concern. Stigma and discrimination negatively impacts the lives of transgender people in China in a number of ways, including increasing barriers to healthcare and psychological support, increasing workplace inequality and preventing marriage equality. According to the UNDP in a report issued in 2017 on China’s Lesbian, Gay, Bisexual and Transgender (LGBT) community, “trans people face the highest levels of discrimination, especially within the family, schools and workplaces.”<sup>1</sup>

The constitution of China enshrines the principle of equality before the law, personal dignity and creates an obligation on the government of China to preserve the human rights of its citizens. Despite these constitutional guarantees, there is no express law protecting transgender people in China from discrimination. The purpose of this report is to assess the discrimination against transgender people in China which can be linked to the health challenges that they face and make recommendations for addressing these problems. The recommendations are made in order to support our partner in its advocacy goals and objectives towards sensitizing Chinese society about its transgender population.

## RECOMMENDATIONS SUMMARY

In order to address the health care challenges faced by the transgender community in China, we have made the following recommendations for where to place advocacy efforts:<sup>2</sup>

1. Modify legal definitions of “gender” in antidiscrimination statutes to include protections for transgender people.

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<sup>1</sup> Agence France-Presse, *China’s Transgender People ‘step forward’ from the shadows*, SOUTH CHINA MORNING POST (Jun. 14, 2018, 10:27 PM), <https://www.scmp.com/news/china/society/article/2150773/chinas-transgender-people-step-forward-shadows>.

<sup>2</sup> These recommendations are discussed in more detail in Part VI of this report.

2. Specialized inquiries in epidemiological research in order to raise awareness and bring attention to the unique needs and challenges of transgender people.
3. Remove the gender affirming surgery requirement for modifying government identification documents.
4. Promote access to safe, reliable and affordable hormone therapy in China for transgender persons.
5. Enact stronger legal protections for violations of health privacy laws.
6. Reduce cost or provide insurance coverage for transition related services.
7. Reduce the role of mental health professionals as gatekeepers by adopting aspects of the Informed Consent Model Standard of Care encouraging patient autonomy.
8. Create counseling services specifically designed for transgender youth.
9. Modify the policy on criminal records related to gender affirming surgery.
10. Encourage widespread grassroots education and activism in order to promote education on gender identity and acceptance of transgender people within the Chinese community.

## INTRODUCTION

This report outlines some of the challenges faced by transgender people when trying to access appropriate health care in China, with a focus on hormone therapy, surgery and psychological support. It will describe the origin and history of stigma of and discrimination against transgender people in China; the laws, policies and national health plans relevant to transgender people in China; and the barriers and challenges transgender people face when trying to access medical care and psychological support. This report will also discuss international standards that promote the right to health of transgender people as well as mechanisms adopted by other jurisdictions (United States, Canada, Thailand, Europe) in meeting the health needs of the transgender community. Lastly, this report will provide recommendations for where to focus advocacy efforts in order to alleviate the health challenges currently facing the transgender community in China.

## BACKGROUND AND HISTORY

### A. Definitions

In this report, we use the term transgender as “[a]n umbrella term for people whose gender identity and/or expression is different from cultural expectations based on the sex they were assigned at birth.”<sup>3</sup> Importantly, “being transgender does not imply any specific sexual orientation. Therefore, transgender people may identify as straight, gay, lesbian, bisexual etc.”<sup>4</sup>

### B. History and Overview of Transgender Rights and Stigma in China

The legal status of the transgender community in China is uncertain.<sup>5</sup> Presently, the Chinese government has not enacted laws that expressly protect the rights of transgender people against discrimination.<sup>6</sup> And no laws exist that protect transgender individuals’ right to access quality healthcare.<sup>7</sup>

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<sup>3</sup> Human Rights Campaign, *Glossary Terms*, <https://www.hrc.org/resources/glossary-of-terms> (last visited Feb. 10, 2019).

<sup>4</sup> *Supra* note 3.

<sup>5</sup> Arber Mavraj, *The LGBT Movement in China: public Perception, Stigma, and the Human Rights Debate*, 8, INQUIRIES JOURNAL, 1/21 (2016).

<sup>6</sup> Gabriel Dominguez, Juan Ju, *Marginalized and stigmatized – China’s transgender sex workers*, (Jan. 1, 2015), <https://www.dw.com/en/marginalized-and-stigmatized-chinas-transgender-sex-workers/a-18214489>.

<sup>7</sup> *Id.*

There are no official statistics reflecting the size of the transgender community in China.<sup>8</sup> However, studies suggest “0.1 percent to 1.1 percent” of the Chinese population are transgender.<sup>9</sup>

*i. Origins of Discrimination*

Because sexuality and gender identity are often conflated, stigma of homosexuality can attach to transgender people who may or may not be gay. Therefore, the stigmatization and discrimination faced by transgender people in China is closely linked to intolerance for homosexuality in China. Such intolerance grew by reason of western influence, the end of dynastic rule in China,<sup>10</sup> and, some have argued, the influence of Confucian philosophy within Chinese society.<sup>11</sup>

The introduction of western religious materials in China and the study of western ideas, which condemned and criminalized homosexuality as a sin and a deviant behavior deserving punishment, contributed to the intolerance of homosexuality by Chinese society.<sup>12</sup> These views compounded after the establishment of the “Chinese Communist Party and creation of the People’s Republic of China.”<sup>13</sup>

Before this time, and as early as 650 B.C., male sexual diversity was accepted by Chinese royal courts and had been developed within its literature.<sup>14</sup> In fact, non-heterosexual identities are said to “have had long-standing roots in Chinese History” for thousands of years.<sup>15</sup> There was tolerance for homosexuals as they were depicted in Chinese poetry, and they faced less persecution before the introduction of western ideas of morality (which was Christian-based), into Chinese society.<sup>16</sup>

An important aspect of Chinese culture is the continuity of the family line.<sup>17</sup> This idea emanated from the influence of Confucian philosophy in China.<sup>18</sup> Confucianism largely influenced the Chinese society by placing “special importance on having children, especially male offspring, as a filial obligation in

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<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> Agi Veres, *A safe and Inclusive Society for Transgender People in China*, UNITED NATIONS DEVELOPMENT PROGRAM (UNDP), (Nov. 13, 2018), <http://www.cn.undp.org/content/china/en/home/ourperspective/ourperspectivearticles/2018/a-safe-and-inclusive-society-for-transgender-people-in-china.html>.

<sup>11</sup> Hunter Gray, *Negotiating Invisibility: Addressing LGBT Prejudice in China, Hon Kong and Thailand*, (2014), [https://scholarworks.umass.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1029&context=cie\\_capstones](https://scholarworks.umass.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1029&context=cie_capstones).

<sup>12</sup> *Supra* note 5.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Supra* note 11.

<sup>16</sup> *Id.*

<sup>17</sup> *Supra* note 5.

<sup>18</sup> *Supra* note 11.

order that children continue the paternal family.”<sup>19</sup> This idea to continue the family line has contributed to the stigma of and discrimination against LGBT people who are perceived as distorting this Chinese traditional value.<sup>20</sup> It is also said to contribute to the guilt LGBT people feel regarding “coming out” about their sexual orientation and gender identity.<sup>21</sup> The pressure on the younger generation to have a family in Chinese culture rests on the need for them to care for their elders and continue the family lineage by bearing children.<sup>22</sup>

## *ii. Current Challenges*

The transgender population in China are discriminated against and stigmatized both within their families and in society at large.<sup>23</sup> As a result, China’s transgender community faces a number of challenges.

Transgender people do not have equal access to social services including health care due to the misconceptions around their sexual orientation and identity.<sup>24</sup> According to the UNDP, “a recent survey of transgender people in China reflects that among 62 percent of respondents demanding access to hormone therapy, only 6 percent were able to access satisfactory care.”<sup>25</sup> There is also a shortage of medical institutions available to transgender people in China for accessing counselling, transition support, hormone treatment, etc. Institutions providing specialized services regarding “hormone use and gender change” are fewer than ten, with the public medical institutions lacking expertise and competency in this area.<sup>26</sup>

Violence is another problem faced by transgender people in China. Recently, there has been media attention concerning the huge number of rape cases within the country.<sup>27</sup> However, violence against transgender women remain largely overlooked or taken seriously.<sup>28</sup> The authorities, particularly the police, have been accused of mocking transgender people who are survivors of sexual violence. They

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<sup>19</sup> *Id.*

<sup>20</sup> Judith A. Berling, *Confucianism*, ASIA SOCIETY, <https://asiasociety.org/education/confucianism>.

<sup>21</sup> *Supra* note 5.

<sup>22</sup> *Id.*

<sup>23</sup> *Supra* note 5.

<sup>24</sup> *Id.*

<sup>25</sup> *Supra* note 10.

<sup>26</sup> *Supra* note 7.

<sup>27</sup> Puja Changoiwala, India: *No Country for Transgender Women*, SOUTH CHINA MORNING POST, (Jun. 8, 2018, 2:47 PM), <https://www.scmp.com/week-asia/society/article/2154077/india-no-country-transgender-women>.

<sup>28</sup> *Id.*



have been accused of not viewing transgender women as “women” with the anatomy for a sexual violence allegation to hold any weight.<sup>29</sup>

Closely related to this are reports that a large number of transgender people are forced to become sex workers due to “social ostracism as well as legal and economic marginalization,” thereby promoting disenfranchisement and discrimination against them in China.<sup>30</sup> Added to this issue is the fact that being a sex worker in China is illegal. Due to this, transgender individuals who follow this path tend to have more interaction with local authorities and are prone to face abuse from the Chinese police who have a habit of mocking them as well as verbally and physically abusing them.<sup>31</sup>

In addition, the transgender community in China is at high risk of HIV infection.<sup>32</sup> Current research indicates that transgender women, especially those who have joined the sex workforce are mostly affected by HIV.<sup>33</sup> According to DW, “Globally, transgender women are 49 times more likely to acquire HIV than the general public. The HIV infection rate among transgender female sex workers is 27.3 percent, which is nine times higher than female sex workers, and three times higher than male sex workers.”<sup>34</sup>

Regarding workplace and employment equality, a major issue faced by transgender people is legal identity.<sup>35</sup> According to Chinese law “only those who have undergone sex reassignment surgery (SRS), can alter the gender on their identity cards.”<sup>36</sup> According to Chinese law “post-operative trans-sexuals are entitled to update their gender identity on household registration and identity cards; however, trans-sexuals are unable to update their gender identity on academic records or other crucial documents.”<sup>37</sup> According to UNDP, due to the difficulty in changing their information on official documents and identification, transgender people face the risk of being unemployed as employers refuse to recognize their qualifications from educational institutions.<sup>38</sup> For these reasons, transgender

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<sup>29</sup> *Id.*

<sup>30</sup> *Supra* note 7.

<sup>31</sup> *Id.*, *Supra* note 27.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> China LBT Rights Initiative, *Discrimination Faced by Lesbian, Bisexual and Transgender Women in China*, [https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/CHN/INT\\_CEDAW\\_NGO\\_CHN\\_16577\\_O.pdf](https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/CHN/INT_CEDAW_NGO_CHN_16577_O.pdf).

<sup>38</sup> *Supra* note 10.

people have identity cards that fail to reflect their desired gender identity.<sup>39</sup> This problem also leads to them having to reveal their status in their work places and when making use of public services.<sup>40</sup>

Fortunately, in early 2018, a Guiyang appeals court ruled on the first lawsuit filed in China against employment discrimination of transgender individuals.<sup>41</sup> According to UNDP, the lower court's decision was upheld by the appeals court which stated that, "workers should not experience differential treatment based on their gender identity and expression."<sup>42</sup> Although the appellate court's ruling may be regarded as a major step towards achieving workplace equality for transgender people in China, the discrimination they face persists.<sup>43</sup>

## CURRENT LAWS, POLICIES AND NATIONAL HEALTH PLANS IN CHINA

The Constitution of China states that:

[a]ll persons holding the nationality of the People's Republic of China are citizens of the People's Republic of China. All citizens of the People's Republic of China are equal before the law. The State respects and preserves human rights. Every citizen is entitled to the rights and at the same time must perform the duties prescribed by the Constitution and other laws.<sup>44</sup>

Despite this broad protection from the highest legal authority in the country, laws and administrative regulations promulgated by the National People's Congress and State Council respectively, abridge transgender people's rights in three main areas: (1) access to gender affirming health services, (2) legal recognition of gender identity and (3) protection from discrimination.

### A. Access to Gender Affirming Health Services

#### *iii. Gender Affirming Surgery*

The National Health Commission is the executive agency under the State Council responsible for health-related policies and enforcement. The Sex Reassignment Procedural Management Standards

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<sup>39</sup> *Supra* note 7.

<sup>40</sup> *Supra* note 10.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> CONSTITUTION OF THE PEOPLE'S REPUBLIC OF CHINA, Mar. 4, 2004, ch. 2. art. 33.

(“Sex Reassignment Standards”) issued by the Commission in 2017, require transgender individuals to meet the following requirements to be approved for gender affirming surgery: the desire to change sex has existed, and been persistent, for over five years with no history of hesitation in pursuing this desire; psychological/psychiatric therapy has been provided for over a year prior to surgery, with no effect; the patient is unmarried; the patient is over 20 years old and has complete civil capacity; the patient has no other contraindications to surgery.<sup>45</sup>

Notably, the requirement that the person is at least 20 years old conflicts with the definition of the “age of persons with full capacity for civil conduct” in the General Principles, and the General Provisions of the Civil Law of the People's Republic of China.<sup>46</sup>

In addition, under the Sex Reassignment Standards, patients are required to submit the following materials before they are eligible for sex affirming surgery: verification issued by the local Public Security Bureau that the patient has no prior criminal record; verification issued by a psychologist or psychiatrist of a diagnosis of transsexualism; verified written request from the surgical patient requesting the surgery; verification that the surgical patient has already notified family of the intention to undergo sex reassignment surgery.<sup>47</sup> Although technically only parental notification, not approval, is required “[i]n practice, such requirement is often misinterpreted by surgeons who usually require the...applicants to provide the consent form from their parents or guardians.”<sup>48</sup>

A recent survey of transgender people in China found that 89.1% of transgender people who wanted sex affirming surgery reported that they were unable to get it.<sup>49</sup> Two commonly cited reasons were parents disagreeing with the procedure (65.3%) and the age restriction (34.4%).<sup>50</sup>

The Sex Reassignment Standards also require that doctors performing gender affirming procedures have: a valid license to practice medicine, and be a registered doctor with the medical facility’s surgical department; over 10 years of clinical medical work experience specializing in plastic surgery, and have held a professional position of deputy director of the department or higher professional technical qualification for over five years; independently completed no fewer than 10 sexual organ

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<sup>45</sup> UNDP and China Women’s University, *Legal Gender Recognition in China: A Legal and Policy Review*, sec. 3.1.3 (2018).

<sup>46</sup> *Id.* at p. 10.

<sup>47</sup> *Id.* at sec. 3.1.3.

<sup>48</sup> *Id.*

<sup>49</sup> Beijing LGBT Center, *2017 Chinese Transgender Population General Survey Report*, sec. 2.2 (2017)

<http://chinadevelopmentbrief.cn/wp-content/uploads/2017/11/2017-Chinese-Transgender-Population-General-Survey-Report.pdf> (hereinafter *2017 Chinese Transgender Survey*)

<sup>50</sup> *Id.*

reconstruction procedures (those performing female-to-male gender-reassignment surgeries need to have completed no fewer than five penis reconstruction surgeries); undergone systematic training certified by the province-level Health and Family Planning Commission administrative department, and possess the necessary skills to perform gender-reassignment procedures.<sup>51</sup> These requirements make it difficult for transgender individuals to find a doctor who is both willing and qualified to perform the surgery.

#### *iv. Hormone Therapy*

Access to safe and reliable hormone therapy for transgender persons in China is also highly restricted. Seventy-one per cent of transgender people who “wanted hormone therapy thought that obtaining safe, reliable information about hormone therapy drugs, and being able to safely and properly receive hormone therapy at the direction of medical personnel was ‘difficult,’ ‘extremely difficult’ or ‘nearly impossible.’”<sup>52</sup> As a result, many transgender people resort to purchasing hormones from the black-market, relying on recommendations from other individuals in the transgender community regarding the type of hormone and dosage to take.<sup>53</sup> Without access to supervised hormone therapy, these individuals often suffer “considerable side effects from the wrong use of hormones.”<sup>54</sup>

### **B. Legal Gender Recognition: Changing Gender Markers and Names**

According to directives issued by the State Council’s Ministry of Public Security, an individual is only permitted to change the gender marker on official documents after sex affirming surgery.<sup>55</sup> After surgery is completed, the person must submit a “certificate of gender authentication” issued by a hospital authorized to perform the surgery, and a verification of the certificate from a notary public.<sup>56</sup> Under these guidelines, even people who have had gender affirming surgery face difficulties gathering the required documentation, and only 50% have been able to change the gender markers on their official identity documents.<sup>57</sup>

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<sup>51</sup> UNDP & China Women’s University, *Legal Gender Recognition in China: A Legal and Policy Review*, sec. 3.1.3 (2018).

<sup>52</sup> *2017 Chinese Transgender Survey*, sec. 1.2

<sup>53</sup> UNDP, USAID, *Being LGBT in Asia: China Country Report*, 39 (2014). Available at: <http://www.undp.org/content/undp/en/home/librarypage/hiv-aids/-being-lgbt-in-asia--china-country-report.html>.

<sup>54</sup> *Id.*

<sup>55</sup> UNDP & China Women’s University, *Legal Gender Recognition in China: A Legal and Policy Review*, sec. 3 (2018).

<sup>56</sup> *Id.*

<sup>57</sup> *2017 Chinese Transgender Survey* at sec. 7.3; Manya Koetse, *Transsexual Chinese Woman Cannot Change Post-Surgery Gender* What’s on Weibo (2016), <https://www.whatsonweibo.com/transgender-woman-cannot-change-official-gender-after->

After changing gender markers on official identity documents, many transgender people still have to change the gender markers on other documents, like diplomas and professional certifications.<sup>58</sup> The laws and policies applicable to these organizations and schools are not apparent, and transgender people have reported that many institutions refuse to change the documents.<sup>59</sup>

Chinese law allows a transgender person to change his or her name.<sup>60</sup> However, a name change requires “extensive documentation, including approval from one’s family and work unit, and ultimately relies on the discretion of the local household registration office where a transgender person was born or legally resides.”<sup>61</sup> In cases where a request for a name change changing a name has been denied on minor grounds, the courts have affirmed the discretion and authority of the household registration authorities.<sup>62</sup>

### C. Protection from Discrimination

China does not have policies or laws that “recognize sexual and gender minorities or protect them from discrimination and unfair treatment on the basis of their gender identity or sexual orientation.”<sup>63</sup> Additionally, conversion therapy is legal in China, and almost 12% of transgender individuals have been forced into conversion therapy by their parents or guardians.<sup>64</sup>

#### i. Employment

Article 12 of the Labor Law of the People’s Republic of China bans discrimination against workers based on “nationality, race, sex, or religious belief,”<sup>65</sup> and Article 13 provides that “women shall enjoy

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surgery/ (last visited Feb 10, 2019); GLOBAL TIMES, *Transgender people talk about changing sex and life in China*, <http://www.globaltimes.cn/content/991992.shtml> (last visited Feb 10, 2019).

<sup>58</sup> UNDP & China Women’s University, *Legal Gender Recognition in China: A Legal and Policy Review*, sec. 3 (2018).

<sup>59</sup> 10% of respondents revealed that they had been met with refusal after applying to change their name and gender marker on professional accreditation documents. 36% of respondents signaled that they had been met with obstacles in the process of changing the name and gender marker on diplomas and educational certificates, with 12% of these further indicating that the school itself had refused. *2017 Chinese Transgender Survey*, sec. 7.3.

<sup>60</sup> GENERAL PRINCIPLES OF THE CIVIL LAW OF THE PEOPLE’S REPUBLIC OF CHINA, 1986, art. 99; REGULATIONS OF THE PEOPLE’S REPUBLIC OF CHINA ON HOUSEHOLD REGISTRATION, 1958, art. 18.

<sup>61</sup> UNDP & APTN, *Legal Gender Recognition: A Multi-Country Legal and Policy Review in Asia*, sec. 5.2.A (2017).

<sup>62</sup> *Id.*

<sup>63</sup> UNDP, *Being LGBTI in China – A National Survey on Social Attitudes towards Sexual Orientation, Gender Identity and Gender Expression* (2016).

<sup>64</sup> *2017 Chinese Transgender Survey* at sec. 3.3.

<sup>65</sup> LABOUR LAW OF THE PEOPLE’S REPUBLIC OF CHINA, July 5, 1994, art. 12.

equal rights as men in employment. Sex shall not be used as a pretext for excluding women from employment...Nor shall the standards of recruitment be raised when it comes to women.”<sup>66</sup> Similar protections are promulgated in the Employment Promotion Law of the People’s Republic of China, and the Law on the Protection of Rights and Interests of Women, however none of the employment discrimination laws explicitly protect discrimination on the basis of gender identity.<sup>67</sup>

Due to the age restrictions promulgated in the Sex Reassignment Standards, most sex affirming surgeries are conducted after a transgender person has graduated school and started a career. Because a transgender person must obtain approval from the employer, they are forced to disclose their sex change, which can result in discrimination or dismissal.<sup>68</sup>

### *ii. Criminal*

Many criminal laws also fail to protect transgender victims. China criminalizes rape, but only if the victim is a woman.<sup>69</sup> Criminal sanctions for sexual harassment were limited to circumstances where the victim was a woman until August 29, 2015 when the National People’s Congress Standing Committee passed a motion to amend the law to expand the protection to “any person.”<sup>70</sup>

### *iii. Marriage*

The Marriage Law of the People’s Republic of China does not recognize same-sex marriage,<sup>71</sup> and there is no law recognizing same-sex partnerships. Transgender people may marry a person only if the couple’s gender markers are different. Unmarried couples receive no protection for “basic partner rights such as joint property, inheritance, tax and mortgage benefits, or joint adoption.”<sup>72</sup>

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<sup>66</sup> *Id.* at art. 13.

<sup>67</sup> EMPLOYMENT PROMOTION LAW OF THE PEOPLE’S REPUBLIC OF CHINA, 2015, art. 3

<sup>68</sup> UNDP & China Women’s University, *Legal Gender Recognition in China: A Legal and Policy Review*, sec. 3.2.3 (2018).

<sup>69</sup> The law states: “whoever, by violence, coercion or other means, rapes a woman is to be sentenced to not less than three years and not more than 10 years of fixed-term imprisonment.” CRIMINAL LAW OF THE PEOPLE’S REPUBLIC OF CHINA, 1997, art. 236.

<sup>70</sup> CRIMINAL LAW OF THE PEOPLE’S REPUBLIC OF CHINA, Aug, 29, 2015, art. 237.

<sup>71</sup> UNDP, USAID, *Being LGBT in Asia: China Country Report*, *supra* note 9 at 39.

<sup>72</sup> *Id.*

## THE REALITIES OF LIFE AS A TRANSGENDER INDIVIDUAL IN THE PEOPLE'S REPUBLIC OF CHINA

In addition to the legal barriers that transgender individuals experience there are social and cultural obstacles that effect the rights of transgender people. Chinese common opinion about lesbian, gay, bisexual, and transgender (hereinafter LGBT) rights is “to let things drift if they do not affect one personally.”<sup>73</sup> China has a history of cross-dressing that is viewed by the general public as solely for the idea of “gender as a performance.”<sup>74</sup> While this type of performance is well-established in Chinese culture, it was viewed as strictly “casual, momentary breaching of the gender boundary.”<sup>75</sup> With the increasingly blurred lines that have arisen in the modern era, the gender norms became “more strictly upheld.”<sup>76</sup> This historical context also speaks to why feminine presenting transgender individuals are reported to have a slightly easier time with navigating their transition and integration into the community.

The general refusal of understanding or acceptance can be seen more distinctly on a micro scale; relatives often become cruel when they discover the gender/sexuality of the LGBT individual and workplaces seek to isolate colleagues.<sup>77</sup> Persons who are not fortunate enough to be surrounded by a community willing to embrace them have increasingly faced pressures to engage in “fake marriages” in order to present a “normal” lifestyle.<sup>78</sup> It is estimated that there are over 4 million transgender individuals in China, but only 2.2 percent of this population reports having a support system of either trans friends or family.<sup>79</sup> The effectiveness, or lack thereof, of government policies in real-life circumstance can be seen in healthcare education and workplace culture.

### A. Healthcare Education

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<sup>73</sup> Pi Jun, *Transgender in China*, 7 *Journal of LGBT Youth* 346, 352 (2010).

<sup>74</sup> THE DIPLOMAT, *China's Complicated Approach to Transgender Rights*, <https://thediplomat.com/2017/10/chinas-complicated-approach-to-transgender-rights/> (last visited Feb 10, 2019).

<sup>75</sup> THE WORLD OF CHINESE, *Crossing the Gender Lines: Transgenderism Might Just Be A Step Too Far For China*, <http://www.theworldofchinese.com/2013/11/crossing-the-gender-lines/> (last visited Feb 10, 2019).

<sup>76</sup> *Id.*

<sup>77</sup> Pi Jun, *Transgender in China*, 7 *Journal of LGBT Youth* 346, 352 (2010).

<sup>78</sup> *Id.*

<sup>79</sup> Asia Catalyst, *“My Life is too Dark to See the Light”: A Survey of the Living Conditions of Transgender Female Sex Workers in Beijing and Shanghai* (2015) <http://asiacatalyst.org/wp-content/uploads/2014/09/Asia-Catalyst-TG-SW-Report.pdf>; The Williams Institute at The University of California Los Angeles School of Law, *Public Support for Transgender Rights a Twenty-Three Country Survey* (2016) <https://williamsinstitute.law.ucla.edu/wp-content/uploads/23-Country-Survey.pdf>

*i. The Pathologization of Transgender People*

Regulatory approaches are the primary means by which information regarding transgender rights and education has been disseminated amongst the population. This approach has resulted in the pathologization of transgender people – that is, viewing transgender people as mentally ill.<sup>80</sup> The requirement for transgender persons to be diagnosed as having a mental illness in order to pursue sexual reassignment surgery has opened up a rift between the transgender community and the medical community, and this is only the initial diagnosis that is required. Many transgender individuals do not wish to pursue this process for such a deep mischaracterization and advocates further state that it undermines their “dignity, privacy, right to self-determination and recognition before the law, as well as other human rights.”<sup>81</sup>

The April 2001 version of the 3rd Edition of the Chinese Classification of Mental Disorders (“CCMD-3”) outlined diagnostic criteria for “gender identity disorder” through the lens of behavioral expression and time duration as follows:

⇒ Behavioural expression:

- The individual’s behaviour in dress, manner of speaking, and other external expression conformed to that expected of the “gender opposite their own physiological sex”.
- The individual refused to participate in activities expected of the individual’s gender. Persistent and firm rejection of their physiological sex characteristics.

⇒ Time duration:

- Behavioural symptoms, as identified above, should persist for longer than six months.<sup>82</sup>

Diagnostic criteria for “transsexualism” have an emphasis on terms such as “disgust,” “psychological tension,” and “desire to change one’s psychological characteristics.”<sup>83</sup> It is of note that this is a diagnosis that is to be made after all other checks have made for other mental illnesses, physical

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<sup>80</sup> UNDP and China Women’s University, *Legal Gender Recognition in China: A Legal and Policy Review*, sec. 4.1 (2018).

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* citing Zhang Xiaohui and Tong Huijie. *Diagnosing Gender Identity Disorder: Perspectives from the DSM-4, CCMD-3, ICD-10*, 5 *Journal of Neuroscience and Mental Health* 376 (2006).



abnormalities, and other alterations. The phrasing of this criteria has lead therapists and doctors to view individuals as “sufferers of transsexualism.”<sup>84</sup>

### *ii. Lack of Trust in Doctors*

The difficulties transgender individuals face in obtaining approval and conducting sexual reassignment surgery has made the stakes incredibly high and the regulations even more unlikely to be followed.<sup>85</sup> In 2014, data from the Changzheng Hospital and Shanghai Ninth People’s Hospital, two major centers for sexual reassignment surgery, suggests that less than 800 transgender patients have been treated in the past 30 years.<sup>86</sup> Among these operations, male-to-female is considered less complicated, and the number of these operations also continues to decrease in state owned hospitals.<sup>87</sup>

The Sexual Reassignment Standards were created with good intentions, but there have been suggestions that they need substantial revision due to how onerous the process is, failure of the regulation to align with prevailing guidelines, and the lack of mention of hormone therapy.<sup>88</sup> Further, the regulation does not specify any penalties for possible violation, which leaves potential patients unsure of their methods of relief in the event there is an issue with their medical procedure.<sup>89</sup> Critics of the current standards argue that regulations should be aimed at promotion of more humane practices and better general health rather than mere health management, the evidence of which can be seen even in how Chinese doctors choose to manage the pain of the surgery: it has been of note that doctors at one point did not even prescribe analgesic.<sup>90</sup>

### *iii. Individual Initiatives*

The aforementioned difficulties between the Chinese medical community and the transgender community have led to some individuals pursuing less than ideal measures to meet their needs, sometimes with dire results.<sup>91</sup> There has been a growing trend of transgender persons of resorting to

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<sup>84</sup> UNDP and China Women’s University, *Legal Gender Recognition in China: A Legal and Policy Review*, sec. 4.1 (2018).

<sup>85</sup> See generally UNDP and China Women’s University, *Legal Gender Recognition in China: A Legal and Policy Review* (2018).

<sup>86</sup> Hua Jiang, et al., *Transgender Patients Need Better Protection in China*, 384 *The Lancet* 2109, 2109-10 (2014).

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*; Pi Jun, *Transgender in China*, 7 *Journal of LGBT Youth* 346, 353 (2010).

<sup>91</sup> SINA NEWS, *Man Died in a Rental House in Beijing after Completing a Sex Change Operation in Thailand*, <http://news.sina.com.cn/s/2006-02-06/00188128730s.shtml> (last visited Feb 10, 2019).

self-dosing and obtaining surgery overseas (notably, Thailand) as a means of circumventing the Chinese system.<sup>92</sup>

While this has worked for some, individuals have attested to health complications of varying severity as a result of self-dosing. One woman, Pipi, who lives in the Liaoning Province resorted to self-dosing more than 15 years ago and developed diabetes from taking the drugs.<sup>93</sup> This was during the first days of the internet, but more recent developments of online pharmaceuticals have led to e-commerce platforms that sell some of the hormonal products that are necessary to undergo changes, which has encouraged individuals to “fabricate prescriptions and...disguise themselves as pharmaceutical professionals to directly buy drugs” from pharmacies. There is no practical way to verify the quality of the medicine, however, with individuals only having the availability of “the descriptions and certifications the online shops display” to make their determinations.<sup>94</sup> Obtaining the drugs is only the first step – individuals then must determine the doses that would work best for them, which has created a niche in the online community with others providing their personal experiences for comparison. The dangers here cannot be understated – using incorrect doses “can damage people’s internal organs, especially their kidneys, and the side effects can be fatal.”<sup>95</sup>

Many people do not wish to assume the risk of self-diagnosis and have access to capital that will take them abroad to conduct the surgery. Notably, Thailand is a nearby country that is common for individuals to travel to in order to conduct gender reassignment surgery. One person quoted her surgery at 70,000 yuan in total (approx. 10,378 USD) and being away from more than 20 days. The experience was markedly different, “in China...people often face discrimination... [unlike] in Thailand they can enjoy good service.”<sup>96</sup> Others have utilized benefits in countries such as Germany while they are students overseas because “surgery fees can be paid for by the government” itself.<sup>97</sup> This is a stark contrast to a quote of the service in China coming at a cost of 100,000 yuan (approx. 14,826 USD) and nearly a year in the hospital.<sup>98</sup>

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<sup>92</sup> GLOBAL TIMES, *No Tolerance for Transgender Prejudice*, <http://www.globaltimes.cn/content/676640.shtml> (last visited Feb 10, 2019).

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> Pi Jun, *Transgender in China*, 7 *Journal of LGBT Youth* 346, 353 (2010).

## B. Workplace Turmoil

In a landmark decision in the southwestern city of Guiyang (in China's Guizhou province), a trans man by the name of Mr. C\*<sup>99</sup>, won a discrimination case against his former employer.<sup>100</sup> Mr. C claimed that he was unfairly fired in 2015 because of his gender identity. Mr. C, like many others, chose to dress in a manner that reflected his personality yet was respectful of workplace dress, yet he was accused by the company's human resource manager of dressing "like a gay man" and there was cause for concern that he "might damage the company's reputation."<sup>101</sup> The statement in question alongside the details of the ruling highlight just how far China still has to go with addressing transgender rights in the workplace.<sup>102</sup>

Mr. C's case was decided in 2016 and was China's first transgender discrimination lawsuit, however, the details of the lawsuit leave much to be desired when it comes to the judicial certainty of transgender rights in the workplace. Mr. C's case resulted in the courts determining that he was unfairly fired, but the court stated that "there was no proof that Mr. C's termination has resulted from the company's discriminatory attitude toward transgender people and did not grant Mr. C's demand for an apology." The reasons behind this portion stem from the plaintiff's inability to verify two documents directly related to the firing itself.

### *i. Institutional Discrimination*

Nonetheless, this landmark case highlighted what has been coined "invisible discrimination," as transgender individuals face workplaces that stigmatize their lifestyle choices and often choose to fire them for superficial reasons unrelated to their gender/sexuality and the timing is suspect at best.<sup>103</sup> Situations like these typically arise once the transgender individual seeks to change the gender listed on their government identification post-surgery. Important files and documents, such as university degree certificates, are linked to their government identification. In the interest of consistency, once

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<sup>99</sup> Name edited for the protection of his family's privacy.

<sup>100</sup> VOX, *Transgender activists in China Just Scored a Historic Victory*,

<https://www.vox.com/world/2017/7/27/16049820/china-transgender-discrimination-lawsuit-mr-c> (last visited Feb 10, 2019).

<sup>101</sup> *Id.*

<sup>102</sup> THE NEW YORK TIMES, *Transgender Man was Unfairly Fired but Bias Not Proved, Chinese Court Says*,

[https://www.nytimes.com/2017/01/02/world/asia/china-transgender-lawsuit.html?mcubz=1&\\_r=0](https://www.nytimes.com/2017/01/02/world/asia/china-transgender-lawsuit.html?mcubz=1&_r=0) (last visited Feb 10, 2019).

<sup>103</sup> *Id.*

one is changed, all of them must be changed. This process is complicated, bureaucratic, and as one can imagine, lengthy. At the end of this long journey comes some of the smaller changes – notifying extended networks and most importantly, employers. The completion of changing all paperwork is critical because consistency in records is a distinct part of background checks for employment. Education and employment records that do not match an individual’s gender can result in job applications being rejected because the “qualifications cannot be verified.”<sup>104</sup>

It does not help that there have been some mixed signals from government organs. One very notable instance in 2011 when Jin Xing<sup>105</sup>, who is arguably China’s most well-known transgender person, was selected as a judge on the Chinese reality series *We Are the Music* but was pulled from judging at the last minute. Officials from the Zhejiang Administration of Radio, Film and Television claimed that “her transgender identity could have negative effects on society.”<sup>106</sup> The negativity portrayed in this instance, and in generally negative media portrayals of transgender individuals in china, does not bode well for individuals who are looking to their communities at large for support. Unfortunately, it is common that they turn toward grey areas of employment to make ends meet.<sup>107</sup>

## INTERNATIONAL AND COMPARATIVE PERSPECTIVES ON THE APPROPRIATE STANDARD OF CARE

### A. Overview of the WPATH-SOCs and Other Alternative Standards of Care

The World Professional Association for Transgender Health (WPATH)<sup>108</sup> is the primary organization which publishes a complete set of model standards of care (SOCs) for addressing transgender health issues. The SOCs are used by governments, health care providers, health care payers, patients, and

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<sup>104</sup> THE DIPLOMAT, *China’s Complicated Approach to Transgender Rights*, <https://thediplomat.com/2017/10/chinas-complicated-approach-to-transgender-rights/> (last visited Feb 10, 2019).

<sup>105</sup> SOUTH CHINA MORNING POST, *Who is Jin Xing, China’s Only Transgender Celebrity?*, <https://www.scmp.com/magazines/style/people-events/article/2173609/who-jin-xing-chinas-only-transgender-celebrity> (last visited Feb 10, 2019).

<sup>106</sup> SINA NEWS, *Transsexual Actress Slams Prejudice*, <http://english.sina.com/life/p/2011/0921/398970.html> (last visited Feb 10, 2019).

<sup>107</sup> THE GUARDIAN, *Transgender Sex Workers Are China’s Most Marginalized People*, <https://www.theguardian.com/world/2015/jan/16/transgender-sex-workers-china-most-marginalised> (last visited Feb 10, 2019).

<sup>108</sup> *Standards of Care for the Health of Transsexual, Transgender, and Gender-Nonconforming People*, WPATH, <https://www.wpath.org/publications/soc> (last visited Feb 6, 2019).

other stakeholders.<sup>109</sup> WPATH was formerly known as the Harry Benjamin International Gender Dysphoria Association, and released the seventh and current revision of its SOC in 2011.<sup>110</sup> The WPATH states that the unifying goal of its standards of care is “to provide clinical guidance for health professionals to assist transsexual, transgender, and gender nonconforming people with safe and effective pathways to achieving lasting personal comfort with their gendered selves, in order to maximize their overall health, psychological well-being, and self-fulfillment.”<sup>111</sup>

Although there are some local standards of care in countries such as Germany, Italy, and the Netherlands, these are most often based on earlier versions of the WPATH-SOCs, illustrating the extent to which the WPATH operates as the principal provider of model standards of care.<sup>112</sup> Two notable alternatives are the set of model standards developed by the International Conference on Transgender Law and Employment Policy, Inc. (ICTLEP), and the Informed Consent Model (ICM).

The ICTLEP standards are somewhat more lenient than that of the WPATH, while SOC's based on prior revisions of the WPATH standards are often stricter in imposing requirements for access to various procedures and treatments. Most notably, the ICTLEP standards do not contain so-called “real life experience” requirements, which provide that individuals seeking gender reassignment surgery should be either mandated or encouraged to live as their desired gender for a period of time before becoming eligible for reassignment surgery.<sup>113</sup> The 7th version of the WPATH, released in 2011, did away with a mandatory three month real life experience requirement for hormone therapy and a one-year requirement for breast augmentation and other surgeries, but still advocates that these three-month and one-year RLE's are recommended, a recommendation that many doctors and countries follow.<sup>114</sup> In the United Kingdom, for example, the National Health Service typically

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<sup>109</sup> Lin Fraser & Gail Knudson, *Past and Future Challenges Associated with Standards of Care for Gender Transitioning Clients*, 40 *Psychiatric Clinics of North America* 15–27 (2017).

<sup>110</sup> *WPATH: History of the Organization* (2019), WPATH, <https://www.wpath.org/about/history> (last visited Feb 6, 2019).

<sup>111</sup> *Supra* note 108.

<sup>112</sup> Timo O. Nieder & Bernhard Strauss, *Transgender health care in Germany: Participatory approaches and the development of a guideline*, 27 *International Review of Psychiatry* 416–426 (2015); *Transgender Healthcare Netherlands: Information and Links*, <https://www.transgenderhealth.com/transgender-healthcare-netherlands-information-and-links/> (last visited Feb 6, 2019).

<sup>113</sup> *Supra* note 108.

<sup>114</sup> *Ibid.*, Eli Coleman, *Standards of Care for the Health of Transsexual, Transgender, and Gender-Nonconforming People*, *Principles of Gender-Specific Medicine* 69–75 (2017).

requires that individuals undergo hormone therapy for 12 months before taking any further steps toward their goal of undergoing gender reassignment surgery.<sup>115</sup>

The primary difference between the Informed Consent Model (ICM) and the WPATH SOC is the involvement of a mental health professional. The WPATH standards require assessments by mental health professionals at many stages of treatment. The ICM, however, strives to provide greater autonomy and respect for patients by stressing that the patient is the best positioned to judge the potential benefits and drawbacks of treatment.<sup>116</sup> Accordingly, the ICM requires the involvement of mental health professionals only in specific situations such as where the patient might have a mental condition that undermines the capacity for informed consent.<sup>117</sup>

The forthcoming text seeks to outline the key tenets of the WPATH SOC and to assess them from a scientific, ethical, and cultural standpoints in order to identify criticisms of and alternatives to these standards of care. WPATH's clinical recommendations for assessment are addressed first, followed by an analysis of the WPATH-SOCs' three categories of treatment options: social, hormonal, and surgical.

## B. Assessment

The WPATH SOC divides assessment protocols into separate sections for children and adults given the unique challenges associated with minors. For both children and adults, the WPATH divides treatment options into three categories: social, hormonal, and surgical.

### *i. Assessment and Treatment of Adults*

The WPATH SOC, require that mental health professionals be involved in the assessment of individuals in order to determine if they should undergo treatment. This requirement is controversial, as will be discussed below. The WPATH defines mental health professionals to include psychologists,

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<sup>115</sup> Hayley Westcott, *Transgender people face two-year wait for NHS appointment*, BBC News Online, January 30, 2018, <https://www.bbc.com/news/uk-england-42774750> (last visited Feb 6, 2019).

<sup>116</sup> Timothy Cavanaugh, *Informed Consent in the Medical Care of Transgender and Gender-Nonconforming Patients*, 18 *The AMA Journal of Ethics* 1147–1155 (2016).

<sup>117</sup> *Id.*

social workers, psychiatrists and other types of therapists, and states that they should (1) achieve a masters degree or equivalent, (2) be able to understand the Diagnostic Statistic Manual of Mental Disorders (DSM) and/or the International Classification of Diseases (ICD), (3) recognize co-existing mental health issues, (4) have training in therapy or counselling, (5) be knowledgeable about gender dysphoria and non-conforming identities, and (6) have access to continuing education, such as workshops and seminars.<sup>118</sup>

In addition to these six credentials, the WPATH advises that clinicians should have “cultural competence,” or edification on pertinent community or public policy issues.<sup>119</sup> The WPATH-SOCs mention of “cultural competence” may belie the fact that, in order to be effective, standards of care must be tailored and adapted to individual countries. Indeed, the WPATH itself acknowledges that its perspective is North American and European, stating that “WPATH recognizes that the SOC have grown out of a Western tradition and may need to be adapted depending on the cultural context.”<sup>120</sup>

Once equipped with the appropriate credentials, health professionals should follow five steps when presented with a client with gender dysphoria according to the WPATH SOC. The first step is to assess the patient, which includes recording the development of the client’s gender dysphoria, evaluating the impact of stigma on the client’s mental health all while considering whether the client’s dysphoria would be better accounted for by another “primary” diagnosis.<sup>121</sup> Second, the health professional should educate the client with information that will facilitate discovery of a comfortable gender expression and provide knowledge about potential medical intervention. The third step is to discuss and educate the client with treatment options for co-existing mental health issues. Fourth and fifth involve assessing the client for treatment options, the former detailing hormonal treatment and the latter surgical. Both hormone therapy and surgery can be initiated by a referral from a mental health professional, but such professionals should keep front of mind that such decisions are client decisions that should result from an informed perspective and coordination among health professionals. While hormone therapy and chest surgery require one referral letter, two referrals from independent health professionals are needed for genital surgery.<sup>122</sup>

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<sup>118</sup> *Supra* note 108.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*, p. 26-7.

Departing from the WPATH SOC is the Informed Consent Model (ICM), which does not require the involvement of a mental health professional and is believed by its proponents to provide greater autonomy and respect for patients.<sup>123</sup> While the ICM still emphasizes the importance of discussions between patient and clinician, it emphasizes the patient as the best positioned to judge the potential benefits and drawbacks of treatment.<sup>124</sup> The ICM does not proscribe the involvement of mental health professionals in specific situations such as where the patient might have a mental condition that undermines the capacity for informed consent. However, requiring such a professional for all patients serves as another hoop in an already difficult process and may engender unhelpful therapeutic relationships where the patient tells the therapist what they need to hear to get the referral. A drawback of the ICM relates to insurability, as some insurers default to WPATH SOC which require the involvement of the mental health professional as a gatekeeper. The degree to which this matter varies by health insurance company.<sup>125</sup>

The requirement that individuals see a mental health specialist ties closely with the classification of conditions related to transgender identification as mental disorders under the WHO's ICD-10, which was released in 1990. As Robles et al. explain:

The definition of conditions related to transgender identity as mental disorders has been used to justify denial of coverage for these conditions by governments and private health plans and has contributed to the perception that transgender people must be treated by psychiatric specialists, further restricting access to services that could be provided at other levels of care.<sup>126</sup>

The rationale given for mental health referrals is based on the idea that treatment is often irreversible, so ensuring that a patient is fully committed is important.<sup>127</sup> Opinions on irreversibility are changing, on the other hand, as medical techniques such as penis reconstruction and the cessation of hormone therapy can somewhat reverse specific processes. Other defenses of the policy are that it helps the

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<sup>123</sup> Timothy Cavanaugh, *Informed Consent in the Medical Care of Transgender and Gender-Nonconforming Patients*, 18 *The AMA Journal of Ethics* 1147–1155 (2016).

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> Rebeca Robles et al., *Removing transgender identity from the classification of mental disorders: a Mexican field study for ICD-11*, 3 *The Lancet Psychiatry* 850–859 (2016).

<sup>127</sup> Timothy J Murphy, *Should Mental Health Screening and Psychotherapy Be Required Prior to Body Modification for Gender Expression?*, 18 *The AMA Journal of Ethics* 1079–1085 (2016).



patient inform and clarify what is important in relieving gender dysphoria, e.g., body modifications, social changes, or changing relationships.<sup>128</sup> The WPATH SOC are considered flexible guidelines, so while the current version still strongly advises the gatekeeping role of mental health professionals, it may not be necessary in all cases. However, while the consensus remains that mental health professional referral is an important step for treatment,<sup>129</sup> it is important to emphasize the human rights issue at hand, specifically, autonomy over one's body.<sup>130</sup>

Additionally, in China, family members serve as an additional gatekeeper when it comes to sexual reassignment surgery. As Jiang et al. reports, “patient[s] must get approval from direct relatives” in order to undergo reassignment.<sup>131</sup> This additional barrier to gender reassignment surgery is largely unique to China and reflects the prevalence of family-based decision making in Chinese culture.<sup>132</sup> In countries other than China, parental consent is usually only a consideration with respect to minors, as will be discussed below.

Finally, the WPATH has come under some criticism for using the language “disorders of sexual development,” or DSD, to refer to “a somatic condition of atypical development of the reproductive tract.”<sup>133</sup> While the WPATH includes a separate section on the assessment and care of individuals with such somatic conditions due to its view that these individuals have unique treatment needs, some have criticized the WPATH for their use of the term “disorder.” Just as the previously discussed study in Mexico outlined the negative impact that the classification of gender dysphoria as a mental disorder had on patients, critics of the WPATH's use of “disorder” make much the same argument.<sup>134</sup> A study by the Lurie Children's Hospital found that both clinicians and patients widely object to the use of the term “disorder” to refer to atypical sexual development, and instead prefer to use the terms “intersex”

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<sup>128</sup> *Id.*

<sup>129</sup> *Medical students' ability to care for lesbian, gay, bisexual, and transgendered patients*, American College of Obstetricians and Gynecologists' Committee on Adolescent Health, Committee Opinion No. 685 (2017).

<sup>130</sup> Lin Fraser & Gail Knudson, *Past and Future Challenges Associated with Standards of Care for Gender Transitioning Clients*, 40 *Psychiatric Clinics of North America* 15–27 (2017).

<sup>131</sup> Hua Jiang et al., *Transgender patients need better protection in China*, 384 *The Lancet* 2109–2110 (2014).

<sup>132</sup> Sam Winter, *Cultural Considerations for the World Professional Association for Transgender Health Standards of Care: The Asian Perspective*, 11 *International Journal of Transgenderism* 19–41 (2009).

<sup>133</sup> Hughes, I. A., Houk, C. P., Ahmed, S. F., Lee, P. A., & LWPE1/ESPE2 Consensus Group, *Consensus statement on management of intersex disorders*, 91 *Archives of Disease in Childhood*, 554–563 (2006).

<sup>134</sup> Rebeca Robles et al., *Removing transgender identity from the classification of mental disorders: a Mexican field study for ICD-11*, 3 *The Lancet Psychiatry* 850–859 (2016).

and “differences in sexual development.”<sup>135</sup> Other advocates take an even stronger stance in their criticism of the use of the DSD terminology. Davis et al. argue that the underlying purpose of classifying intersex development as a disorder is to push the condition “neatly into medical turf and safely away from critics of its medicalization.”<sup>136</sup>

After referral, criteria for hormone therapy requires documentation of the condition, informed consent, client age of majority, and control over pertinent client mental health concerns. Hormone therapy can be administered by doctors (specialists or primary care physicians) or nurses but should be accompanied by proper coordination among health care professionals. Because no formal training programs exist (at least in 2011 when version 7 of the WPATH SOC was published) clinicians should keep current with medical literature and discuss hormone therapy with other professionals through networks established by WPATH. Six tasks encompass the core responsibilities of hormone therapists: an initial evaluation, a discussion of expected effects with the patient (which on average are observed over a 2 year period) confirmation that patient has capacity to understand the treatment, ongoing medical monitoring, communication across all health providers, and finally, if necessary, the provision of written documents to aid the patient in providing proof of therapy when necessary, e.g., with police and other authorities. Clinicians should perform thorough physical exams consisting of blood pressure, height, and weight measurements as part of any assessments. In addition to the above guidelines, WPATH details the regimens for both masculinizing and feminizing therapies.<sup>137</sup>

Before initiating surgery, the client must have documented persistent gender dysphoria by a healthcare professional as discussed above. Doctors who perform surgery should be board certified and can be urologists, gynecologists, plastic surgeons, or general surgeons. In addition, genital reconstruction experience must be documented and skills should be peer reviewed.<sup>138</sup> Surgeons should be communicative with other health professionals in the client’s care plan, such as the referring mental health clinician. Before performing surgery, the patient must be informed and have a pre-surgical

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<sup>135</sup> Emilie Johnson et al., *Attitudes towards ‘disorders of sex development’: nomenclature among affected individuals*, 13 Journal of Pediatric Urology (2017)

<sup>136</sup> Georgiann Davis et al., *DSD is a Perfectly Fine Term: Reasserting Medical Authority through a Shift in Intersex Terminology*, 12 Sociology of Diagnosis (Advances in Medical Sociology) 155-82 (2011).

<sup>137</sup> *Supra* note 108.

<sup>138</sup> *Id.*

consultation with the surgeon. After surgery, long-term follow up should be included as part of the care plan.<sup>139</sup>

*ii. Assessment and Treatment of Children*

WPATH creates separate care standards with respect to children, as the treatment of children presents unique challenges. Puberty is a complicating factor, as is the fact that some children may explore the possibility that they are transgender while on a path of self-discovery that ultimately ends with them determining that they are not, in fact, transgender.<sup>140</sup>

Puberty suppression is a controversial area within transgender health care. The WPATH SOCs note that studies have shown that only 12-27% of prepubescent children with gender dysphoria continue to experience dysphoria in adulthood, while adolescents with gender dysphoria were found to almost universally continue to experience dysphoria into adulthood.<sup>141</sup>

WPATH categorizes puberty suppressing treatments into three categories: fully reversible, partially reversible, and irreversible interventions. WPATH recommends that children experience puberty until at least Tanner stage 2 before becoming eligible for even fully reversible interventions, and thus does not advocate for the treatment of children with gender dysphoria with anything other than counseling.<sup>142</sup> WPATH further states that irreversible interventions should only be carried out on adults.

This view on puberty suppression is the prevailing one, but other clinicians offer alternative perspectives. Lambrese argues that “The importance of preventing development of secondary sex characteristics during this period cannot be overstated..., [as] [o]nce these children... undergo the pubertal development of the “wrong” sex, their psychological well-being deteriorates significantly, and

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<sup>139</sup> *Id.*

<sup>140</sup> Joshua Lambrese, *Suppression of Puberty in Transgender Children*, 12 American Medical Association Journal of Ethics 645–649 (2010).

<sup>141</sup> de Vries, A. L. C., Doreleijers, T. A. H., Steensma, T. D., & Cohen-Kettenis, *Psychiatric comorbidity in gender dysphoric adolescents*. *Journal of Child Psychology and Psychiatry* (2011); Zucker, K. J., *Gender identity development and issues*. *Child and Adolescent Psychiatric Clinics of North America*, 13(3), 551-568 (2004)

<sup>142</sup> *Supra* note 108.

many develop depression and suicidal ideation.”<sup>143</sup> Another US doctor, Giordano, shares this belief, arguing that “if allowing puberty to progress appears likely to harm the child, puberty should be suspended.”<sup>144</sup>

Special issues relating to informed consent also crop up with respect to children, particularly those born with intersex characteristics. As noted by Dreger, parents often “choose a gender” for children born with both male and female characteristics, and often do not fully inform these children of their own medical histories. This lack of information is often supported by children’s’ doctors, and thus reduces the extent to which they are fully informed when making subsequent medical decisions.<sup>145</sup> Dr. Patricia Martin echoes this, noting that “consent remains an issue even if the recommended standard is followed and a psychologist is involved, because the course of treatment decided upon often includes deliberately withholding medical information from the child.”<sup>146</sup>

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<sup>143</sup> Joshua Lambrese, *Suppression of Puberty in Transgender Children*, 12 American Medical Association Journal of Ethics 645–649 (2010).

<sup>144</sup> Giordano S., *Lives in a chiaroscuro. Should we suspend the puberty of children with gender identity disorder?*, 34 Journal of Medical Ethics 580-584 (2008).

<sup>145</sup> Alice Dreger, *Ambiguous Sex or Ambivalent Medicine?*, 28 The Hastings Center Report (1998), <http://www.isna.org/library/dreger-ambivalent.htm> (last accessed 2/9/2019).

<sup>146</sup> Patricia Martin, *Moving toward an international standard in informed consent: the impact of intersexuality and the Internet on the standard of care*, Duke Journal of Gender Law & Policy, Summer, 2002, p.135(35)

## RECOMMENDATIONS

1 - Modify legal definitions of “gender” in antidiscrimination statutes to include protections for transgender people.

The Chinese Government could enact laws that expressly address the discrimination, stigmatization and marginalization faced by the transgender community within the various institutions of Chinese society. These laws could seek to adequately address all the issues discussed above particularly in respect to accessing healthcare and psychological counselling and support.

2 - Specialized inquiries in epidemiological research in order to raise awareness and bring attention to the unique needs and challenges of transgender people.

Regarding the current HIV epidemic in China and its research and treatment programs, it has been reported that transgender women are not treated as a separate group of individuals for the purpose of epidemiological study.<sup>147</sup> This has in turn affected the level of attention, resources, knowledge and data that is available regarding the rate of infection and treatment of transgender’s who are women in China and are HIV positive.<sup>148</sup> These groups of people are said to be grouped with men who have sex with men (MSM) for the purpose of HIV/AIDS research and health interventions/ programs.<sup>149</sup> This gap in research and data on transgender and HIV/AIDS needs to be addressed urgently by the Government of China.

3 - Remove the gender affirming surgery requirement for modifying government identification.

Not all transgender individuals want gender affirming surgery, and many cannot afford it. Additionally, China does not have enough qualified medical professionals to diagnose and operate on all of the transgender people in China. By forcing people to undergo surgery in order to change their identity card, the Chinese government is ignoring the autonomy of many transgender individuals and

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<sup>147</sup> *Supra* note 7., Best, John et al., *Sexual behaviors and HIV/syphilis testing among transgender individuals in China: implications for expanding HIV testing services*, 42,5 *PMC.J* 281-5 (2015).

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

overburdening their system. By removing this requirement, the government will allow transgender people to decide which gender affirming services are suitable and increase access to surgery for those who decide that they need it.

#### 4 - Promote access to safe, reliable and affordable hormone therapy in China for transgender persons.

Access to safe, reliable and affordable hormone therapy for transgender persons in China is highly restricted. As a result, transgender people purchase hormones from unqualified black market vendors and treat themselves without professional medical supervision or accurate information on the correct hormone types and dosages. This leads to the use of inappropriate hormones, ineffective therapy, and adverse side effects. Safe, reliable and affordable hormone therapy should be available to all transgender persons in China, through appropriate and effective regulation of the quality, safety and cost of these therapies, including ensuring accessible, accurate and comprehensive information about the hormones, their appropriate combinations and dosages, and their side effects.

#### 5 - Enact stronger legal protections for violations of health privacy laws.

Members of the transgender community in China attested to the interference of their family life with their health care in that doctors often contact the families of transgender persons, without the person's consent, to discuss confidential medical information. None of this shared information would be health information that is critical to the safety and wellbeing of the patient, instead the doctor felt culturally influenced to utilize the parents to potentially slow down or stop the process altogether. It is important that transgender individuals' privacy is protected in light of issues related to discrimination within their communities. There was no information that arose in our research that demonstrated any sort of enforcement mechanisms for these violations of privacy. The violations of privacy of transgender patients is one of the many contributing factors to individuals choosing much riskier methods to gain access to hormone therapy and gender reassignment surgery.

#### 6 - Reduce cost or ensure insurance coverage for transition related services.

Currently, services related to sexual reassignment surgery and related mental health services are not available to be subsidized under Chinese medical insurance. The financial costs of the procedure and the lack of insurance coverage are major barriers to accessing health care for transgender individuals.

These services can cost significantly less in other countries, and the hormones can be procured for cheaper prices on the black market.<sup>150</sup> Due to the lack of official coverage, transgender individuals also have no official way to take medical leave of absence from their jobs for a surgery that, in China, could hospitalize them for up to a year.<sup>151</sup> In advocating for increased safety related to any medical undertaking that a transgender individual seeks, it is imperative that the cost of these services is adjusted – and insurance coverage provided – to reduce the risk of patients turning to much more dangerous options.

### 7 - Reduce the role of mental health professionals as gatekeepers by adopting aspects of the Informed Consent Model SOCs encouraging patient autonomy.

The shortage of certified mental healthcare professionals and the requirement that individuals receive approval from these professionals in order to become eligible for surgical procedures makes these professionals *de facto* gatekeepers that those wishing to undergo surgery must work hard to satisfy. The shortage of these professionals in China makes them at the very least a bottleneck in the process, and our client has spoken of how mental health professionals often act as a barrier to surgery by, among other things, seeking patients' families' approval before giving patients the required authorization to undergo surgery. Mental health professionals in China thus do not often align with a rights-based approach to health promotion, nor do they comport with an informed consent model of standard of care.

### 8 - Modify the policy on criminal records related to gender affirming surgery.

Requiring evidence of no criminal record is problematic because it discriminates against individuals who have committed a crime. Because the evidence required for a name and gender marker change allow the Chinese government to maintain a link between an individual's past and current identity, allowing someone with a criminal conviction would not endanger society or allow a person to evade prosecution. Thus, this requirement serves no purpose but to discriminate against and further punish those who have a criminal record. Ideally the requirement would be removed in its entirety, however, at a minimum a differentiation should be made between serious offenses and minor violations.

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<sup>150</sup> GLOBAL TIMES, *No Tolerance for Transgender Prejudice*, <http://www.globaltimes.cn/content/676640.shtml> (last visited Feb 10, 2019).

<sup>151</sup> Pi Jun, *Transgender in China*, 7 *Journal of LGBT Youth* 346, 353 (2010).

9 - Enact widespread grassroots education and activism in order to promote education on gender identity and acceptance of transgender people within the Chinese community.

There is an urgent need for sensitizing and educating the Chinese society at large, on the acceptance and tolerance of the transgender population in order to demystifying their lives in the eyes of Chinese society and eradicate the social stigmas and discrimination they face within society.<sup>152</sup> By confronting these social stigmas and engaging in educating the population at all levels, only then will the transgender population be able to achieve social inclusion in China and eliminate the prevailing stigmas, discrimination and violence they face.<sup>153</sup>

10 - Create counseling services specifically designed for minors grappling with gender identity issues.

As is highlighted by the WPATH's creation of extensive, separate standards of care for children and adolescents, gender identity issues often begin in young adulthood, and sometimes even prior to puberty. Given China's age requirement of 20 years old for the commencement of any medical treatment for gender dysphoria, and the stigma associated with identifying as transgender in China, there is a need for the Chinese government and organizations like our partner, the Psychological Team for Trans People in China, to offer counseling services to children and young adults grappling with gender identity issues.

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<sup>152</sup> *Supra* note 5.

<sup>153</sup> *Id.*



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