

**Hong Kong Baptist University  
Symposium on Dismantling Binary Gender and  
Addressing Intersexuality  
27 January 2018**

**Human (Data Privacy) Right for  
Intersexuality in Hong Kong**

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Hong Kong**

PCPD



H K



香港個人資料私隱專員公署  
Privacy Commissioner  
for Personal Data, Hong Kong

# What are human rights?

**“Human rights are rights inherent to all human beings, whatever our nationality, place of residence, **sex**, national or ethnic origin, color, religion, language, or **any other status**. We are all equally entitled to our human rights without discrimination. These rights are all interrelated, interdependent and indivisible.”**

by Universal Declaration of Human Right

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# Overview of Hong Kong's Human Rights Legal instruments and obligations



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# International Human Rights Instruments

(ICCPR)

(ICESCR)

(CERD)

(CEDAW)

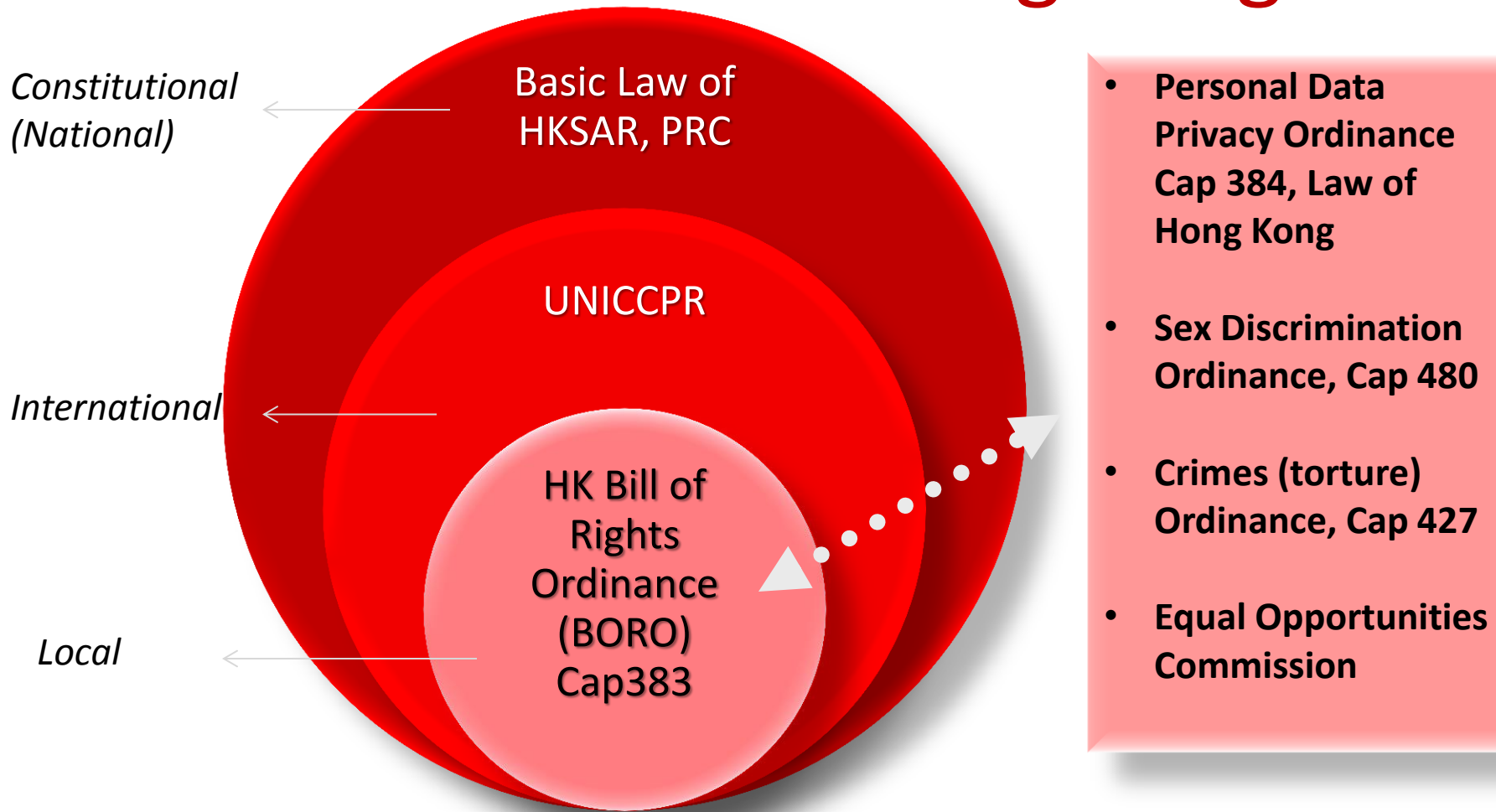
(CRC)

(CAT)

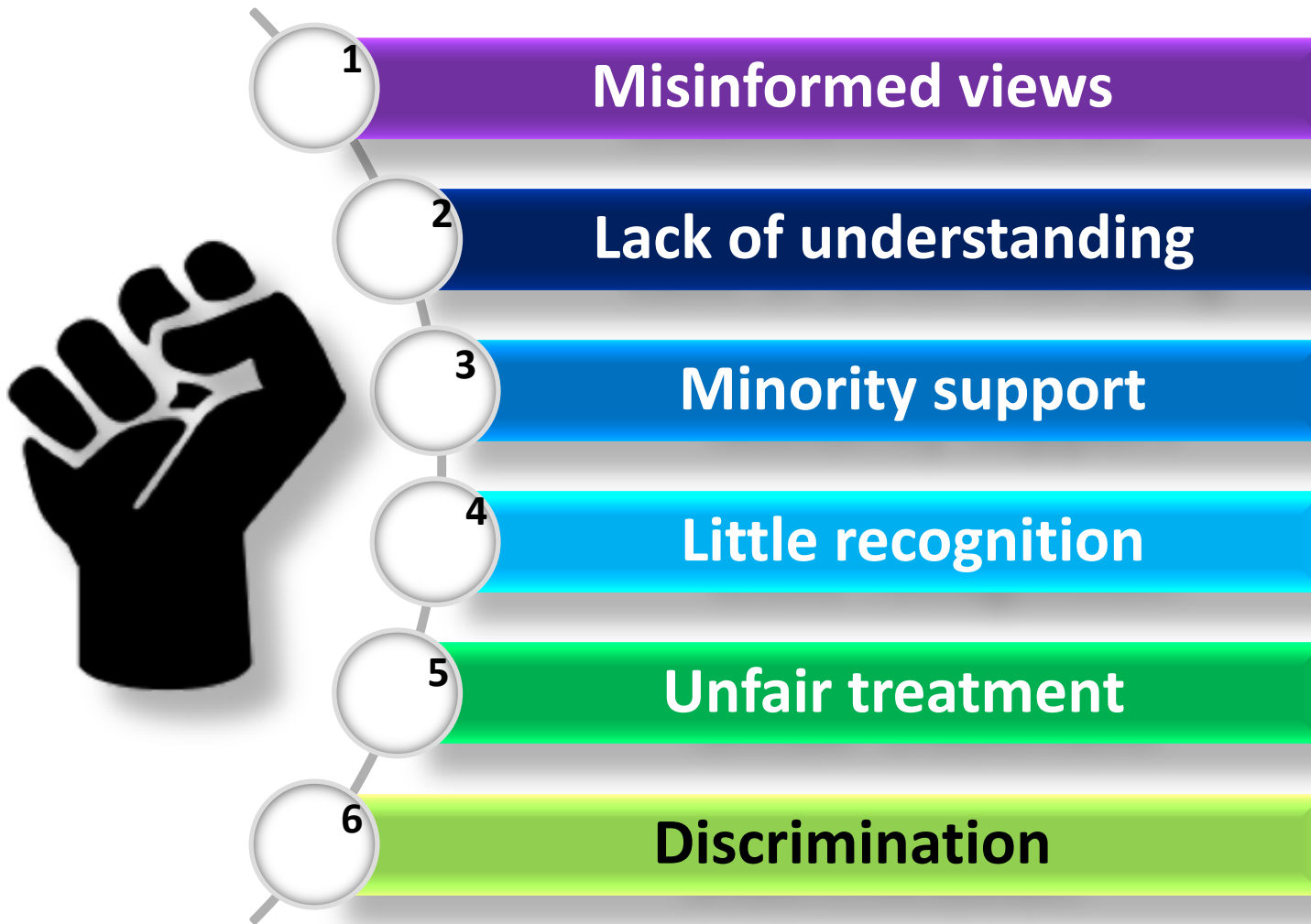
(CRPD)

(ILO)

# Human/ Data Rights Protection in Hong Kong



# LGBTI's Rights



# Significant LGBTI cases in Hong Kong



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[PCPD.org.hk](http://PCPD.org.hk)

est.1996

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# SECRETARY FOR JUSTICE v YAU YUK LUNG ZIGO & ANOR ([2007] 3 HKC 545)

《律政司司長訴丘旭龍》

**Sexual Orientation Discrimination and  
legal procedures of  
potentially unconstitutional legislation**

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# Background

In April  
2004

Two  
males

Aged 19  
and 30

Engaging  
in Anal  
sex in a  
car

Violations  
of Crimes  
Ordinance



# First Prosecution

Unconstitutionally  
discriminating  
against gay men



Dismissed the  
charges



# Court of Final Appeal (CFA)



**JULY 2007**

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# Right to equality

The right to equality was in essence the right not to be discriminated against



# Crimes Ordinance



Section	Title	Contents
<b><u>118F</u></b> <b>(1)</b>	<i>Homosexual buggery [sodomy] committed otherwise than in private</i>	<i>A man who commits buggery with another man otherwise than in private shall be guilty of an offence and shall be liable on conviction on indictment to imprisonment</i>

# Leung TC William Roy v Secretary for Justice

[2006] 4 HKLRD 211

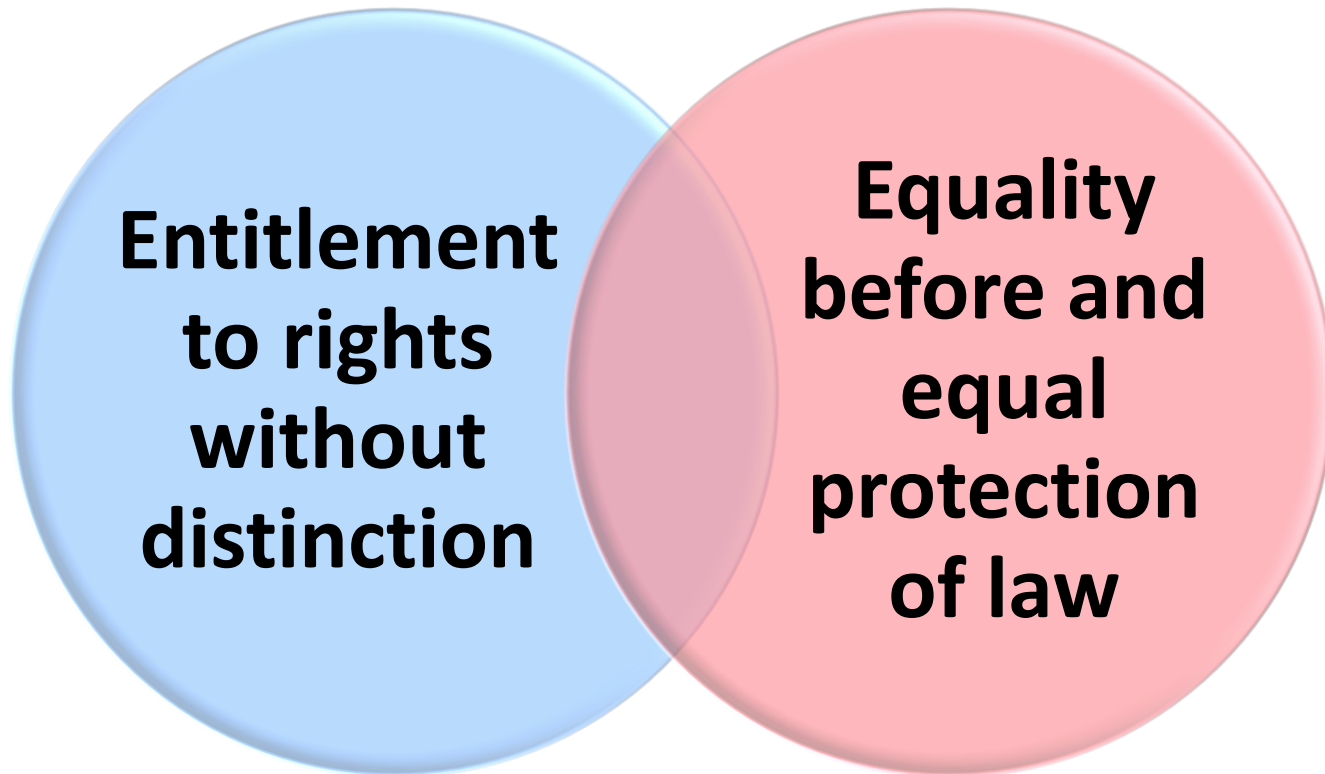
《梁威廉 訴律政司司長》

Equal  
Protection on  
Sexual  
Orientation

#1

# Bill of Right Ordinance (BORO)

## Article 1 & 22



# Significance

1

- The age of consent for homosexual acts standardize at 16

2

- Interpreted to include sexual orientation

3

- Unjustified discrimination based on sexual orientation will be deemed as unconstitutional

4

- Hong Kong people will have the standing (to initiate lawsuit against government) without obvious harms





# Related Laws

Crimes Ordinance



Protected Rights

Equality and Privacy



Basic Law and BORO



# Transgender people's rights of marriage

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# W v Registrar of Marriages

[2013] 3 HKLRD 90

《W訴婚姻登記官》

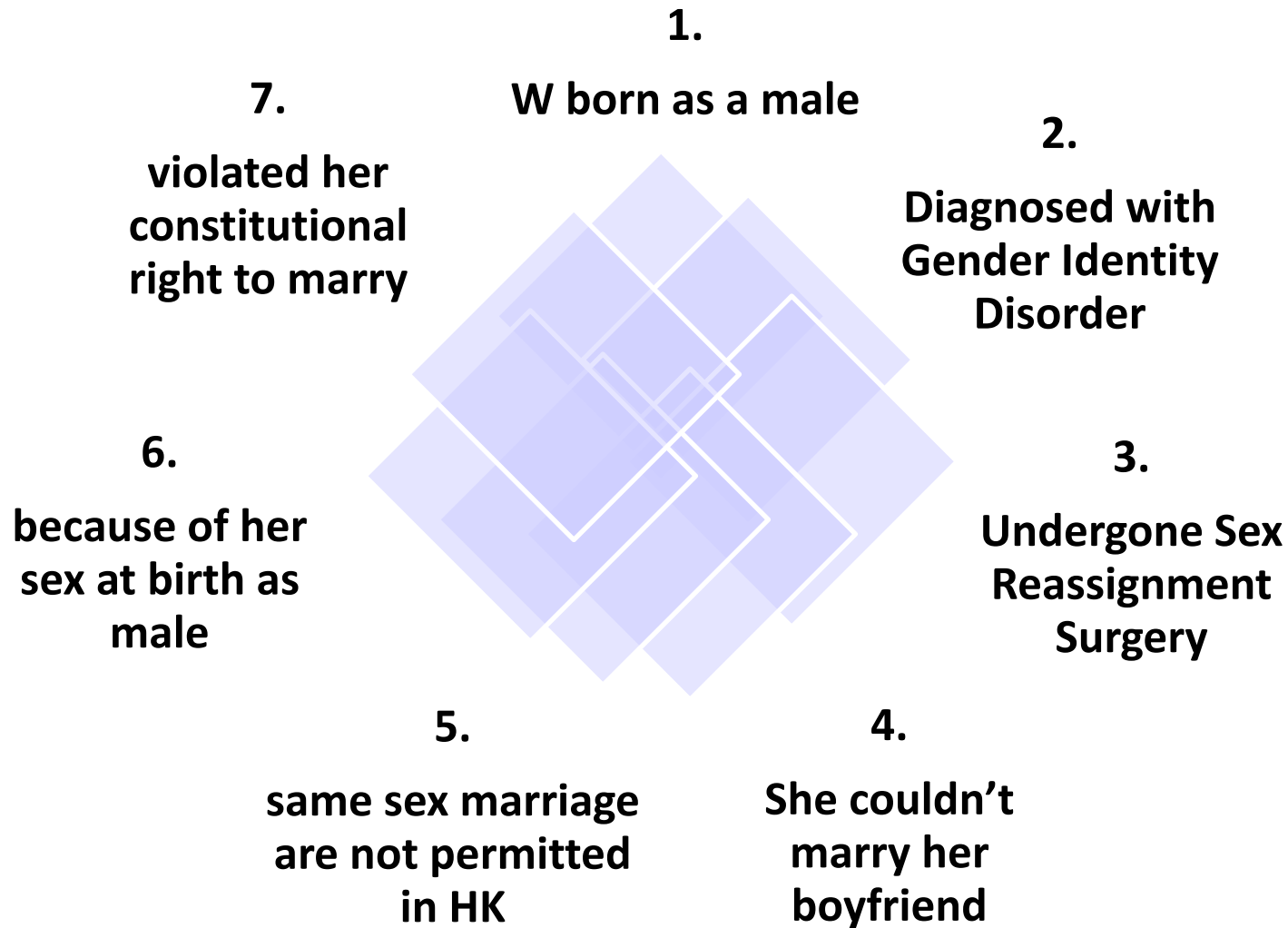
Landmark court case for LGBTI  
rights in Hong Kong

Right to marry as identified gender

Rather than their biological sex at  
birth

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# Background



# Material facts



Transsexualism is a medical condition



Therapy for transsexualism are Hormonal treatments and Sex Reassignment Surgery



Surgery managed by the Hospital Authority



Hospital Authority issues 'sex changed certificate'



The Immigration Department issues new identity card and a passport

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# Court's orders



**A declaration that W is entitled to be included as “woman” in the Matrimonial Causes and Marriage Ordinances**



**‘woman’ and ‘female’ should include post-operative male-to-female transsexuals**

# Court's open suggestion for legislation



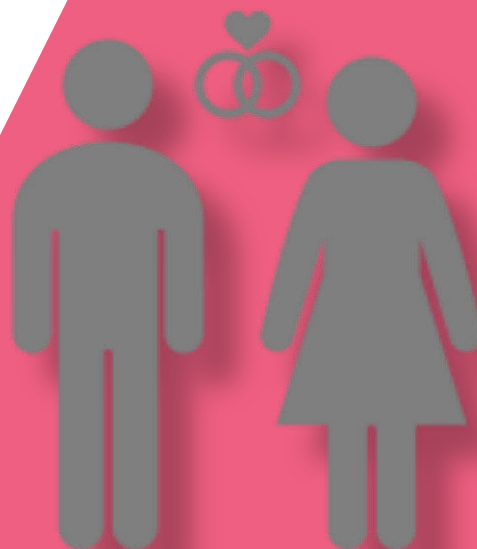
“...at which point a transsexual should be considered to successfully have the sex changed for marriage purposes as well as for other legal areas.”

# Significance

**Transsexuals who are certified are entitled to marry in their acquired sex.**

**The right to marry and the right to found a family are two independent rights**

**the lack of consensus not a reason to deny minority's fundamental rights**





# Government's follow-up

Inter-  
Departmental  
Working Group  
(2014)

for reforms  
as may be  
appropriate

to protect  
the rights of  
transsexual  
persons

# Legal recognition of intersex people



# Intersex in Hong Kong

50 operations on patients  
under the age of 18

Long term physical and  
psychological suffering

# In recent years

civil society organization and human rights institutions have raised issues relating to legal recognition.



# Human Rights and Intersex

COUNCIL OF EUROPE



CONSEIL DE L'EUROPE

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# Legal Recognition of Intersex people

**access to the same rights as other men and women**

**access to administrative corrections to legal documents**

**not about the creation of a third sex or gender classification**

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# UK Gender Recognition Scheme

the issue of  
a Gender  
Recognition  
Certificate

Judicial  
Gender  
Recognition  
Panel

members  
from the  
legal and  
medical  
fields

a new birth  
certificate  
reflecting  
the acquired  
gender



# Examples of other Overseas Gender Recognition Schemes



# A Self-Declaration Model

## Argentina, Denmark, Malta and Ireland

Applicant submitting a specific declaration  
without any medical intervention requirements



# A surgery-free but otherwise detailed model requiring medical evidence

UK, Iceland, Germany, Spain and New York State



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# A Surgery-Requiring Model but with fewer other Medical evidence requirements

New South Wales, Queensland, Liechtenstein  
and New Brunswick(Canada)



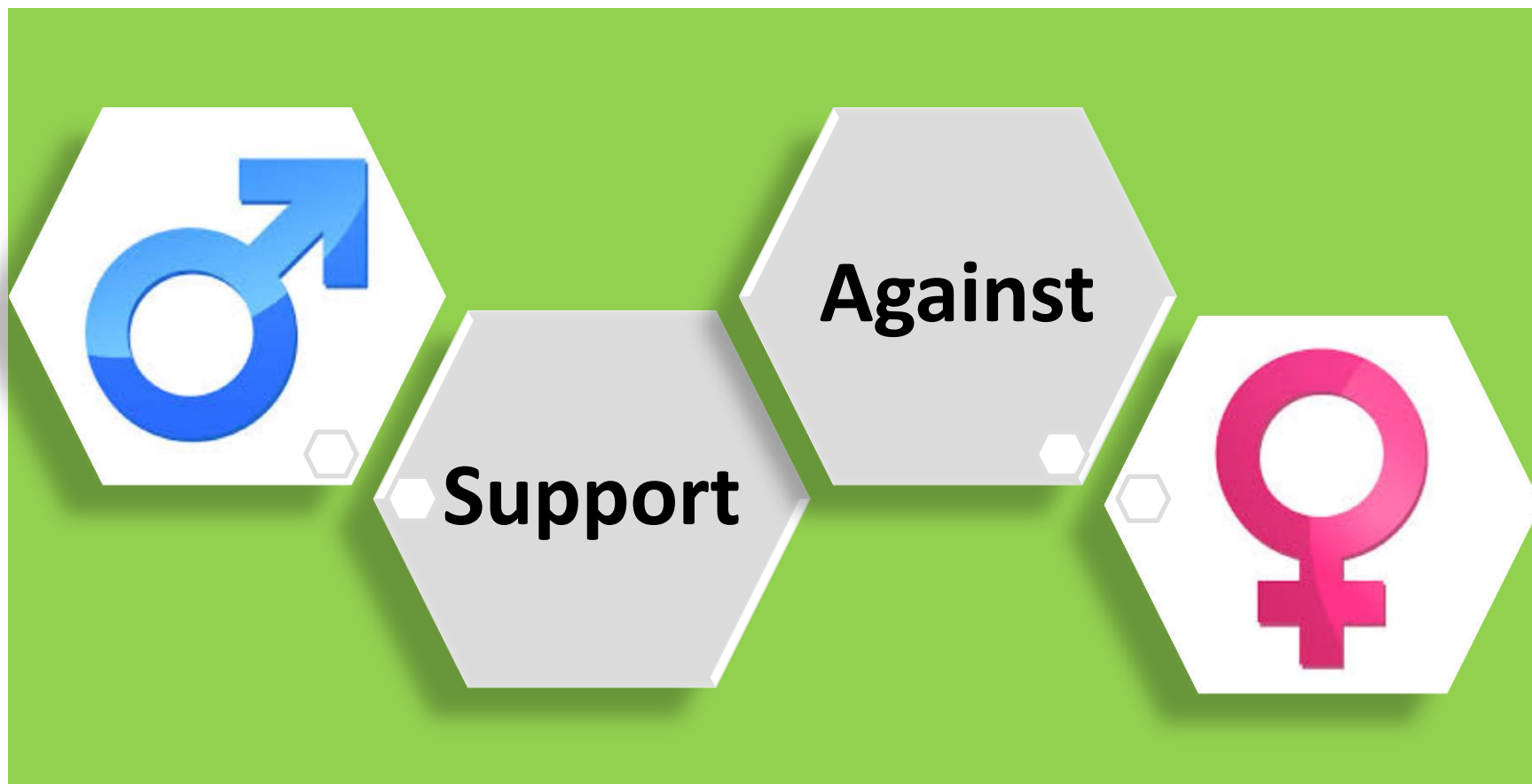
# A model which includes a wide range of requirements

Japan, Mainland China and Finland



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# Should Hong Kong have a Gender Recognition Scheme?



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# Support

Recognition of  
innate gender  
identities

Elimination of  
discrimination

Human rights  
implications

Growing  
international  
trend

Legal certainty

# Human Rights implications

the context of  
a transgender  
person's  
enjoyment of  
the right to  
privacy

the right to  
recognition as  
a person  
before the  
law.



# Against

Birth Sex being the  
law of nature

Lack of Social  
Acceptance

A fully-fledged  
Gender Recognition  
Scheme is  
unnecessary

Potential  
unintended  
consequences

The “slippery  
slope” argument

# Self-Determination being a Human Right

showing respect for an individual's autonomy, Self-Determination and Human Dignity.



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# Hormonal Treatment



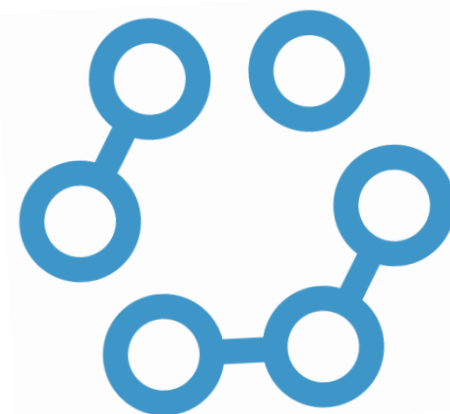
Unwanted Medical Intervention is a violation of human rights



Right to Physical Integrity



Private Autonomy



# Human Right Implications

the Requirement of Sex Reassignment  
Surgery (SRS):



*Involuntary*

*Coerced*

*Forced Sterilization*

should not be made a condition for  
Recognition of Gender Identity

# Human Right Implications

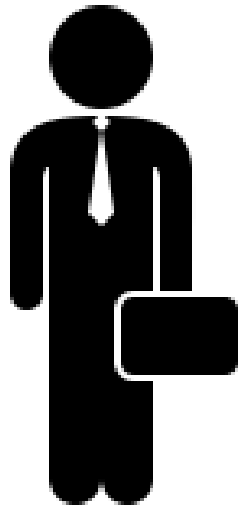
The right to personal or physical integrity of transgender persons,

The right to private and family life,

The right to non-discrimination,

The right to recognition as a person before the law.

# Discrimination Experience of the LGBTI



Employment

Education

Provision of  
goods and  
services

Disposal and  
management  
if premises



# Redressing Discrimination against LGBTI

No  
Assistance

Complaint  
ignored

Helpless

Judicial  
Review



# Protection of Gender History



History of Gender change to be searched and disclosed

implications on the right to privacy





# Global Landscape: Legislation against Discrimination



# HONG KONG

“To address problems facing transsexual person in all areas of law by drawing reference to overseas law and practice”

Court of Final Appeal, Hong Kong

# Hong Kong Law Reform Commission's Work and Paper

Review of Sexual Offences Sub-  
committee's Consultation Paper on "Rape  
and other Non-consensual Sexual  
Offences"

**SEPTEMBER 2012**

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Privacy Commissioner  
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# Application to surgically constructed sexual organs

“We share the view that if modern surgical techniques could provide a surgical constructed penis, penetration by such an artificial organ should be contained within the scope of the rape.

It is as severe an infringement of a person’s sexual autonomy if the person’s vagina, anus or mouth is penetrated without consent by a surgically constructed penis as by a natural penis.

We therefore consider that the definition of penis should include a surgically constructed penis. This definition should apply to all sexual offences and not just rape.”

“Equally, we consider that transsexuals who have surgically constructed vaginas should be protected by the criminal justice system. It is a severe infringement of the sexual autonomy of a transsexual whose sexual organ, although surgically constructed, is penetrated against the transsexual’s will. The definition of a vagina should therefore include a surgically constructed vagina.”

*HKLRC*

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# Recommendation 9

“We recommend that the new legislation should provide that for the purposes of any sexual offence a penis should include a surgically constructed penis and a vagina should include (a) the vulva and (b) a surgically constructed vagina (together with surgically constructed vulva).”

HKLRC

# Gender Recognition Consultation Paper (June 2017)

## Privacy Right



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# Public consultation on Gender Recognition

**“There is currently no legislation in Hong Kong which provides for the recognition of the reassigned, acquired or preferred gender of a person for all legal purposes.”**



# PCPD's Submission in Response to the Consultation Paper – Gender Recognition



# Personal Data Privacy Rights of Transsexual Persons



# Gender Data Recognition Scheme

**Birth  
Gender**



**Legally  
Recognized  
Gender**



# Relevant Data Protection Principles: DPP2

accuracy of personal data held by them

personal data not being kept longer than is necessary for the purpose

prevent any personal data transferred to the data processor from being kept longer than necessary

準確性、儲存及保留  
Accuracy & Retention

2



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# S. 26 PDPO

**“a data user must take all reasonably practicable steps to erase personal data which is no longer required for the purpose for which the data was used, unless such erasure is prohibited by law or it is in the public interest not to erase the data.”**



# Data Users

accuracy of personal data held by them

personal data not being kept longer than is necessary for the purpose

when engaging a data processor to process personal data, contractual or other means being adopted to prevent any personal data transferred to the data processor from being kept longer than necessary

# Keeping Transsexual Person's Birth Gender

## Legal purpose

- For verifying the criminal records



## Medical purpose

- Determining the medical diagnoses or treatment



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# DPP3

**Not being used  
for a New  
purpose without  
Prescribed  
Consent**

DPP **3** 原則 使用  
USE





# Use of the Birth Gender

**Any person may apply to the Registrar of Births and Deaths for a search**

**the birth gender of a transsexual person could possibly be exposed to anyone against his wish under the current system.**



# DPP6

Access to own  
Personal Data

Correction of  
Own Personal  
Data

查閱及更正  
Data Access Et  
Correction

6



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# Access and Correction Rights of Birth Data



A transsexual person who has acquired a Legally Recognized Gender may seek to amend his birth gender as appeared on any document.



# Birth Data

**Registrar of Births and Deaths**  
**“the collection of information about a child (including the gender) is for various purposes”**

# Functions of Registrar of Births and Deaths

To process the births and deaths registration, search and issue of births and deaths records

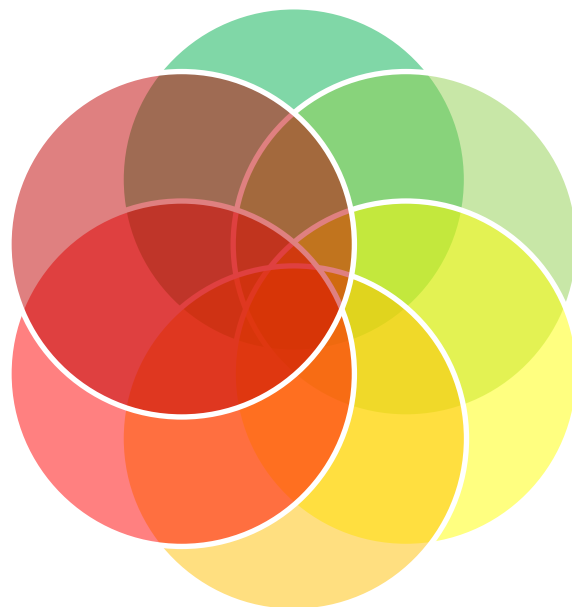
To administer the births and deaths registration related ordinances

To administer/ enforce the Immigration Ordinance

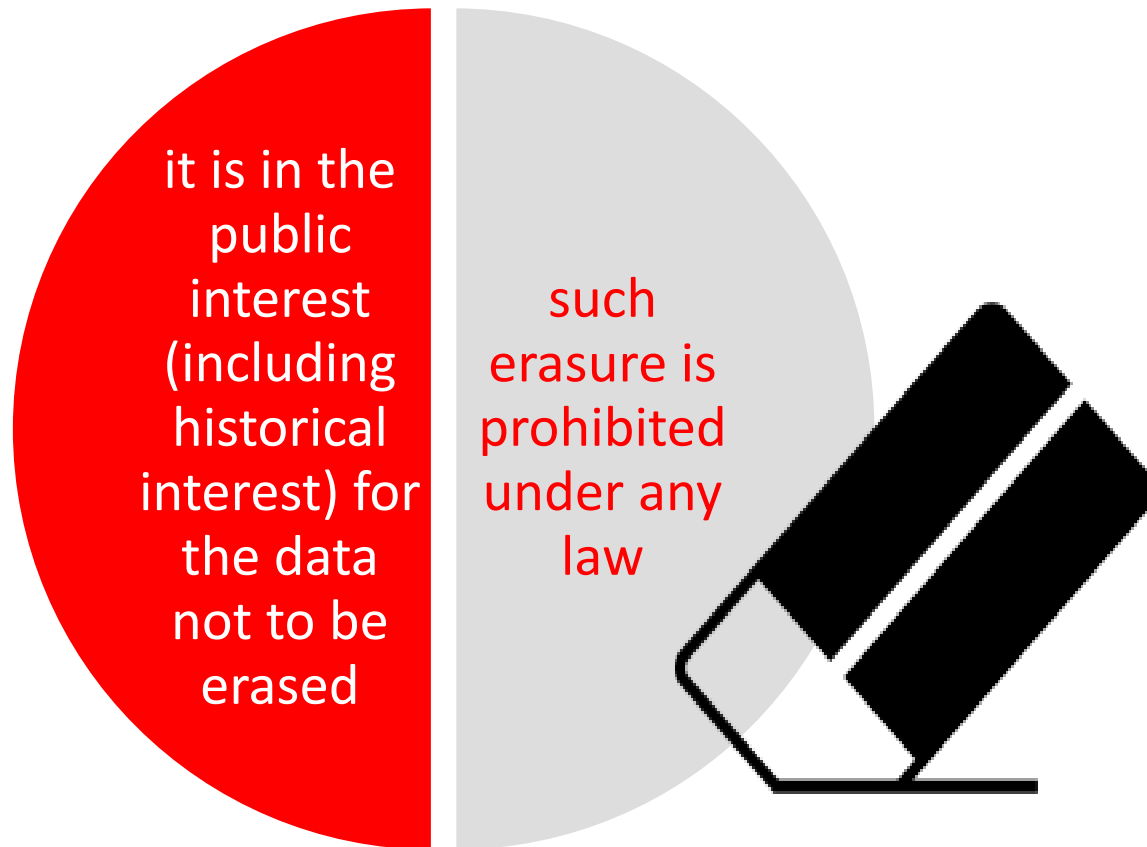
To process other person's application for immigration facilities

Other legitimate purposes

Statistics and research purpose



# Exceptions to erasing “outdated” Gender Information

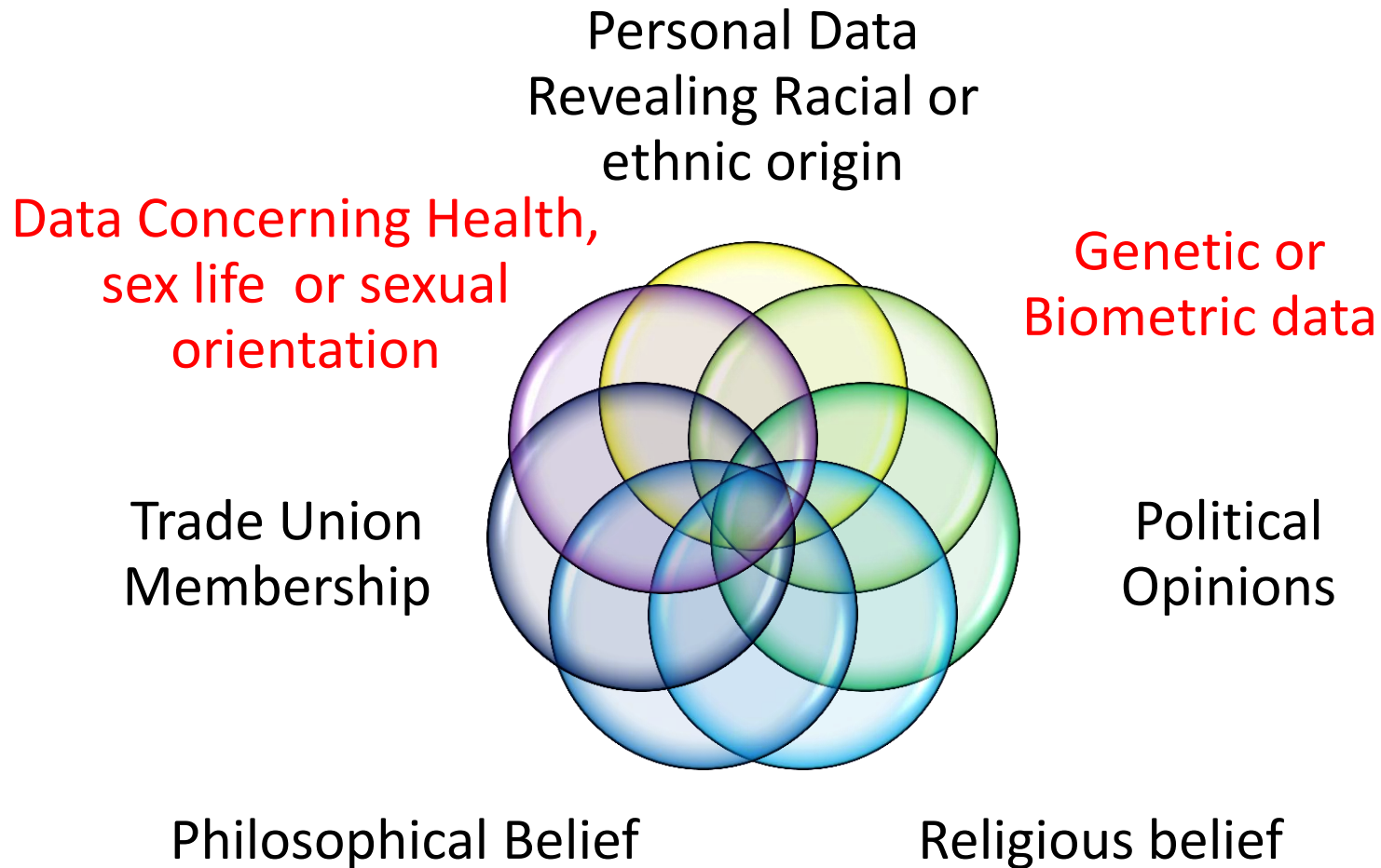


# EU General Data Protection Regulation (GDPR)(to be effective on 25 May 2018): Sensitive Personal Data

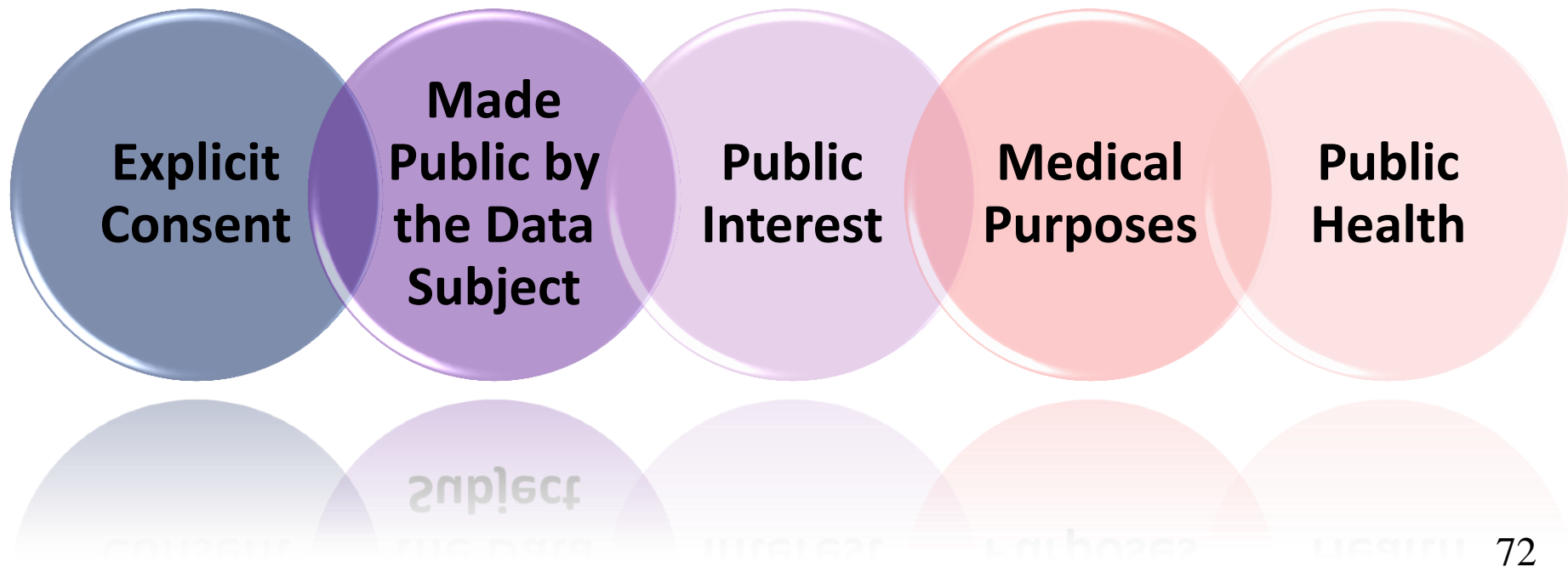


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# Categories of Sensitive Personal Data under GDPR



# Legal Bases for processing of 'Sensitive Personal Data' (non-exhaustive)





# Consent

**“explicit  
consent”**

*“Freely given, specific, informed,  
unambiguous, clearly, affirmative”*

*“all situations where individuals are presented  
with a proposal to agree or disagree to a  
particular use or disclosure of their personal  
information and they respond actively to the  
question, **orally or in writing.**”*




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# Other provisions concerning 'Sensitive Personal Data'



# Right to erasure of personal data in EU



*where personal data is no longer necessary for the purposes they were collected*

*where the data subject withdraws his consent for processing*

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# Inter-sex/ Trans-gender/DSD Data

**Keeping  
Record of  
“Birth Gender”**

**Updating  
Record of  
“Legally Recognized Gender”**

# Use of Legally Recognized Gender



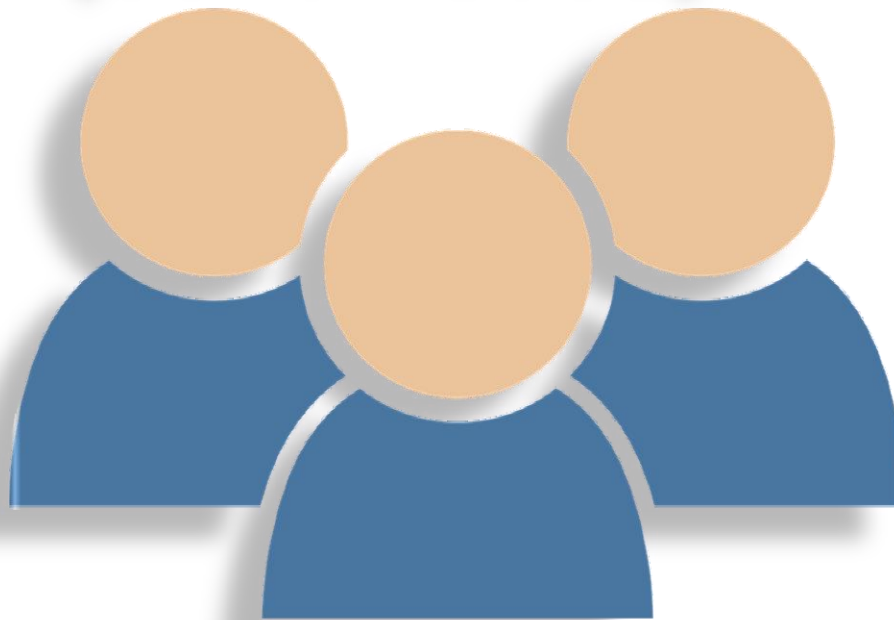
the legally recognized gender is consistent with the physical appearance of a transsexual person.



The Government must exercise due care in maintaining the two sets of gender records

**Q, R, Tse  
v**

**Commissioner of Registration  
(11 Jan 2018)**



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# Sex Reassignment Surgery at Public hospital

1

- Assessment and medical treatments

2

- Diagnosed with GID

3

- Need or Suitable for the surgery



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# Legal Gender Change

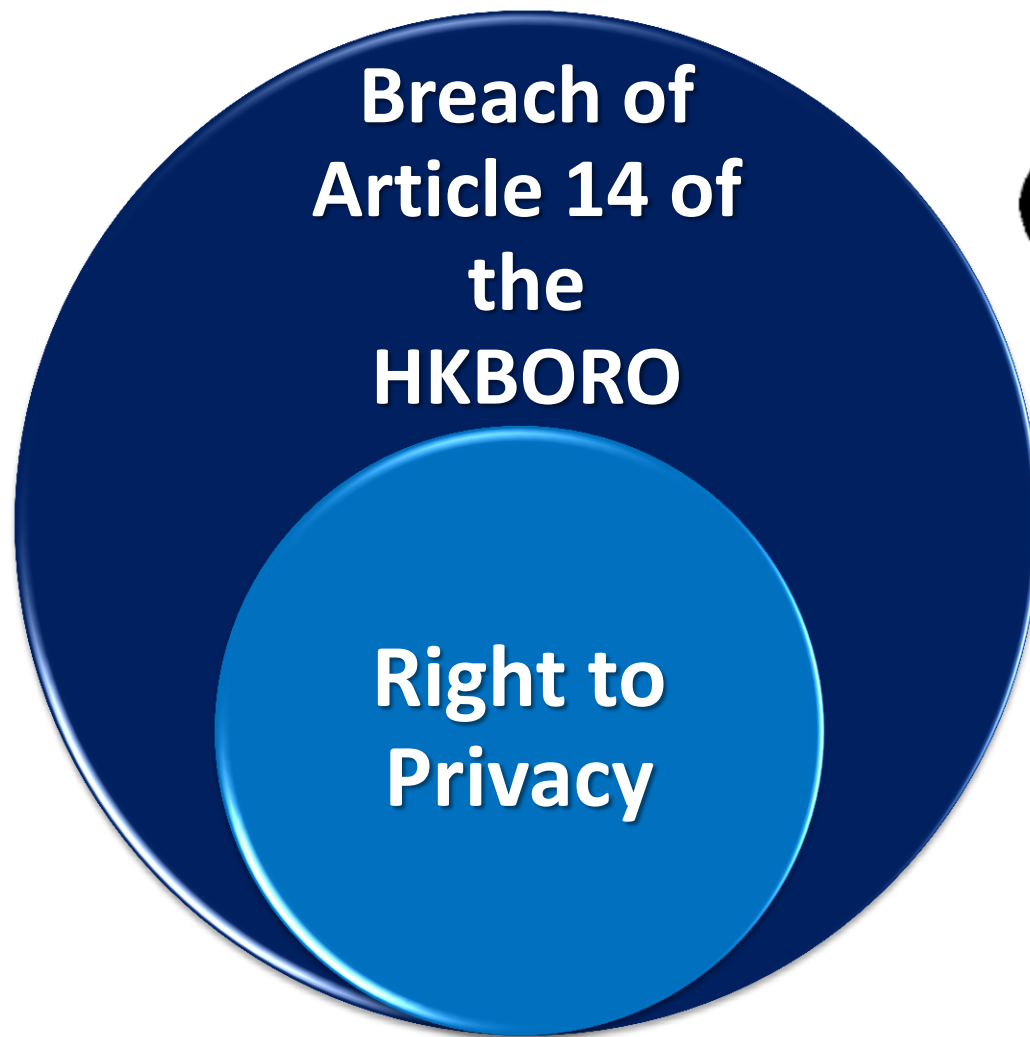
Sex  
Reassignment  
Surgery

Sterilization

New  
identity card  
and passport  
with  
affirmed  
gender



# Grounds of Review



# Article 17 of the ICCPR

***“No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honor and reputation.”***

***“everyone has the right to the protection of the law against such interference”***

*International Covenant on  
Economic Social and Cultural Rights*

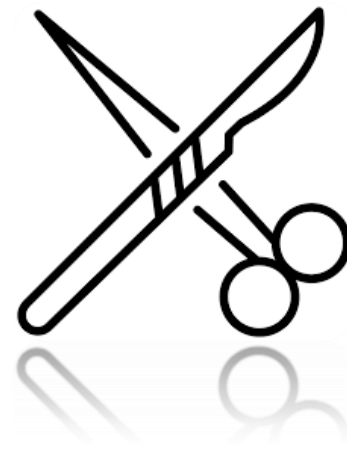
# Second Ground

**Breach of  
Article 3 of  
the HKBORO**

**Right not to  
be subjected  
to Cruel,  
Inhuman or  
Degrading  
Treatment**

# UN's Human Rights concerns

***The Report called on all States to outlaw "... forced or coerced sterilization in all circumstances."***



# UN Committee against Torture



*The Hong Kong Government should “take the necessary legislative, administrative and other measure to guarantee respect for the autonomy and physical and psychological integrity of transgender and intersex person, including by removing abusive preconditions for the legal recognition of the gender identity or transgender person ,such as sterilization.”*

# Third Ground



**Sex  
Discrimination  
Ordinance  
Cap 480**

**Indirect Sex  
Discrimination**

# Globally and Locally

- Human Right (Data Privacy Right included) Protection Laws and Regulations
- Enforcement authorities and mechanisms
- Practices and Standards
- Court Attitude not discouraging
- Responsive Government
- Minority Fundamental Human Rights- to take the lead and be pro-active

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What's New

PCPD Wins the "Most Breastfeed-caring Corporate" Award

PCPD's New Chinese Publication Entitled 《注意！這是我的個人資料私隱》 has been released at the Hong Kong Book Fair 2017! The new book sharing session was held at the HKCEC on 24 July 2017.

PCPD Publishes a New Book Entitled "Watch out! This is my personal data privacy" - Have a Say on Your Own Privacy! (Chinese version Only)

Privacy Commissioner Welcomes the Enactment of the Apology Ordinance

Organisations and Individuals Should Comply with Lawful Requirement of the Privacy Commissioner - A Company Director Became the First Offender Convicted of this Offence

Privacy Commissioner Publishes Investigation Report on the Loss of Registration and Electoral Office's Notebook Computers containing Personal Data of Election Committee Members and Electors

PCPD Joins Global Sweep Exercise to Examine Consumers' Control Over Their Personal Data Collected by Customer Loyalty and Reward Programmes

"It is a timely opportunity for Hong Kong to review the data privacy protection law" Privacy Commissioner Delivers Keynote Address at the 7th European Data Protection Days in Berlin, Germany

For Individuals

Think Privacy! Be Smart Online  
Using Computers and the Internet Wisely  
Be Smart on Social Networks  
Your Identity Card Number and

For Organisations

Mobile App Development  
Professional Workshops  
Online Courses  
Introduction to the PD(P)O Seminar

The 39th International Conference of Data Protection and Privacy Commissioners (ICDPPC)

The 39th International Conference of Data Protection and Privacy Commissioners is now open for registration.

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sagolun  
sukriya  
kop khun krap  
moichakkeram  
go raibh maith agat  
arigatō  
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