

# **A REVIEW OF POLICIES AND SOCIAL PRACTICES ON THE HUMAN RIGHTS OF LGBTI PEOPLE IN THE PEOPLE'S REPUBLIC OF CHINA**

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## Part I. Introduction

### ● Background and Significance

This report is developed by the Aibai Culture & Education Centre (hereafter referred to as Aibai), for the purpose of reviewing the human rights conditions of lesbian, gay, bisexual, transgender and intersex (LGBTI) people in China, and providing recommendations to different stakeholders for future strategy planning. This report is meaningful for the LGBTI community, policy makers, and the general public in China and for the international community.

There should be regular reviews on the progress of developments in human rights of the LGBTI community in China. The past decade witnessed rapid developments of the LGBTI community. It has evolved from the originally gay-dominant community to today's more diverse groups which include gays, lesbians, bisexuals, transgender people, their parents and children, and friends who advocate human rights for sexual minorities. Moreover, LGBTI related activities have also spread from major cities like Beijing, Shanghai and Guangzhou to other medium and small cities. And the activities have diversified from HIV prevention focused to wider LGBTI culture and advocacy events. At the same time, LGBTI NGOs have also grown substantially in China. Their missions shifted from primarily community strengthening to public education for the general public, and the ever growing advocacy activities. These progresses require the LGBTI community to have a systematic knowledge and understanding of the legal environment and social practices regarding their own human rights, so that they could organize public education and advocacy activities more effectively and relevant to the needs of the community.

Policy makers and the general public also need to know the human right conditions for the LGBTI populations. Currently there is no relevant statistics about the LGBTI population in China. Based on the international estimate, about 3-5%<sup>1</sup> of one nation's population are homosexual or bisexual, about 0.5%-2%<sup>2</sup> are transgender people, about 1.5%<sup>3</sup> of the new born are intersex people. According to these estimations, there are about 42 million to 70 million homosexuals or bisexuals in China, about 7 to 28 million transgender people. And among the new born each year, 210,000<sup>4</sup> are intersex. Among them, there are children, adolescents, students, women, workers, people with disabilities and the elderly. Given that the LGBTI community is a diverse community with a large population, it is very important to ensure that the human rights of LGBTI people are recognized, protected and fulfilled. Furthermore, safeguarding

1. International society has done many similar studies, and the Meta study shows the result of 3-5%.

2. "How many people are lesbian, gay, bisexual, and transgender?", The Williams Institute, April 2011, <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Gates-How-Many-People-LGBT-Apr-2011.pdf>, Page 5.

3. "On the Number of Intersex People", OII Australia - Intersex Australia, 28 September, 2013, <http://oii.org.au/16601/intersex-numbers/>.

4. The population of the new born is based on the census in 2010, and  $13786434 \times 0.15$  equals 210,000. The data 13786434 comes from the official website of the Statistics Bureau, <http://www.stats.gov.cn/tjsj/pcsj/rkpc/6rp/indexch.htm>.

the rights of the LGBTI community has positive impacts on other communities in our society. In recent years, heterosexual wives of gay men and heterosexual husbands of lesbians have emerged on the scene. Compelled by pressure from both family and society, many homosexual people ultimately choose to marry the opposite sex while hiding their sexual orientation. Based on the estimate by professionals, there are currently 16<sup>5</sup> million heterosexual women who are married to homosexual men in China. To prevent more women and men from entering this kind of sham marriages, it is necessary to provide supportive legal and social environments for homosexuals.

The international society has also demonstrated increased interest on the human rights situation of the LGBTI community in China. In recent years, International media have increased their coverage on the life and rights conditions of LGBTI community in China. What is more important is that during the second UPR on China by the UN Human Rights Council in October 2013, the human right conditions of LGBTI community in China (including the Special Administrative Regions of Hong Kong and Macao) received broad attention from NGOs and other governments. Set against this background, LGBTI NGOs in China have the responsibility for providing the international community with accurate and reliable information regarding the human rights condition of the LGBTI communities in China.

Against this background, Aibai developed this report under its current strategic framework. Being one of the earliest established LGBTI NGOs in China, Aibai aims to promote equal rights for Chinese speaking LGBTI community through community alliance strengthening, public education and advocacy, and providing medical services and care for people living with HIV and AIDS. It is Aibai's tradition to develop and provide news, reports and other publications on LGBTI related issues and themes. In 2013, Aibai launched its policy and research program which is led by personnel with social research and international human rights law background. This report, which is available both in Chinese and English, is one of the accomplishments through Aibai's policy and research program. To access to the Chinese version, please download it from Aibai's official site at: [www.aibai.org](http://www.aibai.org).

## ● Methodology

In developing this report, staff member from policy and research program at Aibai applied the following methodologies to collect and analyze information.

Firstly, Aibai policy and research program surveyed international and domestic laws, reviewed and analyzed the recognition and protection of human rights of LGBTI people at the international and domestic level. For the review of international human rights laws, this report focused on those hard laws that China has already ratified, such as the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Rights of the Child (CRC), and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). Attention was also given to international soft laws, such as the Universal Declaration of Human Rights (UDHR), the UN "Protect, Respect and Remedy" Framework for Business and Human Rights.

Likewise, for the review of domestic laws, the report focused on China's legally binding laws, such as the Constitution of the People's Republic of China, the Criminal Law of the People's Republic of China, the Maternal and Infant Health Care Law of the People's Republic of China, the Law on the Protection of Minors, the Labour Law of the People's Republic of China, the Labour Contract Law of the People's Republic of China, the Marriage Law of the People's Republic of China, the Law on the Protection of Rights and Interests of Women in the People's Republic of China, the Adoption Law of the People's Republic of China, and the Blood Donation Law of the People's Republic of China.

This report also reviewed relevant regulations, rules, soft laws and political commitments, such as the Regulation Governing the Technologies for Sex Change Surgery (Trial), the Regulation on the Classification of Pornography, the Regulation on the Registration for Social Groups, the Regulation on Foundation Administration, the Provisional Regulation on Registration for Civil Non-Enterprise Organizations, Reply by the Public Security Bureau of the Ministry of Public Security on Issues Regarding the Change of Gender and Household Registration for Citizens after Sex Change Surgery, and Reply by the Third Bureau of the Ministry of Public Security on Issues Regarding the Change of Gender and Household Registration, the Chinese Classification and Diagnostic Criteria of Medical Disorders (CCMD), and the National Human Rights Action Plan of China (2012-2015).

In addition, Aibai policy and research program collaborated with other Aibai programs to collect social practices that are relevant to human rights of LGBTI people in China through online surveys, desk research and interviews. On the issue of recognizing and protecting the human rights of LGBTI people, sometimes the social practice is in line with legal regulations in a society while at other times it runs against these regulations and infringes the individual rights of LGBTI people. There are also times when social practices surpass these regulations and recognize and protect the rights of LGBTI people without those rights being recognized by laws and regulations.

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5. "Millions of Wives Wed to Gay Men: Expert", China Daily, 3 February 2012, [http://www.chinadaily.com.cn/china/2012-02/03/content\\_14528838.htm](http://www.chinadaily.com.cn/china/2012-02/03/content_14528838.htm).

Aibai policy and research program collected and analyzed information using different methods. For example, by designing and conducting online surveys together with other two Aibai projects, Aibai policy and research program analyzed the discriminatory practices against LGBTI people at schools and workplace in China. Through desk research, this report collected and analyzed the attitudes held by the media, education institutions, health entities, lawyers and civil administrative departments towards LGBTI people in China. Through interviews with LGBTI activists, journalists, lawyers, scholars and other professionals, this report summarize their observation on human rights protections against LGBTI people in China.

This report is a working report rather than an academic paper. We encourage government, the UN agencies, the media, educators, businesses, NGOs, LGBTI individuals and the public to read and make use of this report. We welcome any feedback and criticism from the readers to make this report more comprehensive and objective. If you would like to contact us, please reach us via email at: [contact@aibai.org](mailto:contact@aibai.org).



## **Part II: Policy Review on Human Rights of LGBTI People in China**

This part is written based on the structure of the Universal Declaration of Human Rights; it summarizes and analyzes the current policies and social practices on every aspect of human rights of LGBTI people in China. This does not mean that among the following rights some are superior to others. Aibai thinks that all rights are equal and interdependent. It is important to promote all aspects of human rights of LGBTI people at the same time from different angles.

### **Right of Being Equally Protected by Laws**

Article 1 of the UDHR states that all human beings are born equal. Article 33 of the Constitution of the People's Republic of China also affirms that all people are equal in front of the law. The state has obligations to protect its citizens from insults and discrimination.

The Chinese government has taken three progressive steps in order to decriminalize and de-stigmatize the LGBT population in China. In 1997, the new Criminal Law of People's Republic of China removed the crime of "hooliganism", which had been used to criminalize people with same-sex behaviors. In April of 2001, the third version of "Chinese Classification and Diagnostic Criteria of Mental Disorders" (CCMD) removed homosexuality from the list of mental disorder. And according to the official replies from the Ministry of Public Security in 2002 and 2008, namely the Reply by the Public Security Bureau of the Ministry of Public Security on Issues Regarding the Change of Gender and Household Registration for Citizens after Sex Change Surgery (2002) and the Reply by the Third Bureau of the Ministry of Public Security on Issues Regarding the Change of Gender and Household Registration (2008), chinese citizens who have changed their sex through sex reassignment operations in China or abroad, could change their sex on their legal identity documents, such as Chinese household registration (hukou, 户口), Chinese legal identity card (shenfenzheng, 身份证) and passport.

Although sexual minorities are already decriminalized in China, there is still no law or policy in China that clearly recognizes and protects the equal rights of LGBTI people. LGBTI people are still in what is known as the "grey zone", with the official stance being: do not support, do not oppose, do not encourage. This means that LGBTI individuals encounter various forms of discriminations in their daily lives, such as in schools and at their workplaces (which interfere with their rights of education and their rights to work) without strong legal recourse.

Transgender people are still being discriminated at the policy level. Transgender is still listed as a mental disorder in the CCMD. And despite the above-mentioned legal reform, due to a lack of clear procedure and responsible sector under the government, it is difficult for transsexual people who receive sex reassignment operations to change their gender on important documents, such as diploma, academic qualification and occupation physician license. Also, those who have not undergone sex reassignment operations cannot change their sex on their legal identity documents.



Intersex people are currently left out from all laws and policies and their access to equal rights is extremely challenged. Because the two-dimension gender model of male and female runs throughout all laws and policies in China, intersex people are excluded from all laws and policies since their birth. For example, according to Article 23 in the Maternal and Infant Health Care Law of the People's Republic of China, medical health care institutions and professionals that engage in home birth deliveries should issue uniformly fabricated birth certificates for the newborn following the regulation of the State Council's Public Health Administrative Bureau. On the birth certificate uniformly printed by the Public Health Administrative Bureau, there are only two choices for gender, male and female, without third choice. But what is worth mentioning is that on the new birth certificates printed after January 1st, 2014, at gender section, male or female choice is replaced with blank filling for the new born.

Another example, according to Article 3 of the Resident Identity Card Law of the People's Republic of China, among the items required for residents' legal identity card registration, there are only male or female choices for gender. Because intersex people are not inside the male-female two-dimension model, their registrations of legal identity cards are often turned down. Last example, Article 9 of the Inheritance Law of People's Republic of China stipulates that men and women are equal on inheritance, which implies that only males or females have rights to inherit. Those who are neither male nor female do not.

The male-female two-dimensional model held by current laws and daily practices in our society has left intersex and transgender people in the grey zone when it comes to access to public facilities, without effective protection of their rights. For example, most of our public toilets are divided between male and female. But for intersex and transgender people, they often hesitate about which one to go in. Also, men and women are separately detained in prisons and detention centers. But intersex and transgender people are usually randomly placed into whichever part that is convenient to wardens. Rape and sexual assaults occur from time to time in prisons and detention centers. Transgender and intersex people's different gender identity and features often make them more vulnerable to assault.

### The Rights to Freedom of Speech

According to Article 35 of the Constitution of the People's Republic of China, all citizens have rights to freedom of speech.

There have been recent progresses and setbacks for China's relevant policies. According to Article 10 of the Film Examination Regulation promulgated in 1997, all films containing homosexuality should undergo deletion or modification for the relevant content but this regulation was revoked in 2006 and replaced by the Provision on the Archiving of Film Scripts (Abstracts) and the Management of Films (the Radio, Film and Television Department Directive No. 22) (hereafter as "the Provision"). The new Provision no longer requires deletion or modification of relevant story lines for films containing homosexuality. This progress suffered a short setback in 2008. According to the Announcement by the Administration of Press, Publication, Radio, Film and Television to Re-apply for the Film Examination Standards (hereafter "the Announcement"), films containing content of homosexuality were once again on the list for deletion or modification. However, this announcement was abolished two years later. On November 12th, 2010, the State Administration of Press, Publication, Radio, Film and Television passed the General Directive No. 65: Decision on Revoking some of the Radio, Film and Television Department's Regulations and Normative Documents. The Announcement in 2008 was among the regulations and normative documents to be revoked.

Currently, all film examinations still follow the 2006 Provision on the Archiving of Film Scripts (Abstracts) and the Management of Films. Although the Programme on Reinforcing and Improving Adolescents' Ideological and Ethical Education announced in 2004 is still in force, and Article 15 within this Program stipulates that all homosexuality related content should "absolutely be deleted" in radio, film or TV broadcasts, in terms of censorship over film, the regulation of 2006 should rule over this 2004 programme as new laws should always rule over the old ones. In 2003 two screened films, Finding Mr. Right / Anchoring in Seattle and Love Deposit, have homosexuality story lines without being deleted or modified.

Apart from the progress on the laws and regulations on film censorship, there is also certain progress being made on laws and regulations on printed publication censorship. On December 27th 1988 the State Press and Publication Bureau promulgated the Provisional Regulation for Identifying Obscene and Pornographic Publications. This regulation gives detailed definition for pornographic publications as well as their range. Item 6 under its Article 2 stipulates that publications containing obscene description on homosexuality are pornography. However, the new Criminal Law of the People's Republic of China promulgated on 25 February, 2011 gives another definition on pornography under its Article 367. According to this Criminal Law, "magazines, films, video tapes, cassettes, pictures and other salacious objects giving details of sexual acts or advocating pornography in a blatant way" are obscene. It does not specifically mention homosexuality. Moreover, the Criminal Law also stipulates that "scientific works on human physiology and medical knowledge are not obscene pornography". Based on the principle that new laws rule over the old, and laws over regulations, definition of obscene pornography should follow most recent criminal law. In 2013, Human Sexuality: Diversity in Contemporary America (6th Edition with Illustrations) which was translated by Aibai got officially published by the World Publishing Corporation in China. This book does include scientific knowledge on sexual orientation and gender identity.

Based on the improvement mentioned above on the policy environment, and as the society has become more and more tolerant, there has been an obvious increase of positive coverage on LGBTI people and LGBTI related issues in recent years by the official media in China, such as CCTV and China Daily. For example, in June 2011, the CCTV criticized Chinese actor Mr. Haiying Sun and his wife Ms. Liping Lv for making anti-gay speeches on their Weibo (mini-blog) accounts while calling for the general public to respect people with different sexual orientation<sup>6</sup>. In January 2013, the English version of China Daily also published five articles covering the various issues confronting China's LGBTI people<sup>7</sup>.

### Right to Education

According to Article 28 of the Convention on the Rights of the Child (CRC) and Article 3 of the Constitution of the People's Republic of China, all juveniles under the age of 18 have the right to education. Furthermore, Article 19 of the Law on the Protection of Minors of the People's

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6. CCTV criticized Liping Lv for her anti-gay comments, *Rights of Homosexuals are not to be Infringed*, Sina Entertainment, July 6th, 2011, <http://ent.sina.com.cn/s/m/2011-07-06/10243352436.shtml>.

7. Links of these five articles are as follows:  
[http://www.chinadaily.com.cn/sunday/2013-01/06/content\\_16086604.htm](http://www.chinadaily.com.cn/sunday/2013-01/06/content_16086604.htm);  
[http://www.chinadaily.com.cn/sunday/2013-01/06/content\\_16086603.htm](http://www.chinadaily.com.cn/sunday/2013-01/06/content_16086603.htm);  
[http://www.chinadaily.com.cn/sunday/2013-01/06/content\\_16086606.htm](http://www.chinadaily.com.cn/sunday/2013-01/06/content_16086606.htm);  
[http://www.chinadaily.com.cn/sunday/2013-01/06/content\\_16086607.htm](http://www.chinadaily.com.cn/sunday/2013-01/06/content_16086607.htm);  
[http://www.chinadaily.com.cn/sunday/2013-01/06/content\\_16086605.htm](http://www.chinadaily.com.cn/sunday/2013-01/06/content_16086605.htm).

Republic of China specifies that schools must provide students with guidance in life, psychological counseling and adolescence education. Article 13 of the Population and Family Planning Law of the People's Republic of China also has similar content. Finally, according to Item 1 of Article 19 of the CRC, state parties must take all appropriate legislative, administrative, social and educational measures to “protect children from any form of mental or physical devastation, harm or insult, negligence or insufficient care, abuse or exploitation, including sexual assault”.

The Chinese government has always been laying stress on protecting rights of the minors. However, as the current laws and regulations lack appropriate implementation mechanism, and follow the approach of “not support, not oppose and not encourage” towards LGBTI people, many LGBTI children and adolescents cannot fully enjoy their rights to education. Although the Chinese government requires all schools to provide students with adolescence education or sex education, China does not have uniformly developed comprehensive sex education curriculum and text books, and lack teachers with enough knowledge and training. Although there are some sex education textbooks published in China, LGBT related information are often missing, outdated, or misleading.

In addition, a large number of LGBT students (or those perceived as such) have encountered and are encountering homophobic and trans-phobic bullying in schools without substantial support from schools officials and teachers prior, during and after being bullied. According to an online survey conducted by Aibai in 2012<sup>8</sup>, among 421 students from middle and high schools, universities and vocational schools, 77% of the respondents encountered at least one of 17 types of homophobic and trans-phobic bullying in schools. 10% of them were victims from direct or indirect attacks. And 7.6% of the respondents were sexually harassed by their classmates and/or teachers. School bullying negatively impacted their academic performance as well as their psychological health. 3% of them dropped out of school. And after the bullying, only 33% of the respondents sought support from others, most of which was not adequate.

### Rights to Work and Employment

According to Article 6 and Article 2.2 of the International Covenant on Economic, Social and Culture Rights (ICESCR), state parties should recognize the right to work of everyone, and should guarantee that employment rights “will be exercised without discrimination of any kind...”. According to the UN “Protect, Respect and Remedy” Framework for Business and Human Rights, the state parties has a duty to “protect against human rights abuses committed by third parties, including business, through appropriate policies, regulation and adjudication”.

In 1994 and 2007 respectively, the Chinese government released the Labor Law and the Labor Contract Law in order to protect workers' labor rights and rights to work. Both also give special attention to protecting the rights to work for women, people with disabilities and ethnic minorities. However, there are still gaps between policies and practices that prevent LGBTI workers from fully enjoying their right to work. Article 12 of the Labor Law stipulates that all workers must not be subject to employment discrimination based on their ethnicity, race, sex, and religion. But it does not forbid other types of discrimination at workplace, such as those based on sexual orientation and gender identity. If workers encounter discrimination because of their sexual orientation or

gender identity at the workplace, the current laws cannot provide them efficient protection.

According to an online survey conducted by Aibai<sup>9</sup>, Out of 2161 LGBT employees, more than 93% of them choose not to come out fully at their workplace because they are afraid that it would influence their career development or they may face discrimination from colleagues. Quite a portion of the respondents have experienced different types of discriminations based on sexual orientation and gender identity from their colleagues and employers. For example, 38.5% of the interviewees said they once suffered verbal insults; almost 13% of the surveyed once lost opportunities for promotion. 66% of the questioned reported their performance decreased due to the absence of workplace diversity.

Since 2011, workplace diversity issue has emerged in the corporate social responsibilities (CSR) reports of enterprises in China. They monitor inclusive and diverse corporate culture, and all types of discriminations, including discrimination based on sex, physical features, sexual orientation and gender identity. However, it is only limited to a small number of corporations, and few are domestic companies in China.

### Rights to Health

According to Article 12 of the International Covenant on Economic, Social and Cultural Rights, signatory countries should recognize and protect all human beings' rights to health. The Chinese government also reaffirms its citizens' rights to health through Article 45 of the Constitution, and promises that the state would develop social welfare such as social insurance, social relief and medical health service to facilitate the rights to health of its citizens.

China has already made many efforts to guarantee its citizens' rights to health. Since the reform in late 1970s, especially after the SARS outbreak, China has launched a series of public health policies in order to respond to various public health issues, such as, the Maternal and Infant Health Care Law, launched in October 1994; the Public Health Emergency Ordinance, announced in May 2003; the Regulation on the Prevention and Treatment of HIV and AIDS, announced in January 2006 and promulgated in March 2006; the Prevention and the Treatment of Chronic Non-Communicable Diseases (2012-2015) published by the Ministry of Health in July 2012. The national universal social welfare system has been set up after the People's Republic of China was founded and has undergone several reforms. Currently, China established a medical care system that covers all citizens. It mainly comprises three major systems: the urban employee's basic medical insurance system, the new rural cooperative medical care system and the basic medical insurance system for urban citizens. All Chinese citizens, regardless of their sexual orientation and gender identity, can benefit from these three medical insurance systems.

Although the current health policies do not directly exclude LGBTI people, they do not meet some specific health needs of LGBTI people.

#### 1) HIV Prevention, Treatment, Care and Support for Gay Men

The regulation on the Prevention and Treatment of HIV and AIDS has provisions for the rights and obligations of all people living with HIV and AIDS. Article 3 of the regulation stipulates that “any employer and individual should not discriminate against people living with HIV and AIDS and their families”. It also stresses that people living with HIV and AIDS enjoy the same right as others to marriage, employment, medical care and education. Article 39 of the regulation guarantees the rights to privacy for people living with HIV and AIDS by providing that “any

8. Mian L, “*Report of the Online Survey on Homophobic and Trans-Phobic Bully at Educational Institutions*”, Aibai Culture & Education Centre, November 2012, <http://www.aibai.com/booksview.php?id=19532>.

9. *Online Survey Report on The Work Environment for China's LGBT Community*, Aibai Culture & Education Centre, September 2013, <http://www.aibai.com/booksview.php?id=19543>.



employer and individual must not disclose any personal information of people living with HIV and AIDS, and their families”.

Article 38 specifies four obligations of people living with HIV and AIDS: they must accept epidemiological survey and guidance from relevant authorities; inform their sex partners of their infection and illness; inform doctors of their infection and illness when seeking medication; and take necessary measures to avoid infecting others. Articles 38 and 62 also clearly forbid people living with HIV and AIDS from intentionally spreading the virus to others or face civil or criminal charges. The current Criminal law has no punitive stipulation on the intentional spread of the HIV virus. But Article 360 of the Criminal law states that “those who carry on selling or purchasing sex despite clearly knowing they are infected with serious sexual transmitted diseases such as syphilis and gonorrhea will face imprisonment, detention or control for less than 5 years plus a fine”. This article can be used to punish people living with HIV and AIDS for selling or purchasing sex.

In China, men who have sex with men (MSM) are regarded as a high risk group of infecting HIV together with sex workers and injection drug users. And among the MSM, quite a portion of them are gay men. Therefore, it is of great importance to focus on the prevention, treatment, care and support of HIV and AIDS among the gay men’s community. In recent years, HIV infection rate among MSMs is on the rise. According to Article 22 of the regulation on the Prevention and Treatment of HIV and AIDS, the state has an obligation to establish and ameliorate the surveillance network of HIV and AIDS, including the surveillance of high risk groups. It is also clearly specified in China’s Twelfth Five-year Plan for the Containment and Prevention of HIV and AIDS (2012-2016) that stronger intervention among high risk groups need to be taken to stop HIV and AIDS. On the 23rd World AIDS Day (1 December, 2010), the Chinese Ministry of Health announced for the first time that in China, HIV infection rate among MSM was surging, and the Chinese government should take effective measures at all levels to bring the further spread of HIV under control<sup>10</sup>. This announcement also demonstrates the strong political commitment made by the Chinese government.

However, during actual implementation at the local level, the rights to privacy of people living with HIV and AIDS are often challenged. The Regulation on the Prevention and Treatment of HIV and AIDS does not specify whether testing should be anonymous or registered with real names. Since 2012, real-name registration for HIV testing has been promoted and included in provincial regulations on prevention and treatment of HIV and AIDS. For example, Article 32 of Guangxi Zhuang Autonomous Region’s Regulations on the Prevention and Treatment of HIV and AIDS requires real-name registration for all HIV testing. Although Article 32 specifies that without consent from the tested or the supervision of the tested, any employer or individual must not disclose any personal information of the involved or the family of the involved, Article 33 says that people who have been confirmed by the test of HIV infection must inform their spouses or sexual partners of the result within one month. Otherwise, the Centers for Disease Control have the power to inform the spouses and the sexual partners of the infected. This goes against the rights of privacy for people living with HIV and AIDS. Meanwhile, as social attitude is still prejudiced towards MSM, real-name registration for HIV testing can also hamper gay individuals from seeking HIV testing, which will further delay their access to HIV related treatment, care and support.

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10. For detailed news please visit: <http://aids.39.net/a/2010121/1556917.html>.

## **2) Blood Donation**

China has policies that prohibit homosexuals from donating blood. Before July 2012, relevant policies in China did not allow any homosexuals, men or women, to donate blood. In July 2012, China launched and implemented the new Requirements on Health Check for Blood Donors. Based on the new requirements, lesbians are no longer banned from making blood donations. But sexually active gay men are still banned.

## **3) Usage of Hormones by Transgender People and Intersex People**

Like their counterparts in other countries, some transgender and intersex people in China also have the needs to change their gender features by taking hormones. According to the Catalogue of Drugs Covered in the National Medical Insurance and the Industrial Injury Insurance, many hormones that are suitable for transgender and intersex people to change their sexual features are listed on the basic medical insurance drug catalogue. If transgender and intersex individuals get prescription of hormones from the regular hospitals and they are covered by the national medical insurance, they can get reimbursement via the national basic medical insurance. However, in China, not many doctors have the training and skill to provide professional instructions on hormone usage for this purpose. Therefore, most transgender people and intersex people choose to take hormones without medical guidance and regular checkups. This not only increases their economic burden, but can also cause serious side effects, such as hair loss, increased blood pressure, diabetes, and liver or kidney damage.

## **4) Sex Reassignment Surgery for Transgender People**

China allows its citizens to undergo sex reassignment surgery and there are relevant regulations. In 2008, China’s health ministry required all hospitals to stop sex reassignment surgeries because of concerns that there was a lack of guidance on such treatments. In 2009, the Ministry of Health launched the first Regulation Governing the Technologies for Sex Change Surgery (Trial)<sup>11</sup>. This administrative regulation provides clear standards and conditions for hospitals that wish to offer individuals sex reassignment surgeries.

However, some of the requirements in this regulation show no respect for the rights to health of transgender people. First, transgender people are still regarded as patients with mental disorders. Therefore, the regulation requires that transgender people undergo mental health treatment before receiving sex reassignment surgeries, and their desire for the surgery must persist for more than five years (the common international practice is one year). Second, this regulation requires consent from family members before the surgery, regardless of the age of the affected parties. Last, this regulation also requires transgender people to have their genitalia removed before undergoing any change of secondary sexual characteristics, which is the opposite of the procedures adopted internationally for sex reassignment.

Also worth mentioning is that none of the insurances currently available in China covers sex reassignment surgery. According to China’s basic medical insurance system, sex reassignment surgery is not covered in basic medical care. There are many commercial insurers in China covering different types of health insurance but they also clearly specify that they will not pay for sex change surgeries. Many transgender people are held back from sex reassignment surgeries by the huge cost for the operation. Many try to save up for the gender reassignment surgery

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11. For the full content of this regulation, please visit: <http://baike.baidu.com/view/3140460.htm>.

through other means, such as involving in sex work, advertising for certain part of sex reassignment surgery for some hospitals etc. Often, they are further marginalized by society because their rights are not properly protected during these processes.

### 5) Sex Selection Surgery for Intersex People

There is currently no regulation governing surgeries to help intersex people choose their gender. The Regulation Governing the Technologies for Sex Change Surgery currently available for transgender people does not apply to intersex people, because the former only applies to individuals with “gender identity disorder” which does not include intersex people. Back in the 70s, there were already records of surgical intervention on intersex people in China. Currently, many major hospitals have experiences in undertaking sex selection surgery for intersex people. However, most of these have been done in the pediatric departments of those hospitals. This implies that in China, the actual surgical practice for helping intersex people to choose their gender still retains the precondition that priority must be given to the physiological gender, instead of giving much attention to the psychological gender and self-determination of intersex people. This infringes their rights to health and their rights to self-determination.

### Right to Marry and Establish Families

The current laws and policies in China cannot effectively protect LGBTI people's right to marry and establish families. According to the Marital Law of the People Republic of China, marriage can only take place between a man and a woman. Civil partnership is not protected by the laws of China. Therefore, same sex marriage and marriage of intersex people before their sex selection are not protected by current laws.

Because same sex marriage and marriage of intersex people before their sex selection are neither recognized nor protected in China, LGBTI partners are stopped from enjoying other rights accorded to married people. For example, in the situation same sex couples or one of the partners being intersex, according to Article 10 of the Inheritance Law of the People's Republic of China, they cannot become the legally designated heir, unless their partners can apply for a legally binding will on the basis of Article 16 of the Inheritance Law, to designate their partners as the heirs of their estate. Also, according to current law, same sex couples or partners with one being intersex cannot adopt a child together. Although the Adoption Law of the People's Republic of China allows single people above 30 to adopt, for same sex couples or partners with one being intersex, only one of them can adopt children, and the other one cannot enjoy and perform their rights and obligations as a foster parent.

### Political Environment for LGBTI NGOs

Article 25 of the Constitution of the People's Republic of China stipulates that all Chinese citizens have the freedom of association.

Since 1995 China's NGOs grew rapidly. According to the official statistics of the Ministry of Civil Affairs, by the end of 2012, there are 499,000<sup>12</sup> civil organizations registered under the Ministry of Civil Affairs. Among them, most work on education, social service, agriculture and rural development. Furthermore, for those registered social organizations, they are mainly based in Jiangsu, Shandong, Guangdong, Sichuan and Zhejiang provinces. These provinces are all located along the east coast except for Sichuan. In 2013, the Ministry of Civil Affairs further relaxed the registration conditions for civil organizations. In December 2013, the Minister of Civil Affairs announced<sup>13</sup> that in the future, four types of civil organizations, namely industrial and business associations, scientific associations, charity groups and urban-rural social services, could directly register under the Civil Affairs Bureau without finding a sponsoring government agency. The Ministry of Civil Affairs also promised to amend three relevant regulations: the Regulation Governing Social Organizations, the Regulation Governing Foundations and the Regulation Governing Non-Corporate Civil Entities.

However, LGBTI NGOs face many challenges in registration. To date only one organization, which specializes in HIV prevention among MSM (social services) is known to be successfully registered under the Ministry of Civil Affairs. Most LGBTI NGOs, especially those committed to public policy advocacy, cannot register under the Civil Affairs Bureau. At the start of 2012 and towards the end of 2013, two LGBTI organizations respectively applied for registration as civil organizations at the Civil Affairs Offices in Guangdong and Hunan, but both failed in the end. In the case in Hunan, the reply given by the local Civil Affairs Office was that the application by this organization was not in agreement with China's current law<sup>14</sup>, because according to the Marital Law, marriage must consist of a man and a woman. As the marriage and civil partnership between same sex couples are not recognized by the law in China, this application was therefore denied.

12. The Ministry of Civil Affairs announced statistics for the development of social service in 2012, with a total of 89696 professionals engaged in various social services. The official website of the Ministry of Civil Affairs of the People's Republic of China, 23 June 2013, <http://jnjd.mca.gov.cn/article/mzhyzyjnpjhdgzh/yxxyw/201306/20130600476542.shtml>.

13. Ministry of Civil Affairs: four types of social organizations will be directly registered, cancelling unnecessary approvals, ifeng.com, 5 December, 2013, [http://news.ifeng.com/mainland/special/sbjzsqh/content-3/detail\\_2013\\_12/05/31833919\\_0.shtml](http://news.ifeng.com/mainland/special/sbjzsqh/content-3/detail_2013_12/05/31833919_0.shtml).

14. Man in Changsha applied to establish an organization for homosexual people and took the Civil Affairs Bureau to Court after being refused, Xinhua News, 20 February, 2014 [http://news.xinhuanet.com/legal/2014-02/20/c\\_119428771.htm](http://news.xinhuanet.com/legal/2014-02/20/c_119428771.htm).



### Part III:

## China's Second Universal Periodic Review Session and the Rights of LGBTI People

On 22 October 2013, the UN Human Rights Council conducted the second Universal Periodic Review on China's human rights condition, during which the right of LGBTI groups in China was formally discussed at the UN level for the first time. Before the formal review started, an international NGO called Sexual Rights Initiative ("SRI" hereafter) submitted an NGO Shadow Report<sup>15</sup> to the Office of the UN High Commissioner for Human Rights, which gave a comprehensive overview on human rights conditions of LGBTI people in China and related recommendations. In the summary prepared by the Office of the High Commissioner for Human Rights in accordance with paragraph 15 (b) of the annex to Human Rights Council resolution 5/1 and paragraph 5 of the annex to council resolution 16/21, the report submitted by SRI was quoted<sup>16</sup> twice. It recommended the Chinese government establish relevant anti-discrimination laws or regulations to protect LGBTI people; approve marriage or civil relationship for same sex couples; and reconsider its policies on real-name registration for HIV testing at the local level.

During the UPR Session, the human rights condition of LGBTI people in China was once again brought onto the agenda by the Chinese and several other governments. According to the overall remarks by the Chinese government<sup>17</sup>, the government of Hong Kong Special Administrative Region insists that although sexual orientation is a controversial subject in Hong Kong, Hong Kong still believes that "no person should be discriminated against on any grounds, including sexual orientation". Moreover, Hong Kong would continue relevant legislative work, and providing assistance to particular groups including those with different sexual orientations<sup>18</sup>.

Apart from all this, in response to the national report submitted by the Chinese government, the Dutch, Irish and Norwegian governments also raised their recommendations and advance question on human rights of LGBTI people in China to the Chinese government. The governments of all those three nations recommended the Chinese government establish relevant laws or policies to stop discrimination of any form, including the discrimination based on sexual orientation and gender identity. Also, the Norwegian government brought up one advanced question on the human rights of transgender people in China. The details of the questions and recommendations are as follows:

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15. The full report can be downloaded here:

<https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0CB4QFjAA&url=http%3A%2F%2Fsexualrightsinitiative.com%2Fwp-content%2Fuploads%2FUPR-Report-on-LGBT-Rights-in-China-Final-Version.doc&ei=ZGMYVObqHMmQOMKKgfAJ&usq=AFQjCNH8o1Dskr9HWs6Q2ycmk5UMcrqJZA>.

16. *Summary prepared by the Office of the High Commissioner for Human Rights in accordance with paragraph 15 (b) of the annex to Human Rights Council resolution 5/1 and paragraph 5 of the annex to council resolution 16/21*, Office of the High Commissioner for Human Rights, 30 July 2013, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G13/159/93/PDF/G1315993.pdf?OpenElement>, Page 4.

17. *National Report Submitted in Accordance with Paragraph 5 of the Annex to Human Rights Council Resolution 16/21*, The UN Human Rights Council, 5 August 2013, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G13/169/58/PDF/G1316958.pdf?OpenElement>, Page 23.

18. *Report of the Working Group on the Universal Periodic Review*, The UN Human Rights Council, 4 December 2013, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G13/188/55/PDF/G1318855.pdf?OpenElement>, Page 5.

### *The Dutch Government<sup>19</sup>:*

To include a prohibition of discrimination of any kind, including discrimination based on sexual orientation and gender identity, ethnicity, religion and infection with HIV, in labour and employment law in line with international standards.

### *The Irish Government<sup>20</sup>:*

Establish anti-discrimination laws and regulations to ensure that lesbian, gay, bisexual and transgender persons enjoy equal treatment, including at schools and in the workplace.

### *The Norwegian Government (Advance Questions) <sup>21</sup>:*

LGBT individuals continue to face a number of challenges. Which steps will China take to ensure that sexual orientation and gender identity is not a cause for discrimination in educational and employment settings, as well as in terms of access to health services? Will China take steps to remove transgender from the list of mental disorders in the Chinese Classification and Diagnostic Criteria of Mental Disorders?

On 20 March, 2014, China responded to all the recommendations during the 25th UPR Session in Geneva. The response claims that China accepts and has already implemented<sup>22</sup> the recommendations from Irish and Dutch governments, and points out that "China's Constitution clearly stipulates that all citizens are equal before the law. China prohibits all possible discriminations via enacting specific laws. China's Law on Regional National Autonomy, Law on the Protection of Rights and Interests of Women, Law on the Protection of Rights and Interests of Elderly, Law on the Protection of Minors, Law on the Protection of Rights and Interests of Disabled Persons, Law on the Promotion of Employment and other laws clearly prohibit discriminations based on ethnicity, religion, gender, age, disability and other aspects."

Reacting to the Chinese government's response, the international NGO, SRI, released an oral statement during the 25th Session after state's response. This oral statement recognizes the efforts the Chinese government had made in protecting rights of LGBT people in China, and further recommends the Chinese government provide legal interpretations of the above mentioned "other aspects" in current laws, or add language in the current laws that specifically include sexual orientation and gender identity.

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19. *Report of the Working Group on the Universal Periodic Review*, The UN Human Rights Council, 4 December 2013, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G13/188/55/PDF/G1318855.pdf?OpenElement>, Page 18.

20. The same as the above.

21. Webpage: Universal Periodic Review Second Cycle – China, <http://www.ohchr.org/EN/HRBodies/Upr/Pages/CNSession17.aspx>, The UN Human Rights Council. Please click 'Questions Submitted in advance' to view all governments' advance questions for the Chinese government.

22. Webpage: Universal Periodic Review Second Cycle – China, <http://www.ohchr.org/EN/HRBodies/Upr/Pages/CNSession17.aspx>, The UN Human Rights Council. Please click Addendum 1 under the Outcome of the Review in order to see all response China government made. The response to Dutch government and Irish government are in page 5, No. 186.89 and 186.90.

## Oral Statement for UPR on China

19 March 2014

Dear Mr. President:

*The Sexual Rights Initiative (SRI) welcomes the positive actions that the Chinese government has taken to recognize the human rights of lesbian, gay, bisexual, transgender and intersex (LGBTI) people in China. In its report to the Working Group on the Universal Periodic Review, released in October 2013, China openly shared that Hong Kong will continue making efforts to strengthen the protection of the rights of people based on different sexual orientations.*

*In addition, in its response to recommendations from the governments of the Netherlands and Ireland on establishing anti-discrimination laws or instruments in schools and in the workplace to protect the human rights of LGBTI people, or people with a different sexual orientation or gender identity from any form of discrimination, the Chinese government recognized through its response to recommendation 186.89 and 186.90 that LGBTI people are equal before the law, and should be protected under existing laws, such as China's Law on Regional National Autonomy, the Law on the Protection of Rights and Interests of Women, the Law on the Protection of Rights and Interests of the Elderly, the Law on the Protection of Minors, the Law on the Protection of Rights and Interests of Disabled Persons, and the Law on the Promotion of Employment.*

*However, the Sexual Rights Initiative wants to encourage the Chinese government to take further positive actions to fulfill its responsibility to protect LGBTI people in China. The current laws that forbid discrimination are only based on the grounds of ethnicity, religion, gender, age, disability and "other aspects". Yet without legal interpretation of the term "other aspects" LGBTI individuals are prevented from seeking court redress to protect their rights when they encounter discrimination in schools, at the workplace or in other circumstances.*

*Therefore, we recommend that the Chinese government either clarifies the term "other aspects" or specifically includes reference to sexual orientation and gender identity in the above mentioned laws, so as to ensure that all people including all women, the elderly, children, people with a disability and workers can enjoy equal rights without discrimination, regardless of their sexual orientation or gender identity.*

Thank you!

## Part IV: Recommendations

Based on Part II and Part III of this report, Aibai wants to make the following recommendations to the Chinese government, UN Agencies based in China, companies operating in China, NGOs working for the rights of LGBTI people in China and lawyers:

### To the Chinese government:

1. Further implement the recommendation raised by the international NGOs to the Chinese government during the 25th Session of UPR, which is to provide legal interpretation on "other aspects" in the current laws, or add specific language to ensure that human rights of LGBTI people are protected by the current anti-discrimination laws.
2. The Education Sector produces universal and comprehensive outline and textbooks for sex education based on the current laws and regulations, making sure that subjects around LGBTI are accurately and objectively included. Provides necessary training to teachers and include sex education in the standard for evaluating schools.
3. The health sector reviews the policies on the real-name registration for HIV testing at the local levels to ensure the privacy of those tested is appropriately protected.
4. The health sector strengthens its professional competence in order to provide professional guidance and instructions on the usage of hormones to transgender and intersex people.
5. Removes transgender from the Chinese Classification and Diagnostic Criteria of Mental Disorders. And amends relevant laws and regulations related to transgender people, such as the Regulation Governing the Technologies for Sex Change Surgery (Trial), so that they can fully protect the rights of transgender people.
6. Health sector releases policies and guidelines on sex selection surgery for intersex people, ensuring that sex selection surgery could fully respect the gender identity of the involved and their rights to self-determination.
7. Consider establishing laws for same sex marriages or civil partnerships for same sex partners in China, to protect rights to marry and set up families among LGBTI people.
8. Provide friendlier political environment for the NGOs serving LGBTI people, so they could register as social organizations under the Civil Affairs Bureau.

### To UN Agencies in China:

9. Promote dialogue between Chinese government and civil societies, and include the rights of LGBTI people into its focus areas.

**To Companies:**

10. Enhance companies' social responsibilities, promote a diverse and inclusive work environment, and establish internal policies in accordance with the UN "Protect, Respect and Remedy" Framework for Business and Human Rights as well as the current laws in China, such as the Labor Law.

**To NGOs Serving LGBTI people:**

11. Conduct surveys and collect evidence on the topic of rights of LGBTI people in China, so as to further protect their rights.

12. Promote communication and cooperation with the mainstream society, such as mainstream media, lawyers, scholars, government officials, enterprises, professional research institutions, so as to eliminate the marginalized status of LGBTI groups.

13. Strengthen their own capacity to pave the ground for winning more rights for the LGBTI groups.

**To Lawyers:**

14. Start to focus on the rights of LGBTI groups, and make efforts for protecting the rights of LGBTI groups or individuals.



## Annex: Concepts and Definitions

**LGBTI**

LGBTI refers to lesbian, gay, bisexual, transgender and intersex people.

**Sexual Orientation and Gender Identity<sup>23</sup>**

Sexual orientation refers to the enduring emotional, romantic and sexual attraction a person has towards to man or woman. Often, there are three different sexual orientations: heterosexual (to have emotional, romantic and sexual attraction towards to person with the opposite sex), homosexual (to have emotional, romantic and sexual attraction towards to person with the same sex) and bisexual (to have emotional, romantic and sexual attraction to person of both sexes). In addition, there is also the concept of asexuality (to have no emotional, romantic or sexual attraction to either sex). Diversity of sexual orientation permeates throughout human history and in different countries and cultures all over the world. According to the existing research, sexual orientation is formed at the childhood or adolescence period. No scientific research proves that sexual orientation conversion theory is safe or effective; in fact, for homosexual or bisexual individuals, these conversion theories usually bring negative effects or psychological shadows to them.

"Gender identity" refers to a person's psychological self-identification to be a man or woman. It is different from "biological sex", which mainly refers to the anatomical, physical and genetic feature of a male or a female. In most cases, individuals' biological sex is in line with their gender identity. For example, one person's biological sex is male and he also recognizes himself as a man. However, sometimes individuals' gender identity is different from their biological sex. For example, a person is biologically female but recognizes himself as man or the third gender.

**Transgender**

Individuals whose gender identity is different from their biological sex are referred to as transgender. For example, an individual whose biological sex is male but she identifies herself as a woman. Not all transgender people need sex reassignment surgery. Some transgender people only enjoy wearing costumes of the opposite sex, i.e., transvestite; some transgender people wish to change their biological sex through hormones substitution or sex reassignment surgery, i.e., transsexuals; there are also some transgender people who identify themselves neither as males nor females, they are referred as gender-queer.

What is worth noting is that transgender people's gender identity does not influence their sexual orientation. Vice versa, individuals' sexual orientation does not affect their gender identity. For example, a transgender people could be homosexual, bisexual or heterosexual. And any homosexual, bisexual or heterosexual individual can also be transgender people.

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23. *Answers to Your Questions for a Better Understanding of Sexual Orientation & Homosexuality*, American Psychological Association, <http://www.apa.org/topics/lgbt/orientation.pdf>.



### **Intersex<sup>24</sup>**

Intersex refers to those people whose sexual and reproductive anatomical features, such as genes, hormones, or physiological characteristics, do not completely fall into either male or female. For example, some individuals have physiological features of female, but have male anatomical characteristics; others may be born with reproductive organs of both male and female; there are also those who have typical physiological features of male or female, but the numbers and types of their chromosomes have both male and female features.

### **Universal Periodic Review**

Under the auspices of the UN Human Rights Council, the Universal Periodic Review (UPR), conduct periodic review (once every four years) on the human rights conditions in all UN member states. UPR is a member states driven process. During their UPR sessions, each state has to disclose its human rights conditions and actions government has taken to perform its human rights obligations to all other states. Apart from the country reports submitted by governments, civil societies such as NGOs can also submit shadow reports to the Human Rights Council to complement the government's report. The Human Rights Council conducted the first and second reviews on China (including Hong Kong and Macao Special Administrative Regions) in June 2009 and October 2013 respectively.

### **Hard Laws and Soft Laws**

Hard laws and soft laws are contradictory concepts. Hard laws refer to enforceable laws that are legally binding, such as international conventions, international customary laws, UN Security Council Resolutions, national constitutions, laws, etc., whereas soft laws are not legally binding but is nonetheless authoritative at certain levels, such as declarations, programs, directives, and guidelines, etc.

### **Homophobia and Transphobia<sup>25</sup>**

Homophobia describes the irrational fear of same-sex sexual desire and conduct, while transphobia describes the irrational fear of those whose gender identity and/or behavior are either different from their assigned sex, or perceived by others as not conforming to, or as transgressing social norms.

### **School Bullying<sup>26</sup>**

School bullying, also called school abuse or school violence, refers to extended and continuous verbal or physical attacks on others that cause either psychological or physical sufferings. But due to the imbalance of power or size between the victim and the bully, the victim usually dare not or is unable to resist.

School bullies can be carried out by one person or a group, and the harm brought to the victims is irreversible. In some cases, the bullying is committed with intention, but in others it can also be inadvertent. School bullying happen both in and out of the school, as well as on the Internet. The bully, which tries to attack certain people with words or other multimedia means over a long period through internet, is called Internet bullying.

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24. *What is Intersex?*, Intersex Society of North America, [http://www.isna.org/faq/what\\_is\\_intersex](http://www.isna.org/faq/what_is_intersex).

25. *Review of Homophobic Bullying in Education Institutions*, UNESCO, [Http://unesdoc.unesco.org/images/0021/002157/215708e.pdf](http://unesdoc.unesco.org/images/0021/002157/215708e.pdf), Page 13.

26. *Bullying in Schools*, Education.com, [http://www.education.com/reference/article/Ref\\_Bullying\\_Schools/](http://www.education.com/reference/article/Ref_Bullying_Schools/).