



**COMPARATIVE LEGAL REVIEW OF
GENDER
RECOGNITION
LAWS
ACROSS THE COMMONWEALTH**

The Equality & Justice Alliance

**is dedicated to
advancing equality
and promoting equal
protection of the law
for all Commonwealth
citizens regardless of
sex, gender, sexual
orientation, gender
identity or expression.**

1.

Developments in international and regional human rights standards

2.

Commonwealth case studies

3.

Comparisons, conclusions and recommendations

This report

This report commissioned by Sisters For Change provides a comparative legal review of gender recognition laws across the Commonwealth. The entitlement to legal gender recognition is an accepted norm of international human rights law. Yet the majority of Commonwealth countries – 38 in total – have no domestic gender recognition laws, with the result that many trans and non-binary persons live in positions of legal invisibility. This report outlines international and regional human rights standards for recognising gender identity and expression and provides a comparative analysis of legal gender recognition laws in seven Commonwealth countries – New Zealand, Malaysia, India, Namibia, South Africa, Guyana and Malta. The report explores how these seven geographically diverse jurisdictions approach gender identity and analyses the different legislative models of recognising self-identified gender, from models of self-determination (Malta) to surgery-focused requirements (Namibia), and from a broad spectrum of amendment-orientated procedures (India) to a country without any gender recognition process (Guyana). The report concludes by drawing out broad themes from the country case studies and providing a set of practical general recommendations for legal reform. The report does not seek to identify one, optimal legal model for legal gender recognition and acknowledges that across the Commonwealth, gender transitions occur in a multiplicity of diverse contexts. The purpose of this report is to provide guidance to Commonwealth countries wishing to develop domestic gender recognition laws.



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About Sisters For Change

Sisters For Change (SFC) is an international NGO working to eliminate discrimination and violence against women and girls worldwide through legal reform, legal empowerment, legal accountability and legal advocacy strategies. SFC works to generate systemic change in how governments combat violence, structural change to give women voice and agency in justice systems and social change to end the social acceptance of violence against women and girls. SFC is active in the UK, India and Indonesia. As a member of the Equality & Justice Alliance, SFC is working to reform laws that discriminate against women and girls and LGBT people across the Commonwealth. SFC is currently working with the Governments of Namibia, Saint Lucia and Samoa on technical assistance programmes and is a member of the SADC Parliamentary Forum's Technical Working Group on the development of a Model Law on Gender-Based Violence.

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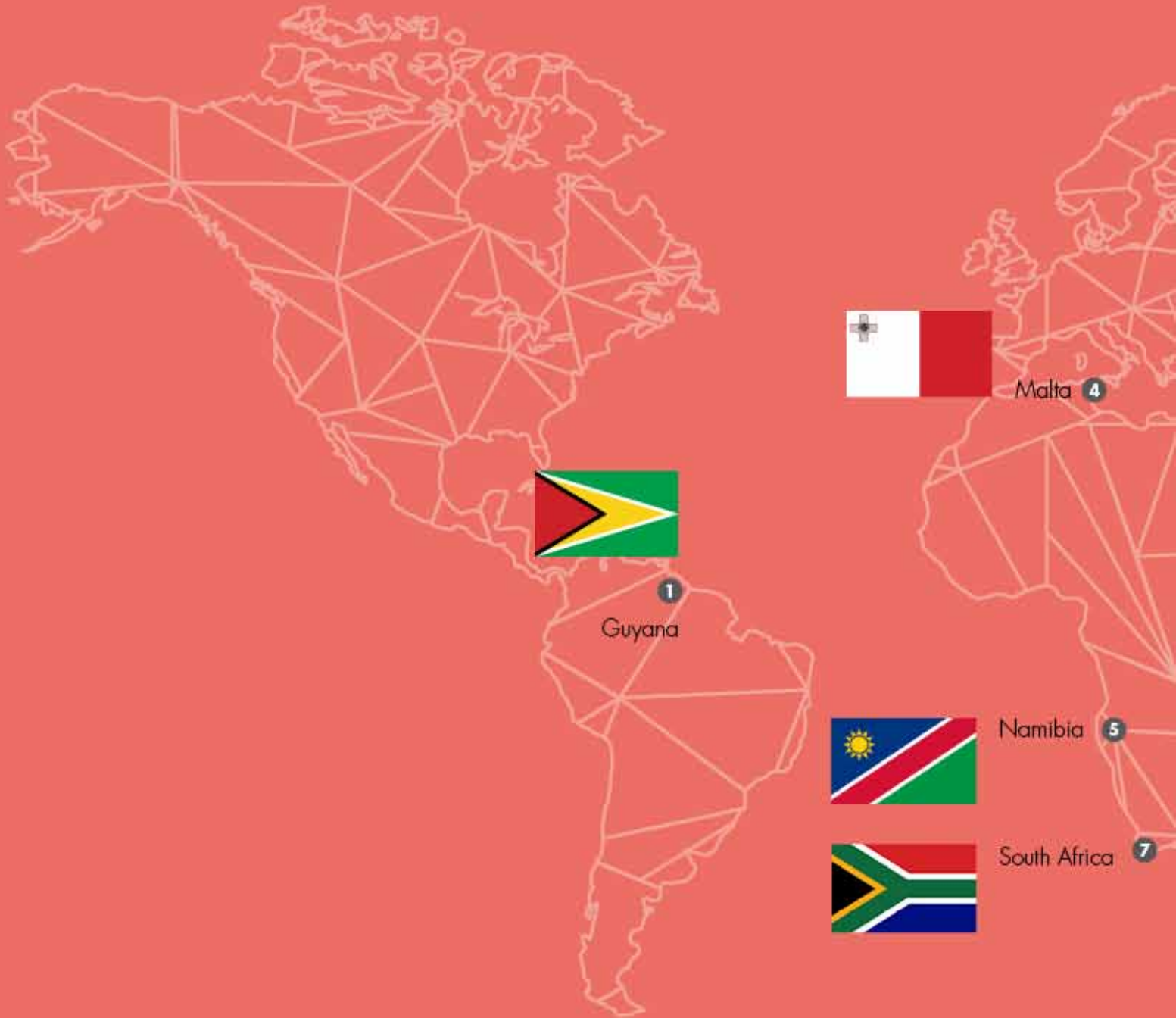
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Focus of review



- 1** Guyana Population of **782,766**
- 2** India Population of **1,366,417,754**
- 3** Malaysia Population of **31,949,777**
- 4** Malta Population of **440,372**
- 5** Namibia Population of **2,494,530**
- 6** New Zealand Population of **4,783,063**
- 7** South Africa Population of **58,558,270**



India ²



Malaysia ³



New Zealand ⁶

53

Commonwealth countries

2.4bn

people

38

Commonwealth countries with
no gender recognition laws

Executive summary

In recent years, the status of transgender (trans) and non-binary individuals – social, legal and political – has gained increasing visibility. While this evolution is most pronounced in Global North jurisdictions (eg: UK, Canada, Malta), trans populations throughout the Commonwealth have achieved significant rights advancements (eg: India, Guyana, South Africa).

Across the Commonwealth, trans advocates and their allies have placed particular importance upon access to legal gender recognition rights. Failure to acknowledge trans persons in their self-identified gender acts as a gateway to broader discrimination. Where individuals retain a legal gender identity which conflicts with their lived gender, this reduces key social opportunities (eg: employment, education), impedes access to core services (eg: transport, healthcare) and increases exposure to harms, including verbal harassment and physical violence. The rights of trans and non-binary individuals are a relatively new priority within human rights law. Yet, there is clear consensus (both at the international and regional level) that individuals should have access to legal gender recognition, and that such access must respect minimum rights protections.

This report explores international human rights standards for recognising gender identity and engages in a comparative analysis of legal gender recognition laws in seven Commonwealth jurisdictions – New Zealand, Malaysia, India, Namibia, South Africa, Guyana and Malta. The report provides a comprehensive overview of the different legal frameworks that exist within these seven geographically diverse jurisdictions and offers a comparative assessment and general recommendations for Commonwealth countries developing gender recognition laws.

The report is divided into three parts. Part 1 explores human rights standards as they apply to trans and non-binary individuals, analysing both international and regional frameworks for protecting gender identity and gender expression and outlining the growing recognition of diverse gender experiences and how trans equality and gender affirmation guarantees have been mainstreamed into human rights jurisprudence.

In Part 2, the report moves to consider domestic gender recognition laws across seven Commonwealth countries. Sections A – G explain how these jurisdictions approach gender identity and analyse the different models of legally recognising self-identified gender. South Africa (Section E), Malta (Section G) and New Zealand (Section A) all have established statutory frameworks which permit individuals to obtain legal gender recognition through administrative and judicial procedures. In India (Section C) and Namibia (Section D), individuals can amend various personal documents through a series of individualised processes – although the utility and accessibility of the existing law and policies remain uncertain. In 2014, the Supreme Court of India acknowledged a constitutional right to legal gender recognition. The final section of Part 2 acknowledges that, despite growing awareness and openness, gender diversity is not protected in all regions of the Commonwealth. In addition to Malaysia (Section B) and Guyana (Section F), the report identifies Commonwealth countries where individuals cannot obtain legal recognition and explores barriers to legal reform.

Finally, Part 3 provides a comparative overview of the various models of gender recognition laws and offers general recommendations to states. Part 3 draws out broad themes from the seven case studies and provides workable, rights-conscious guidance for policymakers. This report recommends that all member countries of the Commonwealth should enact gender recognition laws and should, as far as possible, repeal pre-conditions which mandate unwanted and involuntary medical interventions. Member states should also remove requirements for divorce or (at the very least) create alternative legal structures which, as far as possible, protect and promote the family life of applicants, their spouses and any children of the family. There is a need to consider options for legally recognising the gender of persons under the age of majority – guided by the best interests and evolving capacities of the child – and to ensure that the gender identity of children is adequately protected through domestic non-discrimination legislation. Finally, the report urges member countries of the Commonwealth to explore mechanisms – legal, administrative and social – for acknowledging and validating the identities of non-male and non-female gender identities.

Part 3 does not identify one optimal model for legal gender recognition, nor does it seek to censure more restrictive legal attitudes towards affirming preferred identity. The report acknowledges that across the Commonwealth, gender transitions occur in a multiplicity of diverse contexts. Domestic laws on gender recognition which have been adopted without controversy in some of the 53 member countries of the Commonwealth may simply be unworkable – politically, socially and culturally – in other parts of this multi-region community. The report is committed to emphasising and encouraging the human rights obligations of all nation states. Yet, it also recognises that for many jurisdictions in the Commonwealth, incremental and implementable reforms may be the most desirable and practical way forward.

Introduction

GENDER RECOGNITION IN THE COMMONWEALTH: BACKGROUND AND CONTEXT

This report provides a comparative analysis of legal gender recognition laws across the Commonwealth. By exploring domestic rules for legal gender recognition, and identifying standards of international best practice, the report seeks to offer guidance in developing workable, rights-conscious approaches to acknowledging gender.

In recent years, the status of transgender (trans) and non-binary individuals – social, legal and political – has gained increasing visibility. While this evolution is most pronounced in Global North jurisdictions (eg: UK, Canada, Malta), trans populations throughout the Commonwealth have achieved significant rights advancements (eg: India, Guyana, South Africa).

In the context of the law, there have been key reforms in a number of notable areas: de-criminalisation (ie: repeal of cross-dressing sanctions¹); non-discrimination protections², marriage and relationship rights³, and legal gender recognition beyond binary classifications of male and female.⁴

Across the Commonwealth, trans advocates and their allies have placed importance upon access to legal gender recognition rights – ie: the formal processes through which domestic law acknowledges trans and non-binary identities. There are a number of reasons why trans populations prioritise affirmation of lived identity and why legal gender recognition merits specific analysis in this report:

- Failure to acknowledge trans persons in their gender acts as a gateway to broader discrimination. Where individuals retain a legal identity which conflicts with their presented gender, this reduces key social opportunities (eg: employment, education), impedes

access to core services (eg: transport, healthcare) and increases exposure to harms, including verbal harassment and physical violence.⁵ While progress on questions such as non-discrimination guarantees and family rights has clear importance for trans populations, such reforms are usually contingent upon basic legal recognition of individuals in their gender.

- Even where states do permit formal acknowledgment of preferred identity, the specific legal requirements for affirmation may nevertheless implicate and severely compromise core human rights.⁶ Across the Commonwealth, as this report demonstrates, standard gender recognition rules infringe bodily integrity, draw discriminatory distinctions, undermine family privacy and in some areas conflict with the best interests of children. Analysing domestic gender recognition laws reveals broader social attitudes towards trans populations, and it indicates whether, in a given jurisdiction, trans individuals enjoy full and equal citizenship.
- The rights of trans and non-binary individuals are a relatively new priority within international human rights law. The concept of “gender identity” was only formally acknowledged at the United Nations in 2006⁷ and only in the past eight years has it become a topic of substantive discussion for UN human rights actors.⁸ Yet, as Part 1 of the report discusses, despite this nascent exploration of trans concerns, there is clear consensus (at both international and regional human rights levels) that individuals should (at the very least) have access to legal gender recognition, and that such access must respect minimum rights protections.⁹ Therefore, in surveying domestic gender recognition frameworks, this report offers a comparative assessment of the compliance of domestic laws throughout the Commonwealth with international human rights standards.

1 *McEwan & Others v Attorney General of Guyana* [2018] CCJ 30 (A) (Guyana).

2 Gender Identity, Gender Expression and Sex Characteristics Act 2015 (Malta).

3 *Arunkumar and Sreeja v Inspector General of Registration High Court of Madras, WPM(D) No.4125 of 2019 and WMP(MD)No.3220 of 2019* [22 April 2019] (India).

4 “Change your gender on your official ID” [NZ Government Website, 15 July 2019] <https://www.govt.nz/browse/passports-citizenship-and-identity/changing-your-gender/change-your-gender-on-your-official-id/> [accessed 22 August 2019] (New Zealand).

5 See generally: Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity [12 May 2018] UN Doc No. A/HRC/38/43. The serious social difficulties associated with lack of recognition have also been discussed by numerous judicial actors, including the Supreme Court of India (*National Legal Services Authority (NALSA) v Union of India and others Supreme Court of India, Writ Petition (Civil) No. 400 of 2012* [15 April 2014]) and the High Court of South Africa (*KOS and others v Minister of Home Affairs and others* [2017] ZAWCHC 90).

6 See: Persons – Comparative Analysis and Recommendations’ in Jens M Scherpe (ed), *The Legal Status of Transsexual and Transgender Persons* (Intersentia 2015) 615.

7 See: Elizabeth Baisely, “Reaching the Tipping Point? Emerging International Human Rights Norms Pertaining to Sexual Orientation and Gender Identity” (2016) 38(1) *Human Rights Quarterly* 134, 150-151.

8 United Nations Human Rights Council, “Resolution 17/19 Human rights, sexual orientation and gender identity” [14 July 2011] UN Doc No. A/HRC/RES/17/19.

9 United Nations High Commissioner for Human Rights (UN HCHR), “Discrimination and violence against individuals based on their sexual orientation and gender identity” [4 May 2015] UN Doc No. A/HRC/29/23, [79(i)]; Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity [12 July 2018] UN Doc No. A/73/152, [81(d)]; *Goodwin v United Kingdom* [2002] 35 EHRR 18, [93]; Inter-American Court of Human Rights, *Gender identity, and equality and non-discrimination of same-sex couples*, Advisory Opinion OC-24/17, Series A No. 24 [24 November 2017].

COMPARING AND ANALYSING GENDER RECOGNITION LAWS ACROSS THE COMMONWEALTH

This report engages in a comparative analysis of legal gender recognition in seven countries across the Commonwealth. The report:

- a. explores international human rights standards for recognising gender identity;
- b. analyses the laws and procedures for legal gender recognition (or lack thereof) in the seven selected jurisdictions: and
- c. offers a comparative assessment and general recommendations for trans affirmation throughout the Commonwealth.

The report analyses current gender recognition laws in New Zealand, Malaysia, India, Namibia, South Africa, Guyana and Malta. These seven jurisdictions have been chosen for a number of important reasons. First, they offer “geographic diversity”, including case studies from Commonwealth countries in Africa, Europe, Asia-Pacific and the Americas. Second, the selected countries provide “requirement diversity”, including jurisdictions with light-touch (eg: Malta); highly restrictive (eg: Namibia) and middle-of-the-road (eg: South Africa) legal gender recognition laws. In this way, the report offers a comprehensive overview of the pre-conditions for gender recognition laws which currently operate across the Commonwealth. Finally, the seven jurisdictions ensure “framework diversity”, providing examples of gender identity rights which have been created through statute; developed by administrative practice; and secured through court judgments. As such, the report is an opportunity to compare the effectiveness of gender recognition laws relative to their mode of enactment.

By exploring legal gender recognition (or an absence thereof) in the seven selected Commonwealth countries, and considering those frameworks against international human rights guarantees, this report aims to highlight examples of good practice and to assist policymakers in developing workable, rights-centred approaches towards trans and non-binary populations. The report not only underlines the legal imperative of

acknowledging self-identified gender in law; it also engages with potential pre-conditions for obtaining legal gender recognition, and it offers clear guidance on how Commonwealth jurisdictions can and should determine access to legal transition pathways.¹⁰

The report does not identify one optimal model for gender recognition, nor does it seek to censure more restrictive legal attitudes towards affirming preferred identity. At the outset, the report acknowledges that – across the Commonwealth – gender transitions occur in a multiplicity of diverse contexts. Domestic laws on gender recognition which have been adopted without controversy in some of the 53 member states of the Commonwealth may simply be unworkable – politically, socially and culturally – in other parts of this multi-region community. The report is committed to emphasising and encouraging the human rights obligations of all nation states. Yet, it also recognises that for many jurisdictions in the Commonwealth, incremental and implementable reforms are the most desirable and practical way forward.

The report is focused upon comparative legal analysis – exploring law-based frameworks for gender recognition. In explaining the precise legal requirements for acknowledgement across the seven jurisdictions under review, the report does offer some context and background to clarify uncertain or unclear rules. However, the report does not engage substantively with questions of lived experience or draw to any great extent from the growing body of social science research on trans communities across the Commonwealth. Instead, the report aims to supplement and enhance legal understanding in this area. As noted, it concludes with a comparative legal overview of the surveyed jurisdictions – identifying key themes and offering general recommendations.

¹⁰ The term “legal transition” refers to a process whereby a person amends their legal gender to accord with their self-identified gender.

Terminology¹¹

It is important to acknowledge the deeply personal ways in which many individuals experience their gender. While specific terminology – and definitions – have been used as part of this report, the reader should appreciate that these terms may not align with the multiplicity of ways that certain individuals – cisgender or trans – may understand and live their identity. Although the report uses, where possible, terminology which is commonly used within human rights discourse, the report should not be understood as claiming to use definitive or authoritative language.

Trans

The term *trans* includes those people who have a gender identity and/or a gender expression that is different from the sex they were assigned at birth. “Trans” is an umbrella term that includes, but is not limited to, men and women with trans pasts and people who identify as transsexual¹², trans¹³, transvestite/crossdressing, androgyne, polygender, genderqueer, agender, non-binary, gender variant or with any other gender identity and gender expression which is not standard male or female, and who express their gender through presentation (eg: self-referring language, clothing, etc.) or body modifications, including (but not necessitating) the undergoing of multiple surgical procedures.

Gender Identity

This report adopts the definition of gender identity set out in the Introduction to the Yogyakarta Principles:¹⁴ “Gender identity refers to each person’s deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms.”

Gender Expression

This report adopts the definition of *gender expression* set out in the Preamble to the Yogyakarta Principles Plus 10:¹⁵ Gender expression is each person’s presentation

of the person’s gender through physical appearance – including dress, hairstyles, accessories, cosmetics – and mannerisms, speech, behavioural patterns, names and personal references, and noting further that gender expression may or may not conform to a person’s gender identity.

Transition

Where individuals undertake a process to live – publicly or privately – within their self-identified gender, this may be referred to as a *transition*. There is no standard transition narrative. Instead, a person’s individual process of transition may (but need not) be social, legal, professional, medical or familial.¹⁶

Cisgender

Cisgender refers to individuals who self-identify with, or do not object to, the gender that was assigned to them at birth. Cisgender is derived from the Latin word *cis* (on this side of).¹⁷

Non-binary

An umbrella term for gender identities that fall outside the gender binary of male or female. This includes individuals whose gender identity is neither exclusively male nor female, a combination of male and female or between or beyond genders. Similar to the usage of trans, people under the non-binary umbrella may describe themselves using one or more of a wide variety of terms¹⁸.

Intersex

This report adopts the definition of intersex set out by the Commissioner for Human Rights of the Council of Europe in his 2015 report, *Human Rights and Intersex People*: “Intersex individuals are persons who cannot be classified according to the medical norms of so-called male and female bodies with regard to their chromosomal, gonadal or anatomical sex. The latter becomes evident, for example, in secondary sex characteristics such as muscle mass, hair distribution and stature, or primary sex characteristics such as the inner and outer genitalia and/or the chromosomal and hormonal structure.”¹⁹

11 This section on terminology reproduces text and information previously co-prepared by one of the authors of this report, Dr Peter Dunne, for an EU-funded report on the equality and non-discrimination rights of trans and intersex populations in the European Union and the European Free Trade Association; see: Peter Dunne and Marjolain van den Brink, *Trans and intersex equality rights in Europe – a comparative analysis* (EU Commission 2018) 34-35.

12 The term, “transsexual”, is often used to refer to individuals who undertake a process of full medical transition, seeking to align their bodily characteristics with their internal sense of gender.

13 Trans is, like the word transgender an umbrella notion which refers to all individuals who do not identify with their birth-assigned legal gender. However, some trans-identified persons prefer the term trans rather than transgender as an acknowledgment that not all people have an experience of gender.

14 The Yogyakarta Principles are a 2007 soft-law document, authored by 29 distinguished human rights experts, which apply international human rights to sexual orientation and gender identity, see: About the Yogyakarta Principles” (*Yogyakarta Principles Website, No Date Available*) <http://www.yogyakartaprinciples.org/principles-en/about-the-yogyakarta-principles/> (accessed 24 August 2017).

15 Ibid.

16 Ibid.

17 Ibid.

18 This is the definition of “non-binary” offered by the Trans Equality Network Ireland. See: “Trans Terms” (*Trans Equality Network Ireland Website*) <https://www.teni.ie/resources/trans/terms/> (accessed 29 August 2018).

19 Commissioner for Human Rights of the Council of Europe, *Human Rights and Intersex People: Issue Paper* (COE, 2015) 13.

Structure of report

- 1.** **Part 1** explores human rights standards as they apply to trans and non-binary individuals, analysing both international and regional frameworks for protecting gender identity and gender expression and outlining the growing recognition of diverse gender experiences and how trans equality and gender affirmation guarantees have been mainstreamed into human rights jurisprudence.
- 2.** In **Part 2** the report moves to consider domestic gender recognition laws across seven Commonwealth countries. Sections A – G explain how these jurisdictions approach gender identity and analyse the different models of legally recognising self-identified gender. In section H, the report acknowledges that, despite growing awareness and openness, gender diversity is not protected in all regions of the Commonwealth. In addition to Malaysia and Guyana, this section identifies other Commonwealth countries where individuals cannot obtain legal recognition and explores barriers to legal reform.
- 3.** Finally, **Part 3** provides a comparative overview, drawing out broad themes from the seven country case studies, and offers general recommendations aimed to provide workable, rights-conscious guidance for policymakers.



Developments in
**international
and regional
human rights
standards**

A. Equality and non-discrimination standards

This chapter outlines existing international and regional human rights standards for the protection of trans and non-binary persons.²⁰ It explores the extent to which gender identity and gender expression have been mainstreamed into current human rights frameworks and explains the legal context in which national gender recognition laws should be assessed.

Part 1 is not an exhaustive account of all guarantees (hard and soft law) which benefit global trans communities, and there may be additional human rights instruments upon which applicants for gender recognition can rely. The section does, however, identify key interventions in the evolution of trans rights, and it provides a comprehensive overview of how trans-focused protections have been integrated into international and regional rights standards.

With the notable exception of the The Council of Europe Convention on preventing and combating violence against women and domestic violence (The Istanbul Convention),²¹ gender identity and gender expression are not mentioned in any international or regional human rights treaty. However, numerous United Nations and regional actors – drawing upon the “universality, interdependence, indivisibility and interrelatedness of human rights”²² – have confirmed that trans and non-binary individuals are included within the protection of existing human rights standards.

International human rights system

Since 2011, the UN Human Rights Council has, through various resolutions²³, “strongly deplor[ed] acts of violence and discrimination, in all regions of the world, committed against individuals because of their... gender identity”²⁴ In 2016, the Council appointed an Independent Expert on Protection against Violence and Discrimination based on Sexual Orientation and Gender Identity (UN SOGI Expert).²⁵ In his initial reports, the UN SOGI Expert has called upon states to “adopt anti-discrimination legislation that includes... gender identity” and to establish policies, which tackle the “spiral of discrimination, marginalization and exclusion that have a negative impact” on trans and non-binary lives.²⁶

The UN High Commissioner for Human Rights (UN High Commissioner) has also been an important actor in this sphere. In her landmark report to the UN Human Rights Council in 2011, the UN High Commissioner stated unequivocally that “[a]ll persons, including... trans persons, are entitled to enjoy the protections provided for by international human rights law.”²⁷ The UN High Commissioner has encouraged states to ensure that “anti-discrimination legislation includes... gender identity among prohibited grounds.”²⁸

Among the United Nations human rights treaty bodies, there is an emerging jurisprudence which mainstreams trans populations into international human rights law. In *G v Australia*²⁹, the UN Human Rights Committee – which oversees compliance with the International Covenant on Civil and Political Rights (ICCPR) – affirmed that “the prohibition against discrimination under article 26 [of the Covenant] encompasses discrimination on the basis of... gender identity, including trans status.”³⁰ In its recent Concluding Observations to State Parties, the Committee has consistently affirmed the equality and non-discrimination rights of trans populations,³¹

20 This section on human rights standards reproduces text and information previously prepared by one of the authors of this report, Dr Peter Dunne, for an EU-funded report on the equality and non-discrimination rights of trans and intersex populations in the European Union and the European Free Trade Association; see: Peter Dunne and Marjolein van den Brink, *Trans and intersex equality rights in Europe – a comparative analysis* (EU Commission 2018) 36-54. Although, given the nature of both chapters, there is a natural overlap in all the materials discussed in both chapters, this chapter particularly reproduces and draws upon discussions of UN-level human rights actors, found at pp. 36-40 of the 2018 report.

21 Council of Europe Convention on preventing and combating violence against women and domestic violence, COE Treaty Series No. 210, Istanbul, 11 May 2011.

22 United Nations Human Rights Council, “Resolution 17/19 Human rights, sexual orientation and gender identity” (14 July 2011) UN Doc No. A/HRC/RES/17/19, Recital No. 1 to the Preamble.

23 *Ibid.*, see also: UN Human Rights Council, “Resolution 27/32 Human rights, sexual orientation and gender identity” (2 October 2014) UN Doc No. A/HRC/RES/27/32.

24 UN Human Rights Council, “Resolution 32/2. Protection against violence and discrimination based on sexual orientation and gender identity” (15 July 2016) A/HRC/RES/32/2, [2].

25 *Ibid.*, [3].

26 Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity (12 May 2018) UN Doc No. A/HRC/38/43, [96].

27 United Nations High Commissioner for Human Rights, “Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity” (17 November 2011) UN Doc No. A/HRC/19/41, [5].

28 United Nations High Commissioner for Human Rights (UN HCHR), “Discrimination and violence against individuals based on their sexual orientation and gender identity” (4 May 2015) UN Doc No. A/HRC/29/23, [79(c)].

29 Communication No. 2172/2012 [CCPR/C/119/D/2172/2012] [UN HRC, 15 June 2017].

30 *Ibid.*, [7.12].

31 See eg: Human Rights Committee, “Concluding Observations on the Fifth Periodic Report of Cameroon” (30 November 2017) UN Doc No. CCPR/C/CMR/CO/5, [14][15].

recommending that countries “explicitly prohibit discrimination on the basis of... gender identity and ensure that... [trans] individuals are afforded, both in law and in practice, adequate and effective protection against all forms of discrimination.”³²

These statements have been reinforced by both the UN Committee on the Elimination of Discrimination against Women (CEDAW Committee) and the UN Committee on the Rights of the Child (CRC Committee). The CEDAW Committee – which monitors compliance with the Convention on the Elimination of All Forms of Discrimination against Women – has acknowledged that discrimination against women is “inextricably linked to other factors that [affect] their lives”, including having a trans history.³³ In its Concluding Observations, the Committee has urged State Parties to “[e]stablish processes to eliminate discriminatory rulings and practices against... [trans women] in the justice system.”³⁴ Similarly, the CRC Committee – which oversees compliance with the Convention on the Rights of the Child – has called upon State Parties to “repeal all laws criminalizing or otherwise discriminating against individuals on the basis of their sexual orientation and gender identity”³⁵ and to “adopt laws prohibiting discrimination on those grounds.”³⁶

Regional human rights systems

In addition to UN-level interventions, a number of regional human rights actors have explicitly acknowledged the equality of trans and non-binary individuals.

In *Identoba and Others v Georgia* (2015), the European Court of Human Rights (ECtHR) observed that the non-discrimination guarantee in art. 14 of the European Convention on Human Rights (ECHR) “duly covers questions related to... gender identity.”³⁷

The *Identoba* judgment builds upon an earlier recommendation of the Committee of Ministers of the Council of Europe that State Parties should “ensure that legislative and other measures are adopted and effectively implemented to combat discrimination on grounds of... gender identity.”³⁸ Furthermore, trans populations, or at least those who have undertaken or are planning to undertake a process of “gender reassignment”, also come within sex equality protections under European Union law.³⁹

In *Atala Riffo and Daughters v Chile*, the Inter-American Court of Human Rights (IACtHR) affirmed that the “gender identity of persons is a category protected by the [American Convention on Human Rights].”⁴⁰

The Inter-American Commission on Human Rights (IACmHR) has recently called upon State Parties to “repeal, and if not possible, to annul, legal provisions that discriminate on the basis of... gender identity, gender expression or body diversity.”⁴¹

In 2014, the African Commission on Human and People’s Rights (ACmHPR) adopted a landmark resolution, “[s]trongly urg[ing] States to end all acts of violence and abuse... including by enacting and effectively applying appropriate laws prohibiting and punishing all forms of violence including those targeting persons on the basis of their imputed or real... gender identities.”⁴²

In its 2017 General Comment No. 4: The Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment (Article 5), the ACmHPR included “gender identity” within its non-exhaustive list of grounds of discrimination.⁴³

32 Human Rights Committee, “Concluding Observations on the Third Periodic Report of Lebanon” (9 May 2018) UN Doc No. CCPR/C/LBN/CO/3, [14].

33 Committee on the Elimination of Discrimination against Women, “General recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19” (14 July 2017) UN Doc No. CEDAW/C/GC/35, [12].

34 Committee on the Elimination of Discrimination against Women, “Concluding observations on the seventh periodic report of Chile” (14 March 2018) UN Doc No. CEDAW/C/CHL/CO/7, [15(d)].

35 Committee on the Rights of the Child, “General comment No. 20 (2016) on the implementation of the rights of the child during adolescence” (6 December 2016) UN Doc No. CRC/C/GC/20, [34].

36 Ibid.

37 *Identoba and Others v Georgia* [2015] 39 BHRC 510, [96].

38 Committee of Ministers of the Council of Europe, “Recommendation CM/Rec(2010)5 (31 March 2010), [Recommendation 2].

39 *P v S and Cornwall County Council* [1996] 2 CMLR 247, [20] – [22]; see eg: Directive 2006/54, Recital 3.

40 Inter-American Court of Human Rights (24 February 2012), [91].

41 Inter-American Commission on Human Rights, *Recognition of the Rights of LGBTI Persons* (7 December 2018) OEA/Ser.L/V/II.170 Doc. 184, p. 133.

42 African Commission on Human and People’s Rights, “Resolution on Protection against Violence and other Human Rights Violations against Persons on the basis of their real or imputed Sexual Orientation or Gender Identity” (2014) Resolution 275.

43 African Commission on Human and People’s Rights, “General Comment No. 4 on the African Charter on Human and Peoples’ Rights: The Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment (Article 5)” (2017), [20].

B. Legal gender recognition

Despite the absence of gender recognition laws in many countries, there is a growing consensus among international and regional human rights actors that trans individuals should be officially acknowledged in their preferred gender.

International human rights systems

The UN High Commissioner for Human Rights has condemned the “multiple rights challenges” which lack of legal gender recognition imposes upon trans populations.⁴⁴ She has called upon state authorities to “[issue] legal identity documents, upon request, that reflect preferred gender”.⁴⁵ These recommendations have recently been adopted and reiterated by the UN SOGI Expert.

In his 2018 report, *Violence and Discrimination based on Gender Identity*, the current UN SOGI Expert, Victor Madrigal-Borloz, observed that a “lack of legal recognition negates the identity of the concerned persons to such an extent that it provokes what can be described as a fundamental rupture of State obligations”.⁴⁶ He concluded that states must “[e]nact gender recognition systems concerning the rights of trans persons to change their name and gender markers” having “due respect for free and informed choice and bodily autonomy”.⁴⁷

In their concluding observations and recommendations, numerous UN human rights treaty bodies have called upon States Parties to formally acknowledge trans identities through humane, accessible processes.⁴⁸ Denying recognition rights is inconsistent with the obligations which States Parties have assumed. In its communication decision, *G v Australia*, the UN Human Rights Committee held that refusing to validate preferred gender interferes with privacy guarantees under Article 17 ICCPR.⁴⁹ The CEDAW Committee has warned that “the absence of an official procedure to change the gender marker on identity documents for transgender women... exacerbates discrimination against them” and has urged State Parties to “adopt an expeditious, transparent and accessible official procedure to change the gender marker.”⁵⁰

44 United Nations High Commissioner for Human Rights, “Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity” (17 November 2011) UN Doc No. A/HRC/19/41, [69].

45 United Nations High Commissioner for Human Rights (UN HCHR), “Discrimination and violence against individuals based on their sexual orientation and gender identity” (4 May 2015) UN Doc No. A/HRC/29/23, [79(i)].

46 Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity (12 July 2018) UN Doc No. A/73/152, [23].

47 *Ibid.*, [81(d)].

48 See eg: UN Human Rights Committee, *Concluding observations on the third periodic report of Ireland*, (30 July 2008) UN Doc No. CCPR/C/IRL/CO/3, [8]; UN Human Rights Committee, *Concluding observations on the seventh periodic report of Ukraine*, (22 August 2013) UN Doc No. CCPR/C/UKR/CO/7, [10]; UN Human Rights Committee, *Concluding observations on the fourth periodic report of the Republic of Korea*, (3 December 2015) UN Doc No. CCPR/C/KOR/CO/4, [14] – [15]; UN Committee on Economic, Social and Cultural Rights, *Concluding observations on the fifth periodic report of Costa Rica*, (21 October 2016) UN Doc No. E/C.12/CRI/CO/5, [20] – [21]; UN Committee on the Elimination of Discrimination against Women, *Concluding observations on the seventh periodic report of Finland*, (10 March 2014) UN Doc No. CEDAW/C/FIN/CO/7, [29(b)]; UN Committee on the Rights of the Child, *Concluding observations on the combined fourth and fifth periodic reports of Chile* (30 October 2015) UN Doc No. CRC/C/CHL/CO/4-5, [34][35]; UN Committee against Torture, *Concluding observations on the fifth periodic report of Hong Kong, China*, (3 February 2016) UN Doc No. CAT/C/CHNHKG/CO/5, [28] – [29]. In some cases, the Treaty Bodies have expressly praised States Parties for introducing (or improving) domestic procedures for obtaining gender recognition, see eg: UN Human Rights Committee, *Concluding observations on the sixth periodic report of the United Kingdom of Great Britain and Northern Ireland*, (30 July 2008) UN Doc No. CCPR/C/GBR/CO/6, [5]; UN Committee on the Elimination of Discrimination against Women, *Concluding observations on the seventh periodic report of Argentina*, (25 November 2016) UN Doc No. CEDAW/C/ARG/CO/7, [4(g)].

49 Communication No. 2172/2012 [CCPR/C/119/D/2172/2012] [UN HRC, 15 June 2017], [7.2].

50 UN Committee on the Elimination of Discrimination against Women, *Concluding observations on the fourth periodic report of Kyrgyzstan*, (11 March 2015) UN Doc No. CEDAW/C/KGZ/CO/4, [33][34].

Regional human rights systems

The Commissioner for Human Rights of the Council of Europe⁵¹ and the Parliamentary Assembly of the Council of Europe⁵² have both consistently promoted the legal recognition of trans identities. Their recommendations have been cited in recent case law, and are often a fulcrum around which national policy debates unfold.⁵³

In *Goodwin v United Kingdom*, the ECtHR ruled that failing to acknowledge self-identified gender violates the right to private life under ECHR Article 8.⁵⁴ Citing “clear and uncontested evidence of a continuing international trend in favour... of legal recognition of the new sexual identity of post-operative transsexuals”⁵⁵, *Goodwin* transformed gender identity rights in Europe.⁵⁶

In its high-profile Advisory Opinion to Costa Rica in 2018, the IACtHR noted that the “right of each person to define his or her sexual and gender identity autonomously and that the personal information in records and on identity documents should correspond to and coincide with their self-defined identity is protected by the American Convention.”⁵⁷

According to the Inter-American Court, State Parties “must respect and ensure to everyone the possibility of registering and/or changing, rectifying or amending their name and the other essential components of their identity such as the image, or the reference to sex or gender, without interference by the public authorities or by third parties.”⁵⁸

Responding to the Advisory Opinion, the IACmHR has recently urged states to “[e]nsure that each person has the right to define his or her sexual and gender identity autonomously and that the data contained in any official or legal register, as well as in identity documents, are in accordance with or correspond to the definition and image they have of themselves.”⁵⁹ To that end, states should “[e]stablish simple legal mechanisms that enable everyone to register and/or change, rectify or adapt their name and other essential components of their identity such as image, or reference to sex or gender.”⁶⁰

51 Commissioner for Human Rights of the Council of Europe, “Human Rights and Gender Identity” (29 July 2009) CommDH/IssuePaper(2009) 7 – 10; Commissioner for Human Rights of the Council of Europe, *Discrimination on Grounds of Sexual Orientation and Gender Identity in Europe* (2nd ed., Council of Europe 2011) 84 – 90.

52 Parliamentary Assembly of the Council of Europe, “Discrimination on the basis of sexual orientation and gender identity” (29 April 2010) Resolution 1728 (2010), [16.11.2]; Parliamentary Assembly of the Council of Europe, “Discrimination against Transgender People in Europe” (22 April 2015) Resolution No. 2048(2015), [6.2].

53 *YY v Turkey* App No. 14793/08 (ECtHR, 10 March 2015), [110]; *AP, Garçon and Nicot v France* App Nos. 79885/12, 52471/13 and 52596/13 (ECtHR, 6 April 2017), [124]; House of Commons Select Committee on Women and Equalities, *Transgender Equality* (The Stationery Office Limited 2016) 9 – 10; Natalie Videbaek Munkholm, “The Legal Status of Transsexual and Transgender Persons in Denmark” in Jens M Scherpe (ed), *The Legal Status of Transsexual and Transgender Persons* (Intersentia 2015) 157 – 160.

54 *Goodwin v United Kingdom* [2002] 35 EHRR 18, [93].

55 *Ibid.*, [85].

56 In subsequent cases, the ECtHR has drawn upon *Goodwin*’s ideas of trans dignity and identity development to extend gender identity rights across Europe, see: *Schlumpf v Switzerland* App No. 29002/06 (ECtHR, 5 June 2009); *Van Kuck v Germany* [2003] 37 EHRR 51. *Goodwin* has also been determinative in domestic judgments, see eg: *Foy v Registrar General of Births, Deaths and Marriages* (No 2) [2007] IEHC 470.

57 Inter-American Court of Human Rights, Gender identity, and equality and non-discrimination of same-sex couples, Advisory Opinion OC-24/17, Series A No. 24 (24 November 2017) [115].

58 *Ibid.*

59 Inter-American Commission of Human Rights, *Recognition of the Rights of LGBTI Persons* (7 December 2018) OEA/Ser.L/V/II.170 Doc. 184, p. 130.

60 *Ibid.*



Commonwealth case studies

Introduction

This part of the report considers domestic gender recognition laws across seven Commonwealth countries, exploring how these different jurisdictions approach gender identity and identifying and analysing a range of legal frameworks from self-determination to the total absence of legal gender recognition.



A. NEW ZEALAND

In New Zealand, the law on gender recognition is set out in the Births, Deaths, Marriages and Relationships Registration Act (as amended) (the Act). The Act, as interpreted by recent case law, establishes a legal framework through which individuals can officially amend the gender marker on their birth certificates.

New Zealand operates a court-based procedure and applicants must show evidence of medical intervention before their gender is legally recognised. New Zealand also allows applicants to amend their driving licence and passport documentation – with these latter changes taking place by way of an administrative procedure requiring a statutory declaration. The New Zealand government is currently considering reforms to its existing gender recognition laws (see further below). At present, however, no additional legislation has been adopted.

AMENDING GENDER MARKERS ON BIRTH CERTIFICATES

Adult applicants

The procedure for adults to amend gender markers on their birth certificates is set out in Part 5 of the Births, Deaths, Marriages and Relationships Registration Act 1995 (as amended). Part 5 envisages a judicial process for obtaining legal gender recognition, requiring that individuals submit an application before the Family Court of New Zealand. According to s. 28(1) of the Act, a Family Court judge can declare – on the application of an “eligible adult” – that “birth certificates issued in respect of [the adult] should contain the information that [the adult] is a person of a sex specified in the application”. The Act refers to

the legal gender that the individual wishes to obtain as their “nominated sex.”⁶¹ Section 27A clarifies that eligible adults are individuals who “are 18 years of age or older” or individuals who are younger than 18 years but who are (or have been) in a marriage, civil union or *de facto* relationship.

In order to obtain an amended birth certificate, applicants for recognition are required to satisfy a number of criteria set out in s.28(3) of the Act. They must show either that their birth (although registerable) has not yet been registered under the Act⁶² or that they have been registered as having a gender which is inconsistent with their nominated sex.⁶³ In addition, an applicant must demonstrate to the Family Court that, although not currently acknowledged in the nominated sex on the birth certificate, the applicant “intends to maintain, or has always had and intends to maintain, the gender identity of a person of the nominated sex”.⁶⁴

Section 28(3) of the Act mandates a number of medical interventions as part of the gender recognition process. First, prior to issuing a declaration under s.28(1), the Family Court must ensure, “on the basis of expert medical evidence”, that an applicant “has assumed (or has always had) the gender identity of a person of the nominated sex”.⁶⁵ A healthcare professional must confirm that the applicant has a present, consistent affiliation with their affirmed gender. Second, s.28(3)(c)(i)(B) of the Act requires applicants to undergo “such medical treatment as is usually regarded by medical experts as desirable to enable persons of the genetic and physical conformation of the applicant at birth to acquire a physical conformation that accords with the gender identity of a person of the nominated sex”. In “*Michael*” v Registrar-General of Births, Deaths and Marriages,⁶⁶ the Auckland Family Court clarified what types of medical interventions would satisfy the statutory requirement.

In his decision in “*Michael*”, Judge Fitzgerald recognised “both psychological and surgical”⁶⁷ treatments as satisfying the statutory requirement, confirming that

⁶¹ Births, Deaths, Marriages and Relationships Registration Act 1995, s.28(1).

⁶² *Ibid.*, s.28(3)(a).

⁶³ *Ibid.*, s.28(3)(a)(i)-(ii).

⁶⁴ *Ibid.*, s.28(3)(b)(i).

⁶⁵ *Ibid.*, s.28(3)(c)(i)(A).

⁶⁶ [2008] 27 FRNZ 58. In researching and summarising the case law on s.28(3)(c)(i)(B), the researchers were indebted to the guidance and summaries offered by Elisabeth McDonald and Jack Byrne in “*The Legal Status of Transsexual and Transgender Persons in Aotearoa / New Zealand*” in Jens M Scherpe (ed), *The Legal Status of Transsexual and Transgender Persons* (Intersentia 2015) 527-568.

⁶⁷ *Ibid.*, [76].

there is not a requirement that “every possible medical intervention [be] undertaken.”⁶⁸ Rather, it suffices that there is, “on a case-by-case basis, sufficient treatment as in the opinion of medical experts is desirable to achieve a physical change of identity.”⁶⁹ The judge observed that “Parliament did not intend an applicant should necessarily have to undergo all available surgical procedures, including full genital surgery.”⁷⁰ Rather, applicants should prove “some degree of permanent physical change as a result of the treatment.”⁷¹ In numerous subsequent cases, judges have issued declarations under s.28 of the Act without evidence of surgical interventions or in situations where there have only been limited surgical interventions.⁷² However, while the Family Court has been free to adopt a progressive interpretation of the required treatments, the court must still ensure that, “as a result of the medical treatment undertaken” (irrespective of the exact procedure), the applicant will “maintain a gender identity of a person of the nominated sex.”⁷³

Part 5 of the Act no longer contains any requirements with regards to civil status.⁷⁴ Prior to the introduction of same-sex marriage in New Zealand in 2013, applicants for legal gender recognition – who were in an existing marital union – were obliged to formally dissolve their relationship before amending the gender marker on their birth certificate (former s.30(2) of the Act). The justification for this divorce requirement – as in other jurisdictions canvassed in this report (eg: South Africa) – was the fear that legal gender recognition would become a backdoor for same-gender marriage. Legal transition would create a valid marital union where both spouses had the same gender markers on their birth certificate. However, s.2(1) of the Marriage Act 1955 now defines marriage as “the union of 2 people, regardless of their sex, sexual orientation, or gender identity”. As such there is no longer any legal or intellectual justification for maintaining a divorce requirement for applicants for gender recognition, and s.30(2) of the Act was repealed through s.9 of the

Marriage (Definition of Marriage) Amendment Act 2013.

According to s.30(1) of the Act, where the Family Court issues a declaration under s.28(1) [or s.29(1) – see below] and that declaration is deposited with the Registrar-General, that latter official “shall, on payment of the prescribed fee (if any)”, amend the recorded information about the birth of the applicant so that such information reflects the fact that the applicant has the nominated sex.

Child Applicants

Part 5 of the Births, Deaths, Marriages and Relationships Registration Act 1995 (as amended) also provides a process through which the Family Court can issue a declaration to amend the sex markers on the birth certificates of “eligible” children. According to s.29(1) of the Act, upon an application from the guardian of an “eligible” child, the court may declare both that “it is in the child’s best interests to be brought up as a person of... the nominated sex”⁷⁵ and that any birth certificate issued in respect of the child should indicate the nominated sex.⁷⁶ Section 27A defines “eligible child” as a person who has not attained the age of 18 years and who has never been married, civilly partnered or been in a *de facto* relationship. In deciding whether to make a declaration under s.29 of the Act, the Family Court must ensure that, even though the child “is not a person of the nominated sex”,⁷⁷ the guardian both intends to raise the child as such and wants the nominated sex to be recorded on the child’s birth certificate.⁷⁸

Section 29 of the Act outlines (as s.28 does for adults) numerous medical criteria which child applicants must satisfy. First, according to s.29(3)(c), there must be proof that the young person either has undergone or will undergo (“if the court grants the declaration”⁷⁹) such medical treatment as is “reasonably necessary to enable the child to assume and maintain the gender identity of a person of the nominated sex”.⁸⁰ Second, under s.29(3)(d), the Family Court must confirm that the

68 Elisabeth McDonald and Jack Byrne in ‘The Legal Status of Transsexual and Transgender Persons in Aotearoa / New Zealand’ in Jens M Scherpe (ed), *The Legal Status of Transsexual and Transgender Persons* (Intersentia 2015) 546.

69 *Ibid.*

70 [2008] 27 FRNZ 58, [50].

71 [2008] 27 FRNZ 58, [113].

72 See eg: *Basinger v Registrar-General* [2013] NZFC 3562; *C-DT* [2012] NZFC 10036; *MMT v Registrar-General of Births, Deaths and Marriages* [2012] NZFC 3533; *DAC v Registrar-General of Births, Death and Marriages* [2013] NZFC 1998. In compiling this list, the researchers were grateful for the advice offered by Elisabeth McDonald and Jack Byrne, *op. cit.* at fn 68.

73 Births, Deaths, Marriages and Relationships Registration Act 1995, s.28(3)(c)(i)(C).

74 Births, Deaths, Marriages & Relationships Registration Act 1995, s.30(2) [now repealed].

75 *Ibid.*, s.29(1)(a).

76 *Ibid.*, s.29(1)(b).

77 *Ibid.*, s.29(3)(b).

78 *Ibid.*, s.29(3)(b)(i)-(ii).

79 *Ibid.*, s.29(3)(c)(ii).

80 *Ibid.*, s.29(3)(c).

A. New Zealand cont

child's physical conformation and gonadal and genital development are such that – having submitted to future medical interventions – the child will be able to live more easily in their preferred gender than in the birth-assigned gender.⁸¹

Finally, through s.29(4), the court must specify, in the formal declaration, what future medical treatment (determined in the “light of the expert medical evidence”) it believes that the child must undertake to successfully assume and maintain the nominated sex. According to s.31 of the Act⁸², where the Registrar General amends (under s.30) the information recorded about the birth of a minor, and that amendment was made on the foot of a declaration which specifies necessary medical interventions in the future, if there is expert evidence that the eligible child has not subsequently undergone the specified treatment, the Registrar-General can re-amend the information contained in the birth record.

PRIVACY AND DATA PROTECTION

The Births, Deaths, Marriages and Relationships Registration Act 1995 establishes a framework to protect the privacy and history of individuals who have amended their gender markers on their birth certificates.

Section 64(1) of the Act confirms that, where, under s.30, information regarding sex has been altered by the Registrar-General for eligible adults or children, any birth certificate which is subsequently issued should “contain the information that such a certificate would contain if the person had always been a person of that sex” and should “contain no other information”.⁸³ This guarantee is intended to ensure that where an applicant changes gender-related data about their birth, any such alteration will not be frustrated by ancillary or residual information visible on future birth certificates. However, s.64(4) of the Act does acknowledge potential difficulties in fully concealing past gender designations, observing that the serial number on birth certificates may reveal that there has been newly recorded information under s.30.

The privacy measures set out in s.64 of the Act are reinforced through restrictions on the persons (or entities) who can access documents containing information about past gender on birth certificates. According to s.77(5) of the Act, only the Registrar-General can grant access to such documents. The Registrar-General will restrict this access to, among others:

- a. the individual to whom the information relates;⁸⁴
- b. the executor, administrator, or trustee of an estate or a trust, where the information is material;⁸⁵
- c. a celebrant or registrar⁸⁶ investigating whether or not the parties to a proposed marriage are a man and a woman,⁸⁷ and the information is material; and
- d. persons seeking access in circumstances where 120 years has passed since the birth of the person to whom the information relates.⁸⁸

The Family Court, District Court or High Court can order access to the relevant documents⁸⁹ to prosecute false statements, where the validity of a marriage is in question, “in the event of any question as to the validity of any information recorded under section 30(1)”⁹⁰ and “on any other special ground”.⁹¹ Furthermore, if there is a government agency that has an interest in ensuring that people should not have more than one identity, the Registrar-General may notify that agency that it has recorded information relating to gender of an individual under s.30 of the Act.⁹²

AMENDING GENDER MARKERS ON PASSPORTS AND DRIVERS LICENCES

In addition to altering identity markers on birth certificates, individuals can also amend their gender designation on passports and in the driving licence record (DLR), however, legal gender does not appear on the physical driving licence in New Zealand.⁹³

Like Malta (see Section G), New Zealand's passport and DLR rules are comparatively novel in allowing individuals to select a male, female and indeterminate/unspecified gender option.⁹⁴ The latter status is open to all persons, irrespective of sex characteristics, and is expressed through an “X” marker on the passport or in the DLR.

81 Ibid., s.29(3)(d).

82 Ibid., s.31(a)(d).

83 Ibid., s.64(1)(b)(c).

84 Ibid., s.77(6)(a).

85 Ibid., s.77(6)(b).

86 Ibid., s.77(6)(c)(ii).

87 Ibid., s.77(6)(c)(i).

88 Ibid., s.77(7)(b).

89 Ibid., s.77(8).

90 Ibid., s.77(8)(c).

91 Ibid., s.77(8)(d).

92 Ibid., s.77(9)(a).

93 ‘Change your gender on your official ID’ (NZ Government Website, 15 July 2019) <https://www.govt.nz/browse/passports-citizenship-and-identity/changing-your-gender/change-your-gender-on-your-official-id/> (accessed 22 August 2019).

94 Ibid.







An adult individual who wishes to be acknowledged in their self-identified gender on a passport document must satisfy all standard application requirements and submit a new passport application.⁹⁵ In addition, such adults must also provide a statutory declaration, which specifies both their nominated sex and how long the applicant has maintained their gender identity.⁹⁶ New Zealand passport rules do acknowledge the preferred gender of individuals under the age of 18 years. Where a minor applies to amend the gender marker on their passport, the young person must include statutory declarations from both their parent/legal guardian and a registered counsellor/medical professional which supports the request to alter the gender marker.⁹⁷ Similar rules apply – for both adults and children – where a person seeks to amend their gender within the DLR. However, this can also be achieved by producing an original identity document (eg: passport, etc.) which displays the nominated sex.⁹⁸

Under the current rules, it is possible for an applicant to amend the gender on their passport document more than once. However, the New Zealand Government explicitly cautions individuals that multiple alterations to their passport documents may hinder international travel and make it more difficult for the person to validate their gender “in the wider community.”⁹⁹ The government advises applicants to significantly reflect before amending their identity marker, and it warns that, “[w]here there has been more than one change in gender identity, applicants [will be] required to submit their previous passport with their passport application” – although the older passport will be “cancelled, defaced and returned to” to the individual.¹⁰⁰

PROPOSED REFORM OF GENDER RECOGNITION LAWS

In recent years, the Government of New Zealand has considered updating the process for amending gender markers on birth certificates. The Births, Deaths, Marriages, and Relationships Registration Bill¹⁰¹, as reported by the Parliamentary Governance and Administration Committee,¹⁰² would introduce a system of self-determination – whereby adult applicants would change the gender designation on their birth certificates through an administrative process and without a requirement for medical interventions. The Bill would extend greater autonomy to individuals aged 16 and 17 years, and it would retain a pathway to gender recognition for children under 16 years. In addition, in line with national rules for passports and the DLR, the Bill would also open up the possibility for “X” (indeterminate/unspecified) gender markers on birth certificates. At present, the Births, Deaths, Marriages, and Relationships Registration Bill has not yet been adopted by the New Zealand Parliament. In March 2019, the New Zealand Government announced that the legislation would be deferred for further public consultation.¹⁰³

Requirements for Gender Recognition in New Zealand

	Legal Gender Recognition	Yes
	Medical Requirements	Yes
	Prohibition of Minors	No
	Restrictions on Minors	Yes*
	Non-Binary Gender	Yes**
	Divorce Requirement	No

* An “eligible” child can apply through a guardian to amend the gender marker on their birth certificate.

** Individuals, who do not identify as male or female, can apply for a passport with an “X” gender marker and can request to obtain such marker in the Driver’s Licence Record.

95 ‘Information about Changing Sex / Gender Identity’ (NZ Government Website, 19 May 2019) <https://www.passports.govt.nz/what-you-need-to-renew-or-apply-for-a-passport/information/> (accessed 22 August 2019).

96 Ibid.

97 Ibid.

98 ‘Change your gender on your official ID’ (NZ Government Website, 15 July 2019) <https://www.govt.nz/browse/passports-citizenship-and-identity/changing-your-gender/change-your-gender-on-your-official-id/> (accessed 22 August 2019).

99 Information about Changing Sex / Gender Identity’ (NZ Government Website, 19 May 2019) <https://www.passports.govt.nz/what-you-need-to-renew-or-apply-for-a-passport/information/> (accessed 22 August 2019).

100 Ibid.

101 See: ‘Births, Deaths, Marriages, and Relationships Registration Bill’ (New Zealand Parliament website) https://www.parliament.nz/en/pb/bills-and-laws/bills-proposed-laws/document/BILL_74854/births-deaths-marriages-and-relationships-registration (accessed 22 August 2019).

102 Report from the Governance and Administration Committee of the Births, Deaths, Marriages, and Relationships Registration Bill (New Zealand Parliament website) https://www.parliament.nz/resource/en/NZ/SCR_79010/be83bb6ba26f9fbbf543855e3bc08fa8d954b2a (accessed 27 September 2019).

103 ‘Bill making it easier for trans people to update birth certificate deferred’ (New Zealand Herald 25 February 2019) <https://www.nzherald.co.nz/nz/news/article.cfm?id=1&objectid=12207173> (accessed 22 August 2019).

B. Malaysia



INTRODUCTION

At present, there is no enforceable framework under Malaysian law to recognise self-identified gender. It is not currently possible to amend gender markers on birth certificates. Although there is (at least nominally) a procedure to alter gender status on national identity cards, existing case law suggests that such an option is not available in practice. Malaysia also prohibits the external manifestation of gender identity, through the criminalisation of cross-dressing.

JURISDICTION: FEDERAL AND STATE LAWS

Malaysia operates a federal model of government with national and state-level legislation. There are also separate bodies of civil and Islamic law, backed through enforcement by a Religious Affairs Department at the state level and Syariah (sharia) courts. Islamic law only has effect if provided for by state assemblies.¹⁰⁴

The National Fatwa Council can issue *fatwas* – expressing a view as to whether something is *haram* (forbidden). In order to have legal effect, a fatwa needs to be affirmed at the federal or state level. In 1989, a fatwa was issued against gender confirmation treatment in Malaysia. While it has never been affirmed in law, the fatwa has resulted in the termination of gender confirming surgeries at the University Hospital in Kuala Lumpur.¹⁰⁵ Individuals in Malaysia who desire surgical interventions must now travel abroad for treatment (often to Thailand). Subsequent fatwas have been issued in relation to trans identities, including a 2005 statement that amending gender markers is also *haram*.¹⁰⁶

GENDER MARKERS ON BIRTH CERTIFICATES

The Birth and Death Registration Act 1957 provides that the birth register (and birth certificates) can only be amended if there is a mistake or clerical error.¹⁰⁷ In *Wong Chiou Yong v Pendaftar Besar/Ketua Pengarah Jabatan Pendaftaran Negara*, the High Court of Malaysia held that it is impossible to amend birth certificates at all. A birth certificate, in the view of the court, reflects an individual's gender at birth as

determined by physical characteristics. It cannot be changed later based on gender affirming medical treatment.¹⁰⁸ Justice VT Singham held – albeit noting regret that “parliament could not have envisaged the type of grievance faced by the applicant” – that it was for the legislature, not the judiciary, to implement a system of legal gender recognition in Malaysia.

GENDER MARKERS ON IDENTITY CARDS

While birth certificates are important, they are not the primary form of identification in Malaysia. The National Registration Act 1959 (“Act”) provides for a system of national identity cards, backed by a national register containing the details of all persons in Malaysia.¹⁰⁹

Section 6 of the Act confers a broad discretion on the Minister to set down regulations governing identity cards. This discretion includes the power to create rules for correcting and altering details contained in the supporting register and in identity cards.¹¹⁰ Exercising the discretion granted under the Act, the National Registration Department has published regulations which prohibit amendments to identity cards/the register save where an applicant supplies a court order declaring gender identity.¹¹¹ As a result, the High Court has taken on the primary role of determining whether individuals can be recognised in their preferred gender on identity cards.

The Court of Appeal has, in its appellate jurisdiction, provided guidance on how the High Court should approach this task. In doing so, the appeal judges have favoured the reasoning adopted by the English courts in the case of *Corbett v Corbett (Otherwise Ashley) (No 1)*¹¹² – which has been held by the European Court of Human Rights to violate Articles 8 (right to respect for private and family life) and 12 (right to marry) of the European Convention on Human Rights and which has now been replaced in the United Kingdom through the Gender Recognition Act 2004.

In *Corbett*, Justice Ormrod held that an individual's gender (for the purposes of English marriage law) was to be determined by reference to four factors: (i) chromosomal factors; (ii) gonadal factors (ie: presence or absence of testes or ovaries); (iii) genital factors (including internal sex organs); and (iv) psychological factors. Under the *Corbett* test, internal experience of

¹⁰⁴ See: Asia Pacific Transgender Network, *Legal Gender Recognition in Malaysia: A Legal & Policy Review in the Context of Human Rights* (APT/N 2017) 16.

¹⁰⁵ *Ibid.*, 10.

¹⁰⁶ *Ibid.*, 44.

¹⁰⁷ Birth and Death Registration Act 1957, s.27(1)(2).

¹⁰⁸ *Wong Chiou Yong v Pendaftar Besar/Ketua Pengarah Jabatan Pendaftaran Negara* [2005] 1 CLJ 622.

¹⁰⁹ *Ibid.*

¹¹⁰ National Registration Act 1959, s.6(2)(a).

¹¹¹ *Arahan Jabata Pendaftaran Negara Bill 9/2007*, para. 5.7.2(a).

¹¹² (1970) 2 All ER 33.

gender is relegated to the fourth criterion and self-identification without the need for medicalisation is not contemplated. As a result, the High Court in Malaysia has consistently dismissed applications for legal gender recognition on identity cards and in the supporting register. Despite a number of applicants submitting detailed medical and psychological evidence, the courts have refused to acknowledge their lived gender and maintained the birth assigned identity status.¹¹³

In the recent case of *Tan Pooi Yee v Ketua Pengarah Jabatan Pendaftaran Negara*, the Court of Appeal overturned a decision of the High Court declaring that the applicant was a man.¹¹⁴ The High Court had been provided with detailed medical evidence that the applicant was physically, anatomically and psychologically male. The individual was perceived as male and had presented socially and culturally as a male since pre-pubescence. At first instance, the High Court judge found that – save for the chromosomal factor – the applicant was a man. To insist upon “male” chromosomes would, according to the judge, “ask the impossible and I can think of nothing more unjust than that.”¹¹⁵ The Court of Appeal, however, rejected the original decision and it allowed the National Registration Department’s appeal.¹¹⁶

CRIMINALISATION

In addition to the above obstacles, Syariah laws and courts prohibit gender identity expression. In Malaysia, all 13 states, as well as the Federal Territories of Kuala Lumpur, Labuan & Putrajaya, have laws criminalising a “male person posing as a woman”.







Where an individual is convicted under these anti-cross-dressing laws, they are potentially liable to a custodial sentence of up to three years – depending upon the state in which the prosecution takes place. In addition, some states also expressly censure female persons who “pose” as men – with the threat of similar penalties upon conviction.

The law in the state of Negeri Sembilan – s.66 of the Syariah Criminal (Negeri Sembilan) Enactment 1992 – was subject to a constitutional challenge in *Khamis*

& Others v State Government of Negeri Sembilan & Others.¹¹⁷ The Court of Appeal agreed with the appellants’ counsel that the criminalisation of cross-dressing by state law conflicted with fundamental rights. Such prohibition placed the individuals “perpetually at risk of arrest and prosecution simply because they express themselves in a way which is part of their experience of being human. The very core identity of the appellants is criminalized solely on account of their gender identity”. As a result, the Court of Appeal held that as “long as section 66 is in force the appellants will continue to live in uncertainty, misery and indignity”. State law conflicted with the right to live in dignity under Article 5(1) of the Federal Constitution.

Following the judgment in *Khamis & Others*, the state authorities appealed to the country’s Federal Court. In October 2015, that court gave judgment – going no further than allowing the appeal on procedural grounds alone. Beyond holding that the High Court and Court of Appeal were not seized of jurisdiction to hear the case due to “substantive procedural non-compliance”, the Federal Court made no findings on the arguments presented by the State Government. Since that time, no further challenges to the cross-dressing laws have been made and it remains to be seen what, if any, further challenges to the criminalisation of gender identity expression in Malaysia will arise.

Requirements for Legal Gender Recognition in Malaysia

	Legal Gender Recognition	No*
	Medical Requirements	N/A
	Prohibition of Minors	N/A
	Restrictions on Minors	N/A
	Non-Binary Gender	N/A
	Divorce Requirement	N/A

* Although it is possible to read Malaysian legislation as permitting legal gender recognition, this right has been consistently rejected by the Malaysian judiciary.

¹¹³ See eg: *Fau En Ji v Ketua Pengarah Jabatan Pendaftaran Negara* [2015] 1 CLJ 803.

¹¹⁴ *Tan Pooi Yee v Ketua Pengarah Jabatan Pendaftaran Negara* [2016] 5 MLRH 501.

¹¹⁵ *Ibid.*, [64].

¹¹⁶ Melati A. Jalil, *NRD wins appeal bid to stop transgender from changing IC details*, Malay Mail, 5 January 2017: <https://www.malaymail.com/news/malaysia/2017/01/05/nrd-wins-appeal-bid-to-stop-transgender-from-changing-ic-details/1286225> (accessed 26 August 2019).

¹¹⁷ Court of Appeal of Malaysia, *Khamis and Ors v State Government of Negeri Sembilan and Ors*, Civil Appeal No. N-01-498-11/2012 (7 November 2014).

C. India



INTRODUCTION

There is currently no uniform law for gender recognition in India.¹¹⁸ Rather, legal gender recognition – where possible – must be obtained through a complex series of federal and state-level laws, which require that individuals submit to different procedures depending upon the gender markers to be amended.

In recent years, the Indian judiciary, particularly the Supreme Court in *NALSA v Union of India*¹¹⁹, has played an increasingly important role in acknowledging gender identity. Yet, despite court-based interventions, the pathways to legal gender recognition remain unclear and applications are often processed in an inconsistent, *ad hoc* manner. In August 2019, the *Lok Sabha*, the lower house of the Indian Parliament, passed comprehensive, trans-focused reform legislation. The Transgender Persons (Protection of Rights) Bill 2019 purports to introduce gender recognition and non-discrimination guarantees into Indian law. The Bill, which has been subject to criticism from civil society actors,¹²⁰ is now under consideration by the *Rajya Sabha*, the upper house of the Parliament.

ABSENCE OF UNIFORM GENDER RECOGNITION LAWS IN INDIA

At present, individuals who desire to be legally recognised in their self-identified gender – and who seek to obtain identity documents with their correct gender markers – face a number of obstacles.

A first, and perhaps most obvious challenge, is the continuing existence of federal and state actors who absolutely refuse to legally recognise gender identity.

Despite the broad constitutional right to gender recognition – confirmed by the Supreme Court of India in the *NALSA* judgment [see below]– there is evidence that some public authorities still fail to issue appropriate identity documents.¹²¹ For example, by 2018, a number of states had not re-issued any identity cards which acknowledged lived gender – in some cases, state-level actors even confirmed that they had no policy to provide for such recognition.¹²² Absolute refusals to affirm lived gender have been particularly prevalent in the education sector. The Central Board of Secondary Education – established by the federal government – previously refused to grant matriculation certificates with correct gender markers, a stance also adopted by certain university institutions.¹²³ Students have been forced to issue legal proceedings in order to obtain educational documentation which reflects their preferred gender.¹²⁴

Even where gender recognition is (at least nominally) a possibility, the multiple (sometimes conflicting) laws, administrative practices and local customs, which govern gender recognition, can make it practically impossible for individuals to obtain full acknowledgment. Without one, overarching legal framework, amending relevant gender markers requires a document-by-document approach.¹²⁵

In India, there are a range of identity cards and formal certificates, which contain gender markers. These documents include passports, driving licences, Aadhaar (identity) cards, graduation diplomas and election cards.¹²⁶ Where a person seeks to be “fully” recognised in their lived identity (ie: to have the correct gender markers on all cards and certificates), they must apply to alter each document individually.¹²⁷ Not only is this time-consuming and administratively burdensome, it may also be *de facto* impossible if there is no clear guidance on how certain amendment processes operate. Although, for passports and Aadhaar cards, there are formal rules for amending gender status, this is not the case for other

118 See generally: UNDP and Asia Pacific Transgender Network, *Legal Gender Recognition: A Multi-Country Legal and Policy Review in Asia* (UNDP and Asia Pacific Transgender Network 2017); International Commission of Jurists, ‘Unnatural Offences’ Obstacles to Justice in India Based on Sexual Orientation and Gender Identity (ICJ 2017); International Commission of Jurists, *Living with Dignity: Sexual Orientation and Gender Identity-Based Human Rights Violations in Housing, Work and Public Spaces in India* (ICJ 2019).

119 *National Legal Services Authority (NALSA) v Union of India and others* Supreme Court of India, Writ Petition (Civil) No. 400 of 2012 (15 April 2014).

120 Human Rights Watch, *India: Transgender Bill Raises Rights Concerns*, Human Rights Watch website, 23 July 2019; <https://www.hrw.org/news/2019/07/23/india-transgender-bill-raises-rights-concerns> (accessed 23 August 2019).

121 See eg: Dipika Jain and others, *Bureaucratization of Transgender Rights: Perspective from the Ground* (2018) 14 *Socio-Legal Review* 98; UNDP and Asia Pacific Transgender Network, *Legal Gender Recognition: A Multi-Country Legal and Policy Review in Asia* (UNDP and Asia Pacific Transgender Network 2017) 33.

122 Dipika Jain and others, *Bureaucratization of Transgender Rights: Perspective from the Ground* (2018) 14 *Socio-Legal Review* 98, 111-115.

123 International Commission of Jurists, *Living with Dignity: Sexual Orientation and Gender Identity-Based Human Rights Violations in Housing, Work and Public Spaces in India* (ICJ 2019) 85-86.

124 See eg: High Court of Karnataka, *Jeeva M. v State of Karnataka & Anr*, Writ Petition No. 12113/2019 (15 March 2019).

125 International Commission of Jurists, ‘Unnatural Offences’ Obstacles to Justice in India Based on Sexual Orientation and Gender Identity (ICJ 2017) 28-29.

126 *Ibid.*, 29.

127 *Ibid.*

key documents.¹²⁸ This results in opaque recognition structures, where many individuals cannot alter their identity markers because there is no clear access to, or established procedures for, amendment.

The lack of transparent rules regarding gender recognition encourages *ad hoc*, inconsistent decision making.¹²⁹ Where applications are not judged against established, objective criteria, this may result in public authorities – before they issue amended identity documents – asking people to submit evidence for which there is no legal basis.¹³⁰ For example, in some cases, individuals have been asked to provide residential or gender certificates – which can only be obtained at the discretion of third parties and which may require significant expenditure by applicants.¹³¹ This situation creates a gender recognition lottery – where the possibility of altering gender markers depends upon geographic location and the preferences of individual decision-makers.

In order to alter the identity markers on an Indian passport, an applicant must provide a report certifying medical treatment.¹³² This requirement still persists even though (as noted below) the Supreme Court has observed that a person’s medical status should not determine their access to gender recognition. Medical requirements are mirrored in numerous other procedures for amending gender markers – and may be imposed even where, as above, they are not mandated by law.¹³³ In many circumstances, a state or federal authority may refuse to formally recognise self-identified gender unless the applicant agrees to publish their amended status in the Gazette of India.¹³⁴ Post-NALSA, the Gazette has issued standard forms for such publications, which require a declaration that the applicant has undergone gender confirming surgery.¹³⁵

Where individuals do amend identity documents and educational certificates in India, they are typically able to access gender options beyond the male/female binary. Existing options include “other” (electoral cards) and “transgender” (Aadhaar cards) identity markers.¹³⁶ The modern acknowledgment of additional gender roles in Indian law reflects the historical recognition of cultural identities, such as *Hijra*.¹³⁷ However, there remains a question as to whether – if a trans man or woman seeks to amend their legal gender to reflect a binary identity status – they are expected to adopt an alternative legal gender rather than their preferred male or female option. When the Indian Government first attempted to implement the NALSA judgment in 2016, the proposed legislation implied that all trans individuals – irrespective of internal experiences of identity – fall outside binary gender roles.¹³⁸

JUDICIAL RECOGNITION OF RIGHT TO GENDER IDENTITY

In India, the most important affirmations of preferred gender have not come through statutory or administrative interventions. Rather, in recent years, the Indian judiciary has played the leading role in promoting gender identity rights.

In the landmark judgment, *National Legal Services Authority (NALSA) v India*, the Supreme Court confirmed that the Indian constitution guarantees a right to gender recognition.¹³⁹ Trans individuals, according to the Court, fall within existing constitutional guarantees and the failure to acknowledge their lived gender undermines core legal entitlements.

¹²⁸ *Ibid.*, 30.

¹²⁹ Dipika Jain and others, *Bureaucratization of Transgender Rights: Perspective from the Ground*, [2018] 14 Socio-Legal Review 98, 114; UNDP and Asia Pacific Transgender Network, *Legal Gender Recognition: A Multi-Country Legal and Policy Review in Asia* (UNDP and Asia Pacific Transgender Network 2017) 42.

¹³⁰ International Commission of Jurists, ‘Unnatural Offences’ Obstacles to Justice in India Based on Sexual Orientation and Gender Identity (ICJ 2017) 30.

¹³¹ *Ibid.*

¹³² UNDP and Asia Pacific Transgender Network, *Legal Gender Recognition: A Multi-Country Legal and Policy Review in Asia* (UNDP and Asia Pacific Transgender Network 2017) 37.

¹³³ International Commission of Jurists, ‘Unnatural Offences’ Obstacles to Justice in India Based on Sexual Orientation and Gender Identity (ICJ 2017) 30.

¹³⁴ UNDP and Asia Pacific Transgender Network, *Legal Gender Recognition: A Multi-Country Legal and Policy Review in Asia* (UNDP and Asia Pacific Transgender Network 2017) 37.

¹³⁵ *Ibid.*

¹³⁶ International Commission of Jurists, ‘Unnatural Offences’ Obstacles to Justice in India Based on Sexual Orientation and Gender Identity (ICJ 2017) 29.

¹³⁷ *National Legal Services Authority (NALSA) v Union of India and others* Supreme Court of India, Writ Petition (Civil) No. 400 of 2012 (15 April 2014), [43] – [46].

¹³⁸ See: Transgender Persons (Protection of Rights) Bill 2016.

¹³⁹ See eg: Spence Jones, ‘Towards a Universal Construction of Transgender Rights: Harmonizing Doctrinal and Dialogic Strategies in Indian Jurisprudence’ [2017] 4 Indonesian Journal of International and Comparative Law 91; Akshita Pandit, ‘(Trans) Greeting the Binary: Coalitional Self-Determination for the Third Gender Framework’ [2018] 14 Socio-Legal Review 62.

C. India cont

The Supreme Court held that the protection against sex discrimination in Articles 15 and 16 already “includes discrimination on the ground of gender identity”.¹⁴⁰ Similarly, as “gender... constitutes the core of one’s sense of being”, providing “[l]egal recognition of gender identity is... part of the right to dignity and freedom guaranteed under [Article 21 of the]... Constitution”.¹⁴¹ Finally, the Court held, “freedom of expression guaranteed under Article 19(1)(a) includes the freedom to express one’s chosen gender identity through varied ways”.¹⁴²

The opinion in *NALSA* is striking in at least three respects. First, the Supreme Court emphasised a “right of self-determination of the gender to which a person belongs”.¹⁴³ According to the Court, not only must public authorities allow individuals to alter their gender status; any amendment must also be decided by the person concerned.¹⁴⁴ As such, the judges endorsed self-identification as the constitutionally mandated model for gender recognition. If implemented, this ruling would position India among a small group of nations allowing such self-defined amendments¹⁴⁵ and it places the Supreme Court within an even smaller cluster of courts (national or regional¹⁴⁶) which affirm self-identification as a basic right.

Second, as a corollary of adopting self-determination, the Supreme Court appeared to separate legal gender recognition from medical transition pathways. Individuals should be able to amend their gender status without submitting to gender confirming healthcare. This is, once again, a highly progressive vision of gender recognition and would represent a significant departure from the current rules/practices for amending gender markers in India. However, as a caveat to this point, it should be observed that, in his judgment, Justice A. K. Sikri also spoke of a “constitutional right to get the recognition as male or female *after SRS* [sex reassignment surgery]” (emphasis added).¹⁴⁷ This may indicate that, at least for Justice Sikri, medical interventions play at least some role in the gender recognition process.

Finally, in *NALSA* the Supreme Court expressly acknowledged, as a constitutional right, recognition of gender identities beyond the binary: “[s]elf-identified gender can be either male or female or a third gender. Hijras are identified as persons of third gender and are not identified either as male or female”.¹⁴⁸ While both federal and state-level laws already recognise “other” and “transgender” options, *NALSA* suggests that acknowledging non-binary identities is also a constitutional obligation.

Although the *NALSA* judgment has not yet been implemented through a uniform gender recognition law, the decision has influenced numerous subsequent judicial pronouncements. In the high-profile cases of *Tessy James v The Director General of Police, Thiruvananthapuram and Ors*¹⁴⁹ and *Shivani Bhat v State of NCT of Delhi*,¹⁵⁰ the High Court of Kerala and the High Court of Delhi – drawing upon the Supreme Court’s reasoning – both affirmed the gender identity of young individuals in the face of significant family opposition.

In *Arunkumar and Sreeja v Inspector General of Registration*,¹⁵¹ the Madras High Court declared that a “marriage solemnized between a [cisgender] male and a transwoman, both professing Hindu religion, is a valid marriage in terms of s.5 of the Hindu Marriage Act, 1955”.¹⁵² As such, the Registrar of Marriages was “bound to register” the petitioners’ union, irrespective of whether the bride had been assigned a male gender at birth.¹⁵³ Recalling how *NALSA* had framed gender identity within the domain of personal autonomy,¹⁵⁴ Justice Swaminathan observed that the term “bride” cannot have a static or immutable meaning.¹⁵⁵ Rather, “seen in the light of the march of law”, it must be interpreted to include both cisgender and trans women.¹⁵⁶

140 National Legal Services Authority (NALSA) v Union of India and others Supreme Court of India, Writ Petition (Civil) No. 400 of 2012 (15 April 2014), [59].

141 *Ibid.*, [68].

142 *Ibid.*, [65].

143 *Ibid.*, [74].

144 *Ibid.*

145 See: Zhan Chiam, Sandra Duffy and Matilda Gonzalez Gil, M, Trans legal mapping report. Recognition before the law (ILGA, 2nd ed, 2017).

146 See eg: Inter-American Court of Human Rights, Gender identity, and equality and non-discrimination of same-sex couples, Advisory Opinion OC-24/17, Series A No. 24 (24 November 2017).

147 National Legal Services Authority (NALSA) v Union of India and others Supreme Court of India, Writ Petition (Civil) No. 400 of 2012 (15 April 2014), [106].

148 *Ibid.*, [70].

149 High Court of Kerala, WP(Cr.) No. 215 of 2018 (12 June 2018).

150 High Court of Delhi, W.P.(CrI) 2133/2015 (5 October 2015).

151 High Court of Madras, WP(MD)No.4125 of 2019 and WWP(MD)No.3220 of 2019 (22 April 2019).

152 *Ibid.*, see: ‘Order’ of the Court.

153 *Ibid.*

154 *Ibid.*, [9].

155 *Ibid.*, [10].

156 *Ibid.*, [15].

Finally, in the educational sphere where, as noted, federal and state authorities have been reluctant to acknowledge gender identity, the judiciary has been particularly active in enforcing legal recognition entitlements. The High Court of Madras has intervened at least twice to ensure that school and college institutions allow students to amend gender markers.¹⁵⁷ In *Jeeva M v State of Karnataka*, the High Court of Karnataka not only obliged the state education departments to re-issue education certificates for the individual petitioner; it also required a wider circular under which all educational institutes in Karnataka would, in accordance with the *NALSA* judgment, have to issue certificates and documents with a person's affirmed gender.¹⁵⁸

REFORMING GENDER RECOGNITION LAWS IN INDIA

In August 2019, the *Lok Sabha* passed the Transgender Persons (Protection of Rights) Bill 2019 (the Bill). This proposed law is intended to legislate for the broad principles set out in *NALSA*, and it purports to incorporate both gender recognition and trans non-discrimination frameworks into domestic law.







Section 2 of the Bill adopts a wide definition of "transgender person", embracing all individuals whose gender does not match the legal identity assigned to them at birth. Under s.2(k), this includes a "trans-man or trans-woman... person with intersex variations, genderqueer and [a] person having such socio-cultural identities as kinner, hijra, aravani and jogta". Under s.3 of the Bill, it is unlawful to discriminate against a transgender person in a range of social, economic and cultural spheres – including employment, education and access to goods and services.

Sections 4(1) and (2) of the Bill acknowledge a legal right to be recognised – on the basis of self-determination – as a transgender person. This entitlement extends to minor children, who have the consent of their parent or guardian.¹⁵⁹ Under s.6, District Magistrates are empowered to issue "certificate[s] of identity"¹⁶⁰ – through which individuals can be affirmed as a transgender person on their gender markers¹⁶¹ and can enjoy all benefits attached to that legal status.¹⁶²

In its present form, the Transgender Persons (Protection of Rights) Bill 2019 appears to draw a distinction between the procedures for, on the one hand, "binary gender" recognition and, on the other hand, "transgender" affirmation. While, as noted above, individuals will be acknowledged as a transgender person through a framework of self-identification, only persons who have submitted to gender confirmation surgery will be acknowledged as "male" or "female".¹⁶³ According to s.7 of the Bill, only "if a transgender person undergoes surgery to change gender either as a male or female"¹⁶⁴ can that individual apply to the District Magistrate and be recognised in their preferred, binary gender status.

The two-stage process envisaged by s.7 of the Bill (applicants must be recognised as a "transgender person" under s.6 before they can be affirmed as male or female under s.7) has been subject to significant criticism within civil society.¹⁶⁵ In particular, the requirement for trans men and women to undertake surgical interventions is inconsistent with *NALSA*'s pronouncement that all trans persons (male, female and third gender) are entitled to gender self-determination. The Transgender Persons (Protection of Rights) Bill 2019 now passes to be considered by the upper house in India's Parliament.

Requirements for Gender Recognition in India

	Legal Gender Recognition	Yes
	Medical Requirements	Yes
	Prohibition of Minors	Unclear*
	Restrictions on Minors	Unclear
	Non-Binary Gender	Yes
	Divorce Requirement	Unclear**

* Due to the absence of a uniform gender recognition law, and the variation in administrative practice, it is unclear whether minors can (as a matter of routine) amend the gender markers on all their identity documentation and educational records.

** Due to the absence of a uniform gender recognition law, and the variation in administrative practice, it is unclear whether individuals in a valid different-gender marriage can amend the gender markers on their identity documents without having to dissolve that legal relationship.

¹⁵⁷ International Commission of Jurists, *Living with Dignity: Sexual Orientation and Gender Identity-Based Human Rights Violations in Housing, Work and Public Spaces in India* (ICJ 2019) 85-86.

¹⁵⁸ High Court of Karnataka, *Jeeva M. v State of Karnataka & Anr*, Writ Petition No. 12113/2019 (15 March 2019).

¹⁵⁹ Transgender Persons (Protection of Rights) Bill 2019, s.5.

¹⁶⁰ *Ibid.*, s.6(1).

¹⁶¹ *Ibid.*, s.6(2).

¹⁶² *Ibid.*, s.6(3).

¹⁶³ *Ibid.*, s.7.

¹⁶⁴ *Ibid.*, s.7(1).

¹⁶⁵ Human Rights Watch, *India: Transgender Bill Raises Rights Concerns*, Human Rights Watch website, 23 July 2019: <https://www.hrw.org/news/2019/07/23/india-transgender-bill-raises-rights-concerns> (accessed 23 August 2019).

D. Namibia



INTRODUCTION

In Namibia, the law with regards to legal gender recognition is set out in the Births, Marriages and Deaths Registration Act 1963 (as amended)¹⁶⁶ (the Act). The Act provides a formal pathway through which individuals can amend the gender marker on their birth certificate. Although the Act creates an official framework for legal gender recognition, it remains unclear whether in practice the legislation is accessible for persons seeking recognition. This legal uncertainty is reinforced through the continued criminalisation of expressing non-heterosexual and cisgender identities. While this latter prohibition is rarely enforced, it may deter the public manifestation of a gender status other than that assigned at birth.

GENDER MARKERS ON BIRTH CERTIFICATES

Under s.7B of the Act, an individual may apply to the Minister of Home Affairs to change the description of their gender held in the birth register where they have “undergone a change of sex”. In order to satisfy themselves of that change, the decision-maker may require the applicant to provide such medical reports and institute such investigations as he may deem necessary. Once the records have been altered and a replacement birth certificate has been issued, it stands as *prima facie* proof of the details recorded in it – including the person’s legal gender.¹⁶⁷

The operation of the law in practice is unclear. According to recent evidence, including dialogue with personnel in the Ministry of Home Affairs and Immigration, there is no issue with amending gender status in the register so long as an applicant can provide medical records.¹⁶⁸ The Permanent Secretary in the

Ministry, however, had previously indicated that legal transitions are prohibited in Namibia on the basis that persons are “only born once, so [they] cannot be born a man today and tomorrow be a woman”. The Permanent Secretary went on to suggest that “if one is born as a man or a woman, he or she should remain like that until death” and he confirmed that the Ministry’s policy was to interpret s.7B of the Act narrowly, applying only where there are “complications at birth”.¹⁶⁹

It is also not clear if Namibian medical practitioners are willing or able to provide gender affirming medical procedures, or whether these procedures are available on Namibia’s public healthcare service. While some reports refer to gender confirmation surgery being covered by the Namibian state healthcare system,¹⁷⁰ others say that such treatments are not available under public funding.¹⁷¹

The framework established under the Births, Marriages and Deaths Registration Act only creates a presumption in law, which can be rebutted in the event of a dispute. Identical provisions to the Act were in force for a number of years in South Africa. When disputes did arise in that jurisdiction, the South African courts¹⁷² applied a test – derived from Justice Ormrod’s judgment in *Corbett v Corbett (Otherwise Ashley) (No 1)*¹⁷³ – under which, as noted in Section B, legal gender was grounded in physical characteristics. As a consequence, a number of trans women were designated as male for the purposes of domestic law.

IDENTITY CARDS

Under s.12 of the Identification Act,¹⁷⁴ the national register and an individual’s identity card can be corrected upon an application to the Ministry if it does not “reflect correctly”¹⁷⁵ the particulars of the individual. Where the applicant pays the prescribed fee, the Minister shall issue a corrected version of the identity document or underlying record.¹⁷⁶ If the decision-maker is willing to accept an updated birth certificate, obtained according to the process set out in s.42 of the Act, as evidence that the gender marker on an applicant’s identity card does

166 The Births, Marriages and Deaths Registration Act No. 81 of 1963 has been amended on a number of occasions, including through: Births, Marriages and Deaths Registration Amendment Act 17 of 1967; Births, Marriages and Deaths Registration Amendment Act 18 of 1968; Births, Marriages and Deaths Registration Amendment Act 58 of 1970; Births, Marriages and Deaths Registration Amendment Act 51 of 1974; Native Laws Amendment Proclamation, AG 3 of 1979; Marriages, Births and Deaths Amendment Act 5 of 1987.

167 *Ibid.*, s.42(3).

168 Diane Hubbard and Others, Namibian Law on LGBT Issues (Legal Assistance Centre 2015) 168.

169 Innocentia Gaoes, Sex change ‘legal’ in Namibia, Windhoek Observer, June 2013 available at: <https://www.observer.com.na/index.php/national/item/1602:sex-change-legal-in-namibia> (accessed 25 August 2019).

170 Finn Reagan, *Canaries in the Coal Mines: An analysis of spaces for LGBTI activism in Namibia* (Other Foundation 2017) 10.

171 Zhan Chiam, Sandra Duffy and Matilda Gonzalez Gil, M, *Trans legal mapping report. Recognition before the law* (ILGA, 2nd ed., 2017) 22.

172 *W v W* 1976 (2) SA 308 (W); *Simms v Simms* 1981 SA 186 (D).

173 (1970) 2 All ER 33.

174 Identification Act, 21 of 1996.

175 *Ibid.*, s.12(1)(a) – (b).

176 *Ibid.*, s.12(3).

not reflect their gender identity, then the process should follow automatically. In reality, however, there is evidence that most individuals who apply to amend their gender in national identity cards have their application refused.¹⁷⁷

CRIMINALISATION

The law in Namibia continues to recognise a number of criminal offences, which potentially hinder the willingness and capacity of trans populations to publicly manifest their self-identified gender.¹⁷⁸







One example is the Prohibition of Disguises Act (a former South African law).¹⁷⁹ This statute does not, on its face, relate to cross-dressing activities. However, its predecessor law was widely used by South African authorities to prosecute gender identity expression¹⁸⁰ and to criminalise those perceived as wearing gender non-conforming dress.¹⁸¹ There is no evidence that the Prohibition of Disguises Act has been successfully used in Namibia to censure cross-dressing conduct.¹⁸² The continued existence of the law, however, acts as a barrier to protecting trans individuals from those who may engage in harassment and acts of serious harm.¹⁸³

FUTURE REFORM

In 2013, a draft National Population Registration Bill – comprehensively updating and replacing the Births, Marriages and Deaths Registration Act and Identification Act – was prepared. The Bill makes provision for amendments to gender markers. Section 15 of the draft Bill permits applications to the Ministry of Home Affairs to “change the description of a person’s sex subsequent to a medical procedure intended to alter such sex if proof to this effect is supplied by a registered medical practitioner”.

“Medical procedure” is not defined by the Bill. The draft Bill provides for both an internal administrative appeal and an appeal to the High Court of Namibia.¹⁸⁴ While the application results in changes to birth certificates and the national population register, it does provide that the applicant will be treated, in law, as having their self-identified gender for all purposes. At present, the draft Bill has not been introduced. There continue to be discussions around the system of civil registration in Namibia, but the draft law exists only as an internal Ministry of Home Affairs document and has not yet been laid before the legislature.

Requirements for Gender Recognition in Namibia

	Legal Gender Recognition	Yes*
	Medical Requirements	Yes
	Prohibition of Minors	Yes**
	Restrictions on Minors	Yes
	Non-Binary Gender	No
	Divorce Requirement	Yes***

* Despite the existence of the Births, Marriages and Deaths Registration Act and the Identification Act, it remains uncertain whether there is *de facto* access to gender recognition rights in Namibia.

** Although the Births, Marriages and Deaths Registration Act and the Identification Act do not explicitly exclude minors from gender recognition processes, it appears that children are not able to obtain legal gender recognition in Namibia.

*** Although the Births, Marriages and Deaths Registration Act and the Identification Act do not explicitly require divorce as a pre-condition for gender recognition, it appears – given the absence of same-gender marriage in Namibia – that an applicant would not be able to maintain a different-gender marital union while undertaking a legal transition.

177 Zhan Chiam, Sandra Duffy and Matilda Gonzalez Gil, M, Trans legal mapping report. Recognition before the law (ILGA, 2nd ed., 2017) 22; Usha Jugroop and Others, *Laws and Policies Affecting Transgender Persons in Southern Africa* (Southern African Litigation Centre 2016) 34.

178 Diane Hubbard and Others, *Namibian Law on LGBT Issues* (Legal Assistance Centre 2015) 65.

179 Prohibition of Disguises Act, 16 of 1969.

180 *S v Kola* 1966 4 SA 322 (A).

181 Edwin Cameron, ‘Unapprehended Felons’ in Edwin Cameron and Mark Gevisser (eds.), *Defiant Desire: Gay and Lesbian Lives in South Africa* (Routledge 1994).

182 Diane Hubbard and Others, *Namibian Law on LGBT Issues* (Legal Assistance Centre 2015) 175.

183 *Ibid.*, 83.

184 National Population Registration Bill, Pt. 6.

E. South Africa



INTRODUCTION

The rules for obtaining gender recognition in South Africa are set out in the Alteration of Sex Description and Sex Status Act 2003¹⁸⁵ (the Act). This law (which amended the Births and Deaths Registration Act No. 51 of 1992) provides a comprehensive framework for altering gender status in the national birth register. Along with Namibia, South Africa is one of only two Southern African jurisdictions which have enacted a statutory procedure to acknowledge preferred gender.¹⁸⁶

The Act describes both the process to obtain, and the subsequent consequences of, legal gender recognition. In recent years, the legislation has been subject to increasing scrutiny from judicial and civil society actors.¹⁸⁷ While the statute itself establishes a comparatively liberal framework, there is evidence that administrative application of the Act, including lengthy processing delays and the imposition of non-statutory pre-conditions¹⁸⁸, significantly limits access to gender recognition.

AMENDING GENDER STATUS IN THE NATIONAL BIRTH REGISTER

The Preamble to the Alteration of Sex Description and Sex Status Act 2003¹⁸⁹ identifies an overarching goal of facilitating the “alteration of the sex description of certain individuals in certain circumstances”. Section 2 of the Act clarifies and elaborates upon this guiding principle. According to s.2(1), an individual can request formal recognition of their lived gender by applying to the Director-General of the National Department of Home Affairs “for the alteration of the sex description on his or her birth register”. If the applicant’s request is accepted, that person will be “deemed for all purposes

to be a person of the sex description so altered as from the date of the recording of such alteration”.¹⁹⁰ The consequences of gender recognition are wholly prospective¹⁹¹ and s.3(3) confirms, “[r]ights and obligations that have been acquired by or accrued to such a person before the alteration of his or her sex description are not adversely affected by the alteration”.

GENDER RECOGNITION IN SOUTH AFRICA: A MEDICAL MODEL

The Act envisages a medicalised process for legal gender recognition and limits recognition to persons who have undertaken gender confirming interventions. Under s.2(1) of the Act, the four categories of individuals eligible to be acknowledged in their self-identified gender are:

- Any person whose sexual characteristics have been altered by surgical treatment.
- Any person whose sexual characteristics have been altered by medical treatment.
- Any person whose sexual characteristics have been altered by evolvment through natural development resulting in gender reassignment.
- Any person who is intersexed.

The first two groups are applicants whose “sexual characteristics have been altered by surgical or [by] medical treatment” [emphasis added].¹⁹² Under s.1 of the Act, “sex characteristics” are “primary or secondary sexual characteristics or gender characteristics”. Therefore, at least under the wording of the statute, to obtain recognition, an applicant must show some form of healthcare treatment which has altered their sex organs, external sex characteristics, or the way that the applicant manifests a male/female identity.¹⁹³ Section 2(1) does not specifically mandate surgical procedures. Rather, it should suffice that a person has followed (or is following) a course of hormone therapy. However, in the years since 2003, there has been consistent

185 Act No. 49 of 2003.

186 Zhan Chiam, Sandra Duffy and Matilda Gonzalez Gil, M, *Trans legal mapping report. Recognition before the law* (ILGA, 2nd ed, 2017) 18.

187 See eg: Maxine Rubin, ‘Right to Identity: The Implementation of the Alteration of Sex Description Act’ in *In Pursuit of Equality in South Africa* (Legal Resources Centre 2017) 132-139.

188 *Ibid.*

189 Act No. 49 of 2003.

190 *Ibid.*, s.3(2).

191 *KOS and others v Minister of Home Affairs and others* [2017] ZAWCHC 90, [3].

192 Act No. 49 of 2003: *Alteration of Sex Description and Sex Status Act, 2003*, s.2(1).

193 Section 1 of the Act No. 49 of 2003: *Alteration of Sex Description and Sex Status Act, 2003* defines gender characteristics as “the ways in which a person expresses his or her social identity as a member of a particular sex by using style of dressing, the wearing of prostheses or other means.”

evidence that officials within the Department of Home Affairs routinely reject applications unless the person has surgically transitioned.¹⁹⁴

Section 2(1) of the Act also permits applications from individuals “whose sexual characteristics have been altered by evolvment through natural development” or “any person who is intersexed”. Act No. 49 of 2003: Alteration of Sex Description and Sex Status Act 2003 is comparatively progressive (compared with laws subsequently introduced in other countries) in specifically incorporating the gender recognition entitlements of populations who experience intersex variance. There remains a question, however, as to what extent gender affirmation is a priority for South Africa’s intersex communities as compared to legal protections against genital surgeries on infants. In addition, it is not certain what intended group falls within the class of individuals “whose sexual characteristics have been altered by evolvment through natural development”.¹⁹⁵ If this reference is designed to include applicants who may discover unknown bodily traits later in life, those persons would appear to be already covered by the intersex classification.¹⁹⁶

Where an applicant seeks to amend their gender status on account of surgical or medical treatment, they must attach documentation from two healthcare professionals attesting to the nature and outcome of those interventions.¹⁹⁷ The first report is prepared by either the medical practitioner who administered the treatments or a practitioner who is familiar with such procedures.¹⁹⁸ The option of the alternative physician acknowledges that, by the time they seek official affirmation of their identity, many individuals are several years post-transition, and they may no longer be able to locate their initial provider.¹⁹⁹ In addition, there must also be a report from a second person providing healthcare services “who has medically examined the applicant in order to establish his or her sexual characteristics”.²⁰⁰

Although, as noted, the Act does not specifically require surgical care, there are reports that, as administrators from the Department of Home Affairs increasingly looked for evidence of surgical interventions, so too doctors became less willing to submit the necessary documentation unless individuals submitted to gender confirming surgery.²⁰¹

In situations where the persons seeking gender recognition experiences intersex variance, there must be both a report corroborating the applicant’s medical status and a report “prepared by a qualified psychologist or social worker” confirming that the individual has lived “stably and satisfactorily” for two years in their self-identified gender.²⁰²

Two noticeable omissions from the Act are references to children and non-binary individuals. Unlike other jurisdictions, which have expressly adopted gender recognition statutes, South African law makes no mention of persons under the age of 18 years – either to confirm or reject their inclusion within the statutory framework. On the other hand, while non-binary populations are also not acknowledged in the Act, it is clear that the law does exclude the possibility of alternative gender options.²⁰³ This exclusion is emphasised through use of “his” and “her” identifiers throughout the statute²⁰⁴, and by the fact that the Director-General is only empowered to register male and female identities.

THE CONSTITUTIONALITY OF FORCED DIVORCE?

The Alteration of Sex Description and Sex Status Act 2003 is silent on whether obtaining gender recognition impacts the validity of an existing marriage. As the South African Parliament introduced same-gender civil marriage in 2006, it might have been assumed that altering gender identity would not affect marital unions. Until 2017, however, the Department of Home Affairs operated a practice whereby if an applicant had

194 Busisiwe Deyi and others, *Alteration of Sex Description and Sex Status Act, 2003 No. 49 of 2003 – Briefing Paper* (Gender DynamiX and Legal Resources Centre) <https://www.transgendermap.com/wp-content/uploads/sites/7/2019/05/LRC-act49-2015-web.pdf> [accessed 26 August 2019] 20-21.

195 Maxine Rubin, ‘Right to Identity: The Implementation of the Alteration of Sex Description Act’ in *In Pursuit of Equality in South Africa* (Legal Resources Centre 2017) 133-134.

196 *Ibid.*

197 Act No. 49 of 2003: *Alteration of Sex Description and Sex Status Act, 2003*, s.2(2).

198 *Ibid.*, s.2(1)(b).

199 Busisiwe Deyi and others, *Alteration of Sex Description and Sex Status Act, 2003 No. 49 of 2003 – Briefing Paper* (Gender DynamiX and Legal Resources Centre) <https://www.transgendermap.com/wp-content/uploads/sites/7/2019/05/LRC-act49-2015-web.pdf> [accessed 26 August 2019] 17.

200 Act No. 49 of 2003: *Alteration of Sex Description and Sex Status Act, 2003*, s.2(2)(c).

201 *Ibid.* 20.

202 *Alteration of Sex Description and Sex Status Act, 2003*, s.2(2)(d).

203 Busisiwe Deyi and others, *Alteration of Sex Description and Sex Status Act, 2003 No. 49 of 2003 – Briefing Paper* (Gender DynamiX and Legal Resources Centre) <https://www.transgendermap.com/wp-content/uploads/sites/7/2019/05/LRC-act49-2015-web.pdf> [accessed 26 August 2019] 21.

204 See eg: *Alteration of Sex Description and Sex Status Act, 2003*, ss.1, 2(2)(c) and 2(6).

E. South Africa cont







contracted a valid marriage under the Marriage Act 1961 (the 1961 Act) as opposed to the Civil Unions Act 2006 (the 2006 Act), that person would be asked to dissolve the union.²⁰⁵ The reasoning behind this policy was that, as part of the country's dual marriage system – where all couples can form a marital union under the 2006 Act, but only different-gender couples can solemnise their marriage through the 1961 Act – it was legally impermissible for the parties to a union under the 1961 Act to have the same legal gender.²⁰⁶ Instead, the applicant for recognition would be obliged to dissolve the existing marriage and, post-alteration, enter into a union under the 2006 Act.²⁰⁷ However, as domestic divorce laws only permitted dissolutions where there was an irretrievable breakdown in the relationship – a scenario that was obviously not the case where spouses were only divorcing to satisfy legal requirements – this effectively placed happily married applicants in a position of legal limbo. They could not obtain legal gender recognition until they divorced; and they could not divorce because they remained committed to their husband or wife.²⁰⁸

In *KOS and others v Minister of Home Affairs and others*, the High Court of South Africa held that the divorce requirement was unconstitutional – infringing rights to administrative justice, equality and human dignity.²⁰⁹ In asking the petitioners to divorce before obtaining gender recognition – an obligation set out in neither the Act nor the 1961 Act (which regulates the solemnisation of marriage and not the consequences²¹⁰) – the Department of Home Affairs was acting inconsistently with the State's obligation to respect, protect, promote and fulfil the rights in the Bill of Rights.²¹¹ Justice Binns-Ward ruled that department officials were obliged to process applications without reference to a "person's marital status and, in particular, irrespective of whether that person's marriage or civil partnership (if any) was solemnised under the Marriage Act 25 of 1961 or the Civil Union Act 17 of 2006".²¹²

APPEALING DECISIONS REJECTING AN APPLICATION FOR GENDER RECOGNITION

The Alteration of Sex Description and Sex Status Act 2003 establishes an appeals process in situations where the Director-General rejects an application for gender recognition.²¹³ Within 14 days of the refusal, the applicant must make an appeal to the Minister of Home Affairs, providing copies of the application documents and the reasoning for the initial refusal.²¹⁴ If the Minister accepts the original decision, the applicant can further appeal to a district magistrate.²¹⁵ The applicant is entitled to legal representation at this stage of the process.²¹⁶ Under s.2(9) of the Act, if the magistrate accepts the appeal, the Director-General will be ordered to amend the birth register. However, there is evidence that individuals struggle to navigate the appeals procedure – not least because, contrary to s.2(3), initial decision-makers within the Department of Home Affairs may not, when rejecting an application, furnish the required set of reasons.²¹⁷

Requirements for Gender Recognition in South Africa

	Legal Gender Recognition	Yes
	Medical Requirements	Yes
	Prohibition of Minors	Yes*
	Restrictions on Minors	Yes
	Non-Binary Gender	No
	Divorce Requirement	No

* Although the Alteration of Sex Description and Sex Status Act 2003 does not explicitly exclude minors from gender recognition processes, it appears that children are not able to obtain legal affirmation of their self-identified gender in South Africa.

²⁰⁵ *KOS and others v Minister of Home Affairs and others* [2017] ZAWCHC 90, [27]–[32].

²⁰⁶ *Ibid.*

²⁰⁷ *Ibid.*, [33]–47].

²⁰⁸ *Ibid.*, [12] and [41]. See also: Busisiwe Deyi and others, *Alteration of Sex Description and Sex Status Act, 2003 No. 49 of 2003 – Briefing Paper (Gender DynamiX and Legal Resources Centre)* <https://www.transgendermap.com/wp-content/uploads/sites/7/2019/05/LRC-act49-2015-web.pdf> (accessed 26 August 2019) 24-29.

²⁰⁹ *KOS and others v Minister of Home Affairs and others* [2017] ZAWCHC 90, [90.1].

²¹⁰ *Ibid.*, [79]–[82].

²¹¹ Constitution of South Africa, s.7(2). See: *KOS and others v Minister of Home Affairs and others* [2017] ZAWCHC 90, [90.1].

²¹² *KOS and others v Minister of Home Affairs and others* [2017] ZAWCHC 90, [90.2].

²¹³ Act No. 49 of 2003: *Alteration of Sex Description and Sex Status Act, 2003*, s.2(3)(10).

²¹⁴ *Ibid.*, s.2(5).

²¹⁵ *Ibid.*, s.2(6).

²¹⁶ *Ibid.*, ss.2(8) and 2(10).

²¹⁷ Maxine Rubin, 'Right to Identity: The Implementation of the Alteration of Sex Description Act' in *In Pursuit of Equality in South Africa* (Legal Resources Centre 2017) 137.

F. Guyana



INTRODUCTION

In Guyana, there is no provision for an individual to amend their legal gender or to otherwise secure recognition of their self-identified gender identity. The Registration of Births and Deaths Act²¹⁸ (the Act) contains no provision allowing amendments to the gender marker recorded on birth certificates. Similarly, the national system of identity cards and registration²¹⁹ refers only to a person's gender assigned at birth. Until recently, expression of an individual's gender identity by wearing clothing congruent with their gender identity was criminalised under s.153(1) of the Summary Jurisdiction (Offences) Act.²²⁰ While that prohibition has now been held to be unconstitutional,²²¹ there are still substantial legal barriers to individuals manifesting gender identity openly and safely.

RECORDS AND CERTIFICATES OF BIRTH

Under s.17 of the Registration of Births and Deaths Act, registrars are required to ascertain every birth within their district and record the particulars according to the prescribed form set out in Schedule 1 to the Act. That form requires the registrar to record the child's gender as either male or female – there is no possibility for alternative gender options. This initial document is not the official birth certificate, but it does form the basis of the formal records held by the general register office.

Under s.40(2) of the Act, individuals can request a sealed birth certificate from the relevant office. The prescribed version of the certificate in Schedule 1 discloses a person's gender. The registrar, in drawing up the certificate, must provide a true and accurate reflection of the information contained in the original records held in the general register office.

As a result, unless the underlying registration forms are altered, an individual's birth certificate will always reflect their assigned gender at birth. Although s.35 of the Act does empower the General Registrar to amend the recorded information in limited circumstances, this generally relates to "minor clerical errors". Any other "error" can only be corrected by a Magistrate under s.35(3) of the Act if, after taking evidence under oath, the Magistrate is satisfied that an error has been committed and that it is appropriate to issue a direction for alteration of the records.

There is no indication that the s.35 procedure has ever been used to alter records to recognise an individual's self-identified gender, or that an applicant has even attempted to make such a request. While it may, on a broad interpretation, be possible to read the term "error" as encompassing disputes over an individual's gender identity, it would require domestic courts to accept a distinction between a child's perceived gender identity at birth and their actual gender identity which has manifested itself later in life. Such arguments are likely to encounter resistance on the basis of the Act's prescribed forms, which refer to the child's sex, rather than their experience of gender.

The lack of any overt non-discrimination, equal treatment or human rights framework for trans persons in Guyana²²² indicates that national judges are unlikely to confirm entitlements to gender recognition. Indeed, the prevailing criminalisation of non-heterosexual orientations, and non-cisgender identities, means that accessing Guyanese courts is a significant challenge for trans persons. There is evidence that a number of trans persons have been denied access before Magistrates courts because of the supposed impropriety of their dress (eg: a trans woman wearing female clothing).²²³ In a number of these cases, the trans individuals were appearing in court as victims of assault.

218 Chapter 44:01.

219 See: National Registration Act, Chapter 19:08.

220 Chapter 8:02.

221 *McEwan & Others v Attorney General of Guyana* [2018] CCJ 30 (A).

222 This lack of existing rights frameworks is subject to the domestic incorporation of international human rights treaties (see below).

223 Georgetown Law Human Rights Institute, *Trapped: Cycles of Violence and Discrimination against Lesbian, Gay, Bisexual and Transgender Persons In Guyana* (Georgetown Law Human Rights Institute 2018) 81.

F. Guyana cont

IDENTITY CARDS

In addition to the system for registering births, Guyanese law provides for a mandatory system of civil registration and identity cards. The National Registration Act²²⁴ (the Registration Act) establishes a system of registration districts, areas and divisions²²⁵ to be administered by the Commissioner of Registration²²⁶. Registration is mandatory for all persons who are able to vote and for all other persons in Guyana who have reached the age of 14 years.²²⁷ Anyone who refuses to make an application for registration in the prescribed manner or fails to do so without reasonable excuse will be liable to conviction.

Form R 01 requires individuals seeking registration to disclose their sex and, under the terms of para. 6(2) (b) of the National Registration (Residents) Regulations (the Regulations), furnish the registration officer with documentary proof of their details in *Form R 01*. The Regulations oblige individuals to submit a copy of their birth certificate which, in keeping with the legal framework already set out, will disclose an individual's assigned gender at birth. Those records form the basis of the identification cards and the particulars disclosed therein – including a person's gender status.

Paragraph 14B(1) of the Regulations permits alterations to the underlying records, but only where the individual “changes his name or other particulars *in a manner recognised by the law* for the time being” [emphasis added]. Any amendment to the identification card or registers done without lawful authority is a criminal offence. In the absence of any gender recognition law, a person's identification cards will disclose their birth assigned, rather than their affirmed, identity.

CRIMINALISATION AND CROSS-DRESSING LAWS

The Summary Jurisdiction (Offences) Act (the Summary Jurisdiction Act)²²⁸ has historically been used to suppress lesbian, gay, bisexual and trans populations in Guyana. Provisions relating to, amongst others, vagrancy²²⁹ and loitering²³⁰ are disproportionately invoked to limit public expressions of non-heterosexual and non-cisgender identities.²³¹ In particular, Guyanese authorities have relied upon s.153(1)(xlvii) of the Summary Jurisdiction Act to prevent persons with a male legal gender from wearing supposedly “female attire” and individuals with a female legal gender from wearing supposedly “male attire” – where use of that clothing was for an “improper purpose.”

In November 2018, the Caribbean Court of Justice (CCJ) delivered a landmark opinion in *McEwan & Others v Attorney General of Guyana*,²³² concerning the prosecution and conviction of four trans persons for cross-dressing. The appellants had been convicted by the Chief Magistrate, who commented that they were “confused about their sexuality”, “men and not women” and that they “must go to church and give their lives to Jesus Christ”.²³³ Both the High Court and Court of Appeal confirmed the constitutionality of the Chief Magistrate's decision.

The CCJ issued a declaration of invalidity in respect of s.153(1)(xlvii) on the grounds that the provisions violated rights to equality, non-discrimination and freedom of expression. According to the Court, the law amounted to “stigmatisation of those who do not conform to traditional gendered clothing” which “criminalizes aspects of their way of life”.²³⁴ The State's defence that the statute only criminalised cross-dressing for an improper purpose was rejected as hopelessly vague,²³⁵ an unjustified accusation against the appellants on the facts²³⁶ and having an unjustifiable chilling effect on the expression of gender identity by acting as a “convenient tool to justify the harassment of such persons”.²³⁷

224 *Ibid.*, n.219

225 *National Registration Act*, ss.5 – 6.

226 The Commissioner of Registration is an office established by s.3 of the National Registration Act. The Commissioner is responsible to the Elections Commission.

227 *National Registration Act*, s.6(1).

228 Chapter 8:02.

229 *Ibid.*, s.143.

230 *Ibid.*, s.153(1)(xlvii).

231 Christopher Carrico, *Collateral Damage: The social impact of laws affecting LGBT persons in Guyana* (University of the West Indies 2012) 15 and 22.

232 [2018] CCJ 30 (A).

233 Judgment of Chief Justice Ian Chang, *McEwan & Others v Attorney-General* [6 September 2013].

234 [2018] CCJ 30 (A), [72].

235 *Ibid.*, [85].

236 *Ibid.*, [78].

237 *Ibid.*, [79].







The CCJ held that the “savings law clause” in s.152 of the Guyanese Constitution did not immunise s.153(1)(xlvii) of the Summary Jurisdiction Act from constitutional review. The savings clause is a provision common to a number of Caribbean States, which secured their independence from the United Kingdom. It was understood to mean that laws passed prior to independence could not be found to be inconsistent or incompatible with human rights provisions guaranteed by the post-independence Constitution. Instead, the CCJ held that the savings clause had to be interpreted narrowly and, on the basis of the particular legal framework in Guyana, did not prohibit constitutional review of s.153(1)(xlvii).²³⁸

While the judgment represents an important moment for trans rights in Guyana and the Caribbean, it is unclear whether it will encourage further legal challenges to Guyanese law.

FUTURE REFORM

At the present time, Guyanese authorities have no plans to introduce a comprehensive framework addressing legal gender recognition. Despite a 2015 manifesto commitment by the current governing coalition to put “in place measures which will ensure that all vulnerable groups in our society, including... those marginalised because of sexual orientation are protected and not discriminated against”,²³⁹ no significant legislative changes have been secured during the current administration. In July 2019, the Minister of Social Protection²⁴⁰ gave a statement to the Committee for the Elimination of Discrimination Against Women that the Government recognised its “responsibility to ensure that legal gaps are removed to prevent discrimination based on sexual orientation and gender identity” and was “working towards the path to filling these gaps.”

Requirements for Legal Gender Recognition in Guyana

	Legal Gender Recognition	No
	Medical Requirements	N/A
	Prohibition of Minors	N/A
	Restrictions on Minors	N/A
	Non-Binary Gender	N/A
	Divorce Requirement	N/A

²³⁸ Ibid., [60].

²³⁹ A Partnership for National Unity + Alliance for Change, *Manifesto: Elections 2015* (26 April 2015) http://caribbeanelections.com/eDocs/manifestos/gy/apnu_afc_manifesto_2015.pdf (accessed 24 August 2019).

²⁴⁰ The Honourable Amna Ally, ‘Statement to the Committee for the Elimination of Discrimination Against Women’ (July 2019).

G. Malta



INTRODUCTION

In Malta, the law regulating gender recognition is set out in the Gender Identity, Gender Expression and Sex Characteristics Act (the Act).²⁴¹ Adopted by the Maltese parliament in April 2015, the Act establishes a comprehensive framework for amending legal gender, ensuring privacy rights, tackling LGBT+ discrimination²⁴² and protecting persons who experience intersex. Since its enactment, the Act has served as a model for reform in other European jurisdictions.²⁴³ It is regularly cited by international and regional actors as an example of “best practice” for trans and non-binary human rights.²⁴⁴

RIGHT TO GENDER IDENTITY

A comparatively unique feature of the Gender Identity, Gender Expression and Sex Characteristics Act is that it expressly acknowledges the protection of bodily autonomy and gender self-determination. Although Malta is not the first jurisdiction to de-medicalise legal gender recognition procedures²⁴⁵, the Maltese legislation is striking for the extent to which it foregrounds physical integrity and gender identity as core guarantees. Article 3 of the Act affirms that all citizens of Malta are entitled to “the recognition of their gender identity”²⁴⁶, “the free development of their person according to their gender identity”²⁴⁷ and “bodily integrity and physical autonomy”.²⁴⁸ Article 3 establishes the overarching rights framework in which access to gender recognition in Malta is to be understood.

SELF-DECLARATION

Through the Gender Identity, Gender Expression and Sex Characteristics Act, Malta became the first Commonwealth jurisdiction (and the second country in Europe²⁴⁹) to allow individuals to amend their legal gender by a process of self-declaration. This means that, in Malta, individuals obtain legal gender recognition through a voluntary, administrative procedure without having to satisfy pre-conditions, such as medical interventions. Article 3(3) of the Act affirms that “[t]he gender identity of the individual shall be respected at all times”.

Article 4 of the Act establishes the process through which individuals can apply to have their self-identified gender officially recognised. A person who wishes to change their legal gender in Malta must submit a formal request to the Director of Public Registry (the Director).²⁵⁰ This request takes the form of a “note of enrolment” which is filed with the Director by a notary.²⁵¹ The applicant draws up a public declaratory deed with the notary, in which the applicant includes all relevant particulars, including their act of birth, intended gender, intended name (if they require a name change) and a “clear, unequivocal and informed declaration... that [their] gender identity does not correspond to the assigned sex in the act of birth.”²⁵² Once all the required information and declarations are received, the notary files a “note of enrolment” with the Director.²⁵³ The Director must enter – no later than 15 days after the filing – the relevant note in the applicant’s act of birth, thereby legally acknowledging

241 ‘Gender Identity, Gender Expression and Sex Characteristics Act’ (Government of Malta Website)

https://meae.gov.mt/en/Public_Consultations/MSDC/Pages/Consultations/GIGESC.aspx (accessed 17 August 2019).

242 *Ibid.*, art. 13. This section focuses on legal gender recognition with the Gender Identity, Gender Expression and Sex Characteristics Act.

243 Peter Dunne and Marjolein van den Brink, *Trans and intersex equality rights in Europe – a comparative analysis* (Publications Office of the European Union 2018) 55-68.

244 See eg: Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity (12 May 2018) UN Doc No. A/HRC/38/43.

245 See: Zhan Chiam, Sandra Duffy and Matilda González Gil, *Trans Legal Mapping Report* (ILGA 2017).

246 Gender Identity, Gender Expression and Sex Characteristics Act, art. 3(1)(a).

247 *Ibid.*, art. 3(1)(b).

248 *Ibid.*, art. 3(1)(d).

249 Denmark adopted self-declaration in 2014, see: Amendment Act L182 (2014).

250 Gender Identity, Gender Expression and Sex Characteristics Act, art. 4(1).

251 *Ibid.*, art. 4(2) and (4).

252 *Ibid.*, art. 5(1).

253 *Ibid.*, art. 4(2) and (4).

the applicant's self-identified gender.²⁵⁴ Article 5(2) of the Act reiterates that the notary "shall not request any psychiatric, psychological or medical documents for the drawing up of the declaratory public deed", while Article 4(3) confirms that the "Director shall not require any other evidence other than the declaratory public deed published".

From the date of entry of the note by the Director on the act of birth, the applicant is considered to belong to the gender indicated in the note.²⁵⁵ This entitles the applicant to request a "full certificate of the act of birth" which shows their affirmed gender status.²⁵⁶ It also permits applicants to ask for the reissuance of other documentation – such as the national Identity Card – with the correct gender markers.²⁵⁷

While Article 6 of the Act declares that post-recognition, an individual has their self-identified gender "for all purposes of the law", there are – consistent with other Commonwealth jurisdictions²⁵⁸ – a number of notable exceptions. For example, under Article 3(2)(a) of the Act, amending legal gender does not affect "a person's rights, relationship and obligations arising out of parenthood or marriage." Where an individual, prior to being formally acknowledged, has become a parent, gender recognition does not terminate (nor does it allow them to automatically relinquish) their entitlements and responsibilities. Similarly, entering the note in the applicant's act of birth cannot change "rights arising out of succession" and "any personal or real right already acquired by third parties or any privilege or hypothecary right of a creditor."²⁵⁹

GENDER RECOGNITION AND CHILDREN

Another unique feature of the Gender Identity, Gender Expression and Sex Characteristics Act is the fact that the law provides a comprehensive regime for the formal acknowledgement of children (a feature that, as noted, it shares with the law in New Zealand). Although most European jurisdictions restrict gender recognition to persons who have achieved the age of majority,²⁶⁰ Malta provides a two-tier recognition model under which any young person, irrespective of age, may potentially amend their gender status.

The requirements for acknowledging the affirmed gender of children in Malta are set out in Article 7 of the Act. Article 7(1), read in conjunction with Article 2, limit the specific child-focused requirements to "minors" – defined as individuals who have "not yet attained the age of 16 years."²⁶¹ This means that, although Maltese law imposes stricter conditions for acknowledging the legal gender of younger adolescents, all persons who are 16 years or older can obtain legal gender recognition, like their adult peers, through a process of self-determination.

For children who have not reached 16 years, Article 7 of the Act provides a specific framework whereby individuals with parental authority (or the tutor of the minor) can make an application on the young person's behalf.²⁶² Unlike the general recognition procedure, requests to amend legal gender under Article 7 are made through a judicial, rather than administrative, process – with consent from Malta's Civil Court being a mandatory pre-condition.²⁶³ Human rights considerations play a central role when courts are asked to legally recognise the self-identified gender of children, with judges obliged to both "ensure that the best interests

254 *Ibid.*, art. 4(4).

255 *Ibid.*, art. 6.

256 *Ibid.*, art. 4(6)(a).

257 *Ibid.*, art. 10(1) and (2).

258 See eg: Gender Recognition Act 2004, ss.12 and 20.

259 Gender Recognition, Gender Expression and Sex Characteristics, arts.3(2)(b) and (c).

260 Peter Dunne and Marjolein van den Brink, *Trans and intersex equality rights in Europe – a comparative analysis* (Publications Office of the European Union 2018) 66-67.

261 Gender Recognition, Gender Expression and Sex Characteristics, art. 2.

262 *Ibid.*, art. 7(1).

263 *Ibid.*

G. Malta cont

of the child as expressed in the Convention on the Rights of the Child be the paramount consideration” and to “give due weight to the views of the minor having regard to... age and maturity.”²⁶⁴ Where the Civil Court permits an application, the Director must duly enter a note on the child’s act of birth.²⁶⁵

The Gender Identity, Gender Expression and Sex Characteristics Act explicitly recognises a situation where those exercising parental responsibility (or a tutor) may not have registered a child’s gender identity. Under Article 7(4) of the Act, if those with parental authority (or the tutor) have not registered the child’s gender at birth, they must do so by applying to the Civil Court (Voluntary Jurisdiction Section) before the child reaches the age of 18 years. In making such an application, the person exercising parental responsibility (or the tutor) should act with the “express consent of the minor, taking into consideration the evolving capacities and the best interests of the minor.”

There is one final, child-orientated feature of the Gender Identity, Gender Expression and Sex Characteristics Act worthy of note. Article 14 makes it a criminal offence for medical professionals to conduct non-therapeutic “genital normalising”²⁶⁶ surgeries on infants who experience intersex variance. According to Article 14(1) of the Act, “[i]t shall be unlawful for medical practitioners or other professionals to conduct any sex assignment treatment and/or surgical intervention on the sex characteristics of a minor which treatment and/or intervention can be deferred until the person to be treated can provide informed consent.” Where an individual contravenes this prohibition, they are potentially liable to both a term of imprisonment and a monetary fine.²⁶⁷ While the issue of intersex healthcare is separate from trans affirmation, an increasing number of human rights advocates have called for similar restrictions to be adopted in other jurisdictions.

In exceptional circumstances, Article 14 of the Act does permit individuals exercising parental authority (or a tutor), acting in consultation with an interdisciplinary medical team, to provide informed consent for genital surgeries, even where an infant is not able to agree.²⁶⁸ However, in such a scenario, “social factors” (eg: parental distress, fear of future discrimination, etc.) cannot be a sufficient justification for intervention.²⁶⁹

NON-BINARY GENDER RECOGNITION

Since September 2017, it has been possible for individuals to apply for Maltese passports and Identity Cards with a male, female and “other” gender marker.²⁷⁰ This alternative option is intended to cater for Maltese citizens who do not experience their gender as male or female and who would like to have their lived identity formally acknowledged on their identity and travel documentation.

Where an applicant for a passport or Identity Card selects the “other” gender option, their gender is represented by an “X” symbol on the document that they receive.²⁷¹ In order to obtain the “X” gender marker, an individual must draw up, before a notary, a declaration as to their gender identity. The notarised declaration is submitted with the general application for the passport or Identity Card. Under Article 9(2) of the Gender Identity, Gender Expression and Sex Characteristics Act, a “gender marker other than male or female, or the absence thereof, recognised by a competent foreign court or responsible authority acting in accordance with the law of that country is recognised in Malta.”

264 Ibid., art. 7(2)(a) and (b).

265 Ibid., art. 7(3).

266 Such surgeries are typically performed to physically alter the genitalia of persons who experience intersex so as to bring their genitalia into conformity with social expectations for “male” and “female” bodies. However, in some circumstances, such interventions may be medically necessary and have an agreed therapeutic purpose. For more, see: Commissioner for Human Rights of the Council of Europe, Human rights and intersex people: Issue paper (Council of Europe of Europe 2015).

267 Gender Identity, Gender Expression and Sex Characteristics Act, art. 14(2).

268 Ibid., art. 14(3).

269 Ibid.







270 See eg: *Application for a Malta Passport*, Identity Malta website available at: <https://identitymalta.com/wp-content/uploads/2017/09/FORMA.pdf> [accessed 17 August 2019].

271 Zhan Chiam, Sandra Duffy and Matilda González Gil, *Trans Legal Mapping Report* (ILGA 2017) 68.

DATA PROTECTION AND PRIVACY

The Gender Recognition, Gender Expression and Sex Characteristics Act contains a number of safeguards to protect the data and trans history of individuals who apply for gender recognition. First, under Articles 4(6) and (7) of the Act, where the Director receives a request for a new act of birth, the Director is – within seven days of that request – prohibited from disclosing the applicant’s original birth information, unless the applicant consents to such disclosure or such disclosure is ordered by a court. Second, under Article 11(1) of the Act, a person who knowingly exposes another who has obtained gender recognition is liable to a monetary fine up to €5,000. Finally, according to Article 12 of the Act, any individual who “in the course of the discharge of official duties was involved with a matter relating to [the] Act”, is prohibited from “disclosing such matter”.

Requirements for Gender Recognition in Malta

	Legal Gender Recognition	Yes
	Medical Requirements	No
	Prohibition of Minors	No
	Restrictions on Minors	Yes*
	Non-Binary Gender	Yes**
	Divorce Requirement	No

* Minors (defined as individuals under 16 years of age) must apply for gender recognition through those who exercise parental responsibility or a tutor.

** Individuals who do not identify as male or female can apply for a passport or identity card with an “X” gender marker.

H. Legal invisibility: absence of gender recognition frameworks

The seven Commonwealth jurisdictions explored in sections A-G provide a broad overview of the gender recognition frameworks that exist across the Commonwealth. From models of self-determination (Malta) to surgery-focused requirements (Namibia), and from a broad spectrum of amendment-orientated procedures (India) to a country without any affirmation process (Guyana), Part 2 has demonstrated the diverse legislative approaches which exist across the Commonwealth.

In Part 3, the report analyses the various requirements for recognition which exist across the Commonwealth and assesses those pre-conditions against the international standards of human rights outlined in Part 1. However, before proceeding to these comparisons and conclusions, it is important to acknowledge that although this report has focused (largely) on Commonwealth countries which acknowledge self-identified gender (Malaysia and Guyana being two exceptions), the existence of formal gender recognition laws is still not standard practice in a large number of Commonwealth countries.

This report has considered the manner in which domestic legal and policy drafters have formulated laws to recognise and protect gender identity within their respective national legal frameworks. It has provided different examples from across the Commonwealth, illustrating how lawmakers in geographically and culturally diverse settings have created structures to validate gender identity. Yet, the report is conscious that, for many countries throughout the various Commonwealth regions, the primary task of introducing gender recognition frameworks remains the central goal.

The report does not seek to overlook the extent to which many trans and non-binary persons still live in positions of legal invisibility across the Commonwealth. While the report presents legal gender recognition models which have been adopted by certain member states, it is important to highlight that these “comparative practice” examples have only limited relevance where even basic recognition of gender identity remains absent.

COUNTRIES WITH NO GENDER RECOGNITION LAWS²⁷²

The right to legal recognition begins with the fundamental acknowledgement that trans and non-binary persons should be affirmed, and permitted to live, according to their internalised experience of gender. As Part 1 makes clear, the entitlement to legal gender recognition is an accepted norm of international human rights law. It has been embraced by countless actors – both within the international human rights system and by regional adjudicators. In addition to the recommendations for formulating laws to enable legal transition (set out in Part 3), this report encourages domestic policymakers to adopt and implement legal gender recognition guarantees.

There is evidence that in certain regions across the Commonwealth, policy and judicial actors are engaging in discussions about gender and sexual diversity. In the Caribbean, for example, constitutional and human rights litigation has begun to make tangible changes for lesbian, gay, bisexual and trans persons, with, for example, the decriminalisation of homosexuality in Belize and Trinidad and Tobago following the cases of *Caleb Orozco v Attorney General of Belize*²⁷³ and *Jones v Attorney General of Trinidad and Tobago*²⁷⁴. These advances are not just confined to homosexuality, but, as the section on Guyana illustrates, have extended to decriminalisation of gender identity expression.

²⁷² The list includes some countries where a change of legal gender marker is theoretically possible under domestic law, but where research on the country has given no indication that the law is used in such a way.

²⁷³ High Court of Belize (10 August 2016).

²⁷⁴ High Court of Trinidad and Tobago (12 April 2018).

Looking at the overall picture, however, much progress remains to be achieved. For many of the jurisdictions noted in the list on page 42, there is little (if any) publicly available material on trans and non-binary individuals, and there is no evidence that national policymakers have engaged with the question of legal gender recognition. As noted in the Namibian chapter, criminalisation and persecution of LGBT+ populations often negatively impact even the capacity for constructive conversations about trans and non-binary equality. In this regard, Malaysia stands as a useful case study where, despite the existence of legal mechanisms which could potentially facilitate positive reform, broader social and cultural factors militate against significant advancement towards gender recognition. In this jurisdiction, and those other Commonwealth countries which refuse affirmation to preferred gender, there is an urgent need to recognise their responsibilities under international human rights law.

Countries with no gender recognition laws

Commonwealth Africa

Cameroon
eSwatini
The Gambia
Ghana
Kenya
Lesotho
Malawi
Mauritius
Mozambique
Nigeria
Rwanda
Seychelles
Sierra Leone
Tanzania
Uganda
Zambia

Commonwealth Asia

Brunei
Malaysia

Commonwealth Caribbean & the Americas

Antigua and Barbuda
The Bahamas
Belize
Dominica
Grenada
Guyana
Jamaica
Saint Kitts and Nevis
Saint Lucia
Saint Vincent and the Grenadines
Trinidad and Tobago

Commonwealth Pacific

Fiji
Kiribati
Nauru
Papua New Guinea
Samoa
Solomon Islands
Tonga
Tuvalu
Vanuatu

3.

Comparisons, conclusions and recommendations

Comparisons, conclusions and recommendations

Having surveyed the gender recognition rules across seven Commonwealth countries this final part of the report provides comparisons, conclusions and recommendations on gender recognition rights. Analysing existing gender recognition laws against current international human rights standards, Part 3 identifies models of good practice and seeks to provide workable, rights-conscious guidance for domestic policymakers. Part 3 does not seek to identify one, optimal legal model for gender recognition, nor does it seek to censure more restrictive legal attitudes towards affirming lived gender. Rather, understanding the rich social and cultural diversity which forms the basis of the Commonwealth community, this part highlights key themes and offers practical recommendations for future reform.

RECOMMENDATION 1

All Commonwealth countries should formulate a legal framework through which individuals can obtain formal recognition of their gender.

Surgery, sterilisation and hormone treatments

The most common feature across the countries surveyed for this report – and among other Commonwealth jurisdictions with gender recognition laws – is the requirement that applicants must physically alter their bodies through medical intervention. In Namibia, South Africa, New Zealand and India, a person cannot officially amend their legal gender identity without evidence of healthcare treatments. These requirements manifest themselves in numerous ways: obligations to surgically alter genitalia, mandatory removal of internal sex organs; feminisation or masculinisation of external characteristics (eg: chest reduction or augmentation); sterilisation; and hormone therapies.

While an obligation to undertake gender confirming healthcare has long been a requirement for gender recognition, it raises key difficulties for many trans and non-binary individuals.

Medicine-focused entry conditions operate upon an assumption that all individuals who wish to alter their identity status also desire to physically amend their bodies.²⁷⁵ While this presumption may be correct for some trans and non-binary persons, it does not accurately reflect the view of many other persons, who are comfortable with their natural characteristics.²⁷⁶ There is no such thing as a “standard” transition narrative and law makers should not assume that all trans and non-binary persons experience their gender identity as a physical concern. Gender recognition laws, which are grounded in physical intervention, may require applicants to undergo medical treatment, which is neither necessary nor welcome.²⁷⁷

Medical requirements place gender recognition outside the reach of many trans and non-binary persons. Such pre-conditions incorrectly assume that all applicants for affirmation have access to gender confirming healthcare. However, evidence from across the Commonwealth illustrates that, rather than being freely obtainable, gender-focused treatments (including surgery and hormones) are not available to large sections of the trans and non-binary community.²⁷⁸

Gender confirming treatments are expensive and they are not affordable for many individuals who seek gender recognition. As such treatments are frequently excluded from public healthcare funding (eg: South Africa), there is no means by which many trans and non-binary persons can undertake the prescribed physical alterations.²⁷⁹ Second, in some cases, gender confirming medical interventions may be contra-indicated for a person, due to reasons of age or pre-existing illness. In those circumstances, irrespective of whether an applicant can pay for treatment, they will not be able to satisfy surgical or hormone requirements.²⁸⁰

275 This is a vast body of scholarly literature on the assumption of medicalisation, see eg: Sana Loue, “Transsexualism in medicolegal limine: an examination and a proposal for change” (1996) 24(1) *Journal of Psychiatry and Law* 27, 34.

276 Alice Newlin, “Should a Trip from Illinois to Tennessee Change a Woman into a Man? Proposal for a Uniform Interstate Sex Reassignment Recognition Act” (2008) 17(3) *Columbia Journal of Gender and Law* 461, 465.

277 See generally: *AP, Garçon and Nicot v France* App Nos. 79885/12, 52471/13 and 52596/13 [ECtHR, 6 April 2017].

278 See eg: Sandy E James and others, *The Report of the 2015 U.S. Transgender Survey* (NCTE 2016); European Union Agency for Fundamental Rights, *Being Trans in the EU: Comparative Analysis of EU LGBT Survey Data* (Publication Office of the European Union 2014); House of Commons Select Committee on Women and Equalities, *Transgender Equality* (The Stationery Office Limited 2016).

279 Maxine Rubin, *Right to Identity: The Implementation of the Alteration of Sex Description Act, in In Pursuit of Equality in South Africa* (Legal Resources Centre 2017).

280 See eg: *Schlumpf v Switzerland* App No. 29002/06 [ECtHR, 5 June 2009].

Finally, there may be geographic or religious considerations which prevent persons from physically altering their bodies. In many Commonwealth jurisdictions, (eg: Namibia), there are few (if any) providers of gender confirming healthcare. Where those medical practitioners are not geographically accessible for applicants, there will be no way to access the mandatory interventions. Similarly, as the analysis of Malaysia indicates, many communities of faith object to gender-orientated physical alterations, believing that they contravene key aspects of religious doctrine. For applicants, who have a religious commitment, they may feel unable to undertake gender confirming treatments, if such interventions will compromise their adherence to faith.

In recent years, medical requirements for gender recognition – particularly surgery and sterilisation – have been subject to increasing scrutiny from international and regional rights actors.²⁸¹ Such pre-conditions have been framed as an impermissible intrusion upon bodily integrity, and there is a growing body of jurisprudence which condemns these mandatory treatments as incompatible with core human rights guarantees.²⁸² Since 2004, a growing number of jurisdictions – both within the Commonwealth and around the world – have adopted gender recognition laws which exclude physical medical requirements, including states and provinces in Australia; Belgium; Brazil; California; Canada; Denmark; Iceland; Luxembourg; Malta; Mexico City; the Netherlands; Norway; Portugal; the United Kingdom and the United States.

RECOMMENDATION 2

Commonwealth countries should repeal requirements for physical medical intervention as a pre-condition for legal gender recognition.

Where Commonwealth countries maintain requirements for physical medical intervention as a pre-condition for legal gender recognition, they should ensure that applicants can obtain such treatments in an affordable and geographically accessible manner on the national territory.

Divorce requirements

In numerous jurisdictions analysed in this report, persons applying for legal gender recognition who are in a validly contracted marriage may be obliged to dissolve their union before obtaining official acknowledgement of their gender. While there is no definitive legal statement on the matter in the laws of either country, such “divorce requirements” appear to operate in both India and Namibia, and they formed part of the gender recognition rules in South Africa and New Zealand until the recent past. Divorce/annulment is also imposed by the authorities in other Commonwealth countries, which have not been discussed in this report (eg: Northern Ireland²⁸³).

The justification for divorce pre-conditions, as noted in the South African and New Zealand chapters, relates to concerns around opening the door to same-gender marriage. Across the Commonwealth, policymakers (and courts) have expressed concern that, if an individual in a different-gender marriage amends their identity status, this will give rise to a marital union where both spouses have either a male or female legal gender. For jurisdictions, such as Northern Ireland, which prohibit non-heterosexual marriage, such an outcome is legally troubling and gives rise to claims that gender recognition may become a backdoor for same-gender unions.

The legitimacy of divorce requirements remains a point of contention within international human rights law. While the European Court of Human Rights has suggested that – at least in certain scenarios – limited divorce or conversion obligations (eg: from marriage to civil partnership) may be permissible,²⁸⁴ this approach has been forcefully contradicted by the UN Human Rights Committee. In its recent Communication Decision, *G v Australia* (see Part 1), the Human Rights Committee suggested that divorce pre-conditions not only violate rights to private life; they also constitute discrimination on the grounds of marital and trans status.²⁸⁵ Across the Commonwealth, as this report attests (eg: Malta, New Zealand, South Africa, England and Wales, Scotland), an increasing number of jurisdictions are permitting married applicants to maintain their union through the legal transition process – although, it must be

281 See eg: Report of the Special Rapporteur on Torture and other cruel, inhuman or degrading treatment or punishment (1 February 2013) UN Doc No. A/HRC/22/53, [39].

282 *AP, Garçon and Nicol v France* App Nos. 79885/12, 52471/13 and 52596/13 (ECtHR, 6 April 2017); Inter-American Court of Human Rights, Gender identity, and equality and non-discrimination of same-sex couples, Advisory Opinion OC-24/17, Series A No. 24 (24 November 2017).

283 See: Gender Recognition Act 2004.

284 *Hamalainen v Finland* [2015] 1 FCR 379.

285 *G v Australia* Communication No. 2172/2012 (CCPR/C/119/D/2172/2012) (UN HRC, 15 June 2017) [s.7].

Comparisons, conclusions and recommendations cont

acknowledged that repeal usually only arises where the country has already adopted same-gender marriage.

There are also numerous policy arguments why requiring divorce is not good practice.²⁸⁶ First, involuntary dissolutions may render gender recognition inaccessible to happily married applicants. As the South African chapter illustrates, where national dissolution laws mandate an “irretrievable breakdown” (an element required in many domestic divorce statutes), this standard will not be available to trans persons who would only terminate their union to satisfy gender affirmation laws. Second, similar to discussions around medicalisation, although lawmakers might assume that a different-gender marriage will not survive a process of transition, this does not reflect the relationship experiences of many applicants. In some cases, committed couples do maintain their union through legal affirmation processes.²⁸⁷ For these persons, divorce requirements mandate an involuntary act of separation. Finally, “forced divorce” appears inconsistent with the best interests of children. Where minors grow up in a family where one parent seeks legal gender recognition, it is difficult to understand how that child is best served by mandating the dissolution of an otherwise stable parental relationship.

RECOMMENDATION 3

Commonwealth countries should repeal requirements for divorce as a pre-condition for gender recognition. Where divorce requirements are retained, alternative legal structures should be established which, as far as possible, protect and promote the family life of applicants, their spouses and any children of the family.

Gender recognition and children

A noticeable feature of the seven jurisdictions surveyed for this report is the extent to which trans youth are absent. Although Malta and New Zealand make specific provision for child applicants, the other jurisdictions make no reference to young trans identities – with an implicit suggestion that child applications are unlikely to be entertained.

As with all questions about lesbian, gay, bisexual and trans identities, the status and rights of trans youth are topics of acute sensitivity. Within the spheres of law, policy and academia, there is ongoing debate

as to whether and how law should approach gender diversity in youth. While numerous practitioners, lawmakers and scholars encourage the affirmation of trans experiences in childhood,²⁸⁸ others express doubts about the persistence of non-cisgender identities prior to adulthood.²⁸⁹ They also voice concern about the possibility of mis-identifying children as trans or non-binary. Although an increasing body of medical and social science research indicates the positive impact of affirmation, policymakers, both across the Commonwealth and in other regions, continue to tread with caution on this emerging issue.²⁹⁰

Reflecting domestic jurisprudence in this area, international human rights law has been slow to offer definitive guidance on the rights and entitlements of trans youth. At the regional levels, there have been no cases which explore the protection of trans and non-binary youth. In recent years, the UN Committee on the Rights of the Child has taken a more active stance. The Committee has called upon states to ensure respect and validation for gender identity in youth.²⁹¹ However, as yet, the Committee has not engaged in a substantive discussion of how policymakers should construct gender recognition laws for children.

In the wake of the Gender Identity, Gender Expression and Sex Characteristics Act, Malta has been praised for adopting a child-inclusive affirmation system, which acknowledges and respects the central role of parents/guardians. Under the Maltese system, there is no age-limit for amending gender status in the domestic birth register. However, in order to obtain legal recognition, a young person must apply through their guardian or tutor – the law does not allow persons under the age of 16 years to make unilateral applications. Similarly, unlike the normal (administrative) application procedure for adults, requests to alter the legal gender identity of children must be heard by the Maltese courts, ensuring an additional level of protection for young persons. Finally, when determining whether to permit a minor to amend their legal gender, the courts will use the “best interests of the child” as the guiding principle and will “give due weight to the views of the minor having regard to the minor’s age and maturity”.²⁹²

Adopting a more restrictive regime than applies to adult applicants, the Maltese law appears to strike a fair balance between the rights of trans children – who may experience significant hardship without gender

286 Peter Dunne, “(Trans) Marriage Equality? Challenging Europe’s Marital ‘Dissolution Requirements’” (2016) 28(4) *Child and Family Law Quarterly* 325.

287 See eg: Jennifer Levi, “Divorce and Relationship Dissolution” in Jennifer Levi and Elizabeth Monnin-Browder (eds), *Transgender Family Law: A Guide to Effective Advocacy* (Author House 2012) 87.

288 See eg: Diane Ehrensaft, “From Gender Identity Disorder to Gender Identity Creativity: True Gender Self Child Therapy” (2012) 59(3) *Journal of Homosexuality* 337; Lily Durwood, Katie McLaughlin and Kristina Olson, “Mental Health and Self-Worth in Socially Transitioned Transgender Youth” (2017) 56(2) *Journal of the American Academy of Child and Adolescent Psychiatry* 116.

289 Kenneth J Zucker and Susan J Bradley, *Gender Identity Disorder and Psychosexual Problems in Children and Adolescents* (Guilford Press 1995).

290 Annelou de Vries and others, “Young Adult Psychological Outcome After Puberty Suppression and Gender Reassignment” (2014) 134(4) *Paediatrics* 696.

291 Committee on the Rights of the Child, “General comment No. 20 (2016) on the implementation of the rights of the child during adolescence” (6 December 2016) UN Doc No. CRC/C/GC/20, [34].

292 Gender Identity, Gender Expression and Sex Characteristics Act, art. 7(2)(b).

affirmation – and the legitimate interest of the state in protecting the safety, wellbeing and integrity of young citizens. For policymakers across the Commonwealth who are considering youth recognition models seeking to protect young people and while maintaining an appropriate role for parents, the Maltese example is preferable to the framework set out in s.29 of the Births, Deaths, Marriages and Relationships Registration Act 1995 in New Zealand. Consistent with broader gender recognition procedures in that jurisdiction, s.29 contemplates a medicine-focused process of legal gender affirmation for children. Not only might this be inconsistent with the desires of young trans and non-binary youth – many of whom express satisfaction with their natural bodies – it would also appear to prematurely medicalise youth gender identities, a requirement which does not accord with international standards.

RECOMMENDATION 4

Commonwealth countries should consider options for legally recognising the self-identified gender of persons under the age of majority. Any rules for legally recognising minors should be guided by the “best interests of the child” and should take account of the evolving capacities of young applicants.

Where Commonwealth countries choose to exclude minors from national gender recognition frameworks, they should ensure that the gender identity of children is adequately protected through domestic non-discrimination legislation, particularly in the fields of education, healthcare, access to goods and services, and participation in sporting activities.

Non-binary gender identity

Commonwealth countries are comparatively unique in that, among their ranks, there includes many of the (small number of) jurisdictions which formally acknowledge preferred gender beyond male and female identities. Within this report, Malta, India and New Zealand all provide legal documentation (usually through the provision of an “X” gender marker) which affirms alternative experiences of identity. While in the case of India, non-binary gender options reflect an historical understanding of gender, and developments in both New Zealand and Malta have arisen from more contemporary debates surrounding the politics of non-binary identities.

At present, there is very little international or regional human rights jurisprudence offering guidance on the necessity (or otherwise) of non-male and non-female gender options. In Europe, the German²⁹³, Austrian²⁹⁴ and Belgian²⁹⁵ superior courts have all mandated national legislatures to create frameworks for non-binary gender experiences (although in Austria and Germany, “X” gender markers are limited to individuals who experience intersex variance). These judgments stand in contrast to case law from England²⁹⁶ and France²⁹⁷, where the judiciary – while sympathetic to the claims of litigants – has not been willing to require additional legal categories.

For policymakers across the Commonwealth, non-binary recognition stands at the frontier of gender recognition debates. In particular, for those jurisdictions which are grappling with the preliminary question of whether they should permit any gender alterations, the concept of “X” gender markers may appear far removed from their current policy discussions.

Yet, as research increasingly suggests, a growing number of (particularly young) trans-identified persons experience their gender as outside male and female categories, and as human rights actors increasingly acknowledge the importance of validating internal experiences of gender (however that gender may manifest itself), there is an imperative for domestic lawmakers to explore alternative classifications.

New Zealand, Malta and India illustrate that such accommodation may best be achieved through the official affirmation of additional gender categories. In other Commonwealth countries, alternative strategies, including reducing instances where legal gender is recorded and publicly displayed, may work better.²⁹⁸ Whatever the approach, there is a growing need to engage with issues surrounding non-binary gender. Such discussions reflect the rapidly evolving dynamics of trans populations across the Commonwealth.

RECOMMENDATION 5

Commonwealth countries should explore mechanisms – legal, administrative and social – for acknowledging and validating the identities of non-male and non-female gender identities within their jurisdictions and should consider the extent to which it remains appropriate and necessary to register and record gender status within legal and administrative processes across their jurisdiction.

²⁹³ Federal Constitutional Court of Germany, 1 BvR 2019/16 (10 October 2017).

²⁹⁴ Constitutional Court of Austria, VfGH G 77/2018 (15 June 2018).

²⁹⁵ Constitutional Court of Belgium, 12.3.20190619Judgment 99/2019 (2019).

²⁹⁶ *R (On the Application of Christie Elan-Cane) v Secretary of State for the Home Department* [2018] EWHC 1530 (Admin).

²⁹⁷ Court of Cassation of France, N° 16-17189 (4 May 2017).

²⁹⁸ This is a suggestion that has been endorsed by the House of Commons Select Committee on Women and Equalities: see: House of Commons Select Committee on Women and Equalities, *Transgender Equality* (The Stationery Office Limited 2016) [294] – [299].

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