

LEGAL GENDER RECOGNITION IN MALAYSIA

A LEGAL & POLICY REVIEW
IN THE CONTEXT OF HUMAN RIGHTS



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ABOUT THE ORGANISATIONS

The Asia Pacific Transgender Network (APTN) was launched in December 2009, when 15 transgender women from 10 Asia and Pacific countries and regions came together to champion the health, legal and social rights of transgender women. A milestone in the history of transgender people in the region, they demanded recognition as a distinct demographic group with their unique needs, separate from the MSM umbrella. In 2011, a transgender man drew attention to the need to advocate for transgender men too and joined the APTN Board. APTN provides a platform for transgender people to voice their views at meetings and workshops, in advocacy development, programme planning, implementation and evaluation of projects, and to promote their inclusion in National Strategic Plans and development partners' action plans.

Pertubuhan Pembangunan Kebajikan dan Persekitaran Positif Malaysia (SEED Malaysia) was founded in April 2014. It is the 1st trans-led civil society organisation in a country where being transgender is criminalised. SEED Malaysia is committed to empowering trans people through skills and capacity development, providing access to a safe space, facilitating access to healthcare services and linking people to resources that will improve quality of life. In December 2016, SEED Malaysia was awarded 'SUARAM Human Rights Award for Dedication and Perseverance to Human Rights and Justice'.

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INTRODUCTION [1.0]

LEGAL GENDER RECOGNITION IS ESSENTIAL IN ORDER TO ENSURE THAT TRANS PEOPLE CAN WORK, LIVE, PLAY, AND LEARN WITHOUT IMPEDIMENT, BARRIERS, AND DISCRIMINATION. IT IS CRUCIAL FOR TRANS COMMUNITIES TO THRIVE AND LIVE WITH DIGNITY.

A discrepancy between self-determined, lived gender and gender markers on documentation compounds, and in many cases has a causal link to, arrests, harassment, assault, and degrading treatment.

Discrepancies in legal documentation and expressed gender identity make trans people vulnerable to violations of their right to privacy¹, exclusion from full participation in society, including in the labour market, and inhuman and degrading treatment.²

As a result of being unable to change their sex assigned at birth, Malaysian trans people face numerous challenges and experiences of stigma and discrimination. Elaine illustrates:

“

It is impossible to change it (my gender) because it's against the law. I have trouble applying for loans and financial assistance. Medical practitioners treat us arrogantly and ask us irrelevant questions. If we need to be hospitalised, we are placed in the male ward, and we can't get hormones from public hospitals. – ELAINE (24 Years Old, Kuala Lumpur)

”

It has been emphasised that the very process of attempting to go through the courts for legal recognition, is a ‘legal shredding of self’ due to the scrutiny on intimate individual physicality and the reliance of outdated notions of sex and gender.³ Many trans people and groups have emphasised how discrepancies in identification documents result in exclusion from health, employment, and social services, and that this is a ‘public health priority’.⁴

There has been no previous documentation on the intersection between legal gender recognition and the impact on human rights in Malaysia. This report’s specific focus on laws, court decisions, and policies seeks to clarify the nexus between these issues. It is targeted primarily to policymakers, and seeks to be a useful advocacy tool for trans people working towards eliminating discrimination and ensuring legal gender recognition.

TRANSGENDER PEOPLE & ISLAM IN MALAYSIA [2.0]

THIS REPORT IS A REVIEW OF BOTH CIVIL AND SYARIAH LAW IN MALAYSIA. THE LATTER HAS A DIRECT IMPACT ON MUSLIM TRANS PEOPLE, BUT ALSO IMPACTS THE LIVES OF NON-MUSLIM TRANS PEOPLE.

AS A RESULT OF BEING UNABLE TO CHANGE THEIR SEX ASSIGNED AT BIRTH, MALAYSIAN TRANS PEOPLE FACE NUMEROUS CHALLENGES AND EXPERIENCES OF STIGMA AND DISCRIMINATION.

Trans people in Malaysia face systemic and widespread stigma and human rights violations. Muslim trans people are subject to arrests, harassment and assault from federal, state, and local Islamic religious authorities, and often avoid reporting these incidents for fear that the police will not protect them.⁵ Due to limitations in the separation of state and religion discussed below, state-enacted Islamic law affects the lives of non-Muslim trans people as well, with all trans Malaysians regardless of religion being unable to access gender affirmation surgery and obtain legal gender recognition.

A 2014 Human Rights Watch report documented multiple systemic human rights violations faced by trans people in Malaysia. The following quote, extracted from the report, is illustrative of arbitrary arrest and sexual violence faced by trans women in Malaysia:

“
I was picked up but I was not taken to the Religious Department. They touched me, molested me, and then allowed me to go. It wasn't an official raid. They were just going around in a car. They put me in the back seat of the car, between them. While [two of them] were touching my breasts and holding them, they asked, 'How did you get this done?' They drove around for about half an hour before they let me go. – ADIK (Negeri Sembilan)⁶

It should be noted, however, that many cases go unreported, and thus these experiences represent the tip of the iceberg, and the true scale of similar incidents are likely to be much larger.

Political attitudes towards trans people have been shaped by historical developments of increased religiosity brought on by, among others, emphasis by political leaders on Malay nationalism and Islamic supremacy.⁷ Given the ethnic diversity of Malaysia, this narrow identity definition has implications for current and future policies as it does not encapsulate the needs of a diverse population. In a 2012 speech to 11,000 imams and mosque committee leaders, the current Prime Minister Najib Razak branded lesbian, gay, bisexual and trans (LGBT) people as enemies of Islam.⁸ These interpretations of Islam have been strongly criticised in some quarters⁹, but

they continue to be the dominant narrative.

Other majority-Muslim jurisdictions have seen more compassionate approaches towards trans people. For example, a 2014 precedent-setting decision from the Lebanon Court of Appeals confirmed the right of a trans man to change his official papers, granting him access to necessary medical treatment and privacy.¹⁰ In September 2016, the United Arab Emirates legalised gender affirmation surgeries¹¹, contingent upon an individual receiving a gender dysphoria diagnosis and ‘psychological preparation’ for the surgery. While surgeries should not be a prerequisite for legal gender recognition¹², these developments from the Muslim world are a far cry from what is available in Malaysia.

Fieldwork conducted in the 1970s and the 1980s in the states of Kedah and Kelantan in Malaysia discovered that there was still considerable tolerance and respect for trans people by the wider community.¹³ However these practices have morphed with the passage of time, with increasing Islamisation and the use of religion as the basis for public policy.¹⁴



In 1989, pursuant to the 25th Discussions of the National Fatwa Committee, gender affirmation surgery was declared as haram (forbidden). Despite this declaration having no binding power in law, after attempting to outline the scientific rationale for gender affirmation surgeries¹⁵, the university hospital ceased providing such surgeries. This remains the position today, 27 years later. Depending on the subject matter, *fatwas* are given varying levels of importance. For example, the *fatwa* on cigarette use is generally ignored, in contrast with the *fatwa* on gender affirmation surgeries. This raises important questions as to why the *fatwa* against gender affirmation surgery was swiftly



ⁱ Gender Identity disorder is a diagnostic term in the World Health Organisation's International Classification of Diseases and Related health Problems (ICD).

ⁱⁱ WPATH is an international organisation consisting of over 600 physicians, psychologists, social scientists, and legal professional members engaged in research and/or clinical practice on trans issues. (<http://www.wpath.org/>)

ⁱⁱⁱ Classifying gender diversity as a mental illness is referred to as "psychopathologisation". It reinforces or can prompt stigma, making prejudice and discrimination against trans people more likely, and increasing vulnerability to social and legal marginalisation and exclusion. This increases risks to mental and physical well-being.

and stringently enforced compared to many other *fatwas*. Considering the widespread stigma and discrimination against trans people in Malaysia, including in the political sphere, it is not unlikely that hospitals faced considerable pressure to adhere to this *fatwa* over others. Furthermore, this *fatwa* remains relevant today with the increasing credence¹⁶ given to religious authorities in matters of public health, and whether these trespass into matters that are under Federal jurisdiction.

In 2008, similar rhetoric was used to justify the promulgation of a national *fatwa* against pengkid (females wearing clothes commonly attributed to that of males, and having the outward appearance of a male).¹⁷ This *fatwa* relates to gender expression and impacts on anyone assigned a female sex at birth, regardless of their gender identity or sexual orientation, though trans men and butch lesbians are two key groups affected.

In a 2015 parliamentary question¹⁸ to the Minister in charge of Islamic Affairs, it was asked whether the *fatwa* on gender affirmation surgery would be reviewed given recent developments in relation to the health classification of trans related issues.¹⁹ In response, the Minister stated that gender identity disorderⁱ meant that the individual was confused and that a person in such a situation should undergo 'medical and psychological' treatment and not necessarily surgery. This statement is inconsistent with current professional standards. The World Professional Association for Transgender Health (WPATH)ⁱⁱ states that the expression of gender and gender identities that are not stereotypically associated with one's assigned sex at birth should not be judged as inherently pathological or negative.^{iii, 20} WPATH, the World Health Organisation (WHO) and other professional bodies also state that transitional health services should be available for trans people who want them in order to be able to express their gender.²¹

Negative portrayals of LGBT people by state actors and the mainstream media compound the vulnerability of trans people and the lesbian, gay, and bisexual (LGB) community. In August 2015, the Malaysian Prime Minister Najib Razak compared LGBT groups to the terrorist organization ISIS, which is responsible for widespread human rights violations towards those who fail to adhere strictly to their ideology. The Prime Minister described ISIS' attempts to promote and spread their ideology as similar to LGBT groups' promotion of the human rights of LGBT persons.²²

Mainstream Malaysian media reinforce this unsubstantiated fear that LGBT people intend to spread their sexual orientations or gender identities to the wider population, despite these being innate characteristics. On 20 April 2016, for example, a Malay-language newspaper stated: 'Activities of lesbian, gay, bisexual, and transgender (LGBT) people are being introduced into Muslim communities.'²³





METHODOLOGY [3.0]

A NATIONAL EXPERTS' MEETING WAS HELD ON 10 JUNE 2016, WHERE THE STUDY METHODOLOGY AND ITS ASSESSMENT GUIDE WERE SHARED WITH TRANS PEOPLE, LAWYERS, ACADEMICS AND HEALTH PROFESSIONALS. SUBSEQUENTLY, A LITERATURE REVIEW WAS UNDERTAKEN OF SECONDARY MATERIALS ABOUT ANTI-DISCRIMINATION PROTECTION, CRIMINALISATION OF TRANS PEOPLE AND LEGAL GENDER RECOGNITION.

These included statutes, regulations, case law, media articles and reports. Where there were gaps in the literature, interviews were conducted via multiple means (Facebook messenger, email, WhatsApp, and in person). All interviewees provided verbal consent for inclusion of quotes within the report, and self-determined names to be attached to those quotes. A draft report was circulated prior to a second consultation workshop on 20 August 2016, where participants provided further input into the report.



LAWS, REGULATIONS, COURT DECISIONS & POLICIES: THEIR APPLICATION, ENFORCEMENT, IMPLEMENTATION & IMPACT [4.0]

BRIEF DESCRIPTION OF MALAYSIA'S LEGAL SYSTEM [4.1]

AN UNDERSTANDING OF THE COUNTRY'S LEGAL SYSTEM IS ESSENTIAL TO GRASP WHAT FUNDAMENTAL LIBERTIES ARE IN PLACE TO PROTECT TRANS PEOPLE, WHAT COURTS TRANS PEOPLE MIGHT COME INTO CONTACT WITH IN ASKING FOR LEGAL GENDER RECOGNITION, AND PROVIDES AN ILLUSTRATION OF HOW INCREASING CONSERVATISM HAS INFLUENCED THE POLICY ENVIRONMENT.

Malaysia has a written Constitution, officially titled the Constitution of Malaysia but often referred to as the Federal Constitution. Crucial to the topic at hand, it contains a list of fundamental liberties (see Annex 2), which include the right to life, liberty of the person, equality before the law, freedom of movement, and freedom of speech.²⁴ It does not explicitly refer to the right to privacy, although case law has stated, albeit in dicta^{IV}, that it is 'patently clear' that the right to personal liberty also includes the right to privacy.²⁵

^{IV} Federal Constitution, Part II 34 An incidental or supplementary opinion by a judge in deciding a case, upon a matter not essential to the decision, and therefore not binding as precedent.

^V This means that courts must follow previous decisions (called precedents) from higher courts. They are not bound to follow decisions from courts lower in the hierarchy, and High Courts are not bound by the decisions of other High Courts.

^{VI} This means that the Federal Court may hear certain matters without having it originating from an appellate court (original jurisdiction), or it may, upon request of the King (the Yang di-Pertuan Agong) to pronounce in open court advice on a particular matter (advisory jurisdiction) (Federal Constitution, Article 130), or in constitutional matters refer the questions arising to a different court (Federal Constitution, Article 128(2)). *Assa Singh v Mentri Besar, Johore* [1969] 2 MLJ 30, 37 per Suffian FJ.

Malaysia's legal system is comprised of three branches: the executive (Cabinet), the legislature (parliament) and the judiciary (courts). There is legislature at the federal and state levels, with the former having two houses of parliament (bicameral) and the latter comprising one (unicameral). Each state has either a Sultan (hereditary ruler) or a governor (Yang Di-Pertua Negeri), and these are responsible to the State Legislative Assembly. The Federal Parliament, which reviews, debates, and enacts laws, is wholly elected.²⁶ Malaysia subscribes to the doctrine of separation of powers, but there are significant and powerful overlaps.²⁷

The judiciary comprises the Federal Court (the highest court), the Court of Appeal and subordinate courts, including the Sessions court.²⁸ These courts adhere to principles of English common law and equity²⁹, including that they are bound by judicial precedent.^V Commonwealth case law, however, does not have binding authority. It is merely persuasive.³⁰ The Federal Court is principally an appellate court but in addition, it has three other kinds of jurisdiction: (a) advisory, (b) original, and (c) referral.^{VI}

It has been noted that Malaysia is not secular in the *laïcité* (separation of religion and state) sense³¹, despite the Federation being originally formed with secular principles in mind.³² In September 2001, the then-Prime Minister,

Tun Mahathir Mohamad, declared Malaysia as an Islamic state³³, and further clarified in his memoirs that this declaration was in order to increase Islamic political and financial development.³⁴ The year after, he stated that Malaysia was a fundamentalist Islamic state.³⁵ While he has recently changed his view on whether Malaysia was an Islamic state or a secular state³⁶, from 2001 to the present day, there has been an embrace of religious totalitarianism³⁷ and the use of *fatwas* that restrict citizens' actions, including *fatwas* to ban beauty pageants³⁸, yoga³⁹, and electronic cigarettes.⁴⁰

Malaysia has civil and Syariah courts. The Syariah courts are, however, inferior to the civil courts⁴¹, and they should not be taken as parallel systems. Lawyers Dahlan and Faudzi state that the claim that they are parallel is 'grossly inaccurate in law'.⁴² Constitutional lawyer Aston Paiva, commenting on this report, stated that the existence of civil and Syariah courts is often erroneously quoted as being a dual court system. It is, in fact, one legal system with certain courts given exclusivity over certain matters, for example, Islamic family law matters such as divorce proceedings and property distribution among Muslim families.

As a response to historical conflicts, the Federal Constitution was amended with effect from 10 June 1988, to include Article 121(1A), which states, that 'the courts referred to in Clause (1) shall have no jurisdiction in respect of any matter within the jurisdiction of the Sharia courts'.⁴³ Case law has found that where a person professing the religion of Islam has committed offences that are both under the Penal Code (civil) and Syariah Criminal Offences (Federal Territories) Act 1997, then the High Court (civil) shall have jurisdiction.⁴⁴ Despite a 2007 Federal Court case clarifying jurisdiction of the civil and Syariah courts⁴⁵, to this day, numerous conflicts continue to arise⁴⁶, most recently in the cases of unilateral conversion of minors to Islam⁴⁷, and the constitutionality of state-enacted Islamic laws applying to Muslim trans people. The latter cases are discussed later in this report.

There are 13 state-enacted Islamic laws, applying to each state and federal territories. These are enacted in state assemblies, as opposed to civil laws which are enacted in Federal parliament.

THE SYARIAH
COURTS ARE,
HOWEVER,
INFERIOR TO THE
CIVIL COURTS,
AND THEY SHOULD
NOT BE TAKEN
AS PARALLEL
SYSTEMS.



LEGAL PROTECTIONS OF TRANS PEOPLE'S HUMAN RIGHTS, GENDER IDENTITY & EXPRESSION [4.2]

WHILE NO LAW EXPRESSLY MENTIONS TRANS PEOPLE IN A PROTECTIVE SENSE, OVERARCHING PROVISIONS APPLYING TO ALL MALAYSIANS EXIST IN THE FEDERAL CONSTITUTION. IN ADDITION, ALL STATE LAWS, INCLUDING SYARIAH LAWS PASSED BY STATE LEGISLATURES, MUST BE CONSISTENT WITH PART II OF THE FEDERAL CONSTITUTION (WHICH GUARANTEES THE FUNDAMENTAL LIBERTIES OF ALL MALAYSIANS).⁴⁸

Importantly, the Federal Constitution prohibits discrimination based on gender:

ARTICLE 8(2) Equality

Except as expressly authorized by this Constitution, there shall be *no discrimination against citizens on the ground only of religion, race, descent, place of birth or gender* in any law or in the appointment to any office or employment under a public authority or in the administration of any law relating to the acquisition, holding or disposition of property or the establishing or carrying on of any trade, business, profession, vocation or employment. (Emphasis added.)⁴⁹

THE NEGERI
SEMBILAN CASE IS
INTEGRAL TO AN
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STATE LAW AS IT
PERTAINS TO THE
PROTECTION OF
TRANS PEOPLE'S
HUMAN RIGHTS.

The addition of 'gender' in Article 8 occurred via an amendment, which came into force on 28 September 2001⁵⁰, and was precipitated by Malaysia's signing and ratification of the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) in 1995. In Malaysia, the second highest court (the Court of Appeal) has deemed that Article 8's prohibition of discrimination on the ground of gender means harassment of trans people is unconstitutional. However⁵¹, given that discourse on this matter is limited, there is insufficient clarity on how trans issues are interpreted in the context of gender equality.

[a] Constitutional Rights In Practice: *The Negeri Sembilan Case*

*The Negeri Sembilan case*⁵² is integral to an understanding of the current state of law as it pertains to the protection of trans people's human rights. The trans people in the case had been subjected to a number of arrests and





harassment by the state Islamic authorities under Section 66 of the Syariah Criminal Enactment. They brought an action to determine the constitutionality of the Section. At the Court of Appeal, the judges ruled that the application of Section 66 was indeed unconstitutional on 5 grounds in the Constitution and therefore void. These grounds were violating the personal liberty of the person, the entitlement to equal protection under the law, discrimination on the basis of gender, freedom of movement, and freedom of expression, Articles 5(1), 8(1), 8(2), 9(2) and 10(1)(a), respectively. These Articles are detailed below:

ARTICLE	EXCERPTS FROM THE CONSTITUTION OF MALAYSIA
Article 5(1)	No person shall be deprived of his life or personal liberty save in accordance with the law.
Article 8(1)	All persons are equal before the law and entitled to the equal protection of the law.
Article 8(2)	Except as expressly authorized by this Constitution, there shall be no discrimination against citizens on the ground only of religion, race, descent, place of birth or gender in any law or in the appointment to any office or employment under a public authority or in the administration of any law relating to the acquisition, holding or disposition of property or the establishing or carrying on of any trade, business, profession, vocation or employment.
Article 9(2)	Subject to Clause (3) and to any law relating to the security of the Federation or any part thereof, public order, public health, or the punishment of offenders, every citizen has the right to move freely throughout the Federation and to reside in any part thereof.
Article 10(1)(a)	Every citizen has the right to freedom of speech and expression.

In this case, the appellants had been subject to numerous arrests for ‘cross-dressing’ (see Section 3 of this report) under Section 66 of the Syariah Criminal (Negeri Sembilan) Enactment 1992. Justice of the Court of Appeal (JCA), Mohd Hishamudin Yunus, found in favour of the appellants. This means that the ‘cross-dressing’ provisions in Section 66 were deemed as completely without legal force.

SYARIAH CRIMINAL (Negeri Sembilan) Enactment 1992

Section 66. Male person posing as a woman

Any male person who, in any public place wears a woman's attire or poses as a woman shall be guilty of an offence and shall be liable on conviction to a fine not exceeding one thousand ringgit or to imprisonment for a term not exceeding six months or to both.

In terms of Article 8(2) (discrimination based on gender), the argument used by lawyers representing the trans women was as follows:

It is argued that section 66 thus subjects male Muslim persons like the appellants to an unfavourable bias vis-à-vis female Muslim persons. Therefore, section 66 is discriminatory on the ground of gender, and is inconsistent with Art. 8(2).⁵³

PER GOPAL SRI
RAM JCA: 'IT IS
THE FUNDAMENTAL
RIGHT OF EVERY
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WITH COMMON
HUMAN DIGNITY'.

It should be noted that, at different times in the judgment, the trans women were referred to as males rather than as trans people. The counsel to the trans women in this decision noted, during the consultation meeting on this report, that referring to the appellants as males was not surprising given that the statute itself was highly gendered. When referred to as males, discrimination on the basis of gender was found by comparing males to females, and not by comparing as trans people to cisgender / non-trans people.

In this example, the court considered whether Section 66 amounted to gender discrimination since males (including trans women assigned male at birth) were prohibited from 'posing as a woman', but the Section did not prohibit female persons from dressing as a man or 'posing as a man'.^{vii} The Court agreed this was discrimination on the ground of gender due to an 'unfavourable bias'. The lawyers did not argue that gender identity discrimination (treating trans people differently from cisgender / non-trans people) was a component of gender discrimination.

ARTICLE 5(1) Liberty of the Person

No person shall be deprived of his life or personal liberty save in accordance with law.

It has been found in the Court of Appeal that 'life' in the context of Article 5(1) of the Federal Constitution includes the right to live with dignity. Per Gopal Sri Ram JCA: 'it is the fundamental right of every person within the shores of Malaysia to live with common human dignity'.⁵⁴ This reasoning was quoted in the Negeri Sembilan case at the Court of Appeal. The Court found that, in addition to gender discrimination mentioned above, that Section 66 was also inconsistent with Article 5(1) of the Federal Constitution. Holding

^{vii} See Annex 1 for examples of other laws that criminalise 'posing as a man'.

Section 66 as unconstitutional and void on this ground, Mohd Hishamudin JCA stated:

A more disturbing effect of section 66 is that it builds insecurity and vulnerability into the lives of the appellants and other Muslim male persons with GID^{VIII}... As long as section 66 is in force the appellants will continue to live in uncertainty, misery and indignity.⁵⁵

The Court of Appeal decided favourably for the trans women involved, and this decision continues to act as persuasive authority for future cases that call into question the constitutionality of State Syariah cross-dressing laws.

Unfortunately, on appeal at the Federal Court, it was decided that it was not the courts' role^{IX} to override the powers of the government in the State of Negeri Sembilan to enact its own cross-dressing laws⁵⁶, and that different procedures should have been used to pursue this matter.⁵⁷ The Federal Court case was decided on this procedural issue, rather than substantive constitutional rights. The Federal Court did not technically disagree with the constitutional rights reasoning given in the Court of Appeal. Rather, they said they couldn't consider the case as procedures were not followed. The effect of these cases is this: in future cases where trans women were to challenge the constitutionality of Section 66, they would have to do so by obtaining leave of a single Federal court judge (as recommended in the Federal Court decision) or risk having their case thrown out. It also means, however, that they may rely on the reasoning of the judges in the Court of Appeal (that Section 66 is unconstitutional on 5 grounds) to persuade the court in their favour.

Despite that loss, the decision of the Court of Appeal is still significant. Specifically, the second highest court in Malaysia has ruled that cross-dressing laws violate rights in the constitution. It is important to note that the Federal Court decision did not contradict this part of the Court of Appeal decision. The Federal Court focused solely on procedural issues, not on whether the cross-dressing laws were against rights and liberties in the Constitution. Even though the Court of Appeal decision is not binding, it is a strong argument that can be used to persuade judges in future cases.

[b] National Unity Consultative Council (NUCC)

On 25 November 2013, Najib Razak, the Malaysian Prime Minister, launched the National Unity Consultative Council (NUCC), comprised of 29 members, whose mandate was to prepare a blueprint for national unity and social cohesion. The NUCC produced three bills – The Racial and Religious Hate Crimes Bill, the National Harmony and Reconciliation Bill, and the National Harmony and Reconciliation Commission Bill.

^{VIII} The use of the term 'Muslim male persons with GID' is discussed further in Section 3 of this report. This form of pathologisation of trans identity has been criticised internationally, but may have been used strategically in this case to obtain the best possible outcome. I.e. this was the only route which would enable the case to be tried.

^{IX} The specific words were that it was a 'challenge to the legislative powers of the State Legislature of the State of Negeri Sembilan' and hence jurisdictionally erroneous.

In the National Harmony and Reconciliation Bill 2014, Clause 7 prohibits gender discrimination, including discrimination on the basis of pregnancy, sexual orientation and identity, the denial of access to opportunities, and the systemic inequality of access to opportunities by gender as a result of the sexual division of labour. While the actual inclusion of the clause in the initial draft Bill was a positive step, it drew flak for protecting LGBT people and was labeled as anti-Islam.⁵⁸ The then-deputy Chairman of the NUCC law and policy committee, Lim Chee Wee, said that as a result of the pressure, the clause was likely to be removed.⁵⁹ The NUCC website is no longer accessible, which is a strong indication that they have been disbanded, and the Bills have been shelved.



[c] Right to Health – National HIV Strategic Plan

The National Strategic Plan for Ending AIDS 2016-2030⁶⁰ (NSPEA) includes trans people as a HIV key affected population. It enshrines their right to obtain comprehensive HIV prevention, care, and treatment, but does not discuss transition-related health needs of trans-specific issues in terms of HIV-related care. However, in regard to HIV data, the Ministry of Health does not record trans women as a distinct population. Trans women are grouped together with men who have sex with men. HIV among trans men is not included in Ministry of Health data.

[d] Universal Periodic Review

International calls to reform and introduce legal protections for trans people have been documented in the United Nations Universal Periodic Review (UPR) process.^x In Malaysia's second review in 2013, several countries expressed concern and made recommendations to Malaysia on the human rights of LGBT persons or about discrimination based on gender identity and/or sexual orientation. Their recommendations are tabulated below; none focus

^x The UPR is described as a 'unique process, which involves a periodic review of the human rights records of all 193 UN Member States'. Each country is reviewed by its peer States every 5 years, who make recommendations. Civil society organisations and national human rights institutions provide submissions into the review, which can be considered by other countries alongside the official country report and potentially influence their recommendations. While recommendations from other UN member States are not binding, a country is required to report back to the Human Rights Council confirming which recommendations it accepts and those it "notes". United Nations Office of the High Commissioner for Human Rights (OHCHR). Basic Facts about the UPR [Internet]. OHCHR; [cited 2016 Jul 28]. Available from: <http://www.ohchr.org/EN/HRBodies/UPR/Pages/BasicFacts.aspx>

on human rights issues specific to trans people as distinct from LGB people, such as ‘cross-dressing’ laws or legal gender recognition.

COUNTRY	STATEMENTS
Germany	Take legislative and practical steps to guarantee that LGBTI persons can enjoy all human rights without discrimination ⁶¹
France	Decriminalize homosexuality and respect the fundamental rights of LGBT persons
Chile	Delete those provisions that could favour discriminatory practices against persons based on their sexual orientation and gender identity ⁶²
Argentina	Take the necessary measures to eradicate the discrimination based on sexual orientation ⁶³
Croatia	Introduce legislation that will decriminalize sexual relations between consenting adults of the same sex ⁶⁴
Netherlands	Repeal sections of the Malaysian Penal Code that criminalize consensual same-sex conduct between adults ⁶⁵
Canada	Enact legislation prohibiting violence based on sexual orientation, and repeal laws that directly or indirectly criminalize consensual same-sex sexual activities ⁶⁶

Malaysia did not accept any of the recommendations pertaining to sexual orientation and gender identity in the 2013 UPR.⁶⁷ This echoed Malaysia’s similar response to the previous UPR in 2009. In its statement to the Human Rights Council on human rights violations towards LGBT persons, the Malaysian government stated that ‘matters involving lesbian, gay, bisexual, and transgender persons... would be handled carefully and consistent with cultural traditions, religious doctrine and societal norms, and domestic laws and regulations.’⁶⁸

It should be noted that this occurred despite there being more recommendations on LGBT issues in 2013 compared to 2009, and despite NGO submissions testifying that lesbian, bisexual, gay, trans, intersex and queer persons (LGBTIQ) are vilified, face harassment and are subjected to constant harassment by both state and non-state actors.⁶⁹

[e] ASEAN Human Rights Declaration

The Association of Southeast Asian Nations (ASEAN) was established on 8 August 1967 and consists of 10 countries. On the 18th of November 2012, heads of state of the 10 countries (including the Malaysian Prime Minister Najib Razak) adopted the ASEAN Human Rights Declaration. The Declaration did not expressly mention the rights of LGBT persons, but states that each person has the right to personal liberty and freedom from arbitrary arrest⁷⁰, freedom of movement⁷¹, freedom from arbitrary interference with his or



her privacy⁷², freedom of religion⁷³, and freedom of expression.⁷⁴ While this Declaration is not legally binding, it remains the key human rights document resulting from ASEAN mechanisms, and thus may be utilised to ask governments to better protect trans people.

[f] Ratification of Human Rights Treaties and their application to Trans issues in Malaysia

In terms of international human rights treaties, Malaysia has ratified the Convention on the Rights of the Child (CRC), CEDAW, and the Convention on the Rights of Persons with Disabilities (CRPD), albeit with reservations.^{xi} Malaysia has not signed or ratified the International Covenant on Civil and Political Rights (ICCPR) or the International Convention on Economic, Social and Cultural Rights (ICESCR).

In 1995, Malaysia ratified the Convention on the Rights of the Child (CRC), which provides that all forms of discrimination against children should be eliminated and in all actions concerning children, the best interests of the child should be the primary consideration.⁷⁵ In addition, the Committee on the Rights of the Child has stated that Member States have a duty to ensure that children's health is not undermined as a result of discrimination, and specifically stated that this includes discrimination based on gender identity.⁷⁶

UNICEF has stated the following in regard to LGBT children:

No person – child or adult – should suffer abuse, discrimination, exploitation, marginalization or violence of any kind for any reason, including on the basis of their real or perceived sexual orientation or gender identity.⁷⁷

Many trans children are not able to socially transition – for example, while they are at school and have to adhere to school uniforms or dress codes, including regulated hairstyles which are 'based solely on the student's sex assigned at birth'⁷⁸, resulting in discrimination and humiliation for gender variant children. In Malaysia, gender variant children and trans adolescents have reported violence from their own families, including being handcuffed and locked in a room⁷⁹ and being sent to camps for 'effeminate' boys.⁸⁰ In schools, trans children can be subjected to punishments such as whipping, suspension, or expulsion because of their gender expression.⁸¹ All of these practices are against the principles of the protection of the rights of the child as it has been enshrined in the CRC. Malaysia's Child Act 2001 does not reflect these protections, although it does state that certain bodies (such as the Children's Court) should act in the best interests of the child. Even without

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AND LOCKED IN
A ROOM.

^{xi} Malaysia signed the CRPD with reservations on Article 15 (Freedom from torture or cruel, inhumane or degrading treatment or punishment) and Article 18 (Liberty of movement or nationality). Persons with Disabilities. Human Rights Commission of Malaysia. [Internet]. [cited 2016 Aug 15]. Available from: <http://www.suhakam.org.my/areas-of-work/pendidikan/orang-kurang-upaya-oku/>

explicit protections in domestic laws, children are covered by the rights in the Federal Constitution, including the prohibition of discrimination on the basis of gender.

International literature affirms that children's ability to express their gender greatly improves a child's emotional wellbeing⁸², and enables gender variant children to focus on their education. However, social and legal transition for children has been described as being very difficult⁸³, and this includes their ability to choose their name and reflect their gender identity on school enrolment records. While the CRC is not an enforceable convention, these points, combined with protections contained in the Federal Constitution, may arguably be used to protect Malaysian trans children. The Committee on the Rights of the Child has previously issued Concluding Observations to Malaysia, in 2007, expressing concern at "insufficient efforts made to address discrimination based on sexual orientation."⁸⁴

Malaysia has also ratified the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), again with reservations. In its General Recommendation No. 28, the CEDAW Committee emphasised the importance of intersectionality and that "discrimination of women based on sex and gender is inextricably linked with other factors that affect women, such as sexual orientation and gender identity."⁸⁵

Countries are required to produce reports on their implementation of CEDAW. Given that Malaysia was overdue on the third and fourth periodic reports (and were given reminders by the Committee on Elimination of Discrimination Against Women in January 2012),⁸⁶ Malaysian civil society subsequently produced an alternative report on CEDAW and Malaysia for public discussion. This contained commentary on the treatment of both trans men^{xii} and trans women, including punishments meted out to students in public schools who were deemed to be 'gender confused'.⁸⁷

International literature has documented LGBT people being forced to enter into 'corrective' marriages. Thus far, there is no data of the same in Malaysia. UN mechanisms, including the UPR (and CEDAW) have critiqued forced marriage in Malaysia, where there were more than 9000 child marriages recorded between 2011 and 2016.⁸⁸ While international discourse on child marriage has not focused on pressures for gender diverse children to marry, the CEDAW and UPR processes could be used to raise concerns about such so-called 'corrective' marriages.

^{xii} Referred to as *pengkid* in the law.





CRIMINALISATION OF GENDER EXPRESSION OR GENDER IDENTITY [4.3]

MALAYSIA HAS 13 STATES AND 3 FEDERAL TERRITORIES. ALL HAVE STATE-ENACTED ISLAMIC LAWS THAT CRIMINALISE TRANS WOMEN BASED ON THEIR GENDER IDENTITY AND GENDER EXPRESSION, WHILE SOME CRIMINALISE TRANS MEN.

While most of these provisions are contained in Syariah law (and apply to Muslims only), there are a number of provisions in criminal law that are used to arrest and harass trans people generally. Syariah laws are enacted by the State Legislatures, and contain laws that prohibit ‘posing as a woman’, cross-dressing or cross-dressing for immoral purposes.

Examples of Syariah law that criminalise ‘posing as a woman’ are tabulated below and the complete list is available in Annex 1:

STATE	LAW & PROVISION(S)
Malacca	<p>Syariah Offences Enactment (Malacca) 1991</p> <p>Section 72. Posing as a Woman</p> <p>Any male person who, wears women’s clothing and poses as a woman in any public place without a valid/reasonable reason shall be guilty of an offence and shall be liable on conviction to a fine not exceeding one thousand ringgit or to imprisonment for a term not exceeding 6 months or both.</p>
Selangor	<p>Syariah Criminal Offences (Selangor) Enactment 1995</p> <p>Section 30. Male person posing as a woman</p> <p>Any male person who, in any public place, wears a woman’s attire or poses as a woman <i>for immoral purposes</i> shall be guilty of an offence and shall be liable on conviction to a fine not exceeding one thousand ringgit or to imprisonment for a term not exceeding six months or to both. (Emphasis added).</p>
Negeri Sembilan	<p>Syariah Criminal (Negeri Sembilan) Enactment 1992</p> <p>Section 66. Posing as a Woman</p> <p>Any male person who, in any public place wears a woman’s attire and poses as a woman shall be guilty of an offence and shall be liable on conviction to a fine not exceeding one thousand ringgit or to imprisonment for a term not exceeding six months or to both.</p>

All states in Malaysia criminalise trans women, and five states (Kedah, Kelantan, Negeri Sembilan, Perlis, and Sabah) in Malaysia criminalise trans men. A landmark case was the Negeri Sembilan Trans case⁸⁹, also discussed elsewhere in this report. The applicants were trans women who had been



subjected to repeated arrests and fines under Section 66 of the Negeri Sembilan Syariah Enactment, listed above. They filed a constitutional review based on the grounds that the Section was against their fundamental liberties as contained in the Federal Constitution. In a landmark decision in the Court of Appeal, the Justices of the Court led by Mohd Hishamudin Yunus JCA found the provision to be unconstitutional, and declared Section 66 as void.⁹⁰ This means that Section 66 would be unenforceable. Unfortunately, in the Federal Court, the Judges ruled that incorrect procedures⁹¹ had been followed in terms of the actual challenge of Section 66, and this has been criticised by Justice Mohd Hishamudin Yunus, who presided over the same case at the Court of Appeal.⁹²

Cases criminalising trans people thus far are argued with arguments pathologising trans people. While the word “transgender” was used in the Court of Appeal, it should also be noted that appellants were also repeatedly referred to as “male person(s) with Gender Identity Disorder” (GID) and “medically... not normal males”.⁹³ The pathologisation (i.e. the regard of trans people as psychologically abnormal or unhealthy), as opposed to protecting trans people on the grounds of universality of human rights and the right to self-determination, has been criticised internationally as problematic. It prevents individuals from being accepted and understood⁹⁴, increases the likelihood of prejudice and discrimination, and increases risks to mental and physical wellbeing.⁹⁵

The decision to take this angle, however, was a strategic decision by counsel and judges in the case in light of conservatism in Malaysia, political views on the need for ‘contextualisation’ of human rights (i.e. that human rights need to suit the Malaysian environment), and the potential outcome of the case. The legal counsel in the case, in commentary of the draft of this report, stated that pathologisation was the only way to get the case argued in this context.

While the outcome of the Court of Appeal case was positive, the very concept of how trans persons were addressed in the case undermines the ability of the judiciary to recognise a person’s self-defined gender identity.

Trans women who are heterosexual or bisexual (that is who are attracted to and have relationships with men) are also impacted by civil laws that criminalise homosexuality, because they are deemed to be male by law. Post-colonially, not only did Malaysia inherit penal code provisions which criminalise consensual carnal intercourse between adults of the same gender, but also public indecency or vagrancy laws that are used to target trans people for being in public places. Thus, civil, criminal and state-enacted Islamic laws target trans people. One example of a public indecency or vagrancy law that criminalises trans persons is the Minor Offences Act.⁹⁶

Minor Offences Act 1955

Section 21

Any person who is found drunk and incapable of taking care of himself, *or is guilty of any riotous, disorderly or indecent behaviour*, or of persistently soliciting or importuning for immoral purposes in any public road or in any public place or place of public amusement or resort, or in the immediate vicinity of any Court or of any public office or police station or place of worship, shall be liable to a fine not exceeding twenty-five ringgit or to imprisonment for a term not exceeding fourteen days, and on a second or subsequent conviction to a fine not exceeding one hundred ringgit or to imprisonment for a term not exceeding three months or to both. (Emphasis added).

Section 21 is especially used when a large number of trans persons are arrested in a raid. Typically, those who are Muslim are charged under Syariah law, and non-Muslims are charged under various laws, including the Minor Offences Act or under Section 372B for solicitation.⁹⁷ It should be noted that foreign trans women have also been charged under Section 327B⁹⁸, and while awaiting trial, been placed in lockups with men, jeopardising their safety.⁹⁹

Penal Code¹⁰⁰

Section 372B Soliciting for purpose of prostitution

Whoever solicits or importunes for the purpose of prostitution or any immoral purpose in any place shall be punished with imprisonment for a term not exceeding one year or with fine or with both.

Fatwas are also used disproportionately to criminalise trans women. On 4 April 2016, the Federal Territories Islamic Authority (known by its Malay acronym JAWI) raided a performance by a trans woman, claiming it was a 'beauty pageant'. The raid was made on the grounds of a gazetted¹⁰¹ *fatwa* prohibiting Muslim women from participating in beauty pageants. Lawyer Siti Kasim, an ally for trans people and activist, was in attendance. She has critiqued the use of this *fatwa* against trans women.¹⁰²

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HEALTH.



The use of fatwa to harass transgender people on that night was problematic for two reasons. The first that the fatwa applies to women – and under normal circumstances JAWI and other religious authorities refuse to acknowledge transgender women as women. Secondly, the event on that night was a dinner and a show. Not a beauty pageant. The religious authorities demonstrated and continue to demonstrate a lack of scientific knowledge about gender diversity, and Islam encourages scientific learning. Islam also encourages compassion and kindness towards marginalised communities, not the harassment and cruelty that is evident in this raid. Legal gender recognition and respecting the constitutional rights of transgender people must happen. – SITI KASIM (Kuala Lumpur) Interviewed 30 July 2016



Similar edicts have been used in the past to bring women to trial for participating in beauty pageants¹⁰³, including Muslim cisgender women in 1997¹⁰⁴ and trans women in 2008.¹⁰⁵ These examples of both cisgender and trans women being charged and brought to trial further demonstrated the role of *fatwa* in enforcing normative gender roles, restricting individual gender expression, and policing modesty and morality.

Trans people's access to necessary hormones is also affected by the Poisons Act, which regulates 'sex hormones – androgenic, oestrogenic and progestational, natural or synthetic'¹⁰⁶ as Group B or C drugs which cannot be sold or supplied except by registered medical practitioners or licensed pharmacists. Official policy dictates that government hospitals cannot provide hormones for trans persons, and thus this creates significant difficulties for access to health. In addition, it puts trans people supplying hormones to friends informally at risk for committing an offence under the Act.¹⁰⁷

As a result of the provisions outlined above, the police and Islamic religious authorities frequently harass trans people. The inherent power dynamics between authoritarian police and Islamic authorities and the vulnerability of a criminalised population, invariably result in trans people being subject to sexual, emotional, psychological and physical assault.¹⁰⁸



LEGAL GENDER RECOGNITION PROVISIONS [4.4]

IN A 2014 HUMAN RIGHTS WATCH REPORT, IT WAS NOTED THAT WHILE THERE IS NO LAW IN MALAYSIA THAT EXPLICITLY PROHIBITS LEGAL GENDER RECOGNITION, MOST PEOPLE FIND IT VIRTUALLY IMPOSSIBLE TO CHANGE THE GENDER MARKER ON THEIR IDENTITY CARDS.¹⁰⁹ THE LITERATURE ATTESTS TO THE FACT THAT GENDER MARKER AND NAME CHANGES ON THE IDENTITY CARD WERE POSSIBLE UP TO 1996.

According to a consultant psychiatrist from Peninsular Malaysia, it was still possible for persons to get their Identity Cards (ICs) changed in 1997:

“

During my clinical specialist training in 1997, I wrote letters for transgender people to get their ICs changed. This was possible after a period of counselling, and certainty on my part that the person was psychologically prepared to transition. – CONSULTANT PSYCHIATRIST (Mid 50s, Malaysia)
Interviewed 26 July 2016

”

Subsequently, a stricter policy was put into place. While a partial name change was still possible, a gender marker could not be amended. For example, a trans woman was able to add a female name to her existing male name. The rationale was that retaining both details would prevent trans women from marrying men, given that they were still legally considered to be male and Syariah law prohibits same-sex marriage.¹¹⁰ This partial name-change policy is no longer in practice, so there is no transparent provision enabling a trans person to change name details.

Teh Yik Koon, Professor of Strategic Studies, in a 2008 book chapter, described the changing and increasingly conservative political and religious climate as closely linked to the status of trans people and access to necessary gender affirmation and health procedures.¹¹¹ She described how before 1983, gender affirmation surgeries were carried out in Malaysia pursuant to two years of pre-counselling.

As a result of the current impossibility for legal gender recognition, the lives of trans people are disrupted and arbitrarily affected on a daily basis. Dorian, a trans man living in Kuala Lumpur, described how his documented gender marker resulted in clear difficulty in accessing equitable and necessary healthcare:

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“

If you have pre-existing health insurance and you get ill, and you've had gender affirmation surgery, the doctors' notes in the submission of an insurance claim will note the discrepancy in your physicality and your gender marker on your identification. More often than not, the claim will be rejected.

*In addition to this, health insurance does not cover hormone therapy as it is considered a cosmetic procedure, as opposed to an essential health procedure for a transgender person. – **DORIAN (29 Years Old, Kuala Lumpur)***

”

Trans people are also placed in hospital wards and prisons based on their assigned sex at birth, resulting in humiliation, inappropriate questions, and stigmatising treatment.¹¹²

For those who choose to undergo the court process to try and seek legal gender recognition, there is a substantial cost burden. Prior to the court case commencing, an individual bears the cost of diagnosis of gender dysphoria or GID and physical examinations with multiple medical experts. At the conclusion of the court case, an applicant may be subjected to pay costs, even if the application is rejected. This was the situation in Maha Laksmi's case, where the court, following a 46-year-old precedent from the United Kingdom, rejected her application to be legally recognised as female in her IC, and ordered her to pay costs of MYR3000 (USD\$745.06).¹¹³

These court cases often result in intimate details of the trans person's physicality being dissected in the press and during hearings. For example, during Mohd Soffian's case, a popular Malay-language daily published information about menstruation and details about how Mohd Soffian responded to sexual arousal.¹¹⁴ During hearings, intrusive questions are often asked pertaining to the type of surgeries that an individual may have undergone. For example, in *Tan Pooi Yee v Ketua Pengarah Jabatan Pendaftaran Negara*, detailed evidence of the plaintiff being anatomically male was discussed in court and the judgment.¹¹⁵ As a negative consequence of these, trans persons may be discouraged from applying for legal gender recognition at all, and as a result, face numerous difficulties that occur as a result of discrepancies in their sex assigned at birth and their self-defined gender identity.



PROCEDURAL OR OTHER CONDITIONAL REQUIREMENTS ON LEGAL GENDER RECOGNITION [4.5]

THE NATIONAL IDENTIFICATION CARD IS A BLUE CARD CONTAINING A 12-DIGIT ASSIGNED NUMBER BASED ON DATE OF BIRTH, PLACE OF BIRTH, AND GENDER, AS WELL AS A PICTURE OF THE INDIVIDUAL, NAME, PERMANENT ADDRESS, AND DENOTES IF AN INDIVIDUAL IS MUSLIM.

The IC is considered as a cardinal document which is a prerequisite for changing other documents. Malaysians also have birth certificates but these are seldom required, except for preschool, primary, and secondary school registration.

Amendment of details on the IC is done via an application to the National Registration Department, or in Malay, *Jabatan Pendaftaran Negara Malaysia*. The application is done by filling out and submitting Form JPN.KP16 which is available for free at the National Registration Department. According to an order by the National Registration Department, an amendment of gender on ICs is not allowed unless authorised or ordered by the court.¹¹¹⁶ The same order provides that birth certificates cannot be amended unless there is a mistake or clerical error.¹¹⁷ This is also provided for in the Birth and Death Registration Act 1957, which states:

Births and Deaths Registration Act 1957

Section 27(1) Correction of errors and alteration in register

No alteration in any register shall be made except as authorized by this Act.

Section 27(2) Correction of errors and alteration in register

Any clerical error which may from time to time be discovered in any register may be corrected by the Superintendent-Registrar, in such manner as the Registrar-General shall direct.

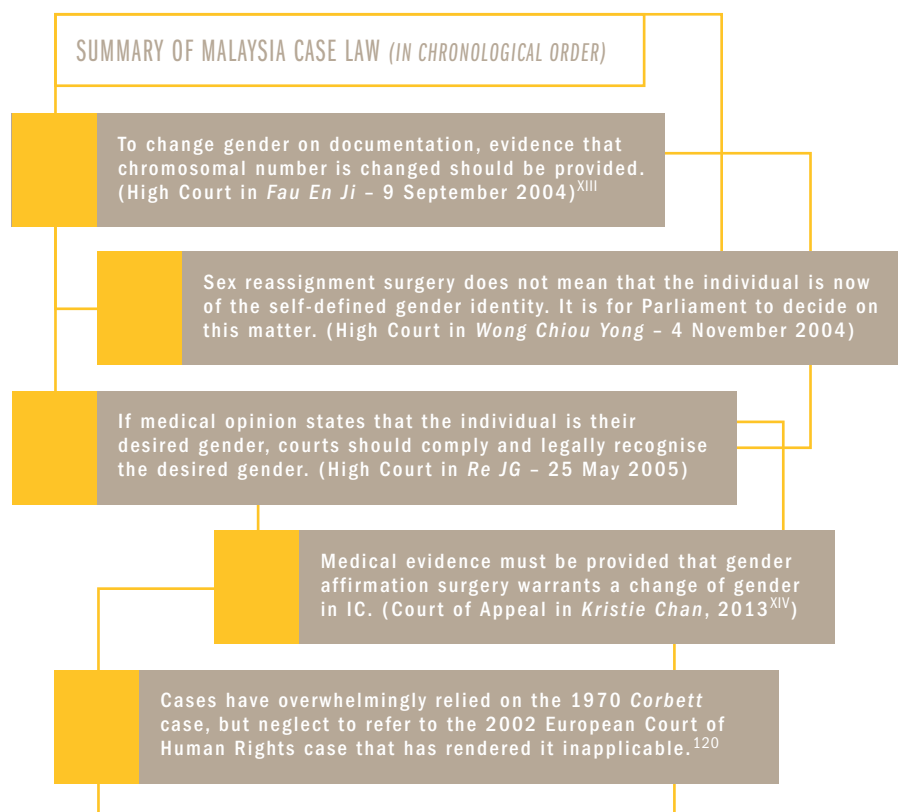
The National Registration Act 1959, regulates changes in the IC and states that the Minister may make regulations in terms of making corrections or alternations in the register and IC.¹¹⁸ Should legal gender recognition become a reality in the future in Malaysia, the Ministry would possibly legislate with

ACCORDING TO
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COURT.

powers endowed under this Act.

In terms of the amendment of gender on the IC, the Departmental Directive 'Arahan Jabatan Pendaftaran Negara Bil. 9/2007' states that amendment of gender in the IC is not allowed except with a Court Order.¹¹⁹

In terms of actual requirements needed to change one's gender, deliberations in Malaysian case law are summarised below:



xiii High Courts are not bound by the decisions of other High Courts. See note 86.

xiv This decision did not unequivocally endorse the view that chromosomal evidence is required in adjudication of change of gender.

MALAYSIAN
CASE LAW
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OR WHETHER IT
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AS A RESULT
OF GENDER
AFFIRMATION
SURGERIES.

Malaysian case law has focused primarily on whether a person's legal sex is biologically fixed at birth and cannot be changed or whether it can be altered as a result of gender affirmation surgeries. The arguments that sex is immutable are based on Ormrod J's judgment 46 years ago in the 1970 English case of *Corbett v Corbett*.¹²¹ English law and biological science have progressed dramatically since, with the case being deemed outdated and against human rights in the European Court of Human Rights, among other developments (discussed below). Despite these developments, Malaysian courts continued to rely on *Corbett*, which held that sex was biologically fixed at birth and so couldn't be changed by medical or surgical means, and required the consideration of the following in determination of sex:

I. CHROMOSOMAL FACTORS
II. GONADAL FACTORS (That is, the presence or absense of testes or ovaries)
III. GENITAL FACTORS (Including internal sex organs)
IV. PSYCHOLOGICAL FACTORS

In the Malaysian case of *Wong Chiou Yong v Pendaftar Besar*¹²² in 2005, for example, the applicant had undergone female-to-male gender affirmation surgery and was seeking a change of gender in his birth certificate and IC. It should be noted that his surgery was carried out in Malaysia in 2002, after the 1989 *fatwa* declaring gender affirmation surgeries as *haram*, but before the 2005 *fatwa* declaring the amendment of gender on ICs as *haram*.¹²³ Justice VT Singham, in his decision, stated that 'post-operative transsexuals should not be denied by society the inner peace of life which is their right'¹²⁴, but in dismissing the application 'with regret'¹²⁵, Justice VT Singham referred to criteria in *Corbett*.¹²⁶

Interestingly, however, the judge emphasised that 'parliament could not have envisaged the type of grievance faced by the applicant' and that 'their remedy lies with Parliament and not the courts.' This finding that it was the jurisdiction of the Legislature instead of the Judiciary to decide on this matter was also the prevailing sentiment in the English case of *Bellinger v Bellinger*¹²⁷, which affirmed findings in *Corbett*, and was referred to in all the Malaysian cases mentioned in this section.

In *Kristie Chan v Ketua Pengarah Jabatan Pendaftaran Negara*¹²⁸, the appellant had been diagnosed with GID and she had undergone male-to-female gender affirmation surgery. This was evidenced via a certificate from a doctor in Hong Kong. Taking into account *Bellinger* and *Corbett*, the Justice of the Court of Appeal dismissed the appeal on the grounds that: "There was no evidence, medical and psychiatric, from experts in Malaysia as to what was

gender, what made a person a male or female or whether sex reassignment surgery changes a person's gender to warrant a change of the gender description.”¹²⁹

Kristie Chan was cited in the 2013 High Court case of *Fau En Ji v Ketua Pengarah Jabatan Pendaftaran Negara*, where Justice Zaleha Yusof stated that categorisation of gender not only involves the desire of the applicant, but also involves consideration of chromosomal, gonadal, genital and psychological factors.¹³⁰ In dismissing the application, the Justice placed importance on the fact that “none of the medical officers gave evidence pertaining to the chromosomal factor”¹³¹ nor what the characteristics of males and females are generally.¹³² Given that chromosomes do not change post-surgery, and prevailing scientific evidence confirms that they are insignificant in determining a person's gender identity, this argument is not persuasive. It is also increasingly out of step with international human rights standards and good practice internationally that deems legal gender recognition as fundamental to ensuring the right to equal recognition before the law.¹³³

In *Fau En Ji*, the Justice Zaleha Yusof emphasised biological criteria in *Bellinger v Bellinger*. Her arguments reflected the words of Lord Nicholls Birkenhead in the latter, that “Self definition is not acceptable.”¹³⁴ In affirming *Bellinger*, the court in *Fau En Ji* neglected to consider evidence from the European Court of Human Rights case of *Christine Goodwin v The United Kingdom*¹³⁵, which considered and rejected *Bellinger*, and led to the enactment of the Gender Recognition Act 2004 in the UK. In *Christine Goodwin*, it was stated:

*The stress and alienation arising from a discordance between the position in society assumed by a post-operative transsexual and the status imposed by law which refuses to recognise the change of gender cannot, in the Court's view, be regarded as a minor inconvenience arising from a formality. A conflict between social reality and law arises which places the transsexual in an anomalous position, in which he or she may experience feelings of vulnerability, humiliation and anxiety.*¹³⁶

The Act merely requires a confirmation that the individual has or has had gender dysphoria¹³⁷ via a report by two medical practitioners, one practising in the field of gender dysphoria, or a registered psychologist practising in the field. Furthermore, the court in *Fau En Ji* did not take into account Lord Justice Thorpe's dissenting opinion in *Bellinger* – that the approach restricted

THE APPROACH OF CITING OLDER UK CASES, AND IGNORING MORE RECENT LEGAL DEVELOPMENTS, IS THE PREDOMINANT APPROACH IN MALAYSIAN CASE LAW, WITH BOTH *CORBETT* AND *BELLINGER* BEING CITED IN ALL THE MALAYSIAN CASES DISCUSSED IN THE SECTION.

to biological criteria was no longer permissible in the light of scientific, medical and social change. The Lord Justice stated:

*To make the chromosomal factor conclusive, or even dominant, seems to me particularly questionable... it seems to me right as a matter of principle and logic to give predominance to psychological factors.*¹³⁸

The argument that a person's sex is biologically fixed at birth has been criticised in other jurisdictions, with Mrs Justice Matthews in the Australian case of *Harris and McGuinness* stating:

*With the greatest of respect to Ormrod J (Corbett v Corbett) this conclusion seems to flow not so much from the medical evidence which was given in the case as from His Lordship's own finding.*¹³⁹



In more recent times, legal reforms have done away with biological criteria altogether as a requirement for legal gender recognition, including in Argentina, Sweden, and Denmark, among others.¹⁴⁰ Furthermore, health policy standards developed for the Asia-Pacific Region have proposed that governments “take all necessary legislative, administrative, and other measures to fully recognise each person’s self-defined gender identity, with no medical requirements or discrimination on any grounds”.¹⁴¹

The approach of citing older UK cases, and ignoring more recent legal developments, is the predominant approach in Malaysian case law, with both *Corbett* and *Bellinger* being cited in all the Malaysian cases discussed in the section. In the aforementioned case of *Maha Laksmi*, the judge stated that, due to these precedents, her hands were tied, and she rejected the application for legal gender recognition.¹⁴²

In the Malaysian High Court case of *Re JG*, however, a more permissive, though still outdated, approach was taken by Justice James Foong. The plaintiff provided medical evidence from three local medical consultants who affirmed that the plaintiff was female and had undergone gender affirmation surgery.¹⁴³

James Foong J, in granting the application for a legal gender change, stated that the applicant complained that the lack of legal gender recognition was the cause of numerous discriminatory experiences and prejudices.¹⁴⁴ He emphasised that while *Bellinger* and other cases are inclined to defer to Parliament to legislate, Parliament would need to rely on medical opinions.¹⁴⁵ This was the basis of his consideration in granting the application. Notably, James Foong J stated:

*She feels like a woman, lives like one, behaves as one, has her physical body attuned to one, and most important of all, her psychological thinking is that of a woman.*¹⁴⁶

In July 2016, a High Court decision (in *Tan Pooi Yee*) involving a trans man who had undergone gender affirmation surgery, Judge S Nantha Balan took a similar stance. He ordered that the defendants amend the Plaintiff’s gender, name, and last digit of the IC number to reflect that he was male. Additionally, he denounced the need for the chromosomal requirement as discussed in *Corbett*, stating:

In my view, the chromosomal requirement is archaic and should be discarded because scientifically it is impossible for a biological male to have female chromosomes and vice versa... It plainly means that to insist on the chromosomal requirement is to ask for the impossible and I think *nothing can be more unjust than that*. (Emphasis added).¹⁴⁷



In coming to his decision, the Judge considered that *Corbett* and *Bellinger* had undergone legislative intervention¹⁴⁸ in terms of the UK Gender Recognition Act 2004, which followed the aforementioned European Court of Human Rights decision of *Christine Goodwin*. He also dismissed the arguments of the defendants (the National Registration Department) that a trans person might later seek a restoration to the gender assigned at birth, and stated, 'I find that it is not just far-fetched, but is also reflective of an alarmist mindset'¹⁴⁹, and affirmed his confidence in the ethical standards of the medical profession¹⁵⁰ in terms of ensuring that an individual is psychologically ready to undergo gender affirmation surgeries.

In commentary, human rights and constitutional lawyers stated that this Malaysia decision changes the current legal position that had previously followed English cases from the 1970s and thus is a departure from previous trends.¹⁵¹

[a] Applicability And Enforceability Of Fatwa To Secular Case Law

Interestingly, the 1989 and 2005 *fatwas* against gender affirmation surgeries and the amendment of gender on the IC did not deter the Malaysian cases mentioned above, nor were they considered by any of the judges. While there is no documentation explaining the absence of attention given to these *fatwas*, it may be due to their lack of legal enforceability^{xv}, or the fact that they are not easily accessible. In Malaysia, a 2009 Federal Court case states that *fatwas* have no legal enforceability unless legislated by State Legislative Assemblies.¹⁵² This means that without further legislation, *fatwas* are mere opinions and have no legal 'bite'. The 1989 *fatwa* against gender affirmation surgeries was not gazetted^{xvi} and is not discoverable. It is only referenced via secondary texts documenting discussion between religious authorities. For these reasons, it is unclear whether this *fatwa* has legal standing.

Fatwas may be reversed, although it is unclear whether there is one standard procedure for the reversal. The Malaysian *fatwa* on yoga, for example, was reversed after widespread public objections and rebukes by ruling Sultans.¹⁵³ In 2016, a challenge in the High Court to reverse a *fatwa* was deemed to be within the jurisdiction of the Syariah courts.¹⁵⁴ Given that several *fatwas* have been gazetted at Federal and State levels (for example, the *fatwa* against trans men^{xvii} in several states), they are legally enforceable. This means the *fatwa* against trans men^{xviii} would need to be reversed to give effect to legal gender recognition for trans men.¹⁵⁵

[b] Judicial Precedent And Applicability To Future Legal Gender Recognition Cases

As per the principles of judicial precedent, Malaysian courts are bound by the decisions of higher courts. Basically, courts must follow previous decisions (called precedents) from higher courts. They are not bound to follow decisions



^{xv} Throughout the Muslim world, *fatwas* are defined merely as advisory opinions. In India, the Supreme Court ruled them to be the 'common man's view on an issue' and thus are not legally binding. Anwar Z. Only in Malaysia: where we have gone wrong with *fatwa*. The Star Online [newspaper on the Internet]. 2013 Aug 4 [cited 2016 Oct 17]. Available from: <http://www.thestar.com.my/opinion/columnists/sharing-the-nation/2013/08/04/the-essence-of-fatwa/>; Khan MW. *Fatwas* are opinions, not laws. Tehelka.com [newspaper on the Internet]. 2014 Mar 14 [cited 2016 Oct 17]. Available from: <http://www.tehelka.com/2014/03/fatwas-are-opinions-not-laws>

^{xvi} 'Gazetted' means to officially publish as law.

^{xvii} Referred to with the outdated term of '*pengkid*' in the law.

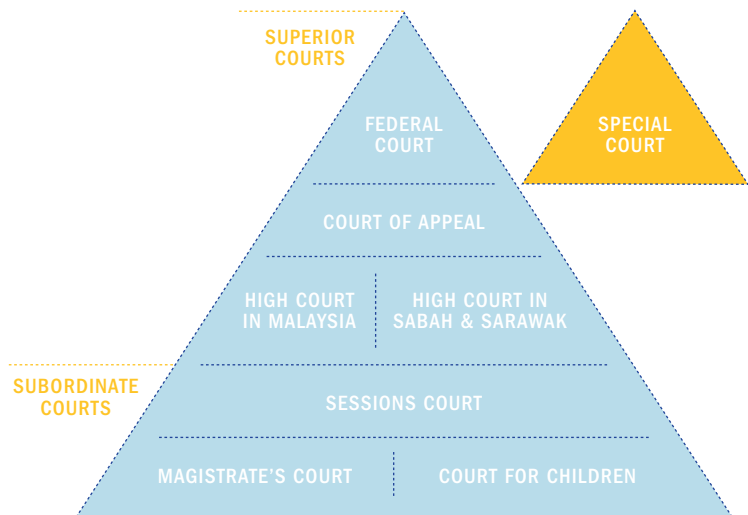
^{xviii} Outdated term for transgender man, but is used in the law.

FATWAS MAY BE REVERSED, ALTHOUGH IT IS UNCLEAR WHETHER THERE IS ONE STANDARD PROCEDURE FOR THE REVERSAL. THE MALAYSIAN FATWA ON YOGA, FOR EXAMPLE, WAS REVERSED AFTER WIDESPREAD PUBLIC OBJECTIONS AND REBUKES BY RULING SULTANS.

from courts lower in the hierarchy. High Courts are not bound by the decisions of other High Courts¹⁵⁶, and may ‘respectfully agree to differ’ from decisions in other High Courts.¹⁵⁷ Given that lower courts do not have the capacity to produce binding precedent, they do not have to follow courts of equal level on the hierarchy.

WHAT IS JUDICIAL PRECEDENT?

- Follows the doctrine of *stare decisis* – Latin for ‘to stand by a decision’.
- In *PP v Datuk Tan Cheng Swee & Anor*, it was stated that the Federal Court expects the High Court and other inferior courts in the common law system to follow similarity, i.e. similar previous decisions.¹⁵⁸



MALAYSIAN COURT HEIRARCHY

Following judicial precedent, it would seem to be that cases in lower courts are bound by the Court of Appeal decision in the case of *Kristie Chan*. This requires medical and psychiatric evidence on whether gender affirmation surgery changes a person’s gender, and therefore warrants a change of the gender description. Judge S Nantha Balan in the High Court, however, noted that the court in *Kristie Chan* did not state unequivocally that it agreed that chromosomes should determine whether sex could be changed, and that the Court of Appeal in that case was ‘merely unsatisfied with the quality of medical and psychiatric evidence that was produced.’¹⁵⁹

In his view that allows some opportunities for future legal gender recognition cases to be brought to the Court of Appeal:

Hence, in Kristie Chan's case, the Court of Appeal was effectively leaving open the possibility that in an appropriate case and depending on the quality and credibility of the medical evidence and other supporting evidence, the Court could make a determination and grant the relevant declarations that we sought with regard to the re-assigned gender.¹⁶⁰

Though overturned on appeal¹⁶¹, the significance of the 2016 *Tan Pooi Yee* case is in terms of its departure from *Kristie Chan* and the denouncement of the chromosomal requirement, and because the judge referred to the plaintiff as 'he' throughout the judgment, which was consistent with his gender identity and expression as a trans man. In the 2017 appellate decision overturning this ruling, the three-judge panel of the Court of Appeal set aside the High Court decision, accepting the National Registration Department's argument that physical condition only, without testimony on chromosomes, is insufficient for change of sex marker on the IC.^{162, XIX}

In summary of the above cases, several trends emerge. Firstly, that the predominant trend in Malaysian jurisprudence is to follow archaic chromosomal requirements in 1970s English law, that biological sex is fixed at birth and cannot change. Secondly, that while decisions are still predominantly based on a pathologised, medical approach to sex and gender, cases are increasingly citing fundamental constitutional rights. Thirdly, trans people still undergo intrusive questions regarding gender affirmation surgeries. Finally, several judges have pointed to the need for Parliament to legislate. These raise important questions as to the future of Malaysian jurisprudence.

The separation of powers of different branches of governments is intended to provide a check and balance. When judges request, in specific cases, that Parliament legislate on legal gender recognition, those arguments to the executive and parliamentary branches of government must be based on evidence, not alarmist rhetoric. Indeed, it has been stated that 'law march(es) with medicine but in the rear and limping a little.'¹⁶³ Considering this, and the fact that trans people undergo daily humiliation and risks to safety when they cannot access legal gender recognition, it is no longer appropriate to accept the delays inherent to relying on case law. Instead, parliament must legislate based on most recent medical and scientific evidence and human rights discourse.

THE PREDOMINANT
TREND IN
MALAYSIAN
JURISPRUDENCE
IS TO FOLLOW
ARCHAIC
CHROMOSOMAL
REQUIREMENTS IN
1970S ENGLISH
LAW, THAT
BIOLOGICAL SEX
IS FIXED AT BIRTH
AND CANNOT
CHANGE.

^{XIX} The full judgment is not yet available; hence information of this case is extracted from media reports.

[c] Depathologisation

As this section has shown, medical evidence has been fundamental to any discussion of legal gender recognition in Malaysia. In the current context, it is understandable that trans people have relied on such evidence when applying to the court to amend a gender marker, or in response to charges of so-called ‘female impersonation’. However, requiring evidence of medical procedures is increasingly out of step with international human rights standards and good practice.

A 2015 comparative review of the legal status of trans people describes the *Corbett* decision, relied on exclusively in Malaysia till very recently, as “non-recognition” of trans people’s gender identity. It then identifies these three subsequent phases internationally on this issue: ¹⁶⁴

I. MEDICAL PHASE	II. RIGHTS NOT REMEDIES	II. MOVING AWAY FROM PATHOLOGISATION (DEPATHOLOGISATION)
where legal gender recognition has been viewed through a medical lens and contingent on medical steps, as is the approach in the recent 2016 case in Malaysia.	where legal gender recognition has been framed in human rights language, including in the <i>Goodwin</i> decision cited above.	where legal decisions and laws remove medical requirements, focusing instead on self-determination, in line with international human rights standards such as those summarised in the Yogyakarta Principles. ¹⁶⁵

Health professionals themselves, notably the World Professional Association for Transgender Health (WPATH), have consistently supported trans people’s right to legal gender recognition based on self-defined gender identity, with no medical evidence required.¹⁶⁶

IMPACT OF A GENDER MARKER CHANGE ON OTHER DOCUMENTS, RIGHTS, & RESPONSIBILITIES [4.6]

GIVEN THAT THE IC IS A CARDINAL DOCUMENT, A GENDER MARKER CHANGE WOULD ENSURE SYNCHRONICITY IN ALL OTHER FORMAL PROCESSES, AND COULD REDUCE UNCOMFORTABLE EXCHANGES AND SAFETY RISKS AS A RESULT OF DISCREPANCIES BETWEEN A PERSON'S GENDER MARKER IN IDENTIFICATION DOCUMENTS AND PHYSICALITY.

For example, the IC is required to apply for a car loan, to apply for health insurance, and to purchase a house.

Trans people are being excluded, ostracised, harassed and abused because their identity documents do not correspond with their expressed gender. The following paragraphs provide examples of this.

In 2005, Chella, a 36-year old trans woman from Kuala Lumpur interviewed for this report, was stopped at a traffic roadblock and her IC was examined. After realising Chella was trans, one of the five police officers stationed at the roadblock asked her if she could give all five of them oral sex. She refused, and one of her friends started crying. It was then that the police left.

Discrepancies in IC also deter trans people from exercising their constitutional right to vote:

“

I choose not to vote because my IC is different from my expressed gender as a trans woman. From there, there is stigma and discrimination from the beginning, i.e. leaving my house because the community will taunt me because I'm a trans woman going to vote. In addition to this the voting process requires verification of the IC and this will make the situation worse because a trans woman may be asked all sorts of irrelevant questions. And even if I vote, the party I vote for won't necessarily defend the rights of trans people. These issues put me in a dilemma. – VEE (32 Years Old, Pahang)

”

Others face cumbersome barriers when renewing their passports, something that ordinarily takes a few hours for others. The following example comes from a trans woman whose passport records her as male.

TRANS CHILDREN
WHO WERE
ASSIGNED MALE
AT BIRTH ARE
FORCED TO ATTEND
CAMPS FOR
EFFEMINATE BOYS,
AND SUBJECTED
TO WHIPPING
FOR SO-CALLED
'GENDER
CONFUSION'.

“

(At the immigration department), they rejected the photo I submitted on the basis that I didn't look like a male. They made me take it twice. While I was waiting for it to process, suddenly all the (immigration) officers came out and ogled me and friends who had accompanied me. Later a lady told me that I needed to look more like a man as my IC mentions. I refused, took my old passport back from them and left. I went to a different place to renew my passport and had no problems there. – NISHA (37 Years Old, Kuala Lumpur)

”

In healthcare settings, trans people have also been subjected to humiliating and intrusive taunts by healthcare staff, and when hospitalised, are placed in a ward according to their sex assigned at birth.¹⁶⁷ Even when requesting services completely unrelated to sexual health, trans people have reported having to undergo pelvic examinations.¹⁶⁸

Trans people also face numerous barriers to completing their education. One trans woman from Kuantan related her experience in a 2014 Human Rights Watch report, stating that due to severe bullying, she dropped out of school at the age of 11.¹⁶⁹ Other trans women report dropping out of university due to strict dress codes that required them to dress in male-normative attire.¹⁷⁰ As mentioned elsewhere in this report, trans children who were assigned male at birth are forced to attend camps for effeminate boys¹⁷¹, and subjected to whipping for so-called 'gender confusion'¹⁷², and are subject to arbitrary dress code guidelines.

Legal gender recognition is a crucial step towards the protection of trans people from sexual, physical, verbal, and emotional assault, the elimination of arrests and harassment by law enforcement officials, the continuation of the fundamental right to education, access to the fundamental right to health, the ability of trans people to vote without impediment, and ensuring that trans people are treated with dignity before the law in all settings, including within government facilities.



PROVISIONS FOR POPULATION GROUPS IN A VULNERABLE POSITION [4.7]

A. PRISONS

Trans people in detention are placed in male or female prisons based on their assigned sex on the IC.¹⁷³ The relevant law does not account for trans persons, and thus their gender identity is not accorded due recognition or importance when deciding where they will be detained.

Prisons Regulations 2000, Prisons Act 1995

Regulation 5(1) Women's accommodation.

Male and female prisoners shall be kept absolutely separate from each other, and shall be confined in different buildings.¹⁷⁴

On 17 May 2016, however, the Penang Transgender Committee held their first meeting in the Penang State Assembly to discuss trans protections, and among the issues that the Committee intended to address included better treatment for trans people in prisons.¹⁷⁵ It is unclear, however, how far discussions have gone. In June 2016, the formation of the committee received backlash from Muslim groups.¹⁷⁶ The Chief Minister of Penang responded by saying that the state government did not endorse the committee, and that it was a private initiative by a few assemblymen.¹⁷⁷

Refugees And Asylum Seekers

In terms of trans refugees or asylum seekers in Malaysia, the policy is not to issue refugee cards based on a trans person's self-defined gender identity. In email correspondence¹⁷⁸, UNHCR Malaysia, stated that UNHCR as an organisation was taking progressive steps towards LGBTI inclusive protection interventions, including ensuring that LGBTI persons have access to durable solutions and resettlement¹⁷⁹, are consulted to ensure dignity is upheld, and staff have training about the protection of LGBTI persons.¹⁸⁰ However, where a refugee card potentially contradicts any official documents issued by the government of the country of origin or country of asylum, UNHCR Malaysia takes a cautious approach of not immediately reflecting the declared name and gender marker. This is because the purpose of the refugee card is not only to confirm the person's identity, but also to better protect the person in often-adverse environments. UNHCR Malaysia stated further that reflecting the desired gender marker could potentially expose the asylum seeker or refugee to risk of deportation or other protection issues. Conversely, it can

WHERE A
REFUGEE CARD
POTENTIALLY
CONTRADICTS
ANY OFFICIAL
DOCUMENTS
ISSUED BY THE
GOVERNMENT OF
THE COUNTRY
OF ORIGIN OR
COUNTRY OF
ASYLUM, UNHCR
MALAYSIA TAKES
A CAUTIOUS
APPROACH OF
NOT IMMEDIATELY
REFLECTING THE
DECLARED NAME
AND GENDER
MARKER.

be argued that the refusal to amend a document can expose a trans person to more discrimination, harassment, and violence (see Section 3 of this Report), especially in incidences when a trans person's gender expression and presentation does not conform to the sex they were assigned at birth. A thorough examination of potential dangers of legal gender recognition for refugees must be undertaken to comprehensively and authoritatively determine practice and policy around refugee cards.^{xx} UNHCR's stance must also be considered in light of the fact that Malaysia has not signed the Convention relating to the Status of Refugees (1951) and the Protocol relating to the Status of Refugees (1967), and is unlikely to do so in the near future.¹⁸¹

Malaysian trans and LGB people have been granted asylum overseas on the grounds of anti-LGBT discrimination, and threats to their lives. In 2016, a gay, atheist student who had been disowned by his family and had received threats from the Malaysian public was granted 'protected person' status by an Immigration and Refugee Board of Canada panel in Winnipeg.¹⁸² The 2016 director of the New York City pride parade was a Malaysian, who after a protracted and expensive battle, was granted asylum in the United States after facing anti-LGBT discrimination and sexual violence in Malaysia.¹⁸³ In 2010, a Malaysian trans woman was granted refugee status by the Refugee Review Tribunal in Australia, who highlighted her poverty and that she would be unable to obtain work without an IC as female.¹⁸⁴ The tribunal suggested, however, that trans people with financial resources would possibly not qualify for such protection.

In 2015, a Malaysian trans woman was denied asylum in Denmark. A petition imploring the Danish Refugee Board to reconsider their decision described how the Danish authorities overlooked several factors in their decision-making. These were that she is registered as a Muslim and legally cannot convert out of Islam, hence she is subject to state-enacted Islamic laws that allow for the arrest and punishment of trans persons; and secondly the magnitude of harassment, risk of arrests, and assaults she had experienced from Malaysian authorities.¹⁸⁵

^{xx} UNHCR's stance must also be considered in light of the fact that Malaysia has not signed the Convention relating to the Status of Refugees (1951) and the Protocol relating to the Status of Refugees (1967), and is unlikely to do so in the near future. This increases the vulnerability of transgender refugees.

THERE ARE NO LAWS THAT EXPRESSLY DICTATE THAT ONCE A GENDER RECOGNITION DECISION IS IN FORCE, THAT THE SEX ASSIGNED AT BIRTH MAY NOT BE MADE PUBLIC OR SEARCHABLE UNLESS THE APPLICANT GIVES CONSENT.

In addition, there is no explicit reference to privacy in the Malaysian Federal Constitution's list of fundamental liberties, with the possible exception of the requirement that '[no] person shall be deprived of his... personal liberty save in accordance with the law.'¹⁸⁶

In the case of *Sivarasa Rasiah v Badan Peguam Malaysia*, however, it was stated *obiter*^{XXI}, that it was 'patently clear' that 'personal liberty' includes the right to privacy.¹⁸⁷

Malaysia has a Personal Data Protection Act 2010 (the PDPA), however it is confined to 'commercial transactions'¹⁸⁸, and is not applicable to Federal and State Governments.¹⁸⁹ This means that Federal and State Governments are able to search for personal data, including sensitive personal data. The Sessions Court has jurisdiction over PDPA offences.¹⁹⁰ 'Personal data' in the PDPA explicitly includes sensitive personal data¹⁹¹, however at the time of writing it has not yet been tested in the courts whether a person's sex assigned at birth would be considered by the courts to fall under this definition. This also reflects the very small number of trans people who have been able to amend their gender marker at this point.

Personal Data Protection Act 2010

Section 4 Interpretation

"Sensitive personal data" means any personal data consisting of information as to the physical or mental health or condition of a data subject, his political opinions, his religious beliefs or other beliefs of a similar nature, the commission or alleged commission by him of any offence or any other personal data as the Minister may determine by order published in the Gazette.

The general principle is that data users must not process personal data unless the data subject has given consent to the processing.¹⁹²

In a relevant case, *Mohd Soffian*^{XXII}, who stated that he was intersex¹⁹³, had a Muslim marriage solemnised by an Imam at a mosque located in Bukit Cina in

XXI An incidental or supplementary opinion by a judge in deciding a case, upon a matter not essential to the decision, and therefore not binding as precedent.

XXII The full judgment is not searchable, hence information of this case is extracted from media reports.

THERE IS
NO EXPLICIT
REFERENCE
TO PRIVACY IN
THE MALAYSIAN
FEDERAL
CONSTITUTION'S
LIST OF
FUNDAMENTAL
LIBERTIES, WITH
THE POSSIBLE
EXCEPTION OF THE
REQUIREMENT
THAT '[NO]
PERSON SHALL
BE DEPRIVED OF
HIS... PERSONAL
LIBERTY SAVE IN
ACCORDANCE WITH
THE LAW'.

the state of Malacca. His National IC stated that he was male.¹⁹⁴ The Malacca Religious Affairs Department refused to register his marriage due to his birth certificate bearing a female name. The Director of the National Registration Department testified in this case.¹⁹⁵ It is unclear whether Mohd Soffian's birth certificate was obtained via a search by the National Registration Department, or whether it was tendered as evidence by Mohd Soffian himself. While this case came to the courts prior to the PDPA, even if it happened now, the Government would still have been able to search for his birth certificate given that they are exempted from liability under the PDPA. The case culminated in an order that the couple's marriage be annulled, and that the National Registration Department amend Mohd Soffian's IC back to reflect the female name.¹⁹⁶



ACCESS TO REMEDIES & REDRESS [4.9]

ACCORDING TO THE MALAYSIAN FEDERAL COURT IN *MOHD JUZAILI*, FUTURE ACTIONS TO CHALLENGE THE CONSTITUTIONALITY OF SYARIAH LAWS REQUIRE OBTAINING LEAVE OF A SINGLE FEDERAL COURT JUDGE TO COMMENCE A CONSTITUTIONAL CHALLENGE AFTER THE CONCLUSION OF THE RELEVANT SYARIAH COURT PROCEEDINGS.

This means the issue proceeds to judicial review.¹⁹⁷ As mentioned in section 3, this decision has been criticised¹⁹⁸, but remains binding.

There are also procedures for the reporting of alleged violations by the State via international treaties that Malaysia has ratified. Both CEDAW and CRC, which Malaysia has ratified, may consider individual complaints regarding alleged violations by the State under both treaties' Optional Protocols. In regard to CEDAW, individual complaints may be submitted to the Committee on the Elimination of all Forms of Discrimination Against Women¹⁹⁹, and in regard to trans children and CRC, individual complaints may be submitted to the Committee on the Rights of the Child. It should be noted, however, that the CEDAW provision is contained in the Optional Protocol that has not been ratified by Malaysia. Given that the CRC's complaints procedure is the main convention, Malaysians can complain via this route.

Complaints may also be lodged with the National Human Rights Commission (known by its Malay acronym SUHAKAM), but given a recent budget cut of over 50%, the then-Chairman of the Commission stated that they would not be able to carry out its full range of functions and that the cut eroded its effectiveness.²⁰⁰ Nevertheless, SUHAKAM has in the past been a strong defender of many human rights, including condemning acts of violence against LGBT persons.²⁰¹ In their 2015 Annual Report, SUHAKAM committed to producing baseline research in 2016 on discrimination faced by the trans community in Malaysia.²⁰²

THE NATIONAL
HUMAN RIGHTS
COMMISSION
HAS IN THE PAST
BEEN A STRONG
DEFENDER OF
MANY HUMAN
RIGHTS,
INCLUDING
CONDEMNING
ACTS OF VIOLENCE
AGAINST LGBT
PERSONS.

CONCLUSION & RECOMMENDATIONS [5.0]

THIS REPORT ENCAPSULATES THE IMPACT OF THE LACK OF LEGAL GENDER RECOGNITION AS A SOURCE OF INDIGNITY, PERSECUTION, INCONVENIENCE, AND PHYSICAL AND PSYCHOLOGICAL HARM TO TRANS PEOPLE. THESE NECESSITATE POLICY CHANGE.

As a result of a second experts' meeting held with the trans community, lawyers, and academics on the 20th of August 2016, it became clear that in working towards these larger policy goals and recommendations, there was a need for priority areas and groundwork to focus on. Both are described below.

[a] Priority Areas For Malaysia

Priority areas that emerged from the second experts' meeting fell under two main headings: producing rigorous data and evidence, and stakeholder engagement and sensitisation. It is vital that trans people and organisations are actively involved in both areas. It is also clear that they will require the support of allies (including lawyers, health professionals, academics and other civil society organisations) and duty bearers including the national human rights institution, SUHAKAM. Participants of this meeting were concerned that legal gender recognition would be difficult without necessary documented research in other areas affecting trans people, that legal gender recognition (even if achieved) would not apply to Muslim trans people, and that there were insufficiently robust relationships with government departments.

Specifically, participants mentioned the value of documentation of research on trans health, the extent of public acceptance of trans people and its impact on the wellbeing of Malaysian trans people, and further research on violence towards trans people. In addition, participants recommended that researchers produce critical analyses of Islamic perspectives of trans people and their effects on Malaysian Muslim trans people, as well as the mapping of the actual population of trans people in Malaysia. Participants also recommended increased stakeholder engagement and sensitisation, including with police, Islamic religious authorities, and politicians. These priority areas are tabulated in the following page:

PARTICIPANTS
RECOMMENDED
INCREASED
STAKEHOLDER
ENGAGEMENT AND
SENSITISATION,
INCLUDING WITH
POLICE, ISLAMIC
RELIGIOUS
AUTHORITIES, AND
POLITICIANS.

PRIORITY AREAS

TARGETED STAKEHOLDER(S)

Producing Rigorous Data & Evidence

Documentation of research on trans health, including access to gender affirming surgeries, impact of stigma on mental health, and access to hormones.

University academics and researchers [Possibly the Gender Studies Programme, Faculty of Arts and Social Sciences, University of Malaya].

Critical analyses of Islamic perspectives of trans people and their effects on Malaysian Muslim trans people.

University academics and researchers [Possibly the Institute of Advanced Islamic Studies, University of Malaya, in collaboration with the Gender Studies Programme].

Research examining the extent of public acceptance of trans people and the impact on the wellbeing of Malaysian trans people.

The National Human Rights Commission, and university academics and lecturers.

Research quantifying the actual population of Malaysian trans people.

Department of Statistics, in collaboration with trans community and allies.

Research on violence against trans people and its impact.

The National Human Rights Commission, and university academics and lecturers.

Stakeholder Engagement & Sensitisation

Scaling up engagement and sensitisation on legal gender recognition to government agencies, including the National Registration Department and Religious Departments.

Trans community working with allies and SUHAKAM.

Training of judges on trans case law and legal implications of recent medical advancements.

Trans civil society groups and allies including lawyers, health professional bodies and national HIV/AIDS civil society organisations.

Sensitisation of politicians on the need for legal gender recognition.

Trans civil society groups and allies including lawyers and national HIV/AIDS civil society organisations.



[b] Policy Goals And Recommendations

To eradicate the violence, mistreatment, humiliation, and abuse resulting from a lack of legal gender recognition, and to be consistent with international human rights standards and scientific norms on trans people, this report recommends the following:

1	Parliamentary researchers to thoroughly analyse domestic and international case law on legal gender recognition.
2	Parliament to legislate to allow legal gender recognition – pursuant to documented requests from the judiciary, the most recent medical evidence, and basic human rights.
3	Courts to no longer apply the outdated ‘chromosomal requirement’ in <i>Corbett</i> ²⁰³ in cases on legal gender recognition. Judges to examine international evidence on depathologisation in making legal decisions.
4	UNHCR to thoroughly re-examine enabling refugees to obtain identification documents based on their self-defined gender identity or expression, including how any potential dangers can be mitigated. This must be undertaken to comprehensively and authoritatively determine practice and policy around refugee cards.
5	The Ministry of Health to mandate that health services recognise self-determined gender identity, consistent with most recent international medical practice and the effects of current practice on the safety and mental health of trans people. This includes, for example, trans people’s placement in wards, access to trans-specific healthcare, and the sensitisation of all health staff.
6	The Prisons department to recognise the risk of physical, sexual, and psychological harm faced by placing trans women in male prisons, and conduct a comprehensive review of international practice in view of preventing harm to the trans inmate.
7	Islamic authorities to engage with the trans community in understanding the reasons for needing legal gender recognition, including the prevention of harm to trans people.

ANNEXES [6.0]

Annex 1

State-enacted Islamic laws that criminalise trans people.

Any male person who, in any public place, wears a woman's attire and poses as a woman shall be guilty of an offence and shall on conviction be liable to a fine not exceeding (x) ringgit or to imprisonment for a term not exceeding (x) or to both.	Any male person who, in any public place, wears a woman's attire and poses as a woman for immoral purposes shall be guilty of an offence and shall on conviction be liable to a fine not exceeding (x) ringgit or to imprisonment for a term not exceeding (x) or to both.	Any female person who, in any public place, wears a man's attire and poses as a man shall be guilty of an offence and shall on conviction be liable to a fine not exceeding (x) ringgit or to imprisonment for a term not exceeding (x) or to both.
<ol style="list-style-type: none"> 1 Kedah 2 Kelantan 3 Negeri Sembilan 4 Perlis 5 Sabah 	<ol style="list-style-type: none"> 1 Johor 2 Malacca 3 Pahang 4 Perak 5 Pulau Pinang 6 Sarawak 7 Selangor 8 Terengganu 9 Wilayah Persekutuan Kuala Lumpur (Federal Territory) 	<ol style="list-style-type: none"> 1 Pahang 2 Perlis 3 Sabah

YEAR	STATE	SECTION	FINE	IMPRISONMENT
1985	Kelantan	Section 7. Pondan ^{XXIII}	1,000	< 6 Months
1988	Kedah	Section 7. Pondan	1,000	< 6 Months
1991	Malacca	Section 72. Male person posing as woman	1,000	< 6 Months
1991	Perlis	Section 7. Pondan	5,000	< 3 Years
1991	Perlis	Section 7. Female person posing as man	5,000	< 3 Years
1992	Perak	Section 55. Male person posing as woman	1,000	< 6 Months
1992	Negeri Sembilan	Section 66. Male person posing as woman	1,000	< 6 Months
1995	Sabah	Section 92. Male person posing as woman or vice versa	1,000	< 6 Months
1995	Selangor	Section 30. Male person posing as woman	1,000	< 6 Months
1996	Penang	Section 28. Male person posing as woman	1,000	< 1 Year
1997	Federal Territory	Section 28. Male person posing as woman	1,000	< 1 Year
1997	Johor	Section 28. Male person posing as woman	1,000	< 1 Year
2001	Sarawak	Section 25. Male person posing as woman	1,000	< 1 Year
2013	Pahang	Section 33. Male person posing as woman	1,000	< 1 Year
2013	Pahang	Section 34. Female person posing as man	1,000	< 1 Year

Annex 2

List of fundamental liberties in the Federal Constitution.

Article 5	Liberty of the person.
Article 6	Slavery and forced labour prohibited.
Article 7	Protection against retrospective criminal laws and repeated trials.
Article 8	Equality.
Article 9	Prohibition of banishment and freedom of movement.
Article 10	Freedom of speech, assembly, and association.
Article 11	Freedom of religion.
Article 12	Rights in respect of education.
Article 13	Rights to property.



^{xxiii} Pondan is a pejorative term.

GLOSSARY

Terms & Definitions

CISGENDER: Denoting or relating to a person whose sense of personal identity, and gender corresponds with their sex assigned at birth.²⁰⁴

DICTA: See *obiter dicta*.

GENDER AFFIRMATION SURGERY/SURGERIES: Surgical procedures that change one's body to conform to one's gender identity. These procedures may include "top surgery" (breast augmentation or removal) and "lower surgery" (altering genitals).²⁰⁵

GENDER DYSPHORIA: A mental health diagnosis in the American Psychiatric Association's manual, used to code access to medical procedures sought by those trans people who medically transition. It focuses on the distress some trans people feel when their gender identity does not match their body.

GENDER IDENTITY DISORDER: A mental health diagnosis that has been used internationally to code access to medical procedures sought by those trans people who medically transition. It has been criticised heavily for describing a trans person's identity as a mental illness.²⁰⁶

GENDER INCONGRUENCE: A new code proposed by the World Health Organisation as an alternative to gender identity disorder, that would no longer be placed in the mental health chapter of its International Classification of Diseases.

JUDICIAL PRECEDENT: When a court follows the ruling of a previous decision on the same issue. Based on the doctrine of *stare decisis*, i.e. 'to stand by things decided'. It 'promotes the even-handed, predictable, and consistent development of legal principles'.

OBITER (OBITER DICTA): An incidental or supplementary opinion by a judge in deciding a case, upon a matter not essential to the decision, and therefore not binding as precedent.²⁰⁷

PATHOLOGISE: To view or characterise as medically or psychologically abnormal.²⁰⁸

PENGKID: Outdated term for trans man. Person assigned female at birth who identifies as a man or gender queer. Trans masculine identity.

SEX REASSIGNMENT SURGERY: Outdated term. See Gender Affirmation Surgery, above.

TRANS PERSON (TRANSGENDER PERSON): Persons who identify themselves in a different gender than that assigned to them at birth. They may express their identity differently to that expected of the gender role assigned to them at birth. Trans / transgender persons often identify themselves in ways that are locally, socially, culturally, religiously, or spiritually defined.²⁰⁹

Abbreviations

CEDAW: Convention on the Elimination of all Forms of Discrimination Against Women.

CRC: Convention on the Rights of the Child.

GID: Gender Identity Disorder.

IC: Identification/Identity Card (Cardinal document for all Malaysian adults, also known as the MyKad. The MyKid is the equivalent for minors).

JCA: Justice of the Court of Appeal.

SOGIE: Sexual Orientation and Gender Identity and Expression.

UPR: Universal Periodic Review.

WPATH: World Professional Association for Transgender Health.

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