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## **ASSESSMENT TOOL**

### **MULTI COUNTRY LEGAL AND POLICY REVIEW ON LEGAL GENDER RECOGNITION IN ASIA PACIFIC IN THE CONTEXT OF HUMAN RIGHTS**

#### **INTRODUCTION AND BACKGROUND INFORMATION**

##### **1. Project description**

UNDP, as part of the *Being LGBTI in Asia* initiative, is conducting a multi- country project looking at legal gender recognition for transgender people in nine countries in Asia Pacific.

The project will comprehensively review laws, regulations and policies in relation to legal gender recognition. This will include looking at the implementation and impact of laws and policies in practice, within the broader context of human rights for transgender people.

This document uses the term ‘transgender’ as an umbrella term to include anyone whose gender identity differs from their sex assigned at birth. This includes many culturally specific third gender identities in this region, including *hijras*, *metis* and *warias*.

The eight countries in this review are India, Bangladesh, Pakistan, Nepal, China, Indonesia, the Philippines and Thailand. The project builds on current national and regional activities and initiatives and will contribute to ongoing multi-stakeholder dialogues on these issues.

Each country’s review will be conducted by a national consultant, using this assessment tool. National consultants are expected to work in such a way that key stakeholders from government agencies, national human rights institutions, and transgender communities are able to contribute their expertise to the project. The technical roundtable held at the start of each national assessment is one example of such a national multi-stakeholder process. There may also be other existing fora that can be utilised to obtain necessary information. It is envisaged that the national consultant will need to maintain ongoing contact with relevant government officials, national human rights institutions and other key stakeholders in each country in order to successfully conduct the national assessment. They will also collaborate closely with UNDP, the Asia Pacific Transgender Network, and either UNDP’s Global Fund sub-recipients in South Asia or UNDP’s

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LGBT focal points in East and Southeast Asia.

The aims and objectives of the project are to:

- assess existing, and generate new legal, policy and practice related information through the country specific projects;
- contribute to ongoing national processes and dialogues on legal gender recognition and human rights;
- create participatory multi-stakeholder national processes where the voices and perspectives of transgender people are strongly and comprehensively taken into account;
- build capacity amongst national experts and transgender activists to initiate and carry out comprehensive legislative and policy processes in a multi-stakeholder context;
- contribute to legal and policy changes in countries, that respect and protect transgender people's human rights and
- provide knowledge transfer to other countries and regions through peer-reviewed publications.

Expected outcomes of each national assessment are:

- a comprehensive, in-depth national legal and policy review, investigating the questions in the assessment tool (Tool);
- a national report analysing the material reviewed, citing all sources, and setting out recommendations for addressing identified barriers to legal gender recognition;
- a longer collated working document containing relevant material from cited laws, court decisions, regulations, and policies and transgender people's documented experiences of attempting to access gender recognition, and
- strengthened multi-stakeholder processes on legal gender recognition and related human rights issues for transgender people, in each of eight countries reviewed.

Additional planned outputs of the project include:

- an assessment Tool on legal gender recognition that can be used in other regions and countries;
- peer-reviewed publications; and
- a UNDP discussion paper, based on the cross-country analysis of national reports, including consolidated recommendations for legal and policy changes that respect and protect transgender people's human rights.

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## **2. Background Information about Legal Gender Recognition**

A separate literature review has been developed for this project. It highlights the importance of legal gender recognition for transgender people in all aspects of their daily lives.

The vast majority of transgender people in Asia Pacific have no ability to amend the gender marker on official documents so that it matches their gender identity and gender expression. This makes transgender people vulnerable to greater levels of discrimination, violence, social exclusion, and marginalisation. In several countries in the region, it makes transgender people liable to arrest and imprisonment, as well as to abuse and persecution from State authorities. Even where some gender recognition provisions exist, they typically involve coercive requirements including forced or coerced sterilisation or other medical interventions. Routinely they exclude people based on factors such as a person's age or marital status, and whether they have children.

Increasingly human rights experts including United Nations mechanisms are speaking out against such human rights violations. These include the September 2015 joint statement by 12 UN agencies on *Ending Violence and Discrimination against Lesbian, Gay, Bisexual, Transgender and Intersex people* and the UN High Commissioner on Human Rights' report, *Discrimination and violence against individuals based on their sexual orientation and gender identity*, presented to the Human Rights Council in June 2015.

The Literature Review provides an overview of access to gender recognition in this region, with a primary focus on the eight countries being reviewed through this project. This helps to identify issues that will be explored through each national assessment. These include the extent to which provisions have been implemented and whether they are applied consistently across all transgender populations. In addition, the Literature Review documents good national practice around the world that reflects human rights standards. This provides potential models to draw on when considering possible policy considerations for each country under review.

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### **3. Introduction to the Tool**

The Tool provides a systematic way to consider whether and to what extent current laws, policies, regulations and practices enable access to gender recognition in a way that meets human rights standards.

The **Tool** is comprised of three sections:

Part I: a description of the assessment process

Part II: the assessment guide

Part III: Annexes containing a section on considerations for intersex people and a glossary of terms.

#### **PART I. THE ASSESSMENT PROCESS**

Laws and policies play a key role in upholding human rights and promoting transgender people's wellbeing. Yet, in many countries laws, regulations and policies are not always consistent with human rights standards and may also represent a barrier for transgender people's wellbeing. This Tool allows countries to use a human rights framework to identify those barriers and make recommendations to overcome or reduce them.

The process of doing a national assessment consists of three phases (described in more detail below), each with a number of steps.

The initial phase involves introducing the project to a wide range of potential stakeholders to establish their interest in, and commitment to, being involved in the project. These stakeholders would include those with vested interests in improving gender identity recognition and transgender people's human rights, as well as State actors responsible for laws and policies that have an impact on transgender people's wellbeing. This includes an initial multi-stakeholder technical discussion. It has to be noted, however, the communities and civil societies may not feel ready to meet with government representatives to discuss this issue. In this case, careful discussion is necessary with the transgender communities about the best way to move forward.

The second phase consists of collecting and assessing laws, policies, regulations and practices using the guide. In the third phase, a draft report is assessed by the transgender communities and relevant stakeholders, who identify recommendations for actions to be taken by specific sectors, and are then involved in dissemination of the final report and required follow-up action

On average, the three phases will be completed over a 6 month period, depending upon

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individual country circumstances and conditions.

### **Phase 1: Initiating the process**

#### ***Establishing commitment and leadership, contracting the consultant***

In any given country, the project will be initiated by UNDP and its partners in collaboration with civil society organizations and other national partners. Once a national consultant is contracted that person will be primarily responsible for creating processes that enable key stakeholders to contribute their expertise to the project.

#### ***Initial technical discussion***

At the beginning of each national project a multi-stakeholder discussion about the upcoming assessment will be organised that aims to review and discuss national legal, regulatory and policy frameworks, their implementation in practice and the impact on transgender people's rights and wellbeing. This roundtable discussion will also aim to ensure that the project builds on current national and regional activities and initiatives and can contribute to ongoing civil society initiatives and multi-stakeholder dialogues on these issues. The specific aims of this discussion will be to:

- inform participants about the project, its process, conceptual framework and expected outcomes
- ensure that the project is integrated into relevant, ongoing initiatives and strategies
- provide an opportunity to progress discussions about legal gender recognition and human rights in the country, including by identifying opportunities and challenges and
- seek commitment from various stakeholders to assist and support the project, including through providing information needed to undertake the assessment.

The participants of the technical meeting in each country may include: key transgender organisations and experts, other civil society organisations that are working transgender communities, UN agencies, national human rights institutions, and sectors of the government with policy or operational responsibilities relevant to gender recognition. This might include, but is not limited to, agencies responsible for Justice (including human rights), Equality (including for Women's Affairs), Social Welfare and Development; Health; or administrative offices responsible for registration or issuing of birth certificates, citizenship documents, passports or other official state identification documents. The nature and timing of the technical meeting, including who should be invited, should be carefully discussed with a diversity of transgender communities. It

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is very important that any technical meeting progresses and does not hinder existing initiatives and dialogues.

**Phase 2: Assessment, adaptation and analysis**

***The assessment guide***

The Tool is primarily an assessment guide that identifies existing laws, regulations, policies and practices that are relevant to legal gender recognition. The assessment focuses initially on available material, such as laws and policies, supplemented by key informant interviews about current practices and barriers where necessary. Laws, regulations and some policies should be published and available from relevant government agencies. The support of government officials will be very helpful in identifying information about internal policies or practices that may not be as easily accessible.

Using the assessment guide involves carrying out:

- A. a desk review of any relevant legal, regulatory or policy provisions and key court decisions (providing the exact citation)
- B. a desk review of information on how the identified laws, regulations, or policies are implemented and how they work in practice including the extent to which they are used and barriers in accessing provisions
- C. a desk review of how laws, policies or regulations and their implementation (or lack of it) impact on transgender people's wellbeing and
- D. key informant interviews to address information gaps in relation to points A, B and C above.

***Adaptation of the assessment guide***

The questionnaire is presented in a generic form. Its use in specific countries may require some adaptation to specific national (or sub-national) contexts. How this is done will be negotiated between the national and international consultants working on the project, to ensure that information collected is relevant to the local context and can be collated and analysed for the cross-country report.

Through the adaptation process, the national consultant will be able to:

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- select questions in the Guide to be developed further for specific issues (e.g. while all countries will indicate whether trans people are able to identify as trans women, trans men, or as a third gender, in some countries in South Asia there will be additional information available about special measures available to *hijras*, *metis*, or other third gender identities),
- add (but not delete) questions in the Guide
- identify where there is no data available on some topics
- amend a question in a way that better reflects the national context, in a way that still enables the material to be compared with other countries in the project and/or
- identify any limitations in how the tool can be applied within the context of this specific country.

In countries with a federal governmental structure and/or a decentralised health system, the instrument may need to be further adapted to the particular context. Nonetheless, it is recommended that all information is collected at national level first, and then, as appropriate, collected or disaggregated at a sub-national level. This will allow for the examination of the relative concordance (or not) between national and sub-national efforts to address or improve legal gender recognition and protect transgender people's human rights.

### ***Analysis of information***

After the data compilation has been completed, analysis is carried out through examining the information about:

- laws, court decisions, regulations and policies alongside
- their implementation in practice and
- the overall impact on transgender people's experiences, in the context of human rights standards.

Such a human rights analysis, which looks at legal frameworks alongside people's lived realities, provides the opportunity to systematically identify gaps, barriers and discrepancies, and address them systematically. The completed analysis will provide a comprehensive picture of how national laws, regulations and policies are supporting, or hindering, the achievement of transgender people's human rights in relation to legal gender recognition. (See Annex 2).

### **Phase 3: Planning for action and implementation**

#### ***Stakeholder workshop and finalisation of the report***

The final phase of the process involves the participation of the different stakeholders in reviewing

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a draft report that sets out the findings of the analysis and possible recommendations, and drawing up an action plan. On the basis of the stakeholder review, a final report should be prepared and reported back to people who have contributed to the assessment.

***Public dissemination and follow-up***

Disseminating and following up the findings of the assessment gives civil society partners and other stakeholders an opportunity to learn from the assessment and have a common understanding of barriers, gaps and implementation of suggested actions

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**PART II.****ASSESSMENT GUIDE****Introduction**

This assessment guide aims to assist the collection of information about existing legal, jurisprudential, regulatory and policy provisions in relation to legal gender recognition, their implementation and application and impact. Its use in specific countries may require some adaptation to specific national, or sub-national, contexts. (Please see Adaptation of the questionnaire, described in Part 1, Phase 2 above.)

**Instructions for using the guide**

***Each question needs to be completed.*** It should be noted if laws, court decisions, regulations or policies do not exist in relation to the specific issue, and/or information about implementation, application or impact is not available.

***Key provisions or relevant restrictions:*** Cite the relevant provisions or restrictions in laws, court decisions, regulations and policies. It is important to provide exact references, precisely referring to the name and date of any laws, regulations and policies. All relevant laws, policies, constitutional, supreme or relevant lower court decisions need to be summarised. Please note if there are no such provisions or decisions.

***Application and Implementation:*** Describe whether and how laws, court decisions, regulations and policies are actually applied and implemented. Implementation in this context means how a law, regulation or policy is put into practice. In the text of the law, for example, there might be an elaboration of the necessary steps to be taken to implement the measure (e.g. when the law specifies that a new birth certificate should be issued incorporating the required changes.) Evidence of implementation may also be found in the creation of mechanisms for administering laws or policies..

***Proposed laws, regulations, or policies:*** The assessment shall include proposed laws, regulations and/or policies. A law/regulation, policy is proposed while it is under consideration by a legislature, or another authoritative body that is authorised to develop and approve laws, regulations and policies (e.g. parliament, Ministries, etc.) The assessment shall clearly indicate the authoritative body that is reviewing the law, regulation or policy, the organisation that submitted the proposal and the process for how it is being considered.

***Restrictions in laws, regulations and policies should be clearly explained.*** Restrictions may refer to exclusion of certain individuals on the basis that they belong to a racial, ethnic, gender or other

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group. For example, a policy on legal gender recognition may require that only unmarried individuals can access those provisions. These kinds of information may be found in grey literature sources such as articles, governmental inquiries, NGO reports etc. Other restrictions may include “third party” restrictions – requiring spousal, familial or parental authorisation or consent for legal gender recognition.

***Barriers in laws, regulations and policies, as well as in their implementation should be identified.*** Certain provisions may constitute barriers because they may not be consonant with human rights obligations and commitments (e.g. the requirement to have surgeries or sterilisation as a prerequisite for changing one’s gender marker). In other instances, the provisions themselves may be aligned with human rights standards but their implementation results in barriers to legal gender recognition. Examples include if certain administrative services are only available in one central location for high fees or if officials obstruct or delay access to procedures. There are also cases where a legal provision itself is a barrier, and this may be further compounded by the implementation process. For example, legally requiring third party authorisation not only violates a transgender person’s right to privacy and access to health services without discrimination, but creates an application process that deters people from seeking legal gender recognition. In other cases there may be a gap in the legal framework (where, for example, laws or regulations are not clear or non-existent) that makes transgender people vulnerable to *ad hoc*, discretionary practices.

***Discrepancies between and among laws and practices need to be noted.*** A discrepancy is an inconsistency or incompatibility. Discrepancies may exist between national laws, regulations and/ or policies. For example, a national law or constitution might protect people’s rights without discrimination on the ground of gender identity but there may be no clear law or regulation that would allow legal gender recognition in practice.

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## Sources of information

### BOX: Sources of Information

#### Sources of laws, regulations, court decisions and policies

*Sources of information might be:* a national Constitution, Constitutional and Supreme or High Court decisions (focusing in particular on the highest court decision), Criminal law, the Civil code, Administrative laws and relevant regulations, customary laws (e.g. Sharia laws), Health care laws and relevant regulations, Patients' rights laws and relevant regulations, Child protection laws and relevant regulations, any relevant policies.

- **Details required:** Name of the law, regulation, policy, or court decision; the issuing authority, year, article, paragraph, and also the authorities responsible for instituting, and enforcing these laws, regulations and/or policies. *Note if such laws, policies, regulations, or decisions do not exist.*

#### Sources of information about implementation, application and impact

*Sources of information might be:* peer reviewed articles published in journals, NGO reports, government reports, academic reports, or country or NGO reports to international, regional, sub-regional or national human rights bodies (e.g. a report to Committee on the Elimination of Discrimination Against Women, or to the Human Rights Council's Universal Periodic Review process). If satisfactory information is not publicly available, interviews with key informants may be used, with the source of the information clearly described. If possible, it is preferable to identify key informants by name. If that is not appropriate, then the nature of their affiliations should be specified (e.g. an official in the Ministry of Health, or the head of a transgender advocacy organisation). If no information can be obtained regarding all or some aspect of implementation, this should be specified and explained.

#### IMPORTANT REMINDERS:

- *Please provide details about whether laws, court decisions, regulations, or policies **apply to all transgender people or only to certain groups** (e.g. transgender men, transgender women, hijras, metis, or other culturally specific identities, and/or other transgender people who identify as non-binary).*
- **State if there are no** laws, court decisions, regulations or policies that are relevant to this question.
- **All references** used in the national assessment shall be accurate and consistent. Exact references should be provided, and the issuing institution (eg. Parliament, Ministry of Social Affairs, etc.) needs to be systematically **noted across the assessment**.

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**Section 1: LAWS, REGULATIONS, COURT DECISIONS AND POLICIES: THEIR APPLICATION, ENFORCEMENT AND IMPLEMENTATION****1. Legal system**

Please assess the national legal system in order to provide a context for the analysis of gender recognition laws, policies and regulations. If your country has a federal legal system, both federal and state or provincial laws may be relevant. If this is the case, the review of laws may be conducted at the federal level and in one or more chosen state or province (to be negotiated with the overall project team). Please explain the rationale for selecting that / those state/s or province/s, based on their importance or representativeness.

- 1.1. Describe briefly the *legal system* generally, including whether it is a common, civil, or mixed law system.
- 1.2. Describe briefly whether laws, court decisions, regulations and policies **are adopted at the federal, state and/or subnational level**, and explain the hierarchy of laws, court decisions, regulations and policies.
- 1.3. Describe briefly whether **customary and/or religious laws apply** and, if so, their relationship with state regulations.
- 1.4. Describe briefly the **intersection between laws, regulations, court decisions and policies (hierarchy of law)**.

**2. Legal protection of transgender people's human rights, gender identity and expression****A) LEGAL PROVISIONS**

- 2.1. Describe any laws, court decisions, regulations and/or policies **that protect and promote the rights** of transgender people? *Please specify what rights they cover and for which groups of transgender people. (For example, specifying what rights are available through the "Women's Policy 2014" issued by the Women and Child Development Department of the Government of Maharashtra, in India and whether those provisions apply to trans men as well as trans women and hijras).*

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- 2.2. Describe any laws, court decisions, regulations and/or policies that **define gender identity, gender expression**, transgender or specific local terms for transgender people?
- 2.3. Describe any laws, court decisions regulations and/or policies that include gender identity and/or expression as a **prohibited ground of discrimination**, and/or protect transgender people from discrimination?
- 2.4. Where gender identity, gender expression or transgender people are not explicitly listed under anti-discrimination provisions), on what basis and to what extent are transgender people considered to be **covered by general anti-discrimination provisions** (e.g. under the ground of sex, 'other status')? This analysis should be based on legal understanding (e.g. constitutional interpretation, court decisions).
- 2.5. Describe any laws, court decisions, regulations and/or policies that **specifically acknowledge** the right to have one's gender identity recognised and/or protected?
- 2.6. Describe any laws, court decisions, regulations and/or policies that **prohibit or limit** the human rights understanding of gender identity and expression. (*For example, when the definition of female is limited to a sex that produces ova and the definition of male is limited to the sex that has organs to produce spermatozoa*),
- 2.7. Describe any laws, court decisions, regulations and/or policies that specifically recognise gender identity in the context of the rights to privacy, self-determination, dignity, autonomy, development or in the context of other human rights principles.
- 2.8. Describe any laws, court decisions, regulations and/or policies that **call for special measures and/or affirmative action for transgender people**. (e.g. through their access to state support, employment quotas, educational scholarships, or access to gender affirming health services because transgender people are recognised as a vulnerable group).
- 2.9. Describe any recommendations, concluding observations or comments from UN treaty monitoring bodies, UN Special Rapporteurs, Universal Periodic Review, or any other relevant international human rights bodies that this country has received on legal gender recognition or protection of transgender people's human rights.

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B) IMPLEMENTATION/ APPLICATION

- 2.10. Describe to what extent the laws, policies, regulations or court decisions identified above, have been implemented and or applied **in practice?**
- 2.11. Describe any **gaps or discrepancies**<sup>1</sup> in how rights have been ignored or groups of transgender people have been excluded.
- 2.12. Describe any **enforcement mechanisms** that exist if such laws, policies, regulations or court decisions are not implemented or applied. Have these been used and, if so, what has been the result?
- 2.13. Describe the **responsible authorities** for the a) adoption and b) implementation of the laws, regulations, court decisions and policies above (e.g. parliament, ministries, professional associations, religious authorities, etc.)

C) IMPACT

- 2.14. Considering all the material described above, what are the **positive and/or negative impacts** of laws, regulations, court decisions, policies and practices on transgender people's ability to change their gender marker and on their broader human rights?
- 2.15. Describe whether and **how these impacts are experienced differently** by specific groups within transgender communities. (For example, are affirmative action measures available to some transgender groups but not others; are anti-discrimination protections universally available or do they exclude migrant workers or sex workers; have issues for transgender men been covered by treaty bodies?)

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<sup>1</sup> See the definition of discrepancy in Part II: Instructions for using the Assessment Guide

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**3. Criminalisation of gender expression or gender identity**

## A) LEGAL PROVISIONS

- 3.1. Describe any laws, regulations or policies that **directly penalise gender expression** or gender identity (e.g. criminalisation of cross-dressing or of female or male ‘impersonation’)?
- 3.2. Describe any punitive criminal laws, regulations or policies that regularly are applied in such a way that they **indirectly penalise** gender identity or expression? (e.g. vagrancy or public nuisance laws; those that criminalise sex work, HIV transmission, Trans Pride marches, or funding of trans organisations)?

## B) IMPLEMENTATION/ APPLICATION

- 3.3. Describe whether transgender people are **prosecuted** the laws, regulations, court decisions and/or policies listed above ).
- 3.4. Describe the **responsible authorities** for the a) adoption and b) enforcement of the laws, regulations, court decisions and policies above (e.g. parliament, ministries, police, religious authorities, etc.)

## C) IMPACT

- 3.5. Considering all the material described above, what are the **negative** impacts of criminal provisions on transgender people’s human rights and well-being?
- 3.6. Describe whether and, if so, how these impacts are experienced differently by **specific groups within transgender communities** (e.g. transgender women, transgender men, third gender people, those engaging in sex work, transgender people living with HIV, etc. )

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#### 4. Sex and gender recognition- overarching provisions

##### A) LEGAL PROVISIONS:

- 4.1. Are there any laws, court decisions, regulations and/or policies enabling a transgender person to **amend gender-specific details / gender markers** on official national or local identification documents?
- 4.2. If yes, which of the following details can be amended:
- Name (*Please specify whether a transgender person has the same freedom as other people to choose whatever name they wish, including to choose a gender-neutral name*)
  - Title (e.g. Mr, Ms, Mrs etc)
  - Sex and/or gender (e.g. male, female or man / woman etc)
  - Gender-specific registration numbers (i.e. where the ID number discloses if someone is male or female)
- 4.3 **Which specific official documents can be amended and how?** (e.g. birth certificate, identity card, passport, driving license, ration card, etc.)

**Please provide the following details for each document that can be amended:**

- List the official name of this document. **To what extent is this document used** by transgender people in the daily life to verify their identity or access services?
- What gender-specific details can be changed?** (e.g. name, title, sex / gender or gendered registration number, if applicable).
- Once amended, are **the person's previous gender-specific details** also recorded on the document (e.g. previous name, title or sex)?
- What are the gender marker options** for transgender people who wish to amend their sex /gender details on this document? *For example, does it enable transgender people to change details from Male to Female, from Female to Male, to select a culturally specific third gender option, and/or to select another non-binary option?*
- What is the **process for amending** these documents (e.g. legal and/or administrative. *Please specify if it depends on which gender-specific details are being changed*)
- Which **authority** is entitled to carry out the procedure and authorise changes to these gender-specific details (e.g. *please specify the name of the actual court, registration board or government agency*)

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- g. **What evidence of identity is required**, including whether family identity documents need to be supplied? *Note: this has been identified as a barrier for transgender people who are estranged from their families.*
- h. What, if any, are the specified **costs** for amending gender-specific details on these documents?
- 4.4 What are the official documents that transgender people **cannot amend any gender-specific information on** (e.g. birth certificate, identity card, passport, driving license, ration card, etc.)
- B) IMPLEMENTATION/APPLICATION
- 4.5. Describe to what extent the abovementioned laws, policies, regulations or court decisions identified above, have been **implemented or applied in practice?**
- 4.6. Describe the **responsible authorities** for ensuring that these provisions or decisions have been a) adopted and b) implemented (e.g. parliament, ministries, professional associations, religious authorities, etc.)
- 4.7. Describe any **gaps or discrepancies**<sup>2</sup>, including how rights have been ignored or groups of transgender people have been excluded. Pay specific attention to these points:
- Describe if the amended document is recognised for all legal purposes, or if there are any limitations
  - Describe whether the procedure is accessible to anyone in practice, irrespective of their economic or other capacity or what part of the country they live
  - Provide any data or anecdotal evidence on the number or proportion of transgender people that have amended gender-specific details on this document / these documents, including whether some details are harder to change than others
  - Describe the main barriers that limit the number or proportion of transgender people amending such documents.

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<sup>2</sup> See definition of discrepancy in the terminology section

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## C) IMPACT

4.8. Considering all the material described above, what are the **positive and negative impacts** of laws, regulations, court decisions, policies and practices on transgender people's ability to change their gender marker and on their broader human rights?

4.9. Describe whether and how these impacts are **experienced differently by specific groups** within transgender communities. (*For example, are these options equally available to people who identify as a third gender, as non-binary, as transgender women and as transgender men?*) are people able to choose a third gender or non-binary option? *are*

## 5. Procedural or other conditional requirements

## A) LEGAL PROVISIONS

Please provide details for each relevant document e.g. birth certificate, citizenship certificate, passport, driving license (and, if relevant, you may wish to include key local registration documents). *Note: In each question, changes to a gender marker could involve changing sex / gender details or other gender-specific details such as name, title or gendered registration number.*

5.1. Describe any laws, court decisions, regulations and/or policies that stipulate a minimum (or maximum?) **age** for when a person's official sex/gender can be changed for legal gender recognition purposes?

5.2. Describe any laws, court decisions, regulations and/or policies that require a transgender person **to be single or unmarried (or to divorce if they are already married)** if they wish to change their gender marker?

5.3. Describe any laws, court decisions, regulations and/or policies that require a transgender person to have **spousal, family or any other third party authorisation or approval** in order to change their gender marker. Please specify who has these approval or authorisation powers.

5.4. Describe any laws, court decisions, regulations and/or policies that require a transgender person to have **mental health evaluation, diagnosis and/or therapy, or institutional confinement** in order to change their gender marker.

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- 5.5. Describe any laws, court decisions, regulations and/or policies that require a transgender person to have other **medical authorization or approval** in order to change their gender marker (*e.g. from a psychologist, general practitioner, gynecologist, surgeon etc.*) and what the authorization or approval letter has to say
  - 5.6. Describe any law, court decisions, regulation and/or policy that requires a transgender person to have **gender affirming / sex reassignment surgery** to change their gender marker.
  - 5.7. Describe any law, court decisions, regulation and/or policy that requires **sterilisation** before a transgender person can change their gender marker.
  - 5.8. Describe any laws, court decisions, regulations and/or policies that require a transgender person to have **hormonal treatment** (including how long the person has to be on hormone treatment) in order to change their gender marker.
  - 5.9. Describe any laws, court decisions, regulations and/or policies that require a transgender person to undergo a **'real life test'** (including the minimum time required to have been living in their gender) in order to change their gender marker
  - 5.10. Describe any laws, court decisions, regulations and/or policies that restrict legal gender recognition if the person has a **criminal conviction**.
  - 5.11. Describe if there are any restrictions to obtaining legal gender recognition if a person has a record of a **mental health condition or illness**.
- B) IMPLEMENTATION/ APPLICATION
- 5.12. Describe to what extent the laws, policies, regulations or court decisions identified above, have been **implemented or applied in practice?**
  - 5.13. Describe any gaps or **discrepancies**<sup>3</sup> including how rights have been ignored or groups of transgender people have been excluded.
  - 5.14. Describe the **responsible authorities** for the a) adoption and b) implementation of the laws, regulations, court decisions and policies above (e.g. parliament, ministries, professional associations, religious authorities, etc.)

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<sup>3</sup> See the definition of discrepancy in Part II: Instructions for using the Assessment Guide

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## C) IMPACT

5.15. Considering all the procedural requirements described above, what are the **positive and/or negative impacts** of these laws, regulations, court decisions, policies and practices on transgender people's ability to change their gender marker and on their broader human rights?

5.16. Describe whether and how these impacts are **experienced differently by specific groups** within transgender communities (*For example, legal requirements for "sex reassignment surgeries" may be a greater barrier for low-income groups and/or transgender men whose surgeries are more expensive. Requirements to have no previous convictions may exclude transgender women who are more likely to be sex workers?*)

**6. Impact of a gender marker change on other documents, rights, or responsibilities**

## A) LEGAL PROVISIONS

Provide details for amending the gender marker on **each relevant document**. e.g. birth certificate, citizenship certificate, passport, driving license, etc. *Note: In each question, changes to a gender marker could involve changing sex / gender details or other gender-specific details such as name, title or gendered registration number.*

6.1. Describe whether laws, court decisions, regulations and/or policies stipulate that the amended gender marker **applies for all future purposes**, or whether there are any exceptions.

6.2. Describe whether laws, court decisions, regulations and/or policies that enable a transgender person to change the gender marker on an official document, **automatically result** in the gender marker being changed on other official documents.

6.3. Describe whether laws, court decisions, regulations and/or policies allow and/or require a transgender person's **educational, employment or other administrative records** to be updated to match their gender marker.

6.4. Describe whether any laws, court decisions, regulations and/or policies stipulate the right of transgender people to **access culturally-responsive, gender-specific health services**, based on medical need, irrespective of their gender marker? (*For example can*

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*transgender women receive prostate cancer checks and transgender men have cervical smears, if needed).*

- If so, do these provisions or decisions specify that such health services are publically funded and/or covered by private health insurance?
- 6.5 Describe whether any laws, court decisions, regulations and/or policies guarantee that a transgender person who changes their gender marker **enjoys all (gendered) rights and duties** on the same basis as a non-transgender person with the same gender marker. **Specify any limits to such guarantees.**

*(Examples include: being able to use gender-specific facilities including hospital wards, to access gender-specific entitlements including some state benefits; and to participate in sex-segregated activities including transgender women competing as females in competitive sports and transgender men being eligible for military conscription).*

- 6.6. Describe whether any laws, court decisions, regulations and/or policies either requires or allows a transgender **parent's legal status to change** if their gender marker changes (*e.g. from mother to father*).
- 6.7. Describe whether laws, court decisions, regulations and/or policies stipulate any impacts on **custody of children or access rights** once a transgender person changes their gender marker?
- 6.8. Describe whether any laws, court decisions, regulations and/or policies require a transgender person's **marital status** to be amended if their gender marker is changed. (*e.g. married status need to be altered to partnership status to avoid a same sex marriage, or divorce is required*).

## B) IMPLEMENTATION/ APPLICATION

- 6.9. Describe to what extent the abovementioned laws, policies, regulations or court decisions identified above, have been **implemented or applied in practice?**
- 6.10. Describe any **gaps or discrepancies<sup>4</sup>**, including how rights have been ignored or groups of transgender people have been excluded.

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<sup>4</sup> See the definition of discrepancy in Part II: Instructions for using the Assessment Guide

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6.11. Describe the **responsible authorities** for the a) adoption and b) implementation of the laws, regulations, court decisions and policies above (e.g. parliament, ministries, professional associations, religious authorities, etc.)

C) IMPACT

6.12. What are the **positive and/or negative impacts** of the laws, regulations, court decisions, policies and practices listed above that result in follow-on effects in other areas of transgender people's lives? *Please specify.*

6.13. Describe whether and how these impacts are **experienced differently by specific groups** within transgender communities. (*See the examples given under specific questions in section 6A*)

7. Provisions for population groups in vulnerable position

A) LEGAL PROVISIONS

7.1. Describe any laws, court decisions, regulations and/or policies that specify the following human rights guarantees to children:

- the best interest of the child
- the evolving capacity of the child
- the right of the child to be heard in any administrative or judicial proceeding that affects them
- the right of the child to their identity
- the right of the child not be subjected to discrimination (and whether this specifies explicitly or implicitly the grounds of gender identity or expression) and/or
- the right to education without discrimination.
- the right of the child to the highest attainable standard of health.

7.2. Describe any laws, court decisions, regulations and/or policies that require specific procedures for **children** to amend their gender marker<sup>5</sup>, and whether these are

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<sup>5</sup> Note: Changes to a gender marker could involve changing sex / gender details or other gender-specific details such as name, title or gendered registration number.

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equivalent to requirements for other decisions a child makes about their identity. Please specify, for each relevant document:

- what is the **legal age** of maturity?
- whether there is a **stipulated age when a child can autonomously change their gender marker** and, if so, whether that differs from the stipulated age for other legal provisions
- at what age a child is able to change their gender marker **with authorisation** from a parent/s or legal guardian/s and whether authorisation from the court is also required
- whether laws, court decisions, regulations, or policies provide an enabling environment for children to live according to their preferred gender

7.3. Describe any laws, court decisions, regulations and/or policies that limit **the upper age** (in case of older applicants) to amend the gender marker?

7.4. Describe any laws, court decisions, regulations and/or policies that enable or limit the ability of **non-citizens** (e.g. migrants, residents) to amend their gender marker or limit the effects of such a change

7.5. Describe any law, court decisions, regulation and/or policies that enable or limit **refugees'** ability to amend their gender marker or limit the effects of such a change

7.6. Describe any law, court decisions, regulation and/or policy that enable or limit the ability of **people in detention** (e.g. prison and mental health facilities) to amend their gender marker or limit the effects of such a change. (*For example, whether a transgender prisoner has the ability to amend their gender marker and/or the right to request to be detained in gender-segregated facilities based on their self-defined gender identity*)

7.7. Describe any law, court decisions, regulation and/or policy that enable or limit the ability of **people with limited legal capacity to make decisions for themselves** to amend their gender marker (e.g. people living with an intellectual disability) and/or limits the effects of such a change

7.8. Describe any laws, court decisions, regulations and/or policies that regulate the **domestic recognition** of legal gender recognition decisions from other jurisdictions?

B) IMPLEMENTATION/ APPLICATION

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- 7.9. Describe to what extent the abovementioned laws, policies, regulations or court decisions identified above, have been implemented or applied **in practice**?
- 7.10. Please describe any gaps or discrepancies<sup>6</sup>, including how rights have been ignored or groups of transgender people have been excluded.
- 7.11. Describe the responsible authorities for the a) adoption and b) implementation of the laws, regulations, court decisions and policies above (e.g. parliament, ministries, professional associations, religious authorities, etc.)

C) IMPACT

- 7.12. What are the positive and/or negative impacts of the laws, court decisions, regulations, policies and practices listed above for population groups in vulnerable positions?

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<sup>6</sup> See the definition of discrepancy in Part II: Instructions for using the Assessment Guide

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## 8. Privacy and data protection

### A) LEGAL PROVISIONS

*Note: In each question, changes to a gender marker could involve changing sex / gender details or other gender-specific details such as name, title or gendered registration number.*

8.1. Describe any laws, court decisions, regulations and/or policies that regulate that once a gender recognition decision is in force, the gender marker that was previously used **may not be made public or searchable**, unless the applicant consents. *If there are exceptions or overriding reasons to permit access to previous documents, please provide details.*

8.2. Describe any laws, court decisions, regulation and/or policies that require any gendered information in official and administrative records (including employment records and educational qualifications) to be updated to match a person's legal gender identity. *Specify all records that must be amended and any penalties for not updating this information.*

### B) IMPLEMENTATION/APPLICATION

8.3. Please provide any information about how the above mentioned requirements are **implemented or applied or enforced in practice**.

8.4. Please describe any **gaps or discrepancies**<sup>7</sup>, including how rights have been ignored or groups of transgender people have been excluded.

8.5. Describe the **responsible authorities** for the a) adoption and b) implementation of the laws, regulations, court decisions and policies above (e.g. parliament, ministries, professional associations, religious authorities, etc.)

### C) IMPACT

8.6. What are the **positive and/or negative impacts** of these laws, regulations, court decisions, policies and practices?

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<sup>7</sup> See the definition of discrepancy in Part II: Instructions for using the Assessment Guide

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**9. Access to remedies and redress**

## A) LEGAL PROVISIONS

9.1 Describe any laws, court decisions, regulations and/or policies that enable an applicant to **appeal a legal gender recognition decision**. *Please specify the remedies, and timeframe/s for applications and for decisions.*

9.2 Describe any laws, court decisions, regulations and/or policies that enable an applicant to complain if authorities treat them in a discriminatory or degrading way during gender recognition procedures E.g. national human rights institute, ombudsman, patients' rights body.

## B) IMPLEMENTATION/ APPLICATION

9.3 Please provide any information about how the above requirements are **implemented and enforced**.

9.4. Please describe any **gaps or discrepancies**<sup>88</sup>, including how rights have been ignored or groups of transgender people have been excluded.

9.5. Describe **the responsible authorities** for the a) adoption and b) implementation of the laws, regulations, court decisions and policies above (e.g. parliament, ministries, professional associations, religious authorities, etc.)

## C) IMPACT

9.6. What are the **positive and/or negative impacts** of these laws, regulations, court decisions, policies and practices on transgender people's ability to change their gender marker and on their broader human rights?

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<sup>88</sup> See the definition of discrepancy in Part II: Instructions for using the Assessment Guide

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**PART III. ANNEXES**

The following annexes provide additional information for this legal and policy review:

Annex 1: Relevance of this project to intersex people (*draft for consultation*)

Annex 2: Terminology (*to be further developed*)

**Annex 1. Relevance of this project to intersex people**

This project has been designed to look at legal gender recognition for transgender people, including those who identify as a third gender. It will involve significant consultation with transgender people, particularly in order to identify material about the implementation of existing regulatory provisions and their impact on transgender people's lives.

Legal gender recognition provisions can also have significant positive or negative impacts for intersex people, depending on how they are designed (Open Society Foundations, 2014). In Asia, existing provisions that enable intersex people to amend their sex or gender marker typically are not based on self-determination but are linked to medical requirements to 'normalise' any physical gender ambiguity. Only intersex people who have undergone such procedures are able to amend their sex / gender. This has significant impacts on intersex people's rights to recognition before the law, physical autonomy and self-determination.

The December 2013 Public Statement by the Third International Intersex Forum, framed legal recognition issues for intersex people around the rights of bodily integrity, physical autonomy and self-determination. Specifically those demands include the need to:

- register intersex children as females or males, with the awareness that, like all people, they may grow up to identify with a different sex or gender.
- ensure that sex or gender classifications are amendable through a simple administrative procedure at the request of the individuals concerned. All adults and capable minors should be able to choose between female (F), male (M), non-binary or multiple options. In the future, as with race or religion, sex or gender should not be a category on birth certificates or identification documents for anybody.

In addition, intersex organisations in this region have recommended that:

- third classifications should be streamlined and labelled 'X', 'indeterminate' or 'non-specified' and should not include the term 'intersex', in order to prevent the involuntary assignment of intersex people to a third sex or gender classification.
- the policy goal should be that sex or gender, like race and religion, will no longer appear on birth certificates and

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- in the meantime, that people who are able to give voluntary and informed consent should be free to choose a gender marker through a simple administrative procedure. .<sup>9</sup>

**This project will not proactively set out to** collect data about laws, policies, regulations, and court decisions that enable intersex people to amend their name, sex/gender, title or gender-specific identification number, on official documents. **However, any information relevant to intersex people that emerges during the project will be collated.** For example that information might concern:

- whether existing gender recognition provisions also apply to intersex people
- if so, whether intersex people are required to meet the same or different criteria than transgender people
- whether those criteria recognise the specific experiences of intersex people or result in indirect discrimination because they are framed around the experiences of transgender people (e.g. by requiring intersex people to also show evidence of clinical treatment for gender transition).<sup>10</sup>
- whether there are separate regulatory provisions for intersex people to amend their sex details, including any that are conditional on undertaking medical interventions
- whether intersex people enjoy the same legal rights as a non-intersex person with the same assigned legal sex or
- whether intersex people's sex classification is recognised for all legal purposes or if there are exceptions (e.g. participation in competitive sport or right to marry)

**This project will not look at the implementation or impact of such regulatory provisions.** This is because such analysis requires a broader focus on the relationship between legal recognition and other human rights issues for intersex people. In addition, it is unlikely that an intersex-led human rights research project would be framed around legal recognition, given other human rights violations that are a higher priority. Such a project would also require specific consultation with intersex people and their organisations at all stages of its development.

It is hoped that data inadvertently collected in this legal gender recognition review will contribute to the development of future intersex-specific research.

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<sup>9</sup> OII Australia, *Submission to the Australian Human Rights Commission: Sexual Orientation, Gender Identity and Intersex Rights Snapshot Report*, February 2015

<sup>10</sup> For example, section 2(1)(a) of the Gender Recognition Act 2004 in the United Kingdom requires that an applicant "has or has had gender dysphoria".

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**Annex 2: Terminology** *(to be further developed)*

A number of terms used in the Tool may require further explanation and are presented below.

**Transgender** *(or Trans)* is an umbrella terms used describe people whose gender identity does not match the sex they were assigned at birth. It encompasses a wide range of people including transsexual people, transgender men, transgender women, gender non-conforming people, and a large number of culturally specific terms across Asia and the Pacific. In addition, there are many trans/gender women in the region who simply identify as women and trans/gender men who identify as men. Asia and the Pacific both have long traditions of third gender identities including *hijra* (India and Bangladesh), *thirunangai* (India), *khwaja sira* (Pakistan), and *meti* (Nepal). Non-binary English language terms such as gender non-conforming or genderqueer are less common in the region, outside of Australia and New Zealand. This document and project is using the umbrella term transgender.

**Gender identity** is a person's internal sense of being a man, a woman, or third or other alternative gender, or combination of genders.

**Gender expression** is a person's ways of communicating masculinity or femininity (or both or neither) externally. This is done through physical appearance (including clothing and hair styles), mannerisms, ways of speaking, and behavioural patterns when interacting with others. **Gender affirming health services** encompasses any of the biomedical, surgical or health interventions a transgender person may undertake to physically transition. This includes, for example, access to counseling, hormone therapy, and hair removal, and a range of surgeries. The term "gender-affirming surgeries" is used alongside the older term "sex reassignment surgery" (SRS).

**Gender marker** refers to how a person's gender is recorded on official documents. Some examples in this region include Male (M), Female (F), indeterminate (X), and Other (O). As documents often use the words 'sex' and 'gender' interchangeably, sometimes this is referred to as changing 'sex details rather than as changing one's 'gender marker'. Other gender-specific details may also be considered to be gender markers, for example a gendered name, title or registration number.

**Intersex:** Intersex people are born with sex characteristics (including genitals, gonads and chromosome patterns) that do not fit typical binary notions of male or female bodies. Intersex is an umbrella term used to describe a wide range of natural bodily variations. In some cases, intersex traits are visible at birth while in others, they are not apparent until puberty. Some chromosomal intersex variations may not be physically apparent at all. According to experts, between 0.05% and 1.7% of the population is born with intersex traits – the upper estimate is

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similar to the number of red haired people.<sup>11</sup>

**Human rights** are the rights people are entitled to simply because they are human beings, irrespective of their sex, age, race, citizenship, nationality or any other status. Human rights become enforceable when they are codified in international treaties, national constitutions and laws. Human rights, such as the right to non-discrimination, have been embodied in national constitutions, and national laws often reflect a state's human rights commitments. At the level of international law, human rights have been comprehensively elaborated the Universal Declaration of Human Rights, and various binding international treaties such as the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Discrimination against Women, and the Convention on the Rights of the Child. There are also a number of regional treaties on human rights, which are relevant sources to countries of those regions and internationally (Africa, the Americas and Europe).

The ratification of any treaty confers upon states the obligation to: *respect* rights; *protect* rights and *fulfil* rights. Monitoring and enforcement of human rights commitments can happen through international, regional and national mechanisms such as treaty monitoring bodies, courts, commissions and special procedures, and national bodies such as national human rights institutions.

**Laws** are considered to be official acts and include provisions in the constitution. Laws and statutes are rules of conduct or action prescribed or formally recognised as binding, or enforced by a controlling authority that governs the behaviour of actors (including people, corporations, associations, government agencies and so on). They are adopted or ratified by the legislative branch of government and may be formally recognised in the constitution. Laws governing legal gender recognition are not necessarily contained in one law. Domestic law may be aligned with the international obligations of States, or there may exist gaps or conflicts with provisions of international law, including treaties ratified by a State.

**Policies** are considered to be high-level plans embracing the general goals and acceptable procedures of governmental bodies. Policies can be targeted towards a sector, such as health, education, transportation, public service or the advancement of transgender people; and they can be national or local in scope. They generally do not have the force of law, however policies may have very strong impacts on people's lives, either positive or negative. E.g. law may specify that the details for changing details on a passport are to be set down in operational policies.

Policies can be compatible with laws but they can also be in conflict with law. Institutions such as hospitals and schools may have their own policies. Policies establish a course or method of action

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<sup>11</sup> Office of the High Commissioner for Human Rights, *Fact Sheet: Intersex*, 2015

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selected from among alternatives, and in light of given conditions, to guide and determine priorities for present and future decisions.

**Regulations** are considered to be executive, ministerial or other administrative orders or decrees. They can be issued by any number of authorities: national, ministerial, sub-ministerial, provincial, district and communal. At the municipal level, regulations are sometimes called ordinances. Regulations and ordinances issuing from governmental entities have the force of law, although circumscribed by the level of the issuing authority. Public institutions such as hospitals and schools also issue their own governing regulations, rules of procedure and redress; corporations issue regulations called by-laws. Associations such as those that govern health professions issue rules and regulations that govern the conduct of their professionals, often called deontological or ethical codes.