

# LEGAL GENDER RECOGNITION IN THAILAND

## A Legal and Policy Review



Thailand

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*Thailand*

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# Foreword



Many transgender people face challenges in daily life because their legal gender on their identification documents do not match their gender identity. Ordinary things in life like opening a bank account or traveling to another country using your passport can become a source of harassment, and even violence. Accusations of using falsified documents is common, thus transgender people are often forced to reveal their sex assigned at birth against their wishes.

The lack of gender recognition can foster social exclusion, stigma, discrimination and violence when individuals are perceived to deviate from gender norms because their gender identity and/or expression does not coincide with their sex assigned at birth. The purpose of legal gender recognition is

to overcome this gap, giving official recognition to a transgender person's gender identity. For a transgender person to meaningfully participate in society and to prevent discrimination, the provision of legal gender recognition to transgender people based on human rights standards is advised.

In 2015, Thailand passed its first law to promote gender equality, namely the Gender Equality Act B.E. 2558, which provides protection from unfair gender discrimination. It became the first legal instrument in Thailand that specifically mentions transgender people. As Thailand considers the possibility of developing its legal gender recognition law, the participation of LGBTI people, particularly the transgender community, throughout that process is key and cannot be overemphasized.

The UNDP Strategic Plan 2018 – 2021 which sets out the direction for a new UNDP, optimized to help countries achieve the 2030 agenda for sustainable development suggests that reducing gender inequalities and empowering vulnerable groups is vital to achieving the Sustainable Development Goals. Meeting the needs of vulnerable and marginalized groups such as LGBTI people ensures that no one is left behind.

Full legal gender recognition is an important step for Thailand to meet international human right treaty obligations and regional policy commitments on respecting, protecting and fulfilling the human rights of all people, including transgender people. UNDP will continue to work with a broad range of stakeholders to comprehensively assess laws, regulations and policies in relation to legal gender recognition in Thailand, as well as in other countries in Asia.

We hope that this report can inform legal and policy formulation related to gender recognition in Thailand, and can serve as an important tool for the ongoing multi-stakeholder dialogue on this issue. The human rights of LGBTI people, or any other marginalized group, cannot be denied. UNDP will continue to work closely with our national government and civil society partners to ensure that there is social inclusion, and enjoyment of human rights for all.

A handwritten signature in blue ink, appearing to read 'Martin Hart-Hansen', written in a cursive style.

Martin Hart-Hansen  
Deputy Resident Representative  
UNDP Thailand



The Department of Women's Affairs and Family Development of the Ministry of Social Development and Human Security has an important mission to promote gender equality, protect and safeguard rights, and to maintain human dignity.

'Gender' now has many dimensions, including biological sex, sexual orientation, gender identity and gender expression. Such diversity has created inequalities and discrimination based on gender.

Therefore, the Department of Women's Affairs and Family Development worked with various stakeholders to pass the Gender Equality Act B.E. 2558. The spirit of the law is to provide protection to and prevent discrimination based on

gender, which is consistent with the current situation in Thai society and also in line with international human rights standards.

Ever since the Gender Equality Act B.E. 2558 has been enforced on 9 September 2015, the law has been implemented at all levels including; at the policy level by the Committee to Promote Gender Equality; and at the practical level by the Committee to Rule on Cases of Discrimination Based on Gender to protect those who are discriminated against. In addition, there is a Gender Equality Fund to provide compensation to victims of discrimination.

However, 'gender' in the new sense has gone far beyond the traditional world where there are only two genders, i.e. male and female. Many countries have begun to revise their relevant laws to keep up with what is happening. These include the legal gender recognition law, and the civil partnership registration law or same sex marriage law. In some countries where there has not been a revision of or a passing of a new law, court rulings or decisions of national committees have set a standard for these issues.

In Thailand, the Department of Women's Affairs and Family Development recognizes the different challenges faced by people whose gender identity do not match their sex assigned at birth. They must face stigma, exclusion and discrimination, which is contrary to the Department of Women's Affairs and Family Development's core values to promote gender equality and social inclusion.

The Department of Women's Affairs and Family Development is, therefore, pleased that UNDP has conducted this study *Legal Gender Recognition in Thailand: A Legal and Policy Review* which can serve as a valuable resource to influence policies that will protect the rights of transgender people. It is also a good example of the partnership between government agencies, private sector and civil society organizations to promote gender equality in Thailand.

A handwritten signature in black ink, appearing to be 'Lertpanya Booranabundit', written in a cursive style.

Lertpanya Booranabundit  
Director General  
Department of Women's Affairs and Family Development

# Acknowledgements

The *Legal Gender Recognition in Thailand: A Legal and Policy Review* report was developed by UNDP to comprehensively review the laws, regulations and policies related to gender recognition in Thailand.

The authors of this report are Nada Chaiyajit and Wannapong Yodmuang.

Contributing authors are Supanee (Jay) Pongruengphant, National Project Officer, Governance, Human Rights, and LGBTI, UNDP Thailand and Jensen Byrne, Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) and Human Rights Project Officer, UNDP Bangkok Regional Hub. The report was edited Andy Quan and Angel Treesa Roni, Research Assistant, UNDP Bangkok Regional Hub.

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- Department of Women's Affairs and Family Development, Ministry of Social Development and Human Security
- Gender Equality Promotion Committee
- Military Recruitment Division, Ministry of Defence
- Rights and Liberties Protection Department, Ministry of Justice
- Royal Thai Armed Forces
- Royal Thai Police
- Office of the Judiciary

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- Division of Legal Affairs, Mahidol University
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- HON Pattaya (Chonburi)
- M Plus (Chiang Mai)
- National Human Rights Commission of Thailand
- Preecha Aesthetic Institute
- Rainbow Sky Association of Thailand (RSAT) (Bangkok)
- SISTERS Center for Transgenders (Pattaya)
- Teeranat Kanjana-aksorn Foundation



- Thai Transgender Alliance (Thai TGA) (Ubon and Bangkok)
- Transgender People Association of Thailand
- Transmen Alliance of Thailand (TMAT)
- Transpiration Power
- Asia Pacific Transgender Network (APTN)

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Edmund Settle, Policy Advisor for HIV, Human Rights and Governance, Katri Kivioja, Programme Specialist, Bangkok Regional Hub, and Suparnee (Jay) Pongruengphant, Governance, Human Rights and LGBTI Project Officer of UNDP Thailand managed the development of the report.

The *Legal Gender Recognition in Thailand: A Legal and Policy Review* report is part of a regional project jointly implemented by UNDP and APTN which reviewed the law, regulations and policies in relation to legal gender recognition in Bangladesh, China, India, Nepal, Pakistan, the Philippines and Thailand. APTN conducted equivalent reviews in Indonesia and Malaysia.

The regional report is available here: [http://www.asia-pacific.undp.org/content/rbap/en/home/library/democratic\\_governance/hiv\\_aids/legal-gender-recognition--a-multi-country-legal-and-policy-revie.html](http://www.asia-pacific.undp.org/content/rbap/en/home/library/democratic_governance/hiv_aids/legal-gender-recognition--a-multi-country-legal-and-policy-revie.html)

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# Acronyms

APF	Asia Pacific Forum of National Human Rights Institutions
APTN	Asia Pacific Transgender Network
CEDAW	Convention on the Elimination of all Forms of Discrimination Against Women
CDA	Constitutional Drafting Assembly
CSO	Civil Society Organization
DSM	Diagnostic and Statistical Manual of Mental Disorders
GID	Gender Identity Disorder
HPP	Health Policy Project
ICD	International Classification of Diseases and Related Health Problems
ICJ	International Commission of Jurists
ILO	International Labour Organization
LGBTI	Lesbian, Gay, Bisexual, Transgender and Intersex
MSDHS	Ministry of Social Development and Human Security
NCPO	National Council for Peace and Order
NHRC	National Human Rights Commission
NSWPC	National Social Welfare Promotion Commission
OHCHR	Office of the United Nations High Commissioner for Human Rights
RSAT	Rainbow Sky Association of Thailand
SDGs	Sustainable Development Goals
SOGIE	Sexual Orientation, Gender Identity, and Gender Expression
TGEU	Transgender Europe
Thai TGA	Thai Transgender Alliance
TMAT	Transmen Alliance of Thailand
UNAIDS	Joint United Nations Programme on HIV/AIDS
UNCESR	United Nations Committee on Economic, Social and Cultural Rights
UNDP	United Nations Development Programme
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNFPA	United Nations Population Fund
UNHCR	United Nations High Commissioner for Refugees
UNICEF	United Nations Children's Fund
UNODC	United Nations Office on Drugs and Crime
USAID	United States Agency for International Development
WFP	World Food Programme
WHO	World Health Organization
WPATH	World Professional Association for Transgender Health

# Terminology

**Cisgender:** A term used to describe a person whose gender identity matches their sex assigned at birth. It is the opposite term, or antonym, to transgender.

**Gender-affirming health services:** An umbrella term used to include any of the biomedical, surgical or health interventions a transgender person may undertake to align their physical body and their gender identity. This may include, for example, access to counselling support, hormone therapy, hair removal and a range of surgeries. The term ‘gender-affirming surgeries’ is preferred in this report rather than the old term ‘sex reassignment surgery’ (SRS).<sup>1</sup>

**Gender expression:** A person’s way of communicating gender (for example, androgyny, masculinity and/or femininity) externally. This is done through physical appearance (including clothing, hairstyle, and the use of cosmetics), mannerisms, ways of speaking, and behavioural patterns when interacting with others.

**Gender identity:** A person’s internal sense of being a man, a woman, a third or some alternative gender, a combination of genders or no gender. Everyone has a gender identity. A person’s gender identity may not correspond with their sex assigned at birth.

**Gender marker:** How a person’s gender is recorded on official documents. In Thailand, gender markers include the designations of ‘Male (M)’ and ‘Female (F)’ as well as gendered name titles in the forms of ‘Ms.’, ‘Mrs.’, and ‘Mr.’

**Gender non-conforming:** A person whose gender expression does not conform to prevailing societal or cultural expectations of what is appropriate for their gender.

**Intersex/Sex characteristics:** 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. Being intersex relates to biological sex characteristics, and is distinct from a person’s sexual orientation or gender identity. An intersex person may be straight, gay, lesbian, bisexual or asexual, and may identify as female, male, both or neither.<sup>2</sup>

**Non-Binary:** A term used for gender identities that are not exclusively masculine or feminine, and are outside of the gender binary.

**Sex:** This term refers to the biological characteristics used to categorize people as either male or female (see definition of ‘intersex’).

**Sex assigned at birth:** The sex to which a person is assigned at, or soon after, birth. This assignment may not accord with a person’s own sense of gender identity as they grow. Most people’s gender identity coincides with their sex assigned at birth. However, for transgender people, their gender identity or expression is different from their sex assigned at birth.

**Sexual orientation:** A term referring to each person’s emotional, affectional and sexual attraction to, and intimate and sexual relations with other individuals. A person may be attracted to people of the same gender (homosexual/gay/lesbian), to people of a different gender (heterosexual) or more than one gender (bisexual or pansexual).

**Transgender:** A term used to describe a person whose gender identity is different from their assigned sex at birth.

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1 Health Policy Project, Asia Pacific Transgender Network, United Nations Development Programme (2015). *Blueprint for the Provision of Comprehensive Care for Trans People and Trans Communities*. Washington, DC: Futures Group, Health Policy Project.

2 UN Free and Equal (2015). *Fact sheet: Intersex*.

**Transgender woman:** A term used to refer to a transgender person who identifies as female (i.e. a person whose sex was assigned male at birth who identifies as female).

**Transgender man:** A term used to refer to a transgender person who identifies as male (i.e. a person whose sex was assigned female at birth but who identifies as male).

**Transition:** The process many, but not all, transgender people undergo to live authentically in their gender identity. This process may involve altering their gender expression (such as name, clothing and hairstyle). Transitioning may also involve biomedical and surgical interventions that align the individual's anatomy with their gender identity.

### A note on translation and Thai language in relation to sexual orientation, gender identity, gender expression and sex characteristics.

This report was originally written in Thai and has been translated into English. The vast majority of legal texts have been translated directly by the researchers and reflect Thai terminology and language conceptions of sexual orientation, gender identity, gender expression and sex characteristics. While the researchers have taken great care to ensure consistency and accuracy in language, often relevant texts use inconsistent or inaccurate language to describe transgender people and issues related to gender identity.

In Thailand, sexual orientation, gender identity, gender expression and having an intersex variation are widely conflated with each other. There is a general presumption that if you are a transgender woman, you are attracted to men, with the overall assumption that you are the same as a gay man. This holds true for transgender men, with the assumption that they are simply masculine lesbians. For instance, the Thai culturally specific term *kathoey* can refer to either a transgender woman or gay man while the term *Tom* can refer to either a transgender man or lesbian woman.

Thai society strictly adheres to gender stereotypes that categorize people into either male or female with specific expectations of how a man or woman should behave. Those whose gender identity lies beyond the binary of male and female are thus rendered invisible. Intersex people are rendered invisible and their naturally occurring biological variations are seen as something to be 'fixed'. Intersex people may commonly be subsumed under the transgender category by the general public and policymakers who are not sensitized to intersex issues.

The social recognition of someone as transgender often depends on whether they have undergone medical transition (gender-affirming hormonal treatments and surgical interventions). It is common for transgender men and women to be seen as lesbians and gay men respectively, prior to physically transitioning, even though their internal sense of gender has remained consistent and often regardless of their sexual orientation.

Throughout this report, you will see translations that refer to 'persons of sexual diversity', 'gender expression different than sex at birth', 'gender diversity' and a host of other terms that are used interchangeably in Thailand when it comes to lesbian, gay, bisexual, transgender and intersex issues. These terms are all transgender inclusive. This is despite the fact that 'sexual diversity' from an English language perspective would appear to apply only to different sexual orientations. However, as discussed above, common conflation of terms within Thailand has led to these terms having a conceptual meaning inclusive of transgender identities and expression. We have endeavoured to indicate, for your reference, throughout the text when these phrases occur.

# Executive Summary

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The rights to self-determination and recognition before the law are fundamental human rights belonging to everyone without distinction including transgender people. However, the human rights of transgender people in this regard continue to be violated and disrespected across the world, in the Asian region and within Thailand itself. In addition, the commitment to “leave no one behind” is a key feature of the UN Sustainable Development Goals (SDGs),<sup>3</sup> and although transgender people are not specifically mentioned in the SDGs, the UN is committed to ensuring that the SDGs benefit all populations globally with a focus on marginalized populations including transgender people.

This report, *Legal Gender Recognition in Thailand: A Legal and Policy Review* has captured and explored the small number of laws, regulations and policies in Thailand that include transgender people within their scope and which may be relevant to legal gender recognition. This report is divided into 10 sections, followed by targeted recommendations.

**The Thai legislative system.** This section provides an overview of the Thai legal system. This chapter will lead you to a greater understanding of the concept of Thai law, which will enable a greater understanding of the chapters that follow.

**Anti-discrimination and transgender people in Thailand.** At present, the only law that extends protection explicitly to transgender people is the Gender Equality Act of B.E. 2558 (2015). However, this is a newly enacted law and its legal application to upholding transgender rights remains to be seen. Prior to the enactment of this law, only the Constitution of the Kingdom of Thailand could be specifically interpreted as providing protection to transgender people. Thailand’s Constitution as well as a number of ratified international human rights treaties prohibit discrimination more broadly, without specific mention of gender identity. This chapter explores the role and responsibilities of the National Human Rights Commission (NHRC) of Thailand in promoting and protecting the human rights of transgender people. Also, it outlines instances in which the NHRC has successfully represented the interests of transgender people and their human rights in Thailand. Additionally, this chapter examines Thailand’s 3<sup>rd</sup> National Human Rights Plan and its potential, specifically its sub-plan on “persons with different sexual orientation/gender identities” as an advocacy tool for promoting legal gender recognition.

**Legal gender recognition and official documentation in Thailand.** Thailand currently has no law enabling transgender people to change their title, sex or gender on official documentation. The inability to change their documents to accurately reflect their gender identity remains the most challenging issue for transgender people attempting to access goods and services. It underscores the need for legal reform to ensure legal gender recognition for transgender people. This section provides a brief background to the draft Gender Recognition Act and the principles of the civil registration system in Thailand, the use of ‘name title’, and clarifies which government agencies are responsible for amending documents.

**Legal gender recognition at the workplace.** There are some existing standards and policies that have significant relevance to legal gender recognition in the workplace, although these do not have specific provisions in relation to gender expression and identity. Their overarching principles, including the discrimination clause in the Thai Labour Standard that includes discrimination on the basis of sex, can open a discussion about how such a standard can be interpreted in the context of the Constitutional protections against discrimination and the Gender Equality Act. In addition, there are restrictive provisions limiting gender expression, such as dress codes in the Civil Service Uniform Regulations.

**Legal gender recognition in education.** Currently there is no specific protection for transgender people from discrimination in the education sector. Students in Thailand are required to wear school uniforms throughout all levels of education, including at university. In primary and secondary schools, students are strictly required to wear the uniform (clothing and hairstyle) that coincides with their sex assigned at birth.

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<sup>3</sup> The Sustainable Development Goals represent the 2030 Agenda for Sustainable Development, and are a set of 17 goals and 169 targets with the aim of “transforming our world”. They seek to build on the Millennium Development Goals (2000–2015).

These regulations also extend to university level where each university has the ability to create its own uniform regulations. If students are found to have violated their school's or university's dress code regulation, they are often penalized by having class performance and examination points deducted in class. This chapter outlines specific examples from universities that demonstrate the inconsistencies and the lack of commonly agreed standards enabling transgender students to study, sit examinations and graduate without having to compromise their gender identity and expression.

**Gender recognition and access to social welfare and military service.** This chapter explores the recognition of transgender people for the purposes of accessing social welfare and military service. The chapter examines the National Social Welfare Promotion Commission Regulation (2012) which specifically identifies transgender people as a group benefiting from social welfare provision and provides the first clear definitions of “sexual diversity” and “transgender people” in Thai law. It also examines the Thai military conscription process which all Thai men are liable to undertake. Prior to 2011, transgender women were required to take part in the military service selection process as they are recognized as male under Thai law. Though commonly exempted from military service after assessment, they were exempted as having a “permanent mental disorder”. A 2006 court case led to a change in this policy and exemptions are now issued stating that their “gender does not match their sex at birth”. This chapter outlines the implications of this judgment and change and how they have been implemented.

**Legal gender recognition and ambiguity in criminal law.** A lack of legal gender recognition may lead to ambiguity in the interpretation of certain criminal laws which may increase the vulnerability of transgender people in ways that affect their access to justice. This chapter examines how laws against sex work are used to disproportionately target transgender women and recommends that protective laws and policies provide explicit reference to transgender people, sexual minorities and intersex people to ensure that these groups are not vulnerable to human rights violations and are specifically included in laws designed to protect all citizens.

**Transgender people detained in the criminal justice system.** This section examines how a lack of legal gender recognition and resulting incongruent identification documents affect the experiences of transgender people as offenders within the criminal justice system. It explores the issuance of summons, and the treatment of transgender people during the restraining stage and while in detention, including search procedures and access to hormones and transgender health-related check-ups.

**Legal gender recognition and its relationship to medical diagnosis (psychopathologization).** In Thailand, medical and scientific evidence plays an important role in the development and interpretation of laws and regulations. As a result, the role of medical evidence has often been central to discussions around transgender legal gender recognition in Thailand. This chapter outlines current trends and debates regarding psychopathologization and outlines expert statements and best practice examples of providing legal gender recognition without restrictive requirements that violate the human rights of transgender people to self-determination and recognition before the law.

**Intersex persons and legal gender recognition.** While a deeper analysis of the legal ramifications of legal gender recognition for intersex people in Thailand is outside the scope of this study, this report has captured and presented any relevant practices in this report for future reference.

## Recommendations

Through the process of writing this report and in consultation with key stakeholders as part of the multi-stakeholder roundtable discussions, the following key issues and recommendations were identified.

### 1. Anti-Discrimination

#### Constitution of the Kingdom of Thailand

##### *Parliament*

- Retain the interpretation of *phet* as transgender-inclusive in the “intentions” document of the new constitution

- Ensure all laws, regulations and policies adhere to the principle of non-discrimination enshrined in the Constitution and international human rights law.

## **Gender Equality Act**

### ***The Ministry of Social Development and Human Security***

- Clarify and raise awareness to transgender people, government agencies, employers, employees, trade unions and the wider public that the definition of unfair gender discrimination in the Gender Equality Act also extends to transgender employees
- Review and if necessary revise exemptions in Section 17 of the Gender Equality Act to ensure that it complies with international human rights standards and that it cannot be used to unfairly discriminate against transgender people
- Ensure members of the Committee on Consideration of Unfair Gender Discrimination and the Gender Equality Promotion Committee are sensitized on transgender issues to inform the scope of their work
- Ensure that the complaints mechanism of the Gender Equality Act is universally accessible to all
- Clarify that Section 30 of the Gender Equality Act regulating the Gender Equality Promotion Fund can be used to support, compensate and rehabilitate any victims of gender discrimination, including transgender people
- Review existing legal provisions to ensure that they do not negatively impact upon the human rights and dignity of transgender people. When negative impacts are identified, utilize the mechanism provided in the Gender Equality Act under Article 21 to challenge the constitutionality of relevant provisions and seek positive reform.

## **3rd National Human Rights Plan**

### ***The National Human Rights Commission of Thailand and the Ministry of Justice***

- Clarify if advancing legal gender recognition is prioritized within Thailand's 3rd National Human Rights Plan, as part of its sub-plan on sexual diversity and gender identity
- Monitor, document and promote initiatives where agencies have adopted or implemented their own human rights plan for sexual diversity and gender identity groups

## **2. Legal gender recognition in the workplace**

### ***Ministry of Labour***

- Monitor, document and promote the implementation of the Thai Labour Standard: Thai Corporate Social Responsibility TLS 8001:2010 among all public and private sector employers
- Ensure that the Thai Labour Standard is implemented in the hiring practices of the Ministry of Labour in order to provide an example of good practice for others to emulate
- Consider reviewing civil service dress codes and provide guidance on their implementation to ensure that transgender applicants and employees can observe the dress code that accords with their gender identity
- Encourage organizations to put policies in place that specifically protect transgender people from all kinds of harassment as well as to set up reporting mechanisms for reporting discriminatory behaviour
- Set out specific measures and put policies in place that protect transgender migrant workers and those working for international organizations who are not covered by Thai labour laws

### ***Ministry of Social Development and Human Security***

- Promote the Gender Equality Act and its application to all private and public employers and employees, including developing a guidance note on the roll-out of the Act for all private and public employers
- Collaborate with the Ministry of Labour to utilize the redress mechanisms of the Gender Equality Act to challenge laws, regulations and provisions that discriminate against transgender employees

## **3. Education**

### ***Ministry of Education***

- Collaborate with universities, particularly the Council of University Presidents of Thailand, and schools to draft clear guidelines on uniform policies for transgender students that coincide with international best practice and are in the best interest and welfare of transgender students.
- Develop and enforce clear anti-bullying policies covering students of all genders, emphasizing the management of bullying perpetrators (including faculty) without discrimination on the basis of the sex, sexual orientation or gender expression of either perpetrators or victims
- Ensure enforcement of the National Social Welfare Promotion Commission Regulation (2012)<sup>4</sup> that states that there should be increased opportunity in education for persons of diverse sexualities.

### ***Ministry of Education, Ministry of Social Development and Human Security, and the Council of University Presidents of Thailand***

- Work with universities and schools to ensure their regulations and provisions are in alignment with the Gender Equality Act. While universities are governed by their own Act of Establishment and cannot be amended by the Gender Equality Act as it is of the same hierarchy of law, the Gender Equality Act can be considered as the guiding document for best practice for gender equality in Thailand.
- Ensure teachers, school administrators and other individuals involved in education institutions are sensitized on the diversity of sexual orientation and gender identity
- Ensure that students are allowed into classes, exam rooms and in public spaces regardless of their chosen uniform.
- Ensure that gender-neutral or transgender-friendly toilets and other necessary facilities are designated or constructed in order to uphold the dignity of transgender individuals.
- Promote international best practice, taking into account the mental health and well-being of transgender students, by allowing transgender students to wear the uniform in accordance with their gender identity.

## **4. Recognition before the law: Definitions**

### ***The Ministry of Social Development and Human Security***

- Utilize the power provided under Section 5 of the Gender Equality Act to develop a comprehensive, inclusive definition of transgender people, gender identity, gender expression, sexual orientation and sex characteristics that can be used across the legal system to ensure consistency and accuracy. Once developed, these definitions may be published in the Royal Gazette as the standard for other legislation and legal issues. The inclusion of these definitions could also be included in future editions of Thai legal dictionaries.
- Develop a draft law for the legal gender recognition of transgender people, in consultation with transgender communities, that:

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<sup>4</sup> National Social Welfare Promotion Commission Regulation on Prescribing a Target Person or Group of Persons to Receive Social Welfare B.E. 2555 (2012).



- Enables transgender people to amend their sex assigned at birth and name title on their birth certificate, civil registration entry and all other official identity documents
- Includes a comprehensive, inclusive definition of transgender people
- Is based on international human rights standards including the right to recognition before the law, privacy, self-determination and bodily autonomy
- Is available to all transgender people without evidence of a medical diagnosis or treatment and regardless of whether they require or seek gender-affirming surgeries or not
- Involves a simple administrative procedure at the request of the person concerned based on self-defined gender identity, as confirmed by a witnessed statutory declaration
- Complies with the anti-discrimination protections in the Gender Equality Act

## 5. Official documentation: Name title

### *Ministry of Social Development and Human Security and Ministry of Interior*

- Develop a law, regulation or policy enabling transgender people to amend their name title:
  - Based on their self-defined gender identity, as confirmed by a witnessed statutory declaration
  - Without requiring evidence of gender-affirming surgeries or a medical diagnosis.

## 6. Education and training of decision-makers

### *Ministry of Social Development and Human Security*

- Sensitize law and policymakers on issues of gender identity, sexual orientation and sex characteristics so that laws and decisions can be formulated with accurate and clear intent, providing clarity to interpretation and implementation, and in line with international human rights standards and in accordance with Section 10 of the Gender Equality Act.
- Develop and provide judicial training or a guidance note on the human rights of transgender people and the implementation of the Gender Equality Act, including their relationship to international human rights standards.

## 7. Transgender people and the military

### *Ministry of Defence*

- Consider revising military recruitment practices to recognize the gender identity of transgender individuals in a manner that does not prevent transgender men or women from voluntarily serving. This would include:
  - Recognizing that transgender women are exempt from military service as they are women, and women are not subject to military conscription in Thailand. This includes developing a national guideline for transgender women in national army recruitment
  - Ending the informal process of screening all transgender people from general recruitment simply for being transgender
  - Allowing transgender men and transgender women to undergo the same voluntary recruitment process to enter the armed forces of Thailand as other citizens subject to the same requirements and without restrictions based solely on the fact that their gender identity does not conform to their sex assigned at birth

## 8. Transgender people in detention

### *Ministry of Justice*

- Include transgender people who are incarcerated or institutionalized in any proposed gender recognition provisions
- Develop guidelines for respectful and sensitized search and detention processes for transgender people based on the need to ensure the safety of all people in detention, including those whose gender identity differs from their sex assigned at birth
- Promote gender identity sensitivity among detention officers through the provision of training on sexual and gender diversity, with a specific focus on the search, detention, rehabilitation, and access to health care for transgender people in detention
- Afford transgender prisoners the right to a safe place of detention, including to choose to be placed in a women's prison, men's prison or other safe place
- Ensure that transgender people have access to the equivalent level of gender-affirming health care while in detention that is available to the general Thai transgender population, including access to hormonal therapy and relevant health check-ups. Ensure that transgender people are made aware of Regulation No. 139 upon arrest so that when possible they can be detained separately from other alleged offenders in police stations if they so wish

## 9. Stakeholder consultation

### *All government agencies*

- Ensure that transgender people and their organizations are consulted at every stage in the development, revision or amendment of laws and policies that may directly affect them

## 10. Intersex people

### *Ministry of the Interior and Ministry of Social Development and Human Security*

- Ensure that sex or gender classifications, including name titles, are amendable through a simple administrative procedure at the request of the intersex individual. This administrative procedure should be in line with international human rights standards including:
  - Expanding the ability to change documents to all intersex people rather than only those whose specific intersex variations result in ambiguous genitalia at birth
  - Removing the requirement for intersex people with ambiguous genitalia to undergo surgical procedures aimed at conforming their bodies to dominant notions of male or female bodies in order to have their gender recognized
  - Removing the requirement for a medical certificate detailing both the gender and sexual orientation of the intersex individual before the ability to change name title and sex or gender classification is granted

## 11. Medical diagnosis and legal gender recognition

### *All government agencies*

- Ensure that medical diagnosis of 'Gender Identity Disorder' or other psychopathologization is not a requirement for the recognition of a transgender person's gender identity, including the ability to express their gender identity in accordance with dress code or uniform requirements

# Chapter 1: Introduction

## 1.1 Research background and goals

### 1.1.1 Research background

The rights to self-determination and recognition before the law are fundamental human rights belonging to everyone without distinction including transgender people. However, the human rights of transgender people in this regard continue to be violated and disrespected across the world, in the Asia-Pacific region and within Thailand itself. This report outlines how transgender people in Thailand suffer numerous forms of rights violations and discrimination as a result of a lack of legal gender recognition. Now, more than 10 years after the drafting of the Yogyakarta Principles, much remains to be achieved if the human rights of transgender people are to be respected.<sup>5</sup>

In addition, the commitment to “leave no one behind” is a key feature of the post-2015 Sustainable Development Goals (SDGs), and although transgender people are not specifically mentioned in the SDGs, the UN is committed to ensuring that the SDGs benefit all populations globally with a focus on marginalized populations including transgender people.

This report is funded by the Being LGBTI in Asia programme,<sup>6</sup> a regional programme aimed at addressing inequality, violence and discrimination on the basis of sexual orientation, gender identity or sex characteristics, which promotes universal access to health and social services in Asia and the Pacific. In 2014, the Being LGBTI in Asia programme held a national dialogue in Bangkok, Thailand.<sup>7</sup> This dialogue was designed to review the legal and social environment faced by lesbian, gay, bisexual and transgender and intersex (LGBTI) people in Thailand. One of the key challenges identified by transgender participants at this dialogue was a lack of legal gender recognition or ability to change official documents to reflect their gender identity.

Additionally, between 2013 and 2015, the Thai Transgender Alliance undertook a community needs assessment and legal review of gender recognition in Thailand. This research found that more than 80 percent of the 275 participants said a lack of legal gender recognition was their top concern, including because of its impact on access to employment.<sup>8</sup>

This identification of legal gender recognition for transgender people as a primary human rights concern was replicated across the region in national dialogues held across Asia and at the regional level.<sup>9</sup> In response to this identified need, the Being LGBTI in Asia programme initiated a multi-country study on legal gender recognition for transgender people in the region. This report is one of the seven country-specific reports as part of this multi-country project.<sup>10</sup> These seven reports were used to inform a regional discussion paper contextualizing legal gender recognition on a regional and international scale.<sup>11</sup>

5 The Yogyakarta Principles (Principles on the application of international human rights law in relation to sexual orientation and gender identity) reflect the existing state of binding international human rights law in relation to issues of sexual orientation and gender identity with which all States must comply; International Commission of Jurists(ICJ) (2007) *Yogyakarta Principles – Principles on the application of international human rights law in relation to sexual orientation and gender identity*.

6 The Being LGBTI in Asia programme is a regional partnership between UNDP, the Embassy of Sweden in Bangkok and USAID.

7 UNDP, USAID (2014). *Being LGBT in Asia: Thailand Country Report*.

8 Areerat, Kongpob (2015). LGBT Activists to push for title law and legal recognitions, Prachatai, 14 July; Klindera, Kent (2015). Fighting for Legal Recognition for Trans Individuals in Thailand [Blog] *amfAR*. 3 August.

9 National dialogues were held in Cambodia, China, Indonesia, the Philippines, Mongolia, Nepal, Thailand and Viet Nam. Each national dialogue led to a country-specific report as well as fed into a regional dialogue and subsequent regional dialogue report. These reports can be found at: <http://www.asia-pacific.undp.org/content/rbap/en/home/operations/projects/overview/being-lgbt-in-asia.html>

10 Bangladesh, China, India, Nepal, Pakistan, the Philippines and Thailand.

11 UNDP, APTN (2017). *Legal Gender Recognition: A Multi-Country Legal and Policy Review in Asia*.

## 1.1.2 Research goals

This report takes a close look at provisions in Thai laws, policies and regulations that affect the lives of transgender people. The report also provides an analysis of the current enforcement of these laws and policies, and their impact on Thailand's transgender community. It identifies key issues and makes recommendations for improving the human rights situation for transgender people in Thailand. Additionally, it is hoped that this report will become an invaluable tool for transgender advocates, activists and their allies in advocating for legal gender recognition for transgender people.

## 1.2 Research objectives and scope

### 1.2.1 Research objectives

The goal of this report is to shed light on the laws and policies in Thailand that affect transgender people as well as to identify key entry points for transgender people in Thailand to advocate for law reform and legal gender recognition. The report considers a wide range of legal and other materials, including: specific provisions of laws and policies and accompanying implementing regulations; arbitration rulings; judicial decisions; evidence demonstrating the deficiencies of current laws and policies; and the cumulative implications for the Thai transgender community.

### 1.2.2 Research scope

The legal and policy assessment and the accompanying multi-stakeholder dialogues evaluated current laws, policies and their enforcement status regarding the legal gender recognition of transgender persons in Thailand. Currently there is no specific law providing transgender people with legal recognition of their gender identity. As a result, the researchers assessed how current laws and policies affected the day-to-day lives of transgender people and identified entry points for future advocacy on legal gender recognition. The researchers also assessed to what degree these laws and policies conformed with human rights standards, and submitted recommendations for improvement.

## 1.3 Research methods

### 1.3.1 Document review and analysis

The researchers collected and analysed all Thai laws and policies related to legal gender recognition and human rights protections relevant to transgender individuals. The team also looked at arbitration rulings and court decisions as other foundational sources for their research. Once the team had clearly defined the parameters of research, they conducted in-depth analysis of the content, seeking to identify all examples demonstrating where the legal framework's treatment of transgender people deviates from established human rights standards.

### 1.3.2 Multi-stakeholder discussions

On 21 October 2015, UNDP convened the Multi-stakeholder Roundtable Discussion on Gender Identity Recognition in Thailand: Legal, Policy and Practice Review. Representatives from the transgender community, National Human Rights Commission (NHRC) and relevant government departments were invited to attend the roundtable, and information was shared with them regarding the nature and objectives of this research project. Organizations and individuals were given a platform to review and provide their own impressions of Thailand's laws and policies governing transgender people. Stakeholders were also asked to provide information necessary for the successful delivery of this research report. Following the event, the research team secured the support and contact information of community leaders, and thereafter undertook wide-ranging consultations and research.

On 15 June 2016, UNDP hosted the follow-up Multi-stakeholder Roundtable Discussion on Gender Identity Recognition in Thailand in order to review the draft report and collect feedback and comments. Participants included transgender civil society members, the NHRC and relevant government representatives.

### 1.3.3 In-depth key informant interviews

The research team interviewed key informants from the Ministry of Justice, Ministry of Social Development and Human Security (MSDHS), the Department of Provincial Administration, the Royal Thai Armed Forces, the Royal Thai Police, the National Human Rights Commission, the Preecha Aesthetic Institute, Mahidol University and Thai transgender civil society (see Annex).

From these sources, the researchers (both members of the Thai transgender community) were able to deepen their knowledge of the lived reality of transgender people in pursuing legal gender recognition on their own terms. Interviewees shared their experiences and impressions of the processes involved in seeking exemption from military conscription, dealing with mandatory dress codes and experiences in detention. They also identified the current highlights and deficiencies of laws and policies as they govern anti-discrimination, access to employment, social security and other important functions.

## 1.4 Data limitations

Thailand currently has no overarching legal definition of gender, transgender, LGBTI, sexual minorities, woman, man or other relevant terms that would help to define the concepts underpinning legal gender recognition and enhance the protection of transgender people.<sup>12</sup>

There is also a lack of research material on gender recognition in Thailand as well as the challenges faced by transgender people in accessing services because of incongruent identification. Prior to this study, no comprehensive overview of relevant laws and policies had been undertaken.

Additionally, there remains little information and engagement on the issue of how a lack of legal gender recognition affects transgender men. The Thai Transgender Alliance has prioritized advocacy work on legal gender recognition. However, initially, this focused on the issue of military conscription affecting transgender women. While the researchers reached out to transgender men, women and gender non-conforming people, the vast majority of information available relates to the experiences of transgender women. Transgender women were also overrepresented among civil society participants during the multi-stakeholder discussions. As a result, the researchers have in some instances relied on interviews with a key informant from the Transman Alliance (Thailand) in areas where information on the experiences of transgender men was scarce. This key informant, Jimmy Kritipat Chotidhanitsakul, is one of the first prominent and visible transgender men in Thailand. Since he came out publicly, the human rights issues of transgender men in Thailand have been gaining more recognition among Thai society as well as the wider LGBTI community. However, despite this increased visibility, there remains a lack of engagement and recognition of the barriers faced by transgender men in Thailand. These include, but are not limited to, access to health care services, discrimination while attempting to access public services and the inability to change documents to reflect their gender identity.

The invisibility of non-binary and gender non-conforming transgender people also remains an issue. As a result, the researchers have not been able to include non-binary and gender non-conforming perspectives in this report. There is no specific term in Thai to define non-binary and gender non-conforming people. Thai society conceives of gender along a strict gender binary of male and female. All official and non-official documents studied as part of this report, including those dealing with name title and gender markers, used exclusively binary language. There is currently no space in the Thai discourse of gender identity for individuals to define their own gender identity beyond binary male or female options. This is the case even within the transgender community, and within the mainstream society, transgender people are widely perceived as those who wish to change from one binary gender to another, that is from male to female, or from female

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<sup>12</sup> The National Social Welfare Promotion Commission (NSWPC) Regulation on Prescribing a Target Person or Group of Persons to Receive Social Welfare B.E. 2555 (2012) provides a definition of 'transgender' and 'persons of sexual diversity' but this definition has not yet been used beyond this regulation.

to male. This is despite the existence of many third-gender identities in South Asia, including among those communities living in Thailand and a growing awareness among young transgender people in Thailand of the existence of non-binary identities and language. The concept of gender identity as an internal sense of one's own gender rather than something that is a direct reflection of physical anatomy remains rare.

## 1.5 Lack of clear definition and understanding of transgender, gender identity or gender expression

In Thai laws and policies, there remains no consistent definition used to describe transgender people or the concepts of gender identity or gender expression. In addition, where a provision or related decisions include transgender people, they often confuse transgender people with intersex people or conflate gender identity with sexual orientation. Provisions regularly use the terms gender, gender identity and sexual identity interchangeably. Other regulatory documents often contain outdated, disparaging terms, for example regulations by the Medical Council that describe a transgender person as “a person with behaviour indicating confusion.”<sup>13</sup> This definition does not respect the right to self-determination of transgender people or their inherent human dignity. Regulations, court decisions and legal Acts show an inconsistency of language that affect interpretation and demonstrate a general lack of sensitization and understanding among the legislature and policymakers in relation to transgender issues. Ultimately this lack of clear definition and understanding has an impact on attempts to advocate for legal gender recognition in that the sensitization of policymakers and other stakeholders on transgender issues is often a necessary precursor.

## 1.6 Importance of legal gender recognition

Identification documents are required for many activities in daily life. For the majority of the population, this is routine and unproblematic. However, for transgender people, it means that their ability to live in dignity, equality and security is severely compromised if they do not have legal gender recognition. Transgender people face discrimination and exclusion when they are required to use a National Identification Card, birth certificate, passport or other identity document that does not match their gender identity or gender expression. This discrimination may involve threats to a transgender person's safety, or mean they are excluded from education, vital health services, employment and housing, or from receiving access to social assistance or to private banking, credit or mortgage facilities.

Often, such identity verification is required at times when people are particularly vulnerable, including when faced with a medical emergency, in natural disasters, or when they are homeless or are crossing borders. Transgender people have been denied access to services or support in each of these circumstances, because they do not have official identity documents recognizing their gender identity and/or gender expression. Therefore, legal gender recognition is vital to ensure that transgender people are legally protected and able to fully realize their human rights.

Official recognition of transgender people can also enable access to special measures or affirmative action provisions. These measures have been applied in other countries in the region and they are designed to meet the specific needs of transgender people or to overcome the barriers they face accessing general services (for example, employment, housing schemes or services in response to gender-based violence). However, such measures are not yet being applied in Thailand.

## 1.7 International context

Legal gender recognition is increasingly being recognized as an essential step required to ensure transgender people's rights to equality and freedom from discrimination. Transgender people are often stigmatized and discriminated against because they are perceived to be defying socially accepted gender norms, and their gender identity or gender expression does not match their sex assigned at birth.

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<sup>13</sup> Regulations of the Medical Council Concerning Ethics in the Medical Profession Rules for Treatment in Sex Change Operations B.E. 2552 (2009).

The provisions of international human rights law are universal and extend in full to all people, including transgender people, whether or not gender identity or gender expression is specifically mentioned as a prohibited ground of discrimination. The prohibition of discrimination on the basis of “other status” encompasses discrimination on other grounds, including based on a person’s actual or perceived gender identity or gender expression.<sup>14</sup> Human rights bodies have called on States to eliminate discrimination on these grounds in all aspects of life.<sup>15</sup>

The Yogyakarta Principles summarize how international human rights standards apply to the human rights issues related to gender identity or sexual orientation.<sup>16</sup> Principle 3 focuses on the right to recognition before the law. It states:

“Every person’s self-defined ... gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom. No one should be forced to undergo medical procedures, including sex reassignment surgery, sterilization or hormonal therapy, as a requirement for legal recognition of their gender identity. No status, such as marriage or parenthood, may be invoked as such to prevent the legal recognition of a person’s gender identity.”

This principle, as well as evolving international standards, encapsulates the core issues faced by transgender people who do not have access to legal gender recognition. Firstly, it points out that the rights of transgender people to self-determination, dignity and freedom are often undermined. Secondly, gender recognition laws, policies or practices that exclude people on the basis of marital or parental/family status are discriminatory. Thirdly, compulsory medical requirements for legal gender recognition undermine the right to freedom from medical abuse and may result in coerced sterilization.<sup>17</sup>

The United Nations Special Rapporteur against Torture has explicitly noted that, “in many countries, transgender persons are required to undergo often unwanted sterilization surgeries as a prerequisite to enjoy legal recognition of their preferred gender”.<sup>18</sup> He has recommended that all States outlaw forced or coerced sterilization in all circumstances and provide special protection to marginalized groups, including transgender people.<sup>19</sup> Other human rights bodies have also recommended removing any compulsory sterilization requirements from gender recognition laws.<sup>20</sup> In its May 2015 update report to the Human Rights Council, the Office of the High Commissioner for Human Rights identified gender recognition as a specific human rights issue.<sup>21</sup> While the joint statement from 12 United Nations agencies in 2015 recommended that “States should uphold international human rights standards on non-discrimination, including by ... ensuring legal recognition of the gender identity of transgender people without abusive requirements”.<sup>22</sup>

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14 UN Committee on Economic, Social and Cultural Rights (CESCR) (2009), *General comment No. 20: Non-discrimination in economic, social and cultural rights*, 2 July, E/C.12/GC/20, para 15; Asia Pacific Forum of National Human Rights Institutions and the United Nations Development Programme (2016). *Promoting and Protecting Human Rights in relation to Sexual Orientation, Gender Identity and Sex Characteristics: A Manual for National Human Rights Institutions*, p. 130.

15 UN Committee on Economic, Social and Cultural Rights (CESCR) (2009). *General comment No. 20: Non-discrimination in economic, social and cultural rights*, 2 July, E/C.12/GC/20; UN Committee on the Elimination of Discrimination Against Women (CEDAW) (2010), *General Recommendation No. 28 on the Core Obligations of States Parties*, 16 December, CEDAW/C/GC/28; UN Committee on the Rights of the Child (CRC) (2013), *General Comment No. 14 on the Right of the Child to have His or Her Best Interests taken as a Primary Consideration*, 29 May, CRC/C/GC/14; UN CEDAW (2015), *General Recommendation No. 33 on Women’s Access to Justice*, 23 July, CEDAW/C/GC/33.

16 ICJ (2007).

17 WHO, OHCHR, UN Women, UNAIDS, UNDP, UNFPA and UNICEF (2014). *Eliminating forced, coercive and otherwise involuntary sterilization: an interagency statement*; WHO (2015). *Sexual health, human rights and the law*.

18 UN Human Rights Council (2013), *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, 1 February 2013, A/HRC/22/53, para 78.

19 *Ibid.* para 88.

20 For instance, in April 2017, the European Court of Human Rights ruled that requiring transgender people to undergo sterilization, in order to have their gender recognized, violated the right to respect for private life. *Affaire A.P., Garçon et Nicot v. France* (79885/12, 52471/13 and 52596/13), 6 April 2017.

21 UN Office of the High Commissioner for Human Rights (OHCHR) (2015). *Discrimination and violence against individuals based on their sexual orientation and gender identity. Report of the United Nations High Commissioner for Human Rights*. New York: United Nations; WHO (2015).

22 ILO, OHCHR, UN AIDS Secretariat, UNDP, UNESCO, UNHCR, UNICEF, UNODC, UN Women, WFP and WHO (2015). *Joint Statement on ending violence and discrimination against Lesbian, Gay, Bisexual, Transgender and Intersex People*; UNDP, APTN (2017).

## 1.8 Good national practice around the world

In May 2012, Argentina became the first country to pass a gender identity law that enables gender markers to be changed on birth certificates and all associated documents, based solely on a person's request for such a change. There is no requirement for a medical diagnosis, surgeries or hormonal treatment. There are no age or other restrictions on who can access the provisions, and there are additional protections for children. Typically, the application is made by the child's legal guardian and the child or young person must give their explicit agreement. The law cites the Convention on the Rights of the Child, including that the child's best interests and evolving capacities must be taken into account.<sup>23</sup>

In Latin America, a 2015 decree in Colombia and a 2016 law in Bolivia have both simplified the process for amending gender markers.<sup>24</sup> The Bolivian law includes anti-discrimination provisions and reduces the role of medical professionals to confirming that the transgender person is making an informed decision to change their gender marker.<sup>25</sup>

In addition, both the Argentinean and Maltese laws have addressed transgender people's rights to health, privacy and protection from discrimination. The Malta law explicitly considers the human rights of intersex people and is the first in the world to prohibit the so-called 'sex-normalizing' genital surgeries on intersex infants. It is the second country in the world, after Australia, to protect intersex people under a specific prohibited ground of discrimination.

Two other countries in Europe, Denmark and Ireland, have gender recognition laws that enable transgender people over the age of 18 to self-define their gender identity.<sup>26</sup> In 2016, Norway became the fourth country in Europe with such a self-determination approach, available to anyone aged 16 years or over. Those aged between 6 and 16 require parental consent from at least one parent.<sup>27</sup>

In this region, there are regulatory provisions in parts of South Asia that enable people to be recognized as third gender on official documents, based solely on self-defined gender identity. Passports in both Australia and New Zealand have the option of male, female or an additional third gender option, based solely on someone's self-defined gender identity.<sup>28</sup> Two territories in Australia apply this approach to birth certificates as well.<sup>29</sup> This means that any person is free to use "M", "F" or "X" as their gender marker on these documents.

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23 Similarly, the 2015 Gender Identity, Gender Expression and Sex Characteristics Act in Malta sets out an accessible process that recognizes a universal right to gender identity, with no age restrictions. For those under the age of 18, applications would be made by a legal guardian. These must give paramount consideration to the best interests of the child and due weight to the child's views, recognizing their age and maturity.

24 Columbian Ministry of Justice Decree 1227 of 2015, 4 June 2015; Lavers, M. (2015). Colombia to Allow Gender Change without Surgery. *The Washington Blade*, June 8; Bolivian Law No. 807: The Gender Identity Law, 21 May 2016.

25 Solares, Mateo Rodrigo and Edelman, Elijah Adiv (2016). Bolivia Prioritizes Transgender and Transsexual Human Rights, *Anthropology News*, 19 May.

26 In Denmark, legal gender recognition is only available to those over 18. While Ireland's 2015 Gender Recognition Act includes a less accessible process for those aged 16 and 17, Ireland's process is not medicalized for adults 18 or over. Those who are 16 and 17 years old must have their parent's or guardian's consent, they must provide a medical evaluation that ensures they have the sufficient degree of maturity for this decision, understand the consequences of the decision and that the decision is made without duress or influence from another person. They must also provide a certificate from an endocrinologist or psychiatrist that concurs with the above medical evaluation. Transgender Equality Network Ireland (2015a). *Gender Recognition and Transgender Young People*.

27 Transgender Europe (TGEU) (2016). Norway Approves Legal Gender Recognition Based on Self Determination [Press Release].

28 However, Australia requires a supporting letter from a health professional.

29 Open Society Foundations (2014a). *License to Be Yourself: Laws and advocacy for legal gender recognition of trans people*; Births, Deaths and Marriages Registration Amendment Bill 2016 (Victoria, Australia).



# Chapter 2: The Thai legislative system

This section starts with an overview of the Thai legal system, as a way to identify the relative status of existing provisions that impact on the lives of transgender people, and the potential opportunities for change. This chapter presents a greater understanding of the concept of Thai law, which will enable a greater understanding of the chapters that follow.

Thailand uses a civil law system that is also significantly influenced by common law. The state government and social administration are regulated by the Constitution, the Penal Code and administrative laws.

A law comes into effect after enactment by the legislature (parliament). However, Thailand also gives some of these powers to the Executive to facilitate their work in state administration and public services. In exercising these powers, the authorities cannot enact a law that is contradictory to the Constitution which is the supreme law of the country. This is relevant to legal gender recognition for example, as no local government could develop regulations or policies in relation to legal gender recognition that contained elements contradicting constitutional rights.

The Thai legislative system includes substantive law<sup>30</sup> as well as court judgments, which are in the hand of an independent judiciary. Substantive laws are the primary sources for the interpretation of any legal matter, and also provide the basis for Supreme Court judgments. However, Supreme Court decisions can provide guidance in individual cases themselves or be applied as a precedent to cases with similar facts.<sup>31</sup> Since Thailand currently has no law enabling transgender people to amend their gender marker on legal documents, court judgments have great relevance to interpreting cases related to legal gender recognition.<sup>32</sup>

Several court decisions are already relevant to legal gender recognition as they deal with issues such as legal title or gender marker change. For instance, a Supreme Court judgment ruled that:

“the gender of a natural person which is recognized by law is based on sex at birth. According to the dictionary, a woman is defined as a person who is able to give birth. However, the petitioner is a man who has undergone sex reassignment surgery but is unable to give birth so the petition to change the gender in the exercise of the rights on Court is dismissed by laws”.

This judgment represents a precedent in law that currently blocks the recognition of transgender women as women.<sup>33</sup>

Comprehensive, nationwide gender recognition in Thailand is most likely to be achieved through a national law or policy. A relevant example is the adoption of the Gender Equality Act of B.E. 2558 (2015). This was the result of a legislative process that included a comprehensive consultative process between officials from the Department of Women’s Affairs and Family Development, women’s civil society organizations and LGBTI civil society organizations before it was approved by the National Legislative Assembly.

As the Gender Equality Act has only recently come into force, it has taken time for subordinate regulations under the Act to be drafted in order to add additional clarifications to its intent and application. These subordinate regulations came into effect on 1 September 2016. Significantly, one of these subordinate regulations outlines the procedure for petitioners to file complaints under the Act. This procedure allows transgender and intersex individuals who face unfair discrimination as a result of their gender identity or intersex variation to file a complaint with the Ministry of Social Development and Human Security (MSDHS). For more information on the Gender Equality Act, please see Chapter 3 Section 4.

30 Substantive laws are laws that determine the rights and obligations of individuals and collective bodies within a state. This includes all categories of private and public law such as criminal law, the law of contracts and tort. Substantive law differs from procedural law, which is the body of legal rules that govern how to obtain one’s rights and how the courts are conducted.

31 A ‘precedent’ is a legal principle created by a court decision which later provides an authoritative or persuasive example for judges who may be deciding on similar issues at a later date.

32 Sangsrikaew, W. (2003). *Legal Status of Transsexual Individuals* [LLM Thesis]. Faculty of Law, Thammasart University.

33 Supreme Court Judgment No. 157/2524 (1981). For more information on this case, please see Section 4.2.3.

In relation to the role of substantive law over court decisions in Thai law, any future judgments of cases brought against alleged violators of the new Gender Equality Act will help to further define the scope of the Act through the creation of legal precedent.

Outlining how legal hierarchy works in Thailand is essential if stakeholders, including transgender leaders and wider civil society, are to understand how to advocate effectively for the enforcement or revision of existing provisions or the enactment of new laws.

The effects of the hierarchy of laws are that:<sup>34</sup>

- A lower hierarchy law or regulation cannot contradict any other law with higher hierarchy. For instance, as mentioned, the Constitution is the supreme law of the state and thus, no other law can contradict it.<sup>35</sup>
- Laws with lower hierarchy, and especially the application of such laws, cannot be enacted beyond the limitation defined by the master law.
- Laws with equal hierarchy can edit and amend each other, such as an act to amend a prior act.

There are two important benefits of the hierarchy of laws.

- a) Law enactment: Within a clear hierarchy, the authorities are careful not to enact lower-ranking laws that would conflict with a higher-ranking law, as such provisions could not be enforced.
- b) Law enforcement: If a law contradicts another law, the problem of which law should be enforced can be determined by the hierarchy of the law. The law with higher hierarchy always takes precedence over the lower hierarchy law.

Hierarchy of laws <sup>36</sup>		Rank
Constitution	Supreme law	1
Act (Genuine law )	Legislative law	2
Emergency decree (Exceptional law)	Executive law	
Royal decree	Subordinate legislation	3
Ministerial regulation/announcement		
Regulations (procedure, rule, announcement)		
Local legislation (Municipal law, Bangkok provisions etc.)	Local ordinance	

34 Neabklang, S. (2010). *Introduction to Law. Legal Textbook Development Center*, Payao University, p. 74.

35 The Constitution of the Kingdom of Thailand B.E. 2550 (2007). Section 6.

36 The Constitution of the Kingdom of Thailand B.E. 2550 (2007). Section 6 “The provisions of any law ... which are contrary to this constitution, shall be unenforceable”; *Jumpa, Manit et al. (2003). Basic Knowledge of the Law*, Bangkok. Bangkok: Darnsutha Printing Co Ltd, p. 80; Chueathai, Somyat (2013). *Introduction to Law*. Bangkok: Winyuchon Publication House, p. 88.

# Chapter 3: Anti-discrimination and transgender people in Thailand

At present, the only law that extends protection explicitly to transgender people is the Gender Equality Act of B.E. 2558 (2015). However, this is a newly enacted law and its legal application to upholding transgender rights remains to be seen. Prior to the enactment of this law, only the Constitution of the Kingdom of Thailand could be specifically interpreted as providing protection to transgender people. Thailand's Constitution as well as a number of ratified international human rights treaties prohibit discrimination more broadly, without specific mention of gender identity.

## 3.1 The Constitution of the Kingdom of Thailand (2007)

During the initial drafting of the 2007 Constitution, a proposal to include specific mention of “persons of sexual diversity”<sup>37</sup> was rejected by the Constitutional Drafting Assembly (CDA). Instead, it was recorded in an “intentions” document issued by the CDA. This stated that the Thai word ‘*phet*’ (sex) in Section 30 would be understood to mean the differences between men and women, and also “differences of individuals whose gender identity, gender and sexual diversity are different from their physical sex.”<sup>38</sup> This record of the constitutional “intentions” has been used as a key factor in legal interpretation, although, it is not written directly in the Constitution.<sup>39</sup>

For instance, Section 30 of the Constitution, with the interpretation provided in the “intentions” document, was cited in a decision by the Administrative Court to revoke an order by the Governor of Chiang Mai prohibiting transgender participants from taking part in the procession during the province's annual flower festival in 2009.<sup>40</sup>

## 3.2 The Constitution of the Kingdom of Thailand (2017)

After the coup d'état in 2014, the 2007 Constitution was abrogated. However, that does not mean that protection from discrimination on the grounds of gender identity ceased. The Interim Constitution of the Kingdom of Thailand (2014),<sup>41</sup> which was in force during the drafting process for the new Constitution of the Kingdom of Thailand (2017), retained Section 30<sup>42</sup> of the 2007 Constitution and included a section upholding the human dignity, rights, freedom and equality of the people of Thailand.<sup>43</sup>

The Constitutional Drafting Assembly was also responsible for drafting the new constitution.<sup>44</sup> There were two attempts to produce draft constitutions. The first draft in 2015 also retained Section 30 of the 2007

37 In Thailand, the concept of sexual diversity is widely used and understood to include gender identity and sexual orientation as well as intersex variations.

38 Section 30 states that “All persons are equal before the law and shall enjoy equal protection under the law. Men and women shall enjoy equal rights. Unjust discrimination against a person on the grounds of the difference in origin, race, language, sex, age, physical or health condition, personal status, economic or social standing, religious belief, education, or Constitutional political views, shall not be permitted.”; ‘Intentions of the Constitution of the Kingdom of Thailand’; UNDP, USAID (2014) p. 22. In the Thai context, this was understood to apply to LGBTI people as a whole. Please see Chapter 1, Section 5 for more information.

39 Preechasilpakul, S. (2013). *Persons with sexual diversity in legal system*. Bangkok: Foundation for SOGI rights and Justice, p. 42; Constitution of the Kingdom of Thailand B.E. 2550 (2007).

40 Suriyasarn, Busakorn (2014). *Gender Identity and Sexuality in Thailand: Promoting Rights, Diversity and Equality in the World of Work (PRIDE)*, p. 21.

41 Constitution of the Kingdom of Thailand (interim) B.E. 2557 (2014).

42 Now as Section 27.

43 Section 4 of the interim constitution states: “The human dignity, rights, liberty and equality of the people shall be protected. The Thai people shall enjoy equal protection under the Constitution”, Constitution of the Kingdom of Thailand (interim) B.E. 2557 (2014).

44 Constitution of the Kingdom of Thailand B.E. 2560 (2017); The new Constitutional Drafting Committee nominated four organizations: National Council for Peace and Order (NCPO), a military group that launched the coup d'état on 22 May 2014; the National Legislative Assembly appointed by the National Council for Peace and Order (NCPO); the Cabinet appointed by NCPO; and

Constitution with no explicit mention of transgender people or sexual diversity. However, the accompanying “intentions” of the constitution still confirmed that non-discrimination on the grounds of *phet* also included sexual orientation and gender identity. However, this draft was voted down by the National Reform Council.<sup>45</sup> Subsequently, another draft in 2015 also retained the content of Section 30 of the 2007 constitution.<sup>46</sup> This draft constitution was put to referendum by the public on 7 August 2016. On 10 August 2016, the Election Commission announced that the draft Constitution had been accepted by a vote of 61.35 percent for and 38.65 percent against.<sup>47</sup> This draft Constitution was then signed into law by the King of Thailand and published in the Royal Gazette on 6 April 2017. At the time of writing, the official “intentions” document for the 2017 Constitution has not been published and thus, it remains to be seen if the interpretation of *phet* as transgender inclusive will remain.

## 3.3 The complaints mechanism of the National Human Rights Commission

### 3.3.1 Role of the National Human Rights Commission

National human rights institutions are official, independent, legal institutions established by the State and exercising the powers of the State to promote and protect human rights. As part of its mandate, the National Human Rights Commission (NHRC) of Thailand monitors human rights violations whether by individuals, government agencies or private entities and can propose remedial measures or revision of laws, rules or regulations, and make policy recommendations for the purpose of promoting and protecting human rights.<sup>48</sup>

If a person or group believes their human rights have been violated, they can submit a written complaint directly to the NHRC or one of its members or any human rights organization accredited by the NHRC.<sup>49</sup> If it is found that the root cause of a human rights violation issue is a law or policy, the commission may propose policy recommendations and proposals to the Parliament and Cabinet to improve laws, regulations or mandates<sup>50</sup> or to promote cooperation and coordination between other sectors such as government agencies, private sectors and other human rights organisations.<sup>51</sup>

A complaint can be filed with the NHRC when a transgender person’s human rights are violated.<sup>52</sup> If the complaint identifies potential issues that need to be addressed, the subcommittee responsible for the human rights of transgender people will coordinate with both parties to clarify the facts surrounding the case and begin an investigation of the alleged human rights violation.<sup>53</sup>

Upon completion of the investigation, if the NHRC considers that a violation of human rights has occurred, they will prepare a detailed examination of the facts and a timeframe to tackle the identified human rights violations. Each complaint is dealt with on a case-by-case basis. This may include arranging meetings

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the National Reform Council appointed by NCPO.

45 iLaw (2015). iLaw compilation of 10 major stories of 2015/2015 iLaw รวม 10 เรื่องเด่น ประจำปี 2558 [Blog], iLaw, 28 December.

46 Now renamed Section 27 in the new draft.

47 Bangprapa, Mongkol (2016). Official Charter Referendum Figures Posted. *Bangkok Post*, 11 August.

48 The National Human Rights Commission of Thailand (n.d.). *Mandates*; National Human Rights Commission Act, Section 15.

49 National Human Rights Commission Act, Section 23.

50 Ibid. Article 15.3.

51 Chaiyakit, N. and Yodmuang, W. (2016). Interview with Kitiporn Boon-am, Human Rights Officer, National Human Rights Commission of Thailand, Office of National Human Rights Commission of Thailand, 4 March 2016.

52 The procedures for filing and investigating complaints of transgender human rights violations are identified in the National Human Rights Commission Act B.E. 2541 (1999). A complaint can be filed with the NHRC under Article 23 of this Act. Under Article 25 of the Act, upon receipt of a complaint a subcommittee does a primary screening as to whether the complaint counts as a violation and falls under the authority of the NHRC

53 In 1999, the NHRC appointed a specific subcommittee to advocate for the protection of the human rights of lesbian, gay, bisexual and transgender people in Thailand. This subcommittee has continued for the last two commission tenures. This subcommittee was founded by the power of the National Human Rights Commission Act B.E. 2542 (1999), Article 15 (9); Chaiyakit, N. and Yodmuang, W. (2016). Interview Kitiporn Boon-am, Human Rights Officer, the National Human Rights Commission of Thailand, Office of National Human Rights Commission of Thailand, 4 March 2016.

among related sectors to discuss the NHRC's recommendations to amend or modify laws or other domestic mechanisms that can protect transgender people. The NHRC also has the power to mediate between parties.<sup>54</sup>

The NHRC also has the responsibility to monitor internal mechanisms<sup>55</sup> such as local laws, policies, regulations or mandates to identify ways they can resolve human rights issues, and to ensure that adequate mechanisms are in place for protecting human rights according to the principles of freedom under the Constitution, international human rights principles or international conventions.<sup>56</sup>

This function is particularly relevant to the current study in relation to the enforcement of the Gender Equality Act.<sup>57</sup> If the NHRC receives a complaint about a human rights violation against transgender people, the Subcommittee on Complaint Screening will coordinate with the MSDHS, as the government agency in charge of enforcing the Gender Equality Act. However, if the NHRC claims that the Gender Equality Act itself does not solve the problem effectively, the NHRC has the authority to review the Act and make recommendations to the government to propose changes.<sup>58</sup>

### 3.3.2 The NHRC and the human rights of transgender people

The NHRC has had a valuable role to play in promoting the human rights of transgender people in Thailand. Through their mandate, they are in a unique position to disseminate information and promote education and research on human rights and to proactively cooperate and coordinate with government agencies, civil society organizations (CSOs) and other human rights organizations. For instance, the NHRC has provided active support and advice to transgender individuals and organizations seeking redress for human rights violations such as during military conscription.<sup>59</sup>

Additionally, the NHRC subcommittee, working with the transgender community, has developed a range of recommendations for various sectors in Thailand such as the educational and business sectors in an attempt to combat pervasive discrimination against transgender people, particularly in cases where they are discriminated against because they are wearing clothes that match their gender identity rather than their sex assigned at birth. In the Thai context, this is referred to as “cross dressing”.<sup>60</sup>

Moreover, the NHRC has previously been instrumental in enabling the transgender community to promote the issue of legal gender recognition and to meet with government to discuss name title laws in Thailand. On 29 March 2011, the NHRC arranged a meeting at Thammasat University and invited CSOs working on LGBTI rights to discuss the amendment of name titles for transgender people in the civil registration system. As a follow-up on 11 September 2011, the NHRC also hosted a similar public forum. Its panellists included representatives from the Department of Provincial Administration of the Ministry of Interior, Ramathipbodi Hospital, the Faculty of Law of Thammasat University and from the transgender and intersex communities.

Since then, the NHRC has continued to be active in protecting and promoting the rights of transgender people in Thailand and most recently, represented a transgender model who was refused entry to a pub in Bangkok's Royal City Avenue.<sup>61</sup>

54 The NHRC itself does not have the power to amend or modify laws but can make recommendations or proposals to the State. Ibid.

55 National Human Rights Commission Act B.E. 2542 (1999), Article 15 (1) (3) and (5).

56 Chaiyajit, N. and Yodmuang, W. (2016). Interview Kitiporn Boon-am, Human Rights Officer, the National Human Rights Commission of Thailand, Office of National Human Rights Commission of Thailand, 4 March 2016.

57 B.E. 2558 (2015)

58 Chaiyajit, N. and Yodmuang, W. (2016). Interview Kitiporn Boon-am, Human Rights Officer, the National Human Rights Commission of Thailand, Office of National Human Rights Commission of Thailand, 4 March 2016.

59 Ibid.

60 It is unknown at this time if these recommendations were implemented or how widely. Additionally, NHRC cases and their results are not available to the public. As a result, the consultants relied on secondary documentary evidence and interviews with NHRC representatives in outlining their work on transgender issues in Thailand.

61 National Human Rights Commission of Thailand (2015). NHRC signing an agreement with transgender and entertainment establishment. Phumhiran, Chanikan (2015). Transgender model appeals to NHRC over alleged ban from pub. *The Nation*, 10 February.

## 3.4 Transgender people’s recognition under Thailand’s 3rd National Human Rights Plan

While not a legally binding document, the 3<sup>rd</sup> National Human Rights Plan 2014–2018 is a valuable advocacy tool for transgender legal gender recognition in Thailand. This policy document is issued by the Rights and Liberty Protection Department of the Ministry of Justice and outlines targets for meeting Thailand’s international human rights obligations. It aims to encourage all sectors to learn about the process of issuing human rights plans for their organizations.<sup>62</sup> As part of this plan, 26 sub-plans were created including a human rights plan on “persons with different sexual orientation/gender identities”. The plan defines “gender identity” according to the definition in the Yogyakarta’s Principles.<sup>63</sup> The plan also provides a series of indicators to monitor the advancement of the human rights of transgender people, showing how the plan could be used as an advocacy tool for promoting legal gender recognition.<sup>64</sup> The indicators include drafting new laws or revising current provisions to guarantee the human rights of “people with sexual diversity”, and conducting a study on the current practices and possibilities of providing appropriate name titles to transgender people. However, research undertaken for this report did not find evidence of any agencies that have adopted or implemented their own human rights plan for sexual diversity and gender identity groups.

## 3.5 Thailand’s Gender Equality Act

### 3.5.1 Introduction

The Thailand Gender Equality Act<sup>65</sup> was enacted in 2015 and is currently the strongest legal instrument for advocating for legal gender recognition in Thailand.<sup>66</sup> The intention behind this law is to protect people from unjust discrimination and provide access to legal processes equally whether the person is male, female or a member of a “sexual diversity group”.<sup>67</sup> Section 3 of the Act explicitly defines “gender discrimination” while clarifying that it is not limited to men and women, but also applies to persons who have “a different appearance from his/her own sex by birth”.<sup>68</sup>

This Act is new and is the first law relevant to gender equality in Thailand. As a result, officials are still in the process of developing information on its enforcement, as well as drafting subordinate regulations under the Act. This process includes defining what unfair gender discrimination means as well as the group/s of people this act is meant to protect, and the creation of guidelines for relevant committees about enforcement of the Act.<sup>69</sup> According to the MSDHS,<sup>70</sup> the interpretation of the Act for a person of “a different appearance from his/her own sex by birth” originated from obligations under the ratification of the Convention on the Elimination of All forms of Discrimination Against Women (CEDAW) which not only protects women but also those persons whose gender expression does not match their sex assigned at birth.<sup>71</sup> This includes, for example, someone assigned a male sex at birth who lives as a woman, or someone assigned as female at birth who lives

62 Including the government, political, private, educational and citizen sectors, judicial and other organizations, and independent entities, *ibid*.

63 The Yogyakarta Principles define “gender identity” to refer to “each person’s deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms.” ICJ (2007).

64 Chokprajakchat, Srisombat et al. (2015). *3<sup>rd</sup> National Human Rights Plan*. Bangkok: Cabinet and Government Gazette: p. 1.

65 Gender Equality Act B.E. 2558 (2015)

66 It was declared in the government Gazette on 13 March 2015 and came into force on 9 September 2015 or 180 days after publication in the government gazette.

67 Department of Women’s Affairs and Family Development, Ministry of Social Development and Human Security (2016) Gender Equality Act B.E. 2558 (Public Edition). Bangkok: Department of Women’s Affairs and Family Development. p. 27.

68 There is currently no official English translation of Thailand’s Gender Equality Act. The translation provided comes from an unofficial English translation released by Human Rights Watch. Human Rights Watch (2015) *Thailand Gender Equality Act*.

69 Chaiyakit, N. and Yodmuang, W. (2016) Interview Ronnapoom Samakkeekarom, Subcommittee on drafting subordinate legislation according to Gender Equality Act B.E. 2558 (2015), MSDHS, Thai Transgender Alliance Office, 27 January 2016.

70 Chaiyakit, N. and Yodmuang, W. (2016) Interview Kantapong Rangsrirawang, Director of Legal Affairs, Division of Gender Equality, MSDHS, Office of Division of Gender Equality, 11 March 2016.

71 It is important to note that in the Thai context “a different appearance from his/her own sex by birth” is understood to mean gender identity rather than simply gender expression.

as a man. Therefore, the Act protects transgender people from discrimination based on their gender identity.

However, a representative from the MSDHS gave unofficial commentary that sexual orientation is not covered under this ground.<sup>72</sup> This may have implications for transgender people as well as sexual minorities, as transgender women are often perceived by the wider community to be gay men and transgender men are considered to be lesbians as a result of the pervasive conflation of gender identity with sexual orientation in the Thai context. This interpretation excluding sexual orientation runs contrary to several key recommendations issued by the Committee on the Elimination of All forms of Discrimination Against Women recognizing discrimination faced by women as a result of sexual orientation and gender identity. Other wider work by UN Women also promotes the rights of lesbian, bisexual, transgender and intersex people, within the context of gender.<sup>73</sup>

The main purpose of the Gender Equality Act is to prohibit anyone from practices that discriminate against someone because of their gender. This also covers the policies, regulations and mandates of public and private agencies.<sup>74</sup> Any person who has been or will be negatively affected can file a petition of complaint directly to a committee created by enforcement of the Act or to one of the committee members or any civil society organizations accredited by the Ministry of Development and Human Security for this purpose.<sup>75</sup>

However, contrary to the prohibition against all forms of discrimination under international law, the Gender Equality Act provides for exemptions in cases where there is a concern for the protection of the persons' safety and welfare, compliance with religious principles or national security.<sup>76</sup> If any of these cases, certain forms of discrimination are deemed lawful. The inclusion of these exemptions has raised concern that the Act will be interpreted to allow certain forms of pervasive discrimination against transgender people to continue. This is of particular concern to transgender people in cases where religious interpretations are used to not support or actively condemn transgender gender identities.<sup>77</sup>

An officer from the Department of Women's Affairs and Family of the MSDHS noted that, in enforcement of this Act, the exception in Section 17 (2) is contrary to its international legal obligations including its ratification of CEDAW which aims to eliminate discrimination against women in all forms.<sup>78</sup>

Section 17 (2) does seem to allow for positive discrimination or affirmative action measures that enable activities or services to be specifically available for marginalized groups in order to eliminate the obstacles they face or to encourage them to exercise their rights and freedoms as equally as other groups.<sup>79</sup> It is unknown at this point how this will be interpreted and whether it will be an entry point for positive discrimination initiatives for transgender people in Thailand, in order to improve their human rights situation, particularly in areas of employment and access to education.

## 3.5.2 Enforcement mechanisms of the Gender Equality Act

### Committee on Consideration of Unfair Gender Discrimination

The Act created a Committee on Consideration of Unfair Gender Discrimination whose duty it is to consider if a complaint counts as gender discrimination under the law. In cases where the Committee on Consideration of Unfair Gender Discrimination decides that an action amounts to unfair gender discrimination, it has the authority to order government agencies, private organizations or individuals involved to take appropriate

72 2<sup>nd</sup> Multi-stakeholder Roundtable Discussion on Gender Identity Recognition in Thailand, 15 June 2016, United Nations Secretariat Building, Bangkok.

73 UN CEDAW 2010; UN CEDAW 2015; UN WOMEN (2016) *Summary of Proceedings: Promoting and protecting the rights of lesbians, bisexual women, transgender and intersex persons*. Bangkok, Thailand, 29 February–3 March.

74 Article 17.

75 Article 18.

76 Article 17.2 states that *"The implementation of paragraph one to eliminate the obstacles or to encourage the persons to exercise their rights and freedom as other persons, or for the protection of the persons, safety and welfare, or for the compliance with religious principles, or for the national security shall not be deemed unfair gender discrimination."*

77 UNDP, USAID (2014) pp. 30–31.

78 2<sup>nd</sup> Multi-stakeholder Roundtable Discussion on Gender Identity Recognition in Thailand, 15 June 2016, United Nations Secretariat Building, Bangkok.

79 While the article seems to allow for this, as promulgation and enactment of the law is in its infancy, this has not been demonstrated yet.

action to suppress and prevent acts of unfair gender discrimination.<sup>80</sup> If the agency fails to comply, it will face criminal charges with the punishment of imprisonment for a term not exceeding six months or a fine not exceeding 20,000 baht or both.<sup>81</sup> The Committee on Consideration of Unfair Gender Discrimination also has a duty to compensate and rehabilitate the victim(s) of discrimination.<sup>82</sup>

The decisions of the committee on Consideration of Unfair Gender Discrimination are binding. If the complainant is successful, this decision can be used to claim their rights in other legal processes such as the Court of Justice and Administrative Court processes. Applications cannot be made to those Courts before or during the process of the Committee on Consideration of Unfair Gender Discrimination.<sup>83</sup>

Some government agencies have previously issued Acts or legislation that are of equivalent rank with the Gender Equality Act that support certain forms of unfair gender discrimination. In a key informant interview, the Director of Legal Affairs, Division of Gender Equality, MSDHS, clarified the legal situation if any government agency enforces legislation or regulations resulting in unfair gender discrimination and justifies it based on legislation that is of the same hierarchy as the Gender Equality Act. Specifically, the Committee on the Consideration of Unfair Gender Discrimination has the power to propose to the Ombudsman that the matter be referred to the Constitutional Court to see if such a text is contrary to the constitutional protection against discrimination.<sup>84</sup> Following this, if the Constitutional Court rules that the text is contrary to the constitution, the decision of the Constitutional Court will repeal any such statement in law that is in conflict with the Constitution. This verdict would affect all government sectors.<sup>85</sup>

This mechanism is particularly relevant to legal gender recognition as it provides advocates with the opportunity to challenge unjust laws that discriminate against transgender people and to emphasize the importance of legally recognizing transgender individuals according to their gender identity.

## Gender Equality Promotion Committee

If the Committee on Consideration of Unfair Gender Discrimination determines any laws or policies that amount to unfair gender discrimination, it can propose amendments to the Gender Equality Promotion Committee. The Gender Equality Promotion Committee can provide the Cabinet with policy recommendations and proposals for improving laws, rules and regulations so they accord with the objectives of this Act.<sup>86</sup>

The Gender Equality Promotion Committee has a duty to promote gender equality to all public and private entities in the central, regional and local areas.<sup>87</sup> The Gender Equality Promotion Committee's duties involve designing plans, policies and other measures for government authorities to promote gender equality, including working with other sectors to encourage cooperation and raise awareness among all sectors of society about gender equality.<sup>88</sup> One key duty of the Gender Equality Promotion Committee is to establish regulations related to the recruitment and operation guidelines of the Committee on Consideration of Unfair Gender Discrimination.<sup>89</sup>

The Gender Equality Promotion Committee is a potentially important partner in advocating for legal gender recognition as it is responsible for disseminating information regarding the Gender Equality Act and its powers.

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80 Article 20 (1).

81 Article 34.

82 Article 20 (2).

83 Chaiyajit, N. and Yodmuang, W. (2016) Interview Kantapong Rangsrirawang, Director of Legal Affairs, Division of Gender Equality, MSDHS, Office of Division of Gender Equality, 11 March 2016.

84 Article 14 (4) of the Gender Equality Act provides the Committee with the power and duty of submitting complaints to the Ombudsman. See also Article 21.

85 Chaiyajit, N. and Yodmuang, W. (2016) Interview Kantapong Rangsrirawang, Director of Legal Affairs, Division of Gender Equality, MSDHS, Office of Division of Gender Equality, 11 March 2016.

86 Article 10 (2).

87 Article 10 (1).

88 Chaiyajit, N. and Yodmuang, W. (2016) Interview Kantapong Rangsrirawang, Director of Legal Affairs, Division of Gender Equality, MSDHS, Office of Division of Gender Equality, 11 March 2016.

89 Article 10 (7).



## Gender Equality Promotion Fund

Besides the above mentioned two Committees, the Gender Equality Act appointed another committee to administer a Gender Equality Promotion Fund.<sup>90</sup> This fund will be used to support, compensate and rehabilitate victims of gender discrimination.<sup>91</sup> It could therefore be used to potentially address discrimination against transgender people, though whether and how this fund might be utilized for this purpose remains to be seen.

### 3.5.3 Progress in enforcing the Gender Equality Act

Since the Gender Equality Act was enacted, there have been complaints of gender discrimination against transgender people lodged with the MSDHS.<sup>92</sup> As the Committee on Consideration of Unfair Gender Discrimination is still recruiting, the MSDHS has taken interim responsibility for informing the complainants and respondents that any actions of unfair gender discrimination are unlawful and can be adjudicated under the Gender Equality Act.<sup>93</sup>

Like all laws, the Gender Equality Act has weaknesses: its content is broad and definitions are currently open to too much interpretation; it often must be enforced by many different committees. Thus, the provision of clear and standardized protection of the rights of transgender people depends on the attitude and perspective of each committee. This will most likely depend, therefore, on how sensitized the members of the committee are on transgender issues. In addition, each committee has only a three-year term, which will likely lead to challenges in continuity and potentially affect the implementation and enforcement of the Act.<sup>94</sup>

The level of organizational and community engagement with the Gender Equality Act enhances its potential ability to promote the rights of transgender people. This can be seen, for example, in the following initiatives:

- On 3 September 2015, the Gender Equality Act was formally launched at an event jointly convened by the MSDHS, the Being LGBTI in Asia programme and the Rainbow Sky Association of Thailand (RSAT).<sup>95</sup> As part of the launch, the Department of Women's Affairs and Family Development, the Lawyers Council of Thailand, the Association of Women Lawyers of Thailand and RSAT signed a Memorandum of Understanding to promote cooperation in enforcing the new Gender Equality Act.<sup>96</sup>
- Being LGBTI in Asia supported a three-day workshop in September 2015 that culminated in the creation in Thailand of a National Advocacy Framework by LGBTI civil society and central government participants.<sup>97</sup>
- Khun Pongthorn Chanlearn, director of MPlus Foundation and an LGBTI rights activist, is a member of the Gender Equality Promotion Committee.<sup>98</sup> In addition, both Khun Ronnaphoom Samakkeekarom, Director of the Thai Transgender Alliance and Khun Kamolset Kengkarnreor, a board member of RSAT are members of the Committee on the Consideration of Unfair Gender Discrimination.<sup>99</sup>

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90 Article 28.

91 Article 30.

92 B.E. 2558 (2015).

93 Chaiyajit, N. and Yodmuang, W. (2016) Interview Kantapong Rangsrissawang, Director of Legal Affairs, Division of Gender Equality, MSDHS, Office of Division of Gender Equality, 11 March 2016.

94 2nd Multi-stakeholder Roundtable Discussion on Gender Identity Recognition in Thailand, 15 June 2016, United Nations Secretariat Building, Bangkok.

95 RSAT is an organization working on LGBT rights in Thailand.

96 UNDP (2015). UNDP Partners with Royal Thai Government and 'Being LGBTI in Asia' to launch new Gender Equality Act [Blog]. UNDP, 3 September.

97 Ibid.

98 TNN24 (2015). 9 members of Gender Equality Promotion Commission are named. *TNN Thailand*, 31 October.

99 Bangkokbiznews (2016) Announcement! 9 members of Committee on Consideration of Unfair Gender Discrimination. *Bangkokbiznews.com*, 25 July.

# Chapter 4: Legal gender recognition and official documentation in Thailand

Thailand currently has no law enabling transgender people to change their title, sex or gender on official documentation. The inability to change their documents to accurately reflect their gender identity remains the most challenging issue for transgender people attempting to access goods and services. It underscores the need for legal reform to ensure legal gender recognition for transgender people. A recent proposal for a draft Gender Recognition Act was widely rejected by Thai transgender civil society. As a result, the Thai government appears to have ceased working on the provision of legal gender recognition for transgender people.

This section of the report provides a brief background to the draft Gender Recognition Act, the principles of the civil registration system in Thailand and the use of name titles, and clarifies which government agencies are responsible for amending documents. This will assist transgender people and advocacy organizations in understanding existing provisions and which government agencies need to be involved in progressing legal gender recognition in Thailand.

## 4.1 Draft Gender Recognition Act

In 2016, the Department of Women's Affairs and Family Development at the MSDHS partnered with the Faculty of Law at Thammasat University to present a study they had completed on legal gender recognition. This study analysed the gender recognition laws of different countries around the world in order to provide a basis for a draft Thai law.<sup>100</sup> A proposed draft Gender Recognition Act was unofficially released to the public in early 2017. On 14 March 2017, For-SOGI, a network of 28 LGBTI CSOs organized a public forum to comment on the leaked draft Gender Recognition Act.<sup>101</sup> Two days after the public forum, the network submitted a joint statement to the Department of Women's Affairs and Family Development outlining concerns about restrictive eligibility criteria (such as the need to have surgery) contained in the draft Gender Recognition Act and requested the public's and especially the transgender community's involvement in the development of the Act. This public forum received much attention from the media, which reported the concerns outlined by civil society at the forum.<sup>102</sup> As a result of the concerns expressed by CSOs and the media about the restrictive criteria contained in the law, as well as the need for a more consultative process in drafting the law, the Director General of the Department of Women's Affairs and Family Development, including the Permanent Secretary of MSDHS, decided to halt the study and the development of the draft Act for the time being.

100 Mahavongtrakul, Melalin (2016). Newly released research provides a framework for gender recognition law, but will it be enough, activists ask. *Bangkok Post*, 26 September.

101 The full name of the network is the Foundation for SOGI (sexual orientation and gender identity) Rights and Justice (For-SOGI).

102 Prachatai English (2017). Our Genders Need no Approval from the State: LGBT Activists. *Prachatai*, 15 March.

## 4.2 The use of name title

The use of gender-specific name titles is legally mandatory in Thailand and enforced through the following acts.

Term	Description	Law
Dekchai (Master)	Name title for a male who is under 15 years old	Child Title Act B.E. 2464 (1921)
Dekying (Miss)	Name title for a female who is under 15 years old	Child Title Act B.E. 2464 (1921)
Nai (Mister)	Name title for a male who is over 15 years old	Act on the Use of Person Name B.E. 2484 (1941) and the Person Name Act B.E. 2505 (1962)
Nangsao (Miss)	Name title for a female who is over 15 years old	Female Title Act B.E. 2551 (2008)
Nang (Mrs)	Name title for a female who is married or divorced	Female Title Act B.E. 2551 (2008)

Name title is based on sex assigned at birth and appears on all official documentation. The system of name titles outline which titles are used by who in Thai society.

The Civil Registration Act B.E. 2534 (1991) states that a newborn infant's personality must be registered in the civil registration database as either Master or Miss.<sup>103</sup> After this, a child will be issued with a child Identification Card at the age of 7.<sup>104</sup>

For adults, the title for males is 'Mister (Mr.)', while the two options available for adult females are 'Miss (Ms)' or 'Mrs'.<sup>105</sup> These need to be registered on all official documentation including passports and National Identification Cards. It is not possible to omit or remove these titles from documents or to change from a male title to a female title, or vice versa. This of course causes many issues for transgender people whose physical appearance or gender expression may not coincide with the gender marker and title on their documents.

### 4.2.1 National Identification Card

The Thai National Identification (ID) Card is the primary legal document used to prove identity in Thailand.<sup>106</sup> This is relevant to transgender people because the National ID Card is a general requirement, every time they seek to access public services, enrol at school, apply for a job or open a bank account. Each time a transgender person presents their National ID Card, the discrepancies between their appearance and the information on the National ID Card leave them vulnerable to stigma and discrimination. This same issue continues each time the transgender individual is required to present documentation that contains a name title, name or gender marker that does not coincide with their gender identity or expression.

## 4.3 Civil registration

The Ministry of Interior is responsible for any laws, rules and regulations regarding the civil registration of Thai citizens.<sup>107</sup> In accordance with the Civil Registration Act B.E. 2534 (1991), the individual data that

103 Bureau of Registration Administration, Department of Provincial Administration, Ministry of Interior (1969) *Operation Manual of Registration subsection on Person Name and Use of Title*. Bangkok: Department of Provincial Administration Publishing, p. 44.

104 This was prescribed in the Royal Gazette on 11 May 2011 and came into force 60 days later on 9 July 2011. "All persons with Thai nationality, aged between 7 and 70 years, who are registered to a house census must have an identification card". Retrieved from: MSDHS, 'Child Identification Card, New Dimension, Many Benefits'. *M Society*.

105 The Female Title Act B.E. 2551 (2008) states that a "Female person of 15 years old or more and has not registered marriage shall use the title of 'Miss'. Female person who has registered marriage or such marriage ceased, can use the title of 'Mrs' or 'Miss' voluntarily."

106 National Identification Card Act B.E. 2554 (2011), Section 5 states that "All persons with Thai nationality, aged Between 7 and 70 years, who are registered to a house census must have an identification card ».

107 The specific section responsible is the Individual Status and Rights Registration Group, Bureau of Registration Administration, Department of Provincial Administration, Ministry of Interior.

specifically needs to be collected is a person's first name, surname, sex, date of birth, death (where applicable), nationality, religion, domicile, marital status, education, names of parents or adoptive parents, spouse's name and children's names.

Civil registration details are used in official statistics and to provide official legal documents including a Birth Certificate, Passport, National ID, Student Card, Hospital Outpatient Card and house census document.<sup>108</sup> Any change to registration details, including a person's name title, must be entered into the civil registration database.<sup>109</sup>

In 2007, civil society networks working on sexual orientation and gender identity and women's rights cooperated with a member of the National Legislative Assembly to propose a draft Persons' Name Title Act to the National Legislative Assembly for consideration. The objective was to give women and transgender people the opportunity to choose their name title without discrimination on the grounds of gender.<sup>110</sup> Article 5 and 6 of this proposed Act stipulated that transgender men or transgender women aged 15 or over could change their name title to be consistent with their gender identity. However, the proposal was limited to those who had undergone gender-affirming surgery and who had been certified as suffering from Gender Identity Disorder (GID) by a medical board.

Ultimately, this inclusion of transgender men and women in the Act was not accepted and the proposed Act was renamed the Draft Act on Women's Name Title with references to transgender people removed. This draft Act eventually became the Female Title Act B.E. 2551 (2008) which provides the ability for non-transgender/cisgender women only to change their name title from Ms to Mrs and vice versa.<sup>111</sup>

During the drafting, officials opposed the inclusion of transgender people in the proposed act based on concerns about technical issues of enforcement and a supposed lack of jurisprudence in how the issue was integrated into the draft law. They also recommended a public hearing to gauge the opinions of relevant organizations. Should the law be amended at a later date, it is likely that any attempts to include transgender people would remain based on restrictive requirements for gender-affirming procedures and medical diagnosis. These would represent de facto discrimination against those transgender people who have not or do not wish to have undergone gender-affirming procedures or be diagnosed with a medical illness.

These policy arguments made by officials against the inclusion of transgender people in the draft law indicate gaps in understanding about transgender people's right to recognition before the law. Since this draft law was proposed, there have been significant developments in relevant international jurisprudence and in the attention that United Nations mechanisms have given to related human rights violations. None of the gender recognition laws in existence when Thailand's name title law was debated, which mandated gender-affirming surgeries and medical diagnosis, would now meet those standards or be considered international good practice.<sup>112</sup>

However, the current civil registration and name title provisions represent an entry point for further discussion, advocacy and engagement with the Ministry of Interior on legal gender recognition. It is possible that the harmonization process of the new Gender Equality Act could provide additional leverage in pursuit of legal changes in name titles. Additionally, Thailand's 3<sup>rd</sup> National Human Rights Plan may lend support to such

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108 The House census is another legal document under the civil registration record in conjunction with the national ID card and birth certificate, and shows the same information including name title and gender marker. The house census is kept by the household but is also used for the national population census. The location of the house a person is registered to will have certain implications, such as where a person will vote or in which district office their National ID card will be issued.

109 Thailand started using the civil registration system in 1956, which required Thai citizens to have individual identification for the purpose of the state's administration and public service management. Thailand's first population census was conducted in 1955 by the Ministry of Interior. The officers surveyed the households within the village in order to record a person's name, surname, date of birth, parents' names and address. In 1983, the Registration Division prescribed that all Thai citizens shall have a 13-digit identification number which is used to identify the individual. The numbering system does not identify a person's sex, so is not relevant to this research.

110 This submission was founded on the principle of non-discrimination in the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). Chaiyakit, N and Yodmuang, W (2016) Interview Kantapong Rangsrirawang, Director of Legal Affairs, Division of Gender Equality, MSDHS, Office of Division of Gender Equality, 11 March 2016.

111 Female Title Act, B.E. 2551 (2008), Article 5 and 6.

112 For more information on this, please see Chapter 10 on legal recognition and its relationship to medical diagnosis (psychopathologization) in Thailand.

advocacy efforts, as it includes conducting a study on the possibility of providing appropriate name titles to transgender people as an indicator (see Chapter 3 Section 3).

Currently, there are limits on intersex people changing their registered name title and gender marker. This is limited to someone who was recognized as intersex at birth and had surgery to “normalize” their genitals to conform to their identified gender. This provision does not recognize numerous intersex variations that may not be discovered until puberty or later. It also requires an individual to undergo invasive and irreversible surgery in violation of their right to self-determination and bodily autonomy.<sup>113</sup>

### 4.3.1 Name determination and name change

According to the Person Name Act, a Thai national must have a first name and a last name, and may also have a middle name.<sup>114</sup> People have the right to choose and change their name; however, a name only has legal status once it is registered. The acceptance or refusal by a registrar of the person’s request for registration is considered a purely administrative procedure.<sup>115</sup> However, this means that the acceptance or rejection of a request for a name change lies purely at the discretion of the registrar themselves.

In practice, transgender people commonly face problems when they try to change their name to match their gender identity because registrars often deny such requests based on a principle in their operational manual that requires a person’s name to indicate whether their gender is male or female.<sup>116</sup> Typically, this provision is interpreted as requiring a person’s gender to be based on their sex assigned at birth.

According to a key informant interview, registrars always follow the principles established customarily and traditionally; however, such principles are voluntary and have not been enacted in law.<sup>117</sup> If a person’s request to change the first and/or last name details is refused, they can appeal to the Minister by filing an appeal with the local office of the registrar within 30 days.<sup>118</sup>

During the compiling of this report, the researchers were unable to find any cases of a transgender person filing an appeal against a registrar’s decision.

To request a change in the National ID, there must always be an investigation of the civil registration database.<sup>119</sup> Many transgender people face problems when they request a new National ID because they wish to change their name or because their existing National ID has expired. The problem occurs when the transgender person’s physical appearance or gender expression differs from their previously recorded personal data, which is based on their sex assigned at birth. When this occurs, they may be subject to investigation or be required to bring their parents or the ‘village head man’ to verify that they are the owner of the National ID. This is despite the fact that biometric data, namely fingerprints, are also stored in the civil registration database together with the person’s 13-digit identification number. As that data remain constant, enabling transgender people to amend their name or sex details does not pose any threat of identity fraud.

### 4.3.2 Birth certificate registration

While the National ID is the primary legal document in Thailand, the Thai Birth Certificate is the first document where someone’s personality is recorded in the civil registration system.<sup>120</sup> Hospitals issue a birth

113 A change of registered sex is permitted in this instance according to the Bureau of Registration Administration’s Regulation under item 113 of the Civil Registration Record B.E. 2535 (1992). For more on legal gender recognition for intersex people in Thailand, please see Chapter 11.

114 Person Name Act, B.E. 2505 (1962), Section 5.

115 Panyawong, S. (2011). *Explanation on Fundamental Public Law, School of Law, University of Phayao*.

116 ‘The Person Name Determination Principle’, in the operational manual for the Department of Provincial Administration, Ministry of Interior.

117 Chaiyajit, N. and Yodmuang, W. (2016) Interview Kamnuan Wiboonphan, Chief of Individual Status and Rights Registration Group, General Registration Division, Bureau of Registration Administration, Department of Provincial Administration, Ministry of Interior, Office of Individual Status and Rights Registration Group, General Registration Division, 24 March 2016.

118 Person Name Act, B.E. 2505 (1962), Section 18.

119 In accordance with the regulations of Department of Provincial Administration on Issuance of the National Identity Card B.E. 2554 (2011), No. 11.

120 The legal concept of personality is prescribed in the Civil and Commercial Code, Article 15, which states “personality begins with the full completion of birth as a living child and ends with death.”

report for recording the person's assigned sex at birth. If the birth occurs outside of a hospital, it can be reported to the 'village head man' who can also issue a birth form.<sup>121</sup> Parents take this form to the registration unit located in the municipal office of the district where the person was born. Then the registrar issues the legal birth certificate and enters the details on the civil registration record. This cannot be amended unless there is an error or the individual is intersex and meets the requirements discussed earlier.<sup>122</sup> For transgender people, this means that the ability to amend a birth certificate is also fundamental to legal gender recognition.

Additionally, for persons living, working or pursuing qualifications overseas, a birth certificate as well as a passport are often the primary identification documents that are required. Incongruence between gender identity and expression and the gender marker and name title included on a birth certificate may cause administrative and personal difficulties for Thai transgender people abroad and, in some circumstances, increase their vulnerability to violence and discrimination.

### 4.3.3 Gender marker

A gender marker refers to how a person's gender is recorded on official documents. In Thailand, the available options are limited to "Male (M)" and "Female (F)". 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".

In Thailand, the gender marker is used primarily to identify the specific rights and duties of male and female citizens based on the binary structure of Thai society. For example, if your assigned sex at birth is male then you have a duty to undergo the military conscription process. If your assigned sex at birth is female, you have the right to choose between the titles of "Miss" or "Mrs."

Another typical use of a gender marker is to enforce binary notions that strictly control gender expression. For instance, there are strictly enforced uniform regulations throughout the Thai education system and Thai civil service that separate uniforms and dress codes into male and female categories, based on one's sex assigned at birth, with very limited options outside those categories.<sup>123</sup>

There are very limited instances in which a gender marker can be changed. One such instance is when an error has occurred which is realized and rectified at a later date.<sup>124</sup>

Current practice is guided by the ruling of Supreme Court Judgment No. 157/2524, dealing with the case of a transgender woman seeking recognition of her gender. The ruling stated that the "gender" of a person is recognized by law as based on the person's sex assigned at birth. As part of the ruling, the judge made reference to the dictionary definition of a "woman" as a person who is able to give birth. The judge further stated that the transgender woman petitioner was "a man who has undergone sex reassignment surgery but is unable to give birth". As a result, the judge dismissed the petition to change the transgender woman's gender marker from male to female.<sup>125</sup>

Based on this judgment, the Department of Provincial Administration issued an official letter to all registration offices forbidding them to register the change of birth gender for a person who has undergone gender-affirming surgeries, which the department referred to as "sex reassignment".<sup>126</sup>

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121 The 'village head man' or village chief (*Phu Yai Ban*) is elected by the population of the village. (A 'village' is defined as a subdivision of a tambon – a higher level of administrative subdivision in Thailand) and then appointed by the Ministry of Interior. Once elected, they serve for a five-year term but can then apply for re-election.

122 See Section 4.2.

123 Some educational institutions provide more flexible options for transgender students. See Chapter 6, Section 2 for more information.

124 Civil Registration Code B.E. 2534 (1991), Section 10.

125 The text of the judgment reads "Gender of natural person which is recognized by law is based on sex at birth. According to the dictionary, woman is defined as a person who is able to give birth. However, the petitioner is a man who has undergone sex reassignment surgery but is unable to give birth so the petition to change the gender in the exercise of the rights on Court is dismissed by laws".

126 Deputy Director, Department Of Provincial Administration (2001) Letter to Phetchabun Provincial Governor No. 0310.1/25058, 7 November; Sangsrikaew, W. (2013) 'Administrative Order for Transgender' *Academic Papers of Senate Law Data and Coordination Service Center*, 4 November.

As there was no adequate definition of the term “woman” in Thai law, the court relied on the definition in the Thai Royal Dictionary. However, this definition is inappropriate for this legal purpose and open to obvious critique. For instance, not all cisgender women can give birth, yet they do not cease to be female or women. Thus, to define someone as a woman based on her reproductive capacity would eliminate a vast number of women from being able to claim their title. Nor is it a cogent argument for refusing to recognize the gender identity of a transgender woman who, while unable to give birth, remains a woman.

Prior to this Supreme Court Judgment, there was the 1972 case of a transgender woman who had undergone gender-affirming surgery and requested to change her sex from male to female on her house registration (Thor. Ror.14).<sup>127</sup> The Khonkaen Provincial Registration Office issued an official letter to the Ministry of Interior stating that this petition was dismissed because there was no guideline and rule for assessing such a claim.<sup>128</sup> Consequently, the Ministry of Interior issued a letter explaining that the sex of a natural person, and their rights and duties, shall be based on sex assigned at birth.<sup>129</sup> The Supreme Court ruled in favour of the provincial office stating that the decision to not change the applicant’s gender marker recorded in the house registration was correct<sup>130</sup> as gender-affirming surgeries had not been certified by law.<sup>131</sup> The transgender woman did not make an appeal against the order of the Ministry of Interior.<sup>132</sup>

This judgment provided a legal precedent for how sex is recognized on the civil house registration. As a result, there is currently no way for transgender people to change any of their legal civil registration documents.

## 4.4 Issuing of passports

A passport is an official document required for travelling abroad. A Thai passport will show the name, name title and gender marker of the passport holder.<sup>133</sup> In order to apply for a passport, an applicant must submit a request, enclosing their National ID card or an equivalent legal document.<sup>134</sup> As it is impossible for a transgender person to amend the gender marker or name title on those documents, passports too are based on a transgender person’s sex assigned at birth rather than their gender identity.

Following the submission of an application, documents are verified and the height and biometric data (photo and fingerprints) of the applicant are recorded. During this process, if an applicant is a transgender woman who has long hair and holds an identification card in which the title identifies her as “Mister”, she will be asked to tie her hair back into a ponytail. This is because it is against the regulations for male applicants to have a passport photo with their hair down.<sup>135</sup>

In order to obtain clear details of a person’s face, the regulation says that all applicants are required to clearly show their ears. Other female applicants who have long hair are not required to tie their hair back into a ponytail, but are simply requested to put their hair behind their ears. So there is a discrepancy between the treatment of transgender and non-transgender/cisgender women with long hair, based on gender identity or expression.

Alternatively, a transgender woman can have her picture taken with her hair down, but she must first write and sign a note stating:

127 Supreme Court Judgment No. 157/2524 (1972).

128 The letter No. Khor.Kor. 19/19705, 10 October 1972.

129 The letter No. Mor.Tor. 0313/14802, 23 November 1972; Article 15 of the Civil and Commercial Code B.E. 2558 (2015).

130 Sornsuphap, J. (2010). *Legal Problems on Sex Transformation and The Postoperative Transsexuals* (ปัญหาทางกฎหมายเกี่ยวกับการผ่าตัดแปลงเพศและบุคคลที่ผ่าตัดแปลงเพศแล้ว) . [Master’s Thesis]. Chulalongkorn University, pp. 152–153.

131 This is despite Thailand performing the highest number of gender-affirming surgeries globally. Additionally, it is the stance and recommendation of this report that legal gender recognition should not mandate medical and surgical prerequisites for recognition. In accordance with international law legal gender recognition should be provided based on self-determination of the concerned individual. For more information, please see Chapter 10.

132 Technically, if the petition was dismissed nowadays, it would be considered as an “administrative order” according to the Administrative Procedure Act, B.E. 2539 (1996), Section 5; this order would be effective to exhaust the rights and affect the status of the petition permanently. The petitioner is able to file the case with the Khonkaen Administrative Court which is the juridical court.

133 Thai passports can only be issued to a person of Thai nationality. A person must be 20 years old (the age of majority in Thailand) to apply their own behalf, Regulation of Ministry of Foreign Affairs on Issuance of Passport B.E. 2548 (2005).

134 National Identify Card No. 1, B.E. 2526 (1983) and No. 2, B.E. 2542 (1999).

135 2<sup>nd</sup> Multi-stakeholder Roundtable Discussion on Gender Identity Recognition in Thailand, 15 June 2016, United Nations Secretariat Building, Bangkok.

“I do hereby affirm taking photograph with hair down in a passport. If any problems occur, I will assume full responsibility in every aspect”

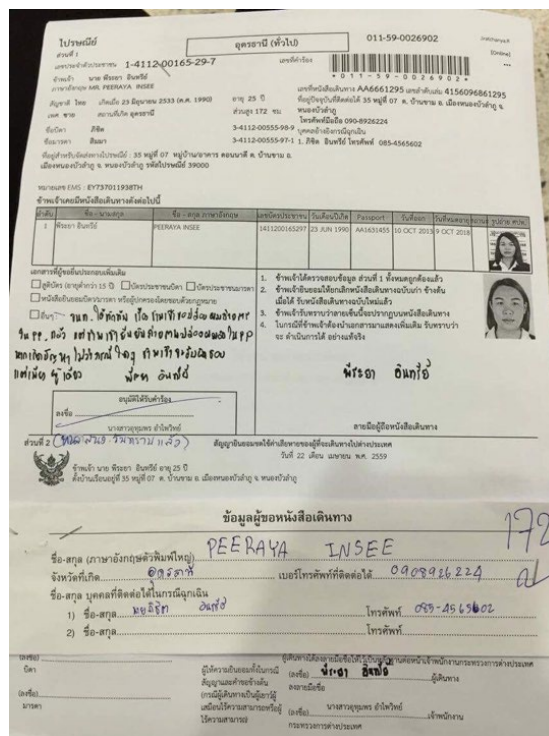


Figure 1 Note Stating Person Assumes Full Responsibility for Taking Photograph with Hair Down

Essentially, this seeks to absolve the government of responsibility for any difficulties or harm that may occur to transgender individuals abroad as a result of the lack of legal gender recognition available in Thailand. Transgender women are placed in a difficult situation because they are unable to amend the gender marker or title on their passport and are pressured to restrict their gender expression. They will be required to travel on a passport that does not often accurately reflect their gender expression or gender identity.

The officer in charge has the right to deny or delay any request to issue a passport on security grounds.<sup>136</sup> The officer may also deny a transgender person a passport if travelling outside of Thailand on an incongruent passport may be a threat to the traveller’s security.<sup>137</sup> This has the added impact of restricting the freedom of movement of a transgender individual and causing an increase in anxiety for transgender travellers who must travel abroad with a passport without knowing how they will be received by border control and immigration officials.

The Thai passport issuance procedure itself is framed in terms of protecting a transgender women’s security, and it recognizes that a discrepancy between one’s passport details and physical appearance is difficult. However, it prioritizes a person’s sex assigned at birth over the individual’s right to determine their own gender identity and expression. In practice, it would be much safer for transgender people to travel if their passport details could be amended to match their actual appearance and gender identity.

Currently, there is little information available about the experience of transgender men during the passport issuance process. However, a key informant interview with the chair of the Transmen Alliance of Thailand indicated that transgender men also encounter difficulties and discrimination. Unlike transgender women, transgender men do not need to tie their hair back if long to prove their identity but may need to undergo a process of investigation to ensure their identity.

136 Regulation of Ministry of Foreign Affairs on Issuance of Passport B.E. 2548 (2005), No. 21 (4).

137 Ibid.



### Jimmy's passport experience

“Generally, issuing a passport may take about 10 minutes but, this is not going to happen when a transgender man needs to get one. From my experience, it takes at least one hour; the extra time included me being subjected to undignified treatment by those responsible for issuing passports. When I went, I was under investigation by the authorities to prove who I am. It seemed that my biometric information as recorded in the civil registration database wasn't enough. I also had to answer some questions that violated my right to privacy including questions such as, ‘What do your parents say about your transition?’, ‘What gender-affirming surgery have you done? Does it function as a real man's?’ It was such an awkward situation in a high-pressure atmosphere. And, I couldn't assert myself and tell them to stop asking me those questions, to stop humiliating me because of my gender identity, wielding their discretionary powers to approve my passport as they were discussing should they approve to issue my passport or not.”<sup>138</sup>

The issue of passport discrepancy is vital to the subject of legal gender recognition as the Thai passport is the cardinal document with which a Thai person will use to identify themselves while travelling or living abroad. In the second experts' meeting held during the writing of this report, government representatives believed that under the Gender Equality Act, a complaint could be lodged indicating that the current passport policy amounts to unfair discrimination on the basis of gender.<sup>139</sup>

## 4.5 Protection of personal data

Currently, there is no data protection law in Thailand. Should legal gender recognition for transgender people be introduced in future, measures would need to be taken to ensure that their personal information was adequately protected so that transgender people who had legally amended their name, name title or gender markers would not have their privacy violated.

Currently, access to the personal information contained in the civil registration database is regulated by law.<sup>140</sup> Any disclosure of data contained within the civil registration database is limited by law. Externally, the data can only be accessed for legal proceedings or when people have a legally binding agreement with another person (juristic relations),<sup>141</sup> for statistical purposes, or for maintaining state security. The personal data contained on the National ID are also protected in accordance with the protection of civil registration data.<sup>142</sup>

138 Chaiyajit, N. (2016). Interview Kritipat Chotidhanitsakul, Chair of Transmen Alliance (Thailand), Rainbow Sky Association Office, 8 September 2016.

139 Under Section 3 of Gender Equality Act B.E. 2558, government representatives from the Rights and Liberties Protection Department of Ministry of Justice and from the Office of Committee on Unfair Gender Discrimination (WorLorPor); 2<sup>nd</sup> Multi-stakeholder Roundtable Discussion on Gender Identity Recognition in Thailand, 15 June 2016, United Nations Secretariat Building, Bangkok.

140 Civil Registration Act (No.2) [Thailand] B.E. 2551 (2008).

141 Juristic relations means an act that is recognized by the Civil Code, such as a contract or agreement between parties.

142 The National identity Card Act, B.E. 2526 (1983) Section 7 in supplement with the National Identity Card Act, B.E. 2554 (2011) Section 6.

# Chapter 5: Legal gender recognition at the workplace

There are currently limited regulatory and policy provisions that protect transgender people's right to legal gender recognition in the workplace in Thailand.<sup>143</sup>

The most concrete example that generated broader action is a gender identity discrimination complaint filed by a transgender person with the NHRC. The case started in 2007, when a transgender woman filed a complaint against Sartorius Co. Ltd with the NHRC for discrimination based on gender identity. The NHRC notified the Sartorius Company that denial of employment because of gender identity or gender expression (including so-called 'cross-dressing') is discrimination and should not occur.<sup>144</sup> The NHRC also asked the Ministry of Labour to inform agencies within both the public and private sectors that discrimination against transgender people and individuals with sexual diversity was prohibited under the then Constitution of the Kingdom of Thailand B.E. 2550 (2007). They also notified employer and employee organizations of the need to recognize the right of transgender people to have freedom from discrimination (in employment because of their gender identity).<sup>145</sup> However, it is unknown if the Ministry of Labour followed up on this recommendation.

There are some existing standards and policies that have significant relevance to legal gender recognition in the workplace, although these do not have specific provisions in relation to gender expression and identity. Their overarching principles, including the discrimination clause in the Labour Standard that includes discrimination on the basis of sex, can open a discussion about how such a standard can be interpreted in the context of the Constitutional protections against discrimination and the Gender Equality Act. In addition, there are restrictive provisions from the point view of gender expression, such as dress codes in the Civil Service Uniform Regulations, which could also be challenged in the context of the Constitution and the Gender Equality Act. All these would require further multi-stakeholder discussions with strong participation from the transgender community.

## 5.1 Thai Labour Standard

Under the Thai Labour Standard: Thai Corporate Social Responsibility TLS 8001:2010, sex is a prohibited ground of discrimination.<sup>146</sup> Article 2 discusses the scope and implementation of the standard. This clarifies that it is a voluntary standard, without the force of law. However, it is based on relevant international human rights standards, including labour law, and principles of corporate social responsibility.

## 5.2 Civil Service uniform regulations

The Thai Civil Service strictly mandates and enforces male and female-specific dress codes, based on a person's sex assigned at birth. As a result, transgender women who seek employment in the civil service must observe the male dress code at work, including having short hair or wearing a masculine wig, because they are legally male, while transgender men would be required to adhere to the female dress code.<sup>147</sup>

The researchers found no incidences of good practice where civil service employers had voluntarily applied the Thai Labour Standard to protect transgender people from discriminatory dress codes at work. It is hoped that the Gender Equality Act may be used as a legislative instrument to address discriminatory dress code policies.

143 Suriyasarn, B. (2014).

144 The complainant also sued the employer in the central labour court. However, as the complainant and Sartorius chose to settle out of courts no decision was issued.

145 NHRC cases and their results are not available to the public. As a result, the consultants relied on secondary documentary evidence and interviews with NHRC representatives; Suriyasarn, B. (2014) p. 68.

146 This is mentioned in the Thai Labour Standard: Thai Corporate Social Responsibility TLS 8001:2010 Section 5.6 Discrimination. This text can be found in the Annex for reference.

147 Suriyasarn, B. (2014) p. 21.

# Chapter 6: Legal gender recognition in education

The effects of a lack of legal gender recognition in the education system can manifest in multiple ways, including transgender children, youth and adults being forced to attend a single-sex school, wear a uniform or use facilities such as toilets and changing rooms based on their sex assigned at birth. This has the effect of creating an institutional environment that discriminates against transgender people, particularly children and youth, which may be harmful to their physical, mental and emotional health.<sup>148</sup> However, this chapter will focus solely on dress code, as this is the only aspect where the research team identified relevant regulations.

Students in Thailand are required to wear school uniforms throughout all levels of education including at university. In primary and secondary schools, students are strictly required to wear the uniform that coincides with their sex assigned at birth, meaning boys are required to wear a white or light-coloured shirt and shorts or trousers (usually khaki or navy blue) while girls are required to wear a white or light-coloured shirt and a skirt (usually navy blue). Schoolgirls are required to either have long or short hair depending on each school's rules. For those who have long hair, their hair must be pulled back and for those who have short hair, it must be above the shoulder. As for schoolboys, they are required to have short hair, usually no longer than 1 to 1.5 inches.

These regulations also extend to the university level where each university has the ability to create its own uniform regulations. If students are found to have violated their school's or university's dress code regulation, they are often penalized by having class performance and examination points deducted in class. In certain universities and most technical or vocational schools, transgender students may be informally allowed to wear uniforms in accordance with their gender identity; however, students are required to wear the "correct" (consistent with their sex assigned at birth) uniform to sit examinations and attend their graduation.<sup>149</sup> This rule is based on a regulation from the Ministry of Education that forbids "cross-dressing".<sup>150</sup> Additionally, in 2009, the Council of University Presidents of Thailand issued a resolution mandating that university students must wear clothing appropriate for their gender.

Currently, there is no specific protection for transgender people from discrimination in the educational sector. However, the National Social Welfare Promotion Commission Regulation (2012) states that there should be increased opportunity in education for persons of diverse sexualities; that pride and value in gender diversity should be promoted and that policies that discriminate against persons of diverse sexualities should be revised.<sup>151</sup> This regulation can provide a possible entry point for engagement with the Ministry of Education and universities to protect and recognize transgender students and promote an inclusive educational environment.

It is also hoped that the Gender Equality Act will become a key instrument for tackling discrimination against transgender people and promoting recognition of the right of transgender people to choose their gender identity in the education sector.

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148 Mahidol University, Plan International Thailand and UNESCO Bangkok Office (2014) *Bullying targeting secondary school students who are or are perceived to be transgender or same-sex attracted: Types, prevalence, impact, motivation and preventative mechanisms in 5 provinces of Thailand*; Open Society Foundations (2014b) *License to be yourself: Trans Children and Youth*; Human Rights Watch (2011) *Rights in Transition: Making Legal Gender Recognition for Trans People a Global Priority*.

149 UNESCO (2015). *From insult to inclusion: Asia-Pacific report on school bullying, violence and discrimination on the basis of sexual orientation and gender identity*, p. 36.

150 This is in accordance with Ministry of Education Regulation on Student Uniform B. E. 2551 (2008); Preechasilpakul, S. (2013) p. 52; Suriyasarn, B. (2014) p. 62.

151 National Social Welfare Promotion Commission Regulations on prescribing a target person or group of persons to receive social welfare B.E. 2555 (2012); UNESCO (2015), p. 50. The National Social Welfare Promotion Commission Regulation is discussed further in Chapter 7.

## 6.1 University dress codes or uniform policies

Each university has its own Act of Establishment that provides it with the authority to issue its own rules and regulations including specific uniform policies. These regulations prescribe the uniform for students to wear during general study or during special occasions such as graduation ceremony. The uniforms for male and female students are clearly distinct from each other and are strictly enforced.

At present, a limited number of institutions have allowed transgender students to dress in the formal uniform according to their gender identity when attending their graduation ceremony. However, other universities have insisted that transgender women and men must wear the formal graduation uniform that matches their sex assigned at birth. Transgender students will still receive their certificate of graduation if they do not attend the ceremony. However, this means choosing between compromising their gender identity, expression and personal welfare or being socially excluded from an important event in their life, consequently adding to the high levels of social exclusion already experienced by transgender people in Thailand.<sup>152</sup> The different standards and unclear rules that exist between universities represent an additional barrier to educational attainment and well-being for transgender students compared to other students.<sup>153</sup>

### 6.1.1 Examples of university uniform guidelines

#### Mahidol University

Mahidol University is currently ranked as one of the top universities in Thailand. Mahidol University's uniform policy is set out in its regulation, Student Uniforms, B.E. 2553 (2010). This regulation describes specific female and male uniforms, but also gives the President of the university the authority to make final decisions "in the case of implementation problems".<sup>154</sup>

They require all students to wear the formal uniform for attending their graduation ceremony. Like other universities, there is a different formal uniform for male students compared to female students and there is no specific mention of transgender students in the regulation. It is assumed that whether someone is male or female is based on their sex assigned at birth. Mahidol University has no regulation allowing transgender students to wear uniforms according to their gender identity.

In 2014, the university allowed some transgender women to wear the formal female uniform to their graduation ceremony. The researchers had the opportunity to interview one of these women, Khun Bella Thanakarn, an activist from the transgender organization, Transpiration Power Group and a former student of Mahidol University. She described the process she undertook to receive permission to wear the female formal uniform to her graduation ceremony.

152 UNDP, USAID (2014); UNESCO (2015).

153 Preechasilapakul, S. (2013) p. 56.

154 Mahidol University Regulation on Student Uniforms B.E. 2553 (2010), Section 7.

## Khun Bella and Mahidol's uniform regulations

In the lead up to their graduation, Bella and some friends, who are also transgender women, sought permission to wear the female graduation uniform. On their own initiative, the students submitted a written request with supporting documentation,<sup>155</sup> including a medical certificate verifying that they had each been diagnosed as having GID.<sup>156</sup> When interviewed for this report, Khun Bella stated that they believed this was the only documentary evidence that would convince the administration of their specific needs as transgender people. Khun Bella who has undergone gender-affirming surgeries reflected that other transgender students who have not undergone similar procedures may be required to provide additional information to a university.<sup>157</sup>

The Director of Legal Division and Student Data Center, Mahidol University stated that the request was subsequently discussed at the President's Meeting. It was decided that as the regulations did not mention how the uniform policy should be applied for transgender students, the President could apply discretionary power allowed in the regulations.<sup>158</sup> As a result, an official letter was issued asking for the opinion of the Dean of the Faculty in which the transgender students studied. The Dean supplied a written response agreeing to the students' request. Finally, the President issued a letter, officially allowing the students to wear the female uniform at their graduation ceremony.<sup>159</sup>

Subsequent to the decision to allow Khun Bella and her friends to wear the female uniform, the President's meeting passed a resolution stating that transgender women wishing to wear the female uniform during the graduation ceremony are required to submit the same documents as Khun Bella had supplied, including a medical certificate confirming a diagnosis of Gender Identity Disorder. This policy has been implemented since the 2014 academic year. While there is now a mechanism for transgender women to apply to wear the formal uniform in accordance with their gender identity, there remains no information on whether this process is open equally to transgender men.

Additionally, by requiring that students submit a request containing the same documentation that Khun Bella provided, the university administration is placing an additional administrative burden on themselves and the students concerned. Requiring that students submit proof of a mental health diagnosis of GID also represents a personal and financial hardship.<sup>160</sup>

155 This set of document consists of:

1. A request letter to wear the formal uniform for female students submitted to the President of the university
2. Regulation of Medical Council Concerning Ethics in the Medical Profession on the Rules for Sex Change Treatment B.E. 2552 (2009)
3. Clinical Practice Guideline in Management of Gender Dysphoria and Transsexualism 2009 B.E. 2552 (2009), the Royal College of Psychiatrists of Thailand (18th September 2009)
4. Reference to ICD-10, WHO (World Health Organization, the ICD-10 classification of mental and behavioural disorders: clinical descriptions and diagnostic guidelines.)
5. A medical certificate identifying that the students making the request have the condition of Gender Identity Disorder/ Transsexualism

156 The pathologization (i.e. regarding transgender people as psychologically abnormal or unhealthy) of as opposed the protection of transgender people on the grounds of universality of human rights and the right to self-determination has been criticized internationally as problematic, as it prevents transgender individuals from being accepted and understood, increases the likelihood of prejudice and discrimination, and increases risks to mental and physical well-being. World Professional Association for Transgender Health (WPATH) (2010). De-psycho-pathologization Statement. 26 May; HPP, APTN, UNDP (2015).

157 This might include explaining their reasons for not undergoing such surgeries such as the high cost, other medical conditions or that the clinic's protocol required them to wait another year before undergoing such irreversible surgeries. Challenges may also present for those who simply do not wish to undergo medical procedures or hormonal therapy or who wish to avoid a medical diagnosis. Chaiyajit, N. and Yodmuang, W. (2016). Interview with Thanakarn Wongwisitsin, Activist, Transpiration Power Group, Rainbow Sky Association Office, 19<sup>th</sup> November 2015. See also Chapter 10 on Transgender legal gender recognition and its relationship to Medical Diagnosis (psycho-pathologization) in Thailand.

158 Mahidol University Regulation on Student Uniforms B.E. 2553 (2010), Section 7.

159 Chaiyajit, N. and Yodmuang, W. (2016). Interview with Boonchu Chaengcharoenkit, Director, Division of Legal Affairs Mahidol University, Office of Division of Legal Affairs Mahidol University, 19 February 2015.

160 See Chapter 10 on Transgender legal gender recognition and its relationship to Medical Diagnosis (psycho-pathologization) in Thailand for more information.

With the passage of the Gender Equality Act B.E. 2558 (2015), Mahidol University voluntarily intend to revise their rules and regulations to ensure that they are in line with the Act. At this juncture, it is a pivotal time for advocates to engage with university administrators to propose inclusive and accessible uniform guidelines for transgender students.<sup>161</sup>

## Chiang Mai University

The Regulations of Chiang Mai University Concerning Student Uniforms B.E. 2555 (2012) also provide details of female and male dress codes for special occasions and are silent on how these are applied to transgender students. However, the researchers discovered one instance in which a transgender man applied and was denied permission to wear the male uniform.

Khun Woranittha, a transgender male student from the Faculty of Law at Chiang Mai University, made a request to wear the male uniform during his graduation ceremony by submitting the same documents as the transgender women at Mahidol University. This included a medical diagnosis of GID. According to Khun Woranittha, the secretariat of the ceremony's administration refused his request on the grounds that a transgender male student wearing a male uniform would be against the tradition of the ceremony and represented an obstacle for preparing the ceremony in honour of Her Royal Highness Princess Maha Chakri Sirindhorn.<sup>162</sup>

## Bangkok University

In 2015, Bangkok University issued new uniform guidelines that included four categories: "Boy", "Girl", "Tomboy" and "Ladyboy".<sup>163</sup> These categories provided students with the opportunity to choose a uniform in accordance with their gender identity without censure as long as they adhered to the uniform requirements themselves.<sup>164</sup> These guidelines remain the most progressive and accessible guidelines yet to emerge in Thailand that recognize various gender expressions in uniform policies and provide an example of how to integrate and include transgender students in uniform policies. Further information on how effectively these guidelines have been applied or implemented remains to be seen.

## Ramkamhaeng University

Additionally in 2013, a case was filed with the NHRC by a transgender man after he was denied permission to sit his exams multiple times for refusing to wear a skirt. His complaint was successful and Ramkamhaeng University now allows students to wear their uniform of choice during exams once they have a letter of approval from the administration. In order to procure such a letter, students would need to request for permission at the start of each semester.<sup>165</sup>

## Phayao University

The Gender Equality Act is a particularly promising route to secure the right to legal gender recognition in education, as this example illustrates. In 2016, the University of Phayao refused to issue a transgender intersex woman with her certificate and transcripts upon completion of her degree because she had submitted a photo in which she looked like a woman, despite her identification documents carrying male gender markers, which was against university policy. The university advised that she take a new photo in which she had tied back her hair, worn a tie, and generally presented as a man before they would release her documents. Up until then,

161 Chaiyakit, N. and Yodmuang, W. (2016). Interview with Boonchu Chaengcharoenkit, Director, Division of Legal Affairs Mahidol University, Office of Division of Legal Affairs Mahidol University, 19 February 2015.

162 Chaiyakit, N. and Yodmuang, W. (2016). Interview with Woranittha, transgender male student, Faculty of Law, Chiang Mai University, 19 November 2015.

163 Tomboys or toms is a word that refers to transgender men. The women who date them are not necessarily lesbians or bisexual. "Ladyboy" is one of the many words used to refer to transgender women. The men they date are not necessarily gay or bisexual.

164 McCormick, Joseph Patrick (2015). Top Thai University Changes Uniform Guidelines to Accommodate Trans Students. *Pink News*, 10 June.

165 UNDP, USAID (2014). p. 37.

the university had granted exemptions regarding uniforms to students on a case-by-case basis and typically on submission of evidence that they had Gender Identity Disorder and gender reassignment surgery. Upon disclosure of the fact that she had undergone gender-affirming surgeries, the university informed the student that her application would be straightforward. However, the law student made the choice not to petition the university. She disagreed with the requirements for Gender Identity Disorder and gender-affirming surgeries, believing they do not respect the right of transgender people to self-determination. Instead, the student relied on the new anti-discrimination provisions outlined in the Gender Equality Act. In December 2016, her petition on the basis of the Gender Equality Act was granted and she received her university transcripts and certificate in person in January 2017. However, this student could not change her name title, from Mr. to Ms., because that falls under the jurisdiction of a different law (see Chapter 4). As of the date of the decision, 10 more students at her university have come forward with their own requests.<sup>166</sup>

The above information about dress codes in universities demonstrates the inconsistencies and the lack of any commonly agreed standards enabling transgender students to study, sit examinations and graduate without having to compromise their gender identity and expression. Even though several universities, as listed above, have improved guidelines or practices, this has not yet influenced the approach to uniforms in other universities in Thailand. The enforcement of the Gender Equality Act alone will not help to clarify these inconsistencies as the Act of Establishment of each university is of equivalent legal hierarchy. However, as mentioned before, the Committee on Consideration of Unfair Discrimination may propose that the Ombudsman refer the matter to the Constitutional Court to decide if the text is contrary to the Constitution.<sup>167</sup>

Students seeking to wear a uniform that coincides with their gender identity are not simply being wilful, as the inability to express their internal sense of self can lead to deep psychological torment. A lack of recognition in education can negatively affect confidence, self-esteem and levels of inclusion while having a negative effect on mental health and academic performance.<sup>168</sup> As a result, transgender-inclusive uniform regulations are a vital component of securing legal gender recognition and creating accommodating learning environments for all students.

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166 Mahavongtrakul, Melalin (2017). Uniform Justice: Not Until LGBTI rights become universal—even in the realm of university uniforms—will the sexes be entirely equal. *Bangkok Post Lifestyle*, 6 February.

167 Gender Equality Act B.E. 2558 (2015). Article 14(4); Article 21.

168 Chaiyajit, N. and Yodmuang, W. (2016). Interview with Woranittha, transgender male student, Faculty of Law, Chiang Mai University, 19 November 2015.

# Chapter 7: Gender recognition and access to social welfare and military service

This chapter explores the recognition of transgender people for the purposes of accessing social welfare and military service.

Everyone has the right to recognition as a person before the law<sup>169</sup> and legal gender recognition is essential to ensuring that transgender people have equal recognition before the law.<sup>170</sup>

Transgender people in Thailand have at this time received only limited recognition before the law. Where recognition has occurred, it has been on the basis of recognition that transgender people exist as part of the Thai population. However, this recognition has not extended to the self-identified gender of transgender people.

## 7.1 Access to social welfare for transgender individuals and access to funding for transgender civil society organizations

The National Social Welfare Promotion Commission Regulation (2012)<sup>171</sup> specifically identifies transgender people as a group benefiting from social welfare provision and provides clear definitions of “sexual diversity”<sup>172</sup> and “transgender people”.<sup>173</sup>

This is significant to legal gender recognition as it is the first law that defines these groups. As the definitions indicate, transgender people were not only defined separately but also included in the definition of “persons of sexual diversity”.

This regulation serves as one of the regulations that enable organizations, groups or individuals providing social welfare to transgender people to register as non-government organizations certified by law. As registered organizations, they can then apply for and receive funding for this work.

These regulations also set out the following three key measures to improve the quality of life of persons of diverse sexualities:

169 The right to recognition before the law is set out in the Universal Declaration of Human Rights (Article 6) and binding international human rights treaties, including the International Covenant on Civil and Political Rights (Article 16) that has been ratified by Thailand.

170 How the right to recognition before the law applies to transgender people is the focus of principle 3 of the Yogyakarta Principles. This principle states that a person’s gender identity is integral to their personality and a basic aspect of self-determination, dignity and freedom. In order for a transgender person to be recognized before the law, they must be recognized in accordance with their self-identified gender. Principle 3 also highlights the responsibility of states to take all necessary legislative, administrative and other measures to fully respect and legally recognize each person’s self-defined gender identity. ICJ (2007).

171 National Social Welfare Promotion Commission Regulation on Prescribing a Target Person or Group of Persons to Receive Social Welfare B.E. 2555 (2012). Under Article 7; issued according to National Social Welfare Promotion Act 2003, additional amendment by National Social Welfare Promotion Act (2<sup>nd</sup> issue) B.E. 2550 (2007).

172 Section 13, Article 51, “Persons of sexual diversity refers to individuals who have sexual preference or satisfaction or sexual expression in various forms, including homosexual, bisexual, transgender, people who have unclear biological sex and people with a sexual character which could be affected by the society.”

173 Section 13, Article 54, “...transgender people refer to people whose gender identity does not match the sex they were assigned at birth and whose gender that does not match social expectations but individual feeling. Transgender people can encompass male to female transgender people such as Kathoey, Sao Praphet Song or transwoman and female to male transgender people such as Tom, including those who define themselves as neither female, nor male.”



1. Promote pride and value in gender diversity and correct prejudice in social values, traditional and belief systems that devalue human dignity of persons of diverse sexualities
2. Increase opportunities and options in employment, education, and health for equal rights and protection of person of diverse sexualities
3. Systematize social service and participation in policymaking and governance, and revise measure, rules, regulations, laws and policies that discriminate against persons of diverse sexualities.

The researchers of this report did not find any solid evidence of this regulation being implemented, despite its potential to increase access to social welfare for transgender individuals and access to funding for transgender CSOs providing such support.<sup>174</sup> This regulation is also significant due to its clear definitions and recognition of “sexual diversity” and “transgender people” in law.

## 7.2 Recognition and protection of transgender people in the military

In Thailand, all males are required to serve in the military.<sup>175</sup> Prior to 2011, transgender women who had undergone feminizing surgeries or hormonal treatment were required to take part in the military service selection process as they are recognized as male under law.<sup>176</sup>

Prior to a 2006 court case, ministerial regulations identified which personal characteristics were considered appropriate or inappropriate for military service.<sup>177</sup> However, up until 2011, transgender women who attended the military service selection process were still provided with an exemption from military service as suffering from a “permanent mental disorder”.<sup>178</sup> This exemption came in the form of the military service document certifying the results of the selection process known as “SorDor 43”.

The 2006 court case that led to an eventual change in policy was filed by a Thai transgender woman, with the Administrative Court against the Minister of Defence after she was exempted from military service with “permanent mental disorder” written on the exemption form.<sup>179</sup> The complainant filed the case on the grounds that by classifying her as having a permanent mental disorder, they were violating her human dignity and having a negative effect on her legal personality.<sup>180</sup>

As indicated by a key informant, a Military Recruitment Officer, there has been a ripple effect in the Ministry of Defence since this case was filed. There were consultation workshops with bodies, including the Ministry of Public Health, Department of Mental Health, Royal Thai Army Medical Department, human rights groups and civil society, on the appropriate terms to refer to the characteristics of transgender women identified in the “SorDor 43” document. These discussions included seeking solutions for individuals who went through the military service selection process before 2006 and have already been identified as having a “permanent mental disorder” [as well as] the methods required to rectify the “SorDor 43” document of the complainant.<sup>181</sup>

In September 2011, the Administrative Court ruled that the term “permanent mental disorder” should

174 Chaipayit, N. and Yodmuang, W. (2016). Interview Kantapong Rangsrirawang, Director of Legal Affairs, Division of Gender Equality, MSDHS, Office of Division of Gender Equality, 11 March 2016.

175 Section 7 Military Enlistment Act B.E. 2497 (1954).

176 Preechasilpakul, S. (2013) p. 56.

177 Ministerial Regulation, issue 37 (1973) amended by Ministerial Regulation, issue 47 (1975) under the Military Enlistment Act B.E. 497 (1954); Chaipayit, N. and Yodmuang, W. (2016). Interview Lt. Col. Piyachat Prasannam, Military Recruitment Officer, Recruiting Department, The Royal Thai Armed Force, Office of Recruiting Department, 2 March 2016.

178 According to Ministerial Regulation, issue 74 (1997) under the Military Enlistment Act B.E.497 (1954), as category 4; person that could not serve in the military according to Article 41 of Military Enlistment Act 1954; Chaipayit, N. and Yodmuang, W. (2016) Interview Lt. Col. Piyachat Prasannam, Military Recruitment Officer, Recruiting Department, The Royal Thai Armed Force, Office of Recruiting Department, 2 March 2016.

179 Preechasilpakul, S. (2013) p. 56.

180 This affect to her legal personality relates to an article within the Civil Code that states that people with a mental disorder are lacking of full capacity by law. Thailand’s Civil Code Section 28–30.

181 Chaipayit, N. and Yodmuang, W. (2016). Interview Lt. Col. Piyachat Prasannam, Military Recruitment Officer, Recruiting Department, The Royal Thai Armed Force, Office of Recruiting Department, 2 March 2016.

be removed from the SorDor 43 form and that the Ministry of Defence should correct and clarify the characteristics that exempt the complainant from military service.<sup>182</sup> In an appendix to the verdict, the court stated that the use of the term “permanent mental disorder” did not reflect the current medical knowledge, served to disgrace<sup>183</sup> the person, and was an enforcement of law without consideration for the individual’s human dignity.<sup>184</sup> The court judgment further affirmed that government agencies should uphold the rights of transgender people and treat them with the same dignity and humanity as others.<sup>185</sup>

In response to this judgment, it was decided that the Military Recruitment Department would issue a new document certifying that the complainant was exempt from military conscription as a person whose “gender does not match their sex at birth”.<sup>186</sup> However, they would not automatically change the wording of documents already issued to transgender women; thus individuals conscripted before 2012 are required to request an amended document from the Military Recruitment Department.<sup>187</sup> This particular decision is problematic as it relies on transgender women who were conscripted before 2012 to actually be aware of this change in policy so they can seek their own rights administratively. Limited proactive steps have been made by the Military Recruitment Department to update these documents. This means, a large number of transgender women who were categorized before 2012 as having a “permanent mental disorder” are likely to still have this wording on their exemption document. This leaves them in the same position of vulnerability and stigma already ruled harmful to their human dignity by the Administrative Court.

After the initial judgment, and prior to Ministerial Regulation No. 75 coming into force, the old regulations remained in place and the recruitment department issued an interim policy to all recruiting committees nationwide.<sup>188</sup> This interim policy enabled an applicant whose gender did not match their sex assigned at birth to be granted an exemption under an existing provision for someone whose physical condition is not strong enough for military service at that time (Category 3). Transgender women were thus granted a temporary exemption and required to report back the following year when the regulation would be in force.<sup>189</sup>

When Ministerial Regulation No. 75 came into force in 2012, transgender women became exempt from military service because their “gender does not match sex at birth” rather than because they had a “permanent mental disorder”. This is a ‘Category 2’ exemption that places them below those in good physical condition (Category 1), but does not define being transgender as a mental illness. While removing the term “permanent mental disorder” was progressive, there is nothing wrong with the physical condition of transgender women that would render them unfit for military service. Their exemption in this regard is not based on recognition of them as women but in the assertion that their physical condition is somewhat inferior, even when they are in good health. This is particularly problematic as a key informant stated that the Ministry of Defence has a screening policy for not recruiting transgender people in general.<sup>190</sup> This implies that transgender men would not be able to enter the Thai military as men, nor would transgender women be able to enter the military as women. Thus, while the language used in this judgment and the subsequent Ministerial Regulation No. 75 remain among the most progressive in Thailand, in practice, the military establishment does not recognize the gender identity of transgender persons. However, in terms of broader relevance to legal gender recognition,

182 As well as two other related documents issued to complainant. Administrative Court Decision No.1540/2554 (2011). Available at: <http://www.admincourt.go.th/admincourt/site/search.html?page=03suitdetail&ids=2-1-15021> (Accessed 5 July 2016).

183 This is a direct translation from the Thai term ‘*Aub Eye*’ (อัปยัย) and is not meant to stigmatize those with permanent mental health conditions.

184 In the decision, the judge cited the definition of ‘Permanent Mental Disorder’ as available in the Thai Dictionary as well as the definition used by the Department of Mental Health to say that while the complainant was assigned male at birth, she had breasts and the personality of a woman. This is not a category of ‘Permanent Mental Disorder’ according to the available definitions; the court also cited the opinion of a representative from the Department of Mental Health regarding the fact that the elimination of homosexuality from the WHO’s ICD-10 showed that the act of military recruitment committee, which used the term ‘permanent mental disorder’ in the SorDor 43 document of the complainant, did not reflect current medical facts. In this regard, the judgment relied on the conflation within Thai society of homosexuality and transgender gender identity. In as much as transgender women are being barred as a result of their gender identity, they are also being barred for their presumed homosexuality and gender expression.

185 Preechasilpakul, S. (2013), pp. 56–57.

186 The agency in the Ministry of Defence responsible for considering the required amendment is the Royal Thai Armed Forces; Ministerial Regulation No. 75.

187 Chaiyakit, N. and Yodmuang, W. (2016). Interview Lt. Col. Piyachat Prasannam, Military Recruitment Officer, Recruiting Department, The Royal Thai Armed Force, Office of Recruiting Department, 2 March 2016.

188 Ministerial Regulation No. 75 came into force on 11 April 2012.

189 Chaiyakit, N. and Yodmuang, W. (2016). Interview Lt. Col. Piyachat Prasannam, Military Recruitment Officer, Recruiting Department, The Royal Thai Armed Force, Office of Recruiting Department, 2 March 2016.

190 Ibid.

the rejection of a mental health diagnosis as the basis for military exemption sets a positive example about the need to avoid such requirements in other policy areas.<sup>191</sup>

### Military Conscription Categories

Category 1 – Having a good physical condition

Category 2 – Having a physical condition which is not as good as Category 1

Category 3 – Having a physical condition which is not strong enough for military service at the moment because he is sick and cannot recover within 30 days

Category 4 – People with a disability or having diseases which are set out in ministerial regulation.

## 7.3 Perspectives on the current exemption process

During focus group discussions for this report, two perspectives regarding the new military conscription regulations emerged. One group believed that the specific screening process for transgender women provides protection to transgender women. This was based on the belief that military service has a training system and regulations that are made for men. In this regard, transgender women, particularly those who have undergone feminizing procedures or who are on hormonal treatment do not have the physical ability for such training systems and regulations. Conversely, another group believed that screening out transgender women from military service completely was a limitation of transgender women's rights because they cannot not enter the military as women.<sup>192</sup> Moreover, the automatic screening policy to exclude all transgender people was considered to discriminate against any transgender person who may wish to enter military service.<sup>193</sup>

## 7.4 The Thai Military conscription process

On the day of military conscription, there is now a process for identifying individuals whose gender does not match their sex assigned at birth.

Transgender women are required to bring a medical certificate stating that their gender does not match their sex assigned at birth. These can be requested at any hospital under the Royal Thai Army or any psychiatric hospital. This certificate is used by the selection officer to certify exemption under Category 2 in the 'SorDor 43' and the individual does not need to go through any physical check-up.

If a transgender woman does not have a medical certificate, they have to go through the initial selection process which includes a physical check up in a private room. In general, if a person has already undergone feminizing procedures or hormonal treatment, selection officers will give them the Category 2 exemption.

If a transgender woman does not have a medical certificate or these types of obvious physical changes, they are usually defined as Category 1 which means they are physically fit for military service and are eligible for conscription. The Selection Committee may also provide information to or question the applicants on the selection day. If they suspect someone is a transgender woman, but there is no medical certificate confirming this, the Committee's policy is to issue a Category 3 exemption, based on a temporary physical condition, requiring the person to report back the next year.

191 Please see Chapter 10 for more information on transgender legal recognition and its relationship to medical diagnosis in Thailand.

192 2<sup>nd</sup> Multi-stakeholder Roundtable Discussion on Gender Identity Recognition in Thailand, 15 June 2016, United Nations Secretariat Building, Bangkok.

193 Described in Chaiyajit, N. and Yodmuang, W. (2016). Interview Lt. Col. Piyachat Prasannam, Military Recruitment Officer, Recruiting Department, The Royal Thai Armed Force, Office of Recruiting Department, 2 March 2016.

Although the recruiting department has a policy of screening individuals whose gender does not match their sex assigned at birth, it is recognized that there may be some transgender women who may not be aware of this policy or who refuse to enter the selection process for fear of having to enter military service. On this point, the key informant outlined two possible scenarios.

Scenario 1: A transgender woman slips through the screening process and goes into the draw for military service.<sup>194</sup> This case may occur due to lack of information or assistance on the selection day. Alternatively, the transgender person may not have revealed their gender identity during the selection process. There are practical guidelines for dealing with these cases. The transgender person sends a request to the High Commission of the province by 30 April of the selection year. When it is found that a person has a gender that does not match sex assigned at birth, an order will be issued to the department or division that the transgender person has been assigned to, stating that the particular person will no longer be required to report for military service. If the process cannot be done in time and the individual has to report for military service in the first few rounds, the order will be issued as an official document of release when it is found that their gender does not match their sex assigned at birth.

Scenario 2: If a transgender woman is afraid of military service and chooses not to participate in the screening process, or if she wishes to continue entering postponement requests but fails to submit such a request, she will have committed an offence under Military Enlistment Act B.E. 497 (1954), Article 45. This offence carries a criminal penalty of imprisonment not exceeding three years. Having completed their criminal sentence, if the person is found not to have any condition or disease in accordance with Ministerial Regulation No.76, the person will be required to enter military service without the right to enter the military draw.

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<sup>194</sup> A draw is used to determine who will be conscripted. Each person who is assigned male at birth will have to draw a card on conscription day. There is a red and black card. If they get a red card, they are exempted from military service.

# Chapter 8: Legal gender recognition and ambiguity in criminal law

A lack of legal gender recognition may lead to ambiguity in the interpretation of certain criminal laws which may increase the vulnerability of transgender people in ways that affect their access to justice.

## 8.1 Laws that directly or indirectly criminalize transgender people

In Thailand, there is no law which criminalizes transgender people directly but prostitution is a criminal offence under the Prevention and Suppression of Prostitution Act B.E. 2539 (1996). This law can result in the indirect criminalization of transgender women, especially in Pattaya. The police have often stopped transgender women in public places on the grounds of public nuisance and vagrancy, despite the fact that these are not offences under Thai law.<sup>195</sup> As transgender women are overrepresented and visible among female sex workers, there is a common assumption that all transgender women are sex workers. This leads to transgender women in general, including those who are sex workers, being disproportionately targeted by police.

## 8.2 Ambiguity in criminal law: Rape under Thailand's Criminal Code

Thailand's Criminal Code was amended in 2007 to expand the definition of rape to include sexual penetration and marital rape of all people, regardless of sex/gender. It also imposed stricter penalties on those who committed acts of rape or sexual abuse.<sup>196</sup> However, despite this broad and clear definition, a debate arose regarding whether the rape of transgender individuals who have undergone genital surgeries would be recognized legally.<sup>197</sup> As it stands, any transgender person, regardless of whether they have or have not had gender-affirming surgeries on their genitalia, is culpable if they commit rape, or are recognized as protected under the current law if they are raped. However, the lack of clear legal gender recognition for transgender people in Thailand, which recognizes the diversity of transgender bodies, has led to ambiguity and obscure arguments that challenge this law. It is clear, however, that despite debate, the original law was drafted with the clear intent to protect all persons from sexual violence and rape; and to hold all persons who commit these acts accountable, regardless of their surgical status.<sup>198</sup>

Judge Dol Bunnag, a member of the judiciary that enforces the law and a participant at the 2nd Multi-Stakeholder Roundtable Discussion, proposed a further amendment in the Criminal Code to include the phrase “a person who has changed their sex organs should also be protected by law” in order to remove any doubt over whether all persons were protected under this law. The other participants at the meeting agreed that this

195 Article 5 of the Prevention and Suppression of Prostitution Act states that “Any person who, for the purpose of prostitution, solicits, induces, introduces herself or himself to, follows or importunes a person in a street, public place or any other place in an open and shameless manner or causes nuisance to the public, shall be liable to a fine not exceeding one thousand baht.” However, this relates solely to the context of those soliciting sex; there are no laws specifically against public nuisance or vagrancy in Thailand.

196 Criminal Code Amendment Act (No. 19) B.E. 2550 (2007).

197 2<sup>nd</sup> Multi-stakeholder Roundtable Discussion on Gender Identity Recognition in Thailand, 15 June 2016, United Nations Secretariat Building, Bangkok.

198 In support of this, Asst. Prof. Dr. Sirachai Jindarak, an experienced plastic surgeon, stated that the law should recognize and protect a transgender person who has undergone gender-affirming surgery and has their sex organ reconstructed as it would do for a transgender person who has not undergone any such surgery; Chaiyajit, N. and Yodmuang, W. (2016). Interview with Asst. Prof. Dr. Sirachai Jindarak, Aesthetic Plastic Surgery, PAI Institute, 15 March; 2nd Multi-stakeholder Roundtable Discussion on Gender Identity Recognition in Thailand, 15 June 2016, United Nations Secretariat Building, Bangkok.

suggestion was in line with the intent of the original amendment to protect people from sexual violence and rape and would ensure that all transgender people were protected.<sup>199</sup>

The development of ‘ambiguous’ interpretations of a clearly articulated law demonstrates a need for the explicit mention and definitions of transgender people, gender identity, sexual orientation, intersex variations, sexual diversity and any terms that have been used in the context of LGBTI people in laws, policies, regulations and court judgments. The current absence of explicit reference leaves transgender people, sexual minorities and intersex people vulnerable to human rights violations and potentially diminishes the capabilities of laws designed to protect all citizens.

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199 Observation from 2<sup>nd</sup> Multi-stakeholder Roundtable Discussion on Gender Identity Recognition in Thailand, 15 June 2016, United Nations Secretariat Building, Bangkok.

# Chapter 9: Transgender people detained in the criminal justice system

This section will examine how a lack of legal gender recognition and the resulting incongruencies in identification documents affect the experiences of transgender people as offenders within the criminal justice system. A transgender person's civil registration record or National ID has implications for their treatment when charged or detained under criminal laws in Thailand. This is because there are different search and detention provisions for females and males, and transgender people are treated according to their sex assigned at birth rather than in accordance with their gender identity.<sup>200</sup>

The relevant enforcement laws in this regard in the Thailand criminal justice system are the Criminal Procedure Code together with the President of the Supreme Court's Regulation on the Criteria and Procedure concerning the issuance of Court Writ or Criminal Warrants B.E. 2548.<sup>201</sup>

## 9.1 Separation of females and males in detention

The United Nations Standard Minimum Rules for the Treatment of Prisoners states that women deprived of their liberty should be held in accommodation which is physically separate from that of male prisoners in order to protect them against sexual harassment and abuse.<sup>202</sup> This standard minimum rule is reflected in prison regulations across the region.<sup>203</sup> Since very few transgender people are able to gain legal gender recognition in this region, this means, with decisions about the detention of transgender people typically based on sex assigned at birth, that transgender women may be placed in the same accommodation as cisgender men, subjecting them to possible sexual harassment and abuse.

## 9.2 Issuance of a summons or criminal warrants

A lack of legal gender recognition and the reliance on the national ID card as the primary identification document means transgender women are treated as males in prison, while transgender men are treated as females. Officials use the civil registration database to search for people in order to issue a summons. If a person in a summons has the title of "Mister", the officials search for a male person; if a person has a title as "Miss" they search for a female person. Police consulted during the writing of this report acknowledged this can make it harder to identify a suspect and can result in arresting the wrong individual.<sup>204</sup> Enabling National ID cards to be updated to match a transgender person's gender identity and expression could reduce problems of mistaken identity.

The evidence that an officer uses to verify a transgender person's identity is the 13-digit identification number and biometric data held in the civil registration database. An outdated photograph on a transgender person's National ID (matching their sex assigned at birth) impedes the police officer's ability to do a criminal history check or to look for a transgender person who is suspected of committing a crime. So, enabling National ID cards to be updated to match a transgender person's gender identity would be beneficial for both the safety of transgender people generally and the ability to identify the minority of transgender people who commit criminal offences.

200 There is also no recognition of non-binary transgender people and so, non-binary and gender non-conforming people are also treated according to their sex assigned at birth.

201 In addition, Section 28 of the Constitution prescribes that any arrest, detention, searching of an individual or any actions that affect rights and liberties in life and body shall not be permitted, except by a court order or warrant or any other ground as specified by law.

202 The United Nations Standard Minimum Rules for the Treatment of Prisoners, section 8(a); United Nations Office on Drugs and Crime (2008). *Handbook for prison managers and policymakers on Women and Imprisonment*, Criminal Justice Handbook Series, p. 34.

203 For example, Malaysia's Prisons Regulations 2000, Regulation 5(1); Thailand's Regulation of Department of Corrections on the treatment of detained persons: Detention and Administration Procedure No. 24.

204 Chaiyajit, N. and Yodmuang, W. (2016). Interview Pol. Col. Apicha Thawornsiri, a Superintendent of Case Inspection Sub-division 3, Criminal Affairs Division, 25 February 2016.

## 9.3 Treatment of transgender people during the restraining stage and while in detention

Principle 9 of the Yogyakarta Principles provides clear guidance on the responsibilities of states to treat transgender people with humanity while in detention. It states:

“Everyone deprived of liberty shall be treated with humanity and with respect for the inherent dignity of the human person. Sexual orientation and gender identity are integral to each person’s dignity”.

This principle includes the responsibility of States to take measures to avoid further marginalization of transgender people in detention and subjecting them to risk of violence, ill treatment or physical, mental or sexual abuse – as well as the responsibility to provide adequate access to medical care with recognition of the particular needs of transgender people including access to hormonal and sex affirming surgeries where desired. Significantly, Principle 9 also emphasizes that those in detention participate in decisions regarding their place of detention appropriate to their gender identity, as much as possible.<sup>205</sup>

Both internationally and in Thailand, transgender people face an increased risk of discrimination, torture, ill treatment and violence, including sexual assault and rape, while in detention. This is a result of criminal justice systems that tend to overlook and neglect their specific needs.<sup>206</sup> Thailand currently has no formalized guidelines in place for the search, restraint and detention processes for transgender prisoners. Transgender people may be detained under warrant during the staging of a criminal trial or when imprisoned, including pending an appeal. Department of Corrections’ regulations state that male detainees and female detainees shall be detained separately.<sup>207</sup> In Thailand, transgender women are more likely to be criminalized than transgender men because, for many, sex work is one of their few employment options, and it is illegal in Thailand. Evidence also shows that transgender women in particular are vulnerable to sexual and physical violence when detained with male prisoners.<sup>208</sup>

In order to manage detention of alleged offenders during the restraining stage, all police stations in Thailand contain two detention rooms to detain men and women separately. Again, the gendered information on the National ID is used to decide whether an alleged offender is held with men or women, based on the person’s sex assigned at birth.

Discretionary power provided in Regulation No. 139 gives the superintendent of each police station the authority to order that a temporary and separate detention room is prepared for a transgender person, separate from other alleged offenders.<sup>209</sup> However, during the multi-stakeholder dialogues it emerged that the majority of transgender participants were unaware of this regulation and it is unknown to what extent alleged offenders who are restrained by the criminal justice system are informed of this possibility. Additionally, this discretionary power does not extend beyond the initial restraining stage to detention in prisons (see Section 9.1 above).

When interviewed, a key informant from the Rights and Liberties Protection Department considered that the lack of clear law, regulations or guidelines on the treatment of transgender people in detention was not a problem because the Ministry of Justice already takes these issues into account. However, he went on to say that “in practice, due to a limitation in detention space in some prisons, there are limited options to manage the environment and separate detainees as appropriate. Only some prisons with sufficient resources can allocate the space for such a purpose”.

205 The text of Principle 9 can be found in the Annex.

206 UN Human Rights Council (2016), *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, 5 January 2016, A/HRC/31/57, paras 34–36; UNODC (2009) *Handbook on Prisoners with Special Needs*. Criminal Justice Handbook Series.

207 Regulation of Department of Corrections on the treatment of detained person: Detention and Administration Procedure No. 24

208 iLaw (2014). The Story of Trans people in Male Prisons – เรื่องเล่าความหลากหลายทางเพศในคุก (ชาย) [blog], iLaw, 22 April; BBC Thai (2016). Stories from an inmate: When Thai prisoners will designate a special area of LGBTs – ฟังความเห็นนักโทษ เมื่อเรือนจำไทยจะเปิดแดนพิเศษเพื่อผู้มีความหลากหลายทางเพศ; Office of the High Commissioner for Human Rights (2011) *Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity*. A/HRC/19/41; UNODC (2009).

209 Police Procedure Code Concerning the Case: Regulation No 139.



Given these constraints, he felt that progressing human rights protections for transgender people in prison should be limited to the level of an agreement or ‘guideline’. The key informant believed that creating and adhering to mandatory requirements would be impossible within current resource constraints.<sup>210</sup>

However, the safety and security of transgender people in detention must always be of the highest priority. International best practice as well as international guidelines on the detention of transgender people issued by the UN Office on Drugs and Crime (UNODC) state that the allocation of transgender prisoners should occur in consultation with the concerned prisoner on a case-by-case basis. They further state that the allocation of transgender prisoners based on their sex assigned at birth, and especially housing transgender women with male prisoners, actively facilitates sexual abuse and rape. Irrespective of whether the transgender individual has had gender-affirming surgery or not, a transgender person should never be placed in dormitories or cells together with prisoners who may pose a risk to their safety.<sup>211</sup>

## 9.4 Searching the alleged offender

During an arrest, police have the power to search an alleged offender: “Such a search must be conducted with due propriety. Whenever it is made on a woman, it must be made by another woman.”<sup>212</sup>

In Thailand, because a transgender woman is legally classified as a male, she would be searched by a man, while a transgender man is legally classified as female and would be searched by a woman. However, applying this standard to transgender people based on their sex assigned at birth leaves them vulnerable to ridicule, invasions of privacy and discrimination.

A key informant stated that while the Criminal Procedure Code states that a person should be searched by a person of the same gender (interpreted as defined by sex assigned at birth), in practice, the appearance and characteristics of a transgender woman being searched may be considered when deciding if she can be searched by a female officer. The examples given were if the transgender woman had undergone gender-affirming genital surgery or whether a female official was comfortable conducting the search.<sup>213</sup> This means that the gender of the person who searches a transgender woman is based on a discretionary decision by the officers in charge rather than the existence of clear guidelines. This ambiguity leaves transgender women vulnerable to violations of their human rights and personal dignity, but at least is better than a strict interpretation of the law. It also emphasizes the bodily makeup of a transgender woman as the key determinant for how they are treated in detention rather than safety concerns or respect for their dignity and well-being.

In the case of transgender men, the key informant stated that transgender men will be treated without consideration of their gender identity, appearance and whether they have had gender-affirming surgeries.<sup>214</sup> Essentially, this means that transgender men will always be treated as women when it comes to their experience in detention. Regardless of their preference, appearance or physical characteristics, they will be searched by a female officer.

A focus on safety and security, including the risk of sexual harassment or assault, is essential when considering the vulnerability of transgender people in prison. However, it is not accurate to assume that this vulnerability is based on whether or not a transgender person has undergone genital reconstruction (or chest/breast reconstruction surgeries). The Royal Thai Police’s search policy currently allows some discretion about who searches transgender prisoners, based on safety concerns. However, this should be formalized and allow for an

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210 Chaiyajit, N. and Yodmuang, W. (2016). Interview Kerdchok Kasemwongjit, specialist on dispute settlement and the Promotion of Rights and Liberties Protection Department, Office of Promotion of Rights and Liberties Protection Department, 22 January 2016.

211 Human Rights Watch (2011); UNODC (2009), p. 115.

212 Section 85 of the Criminal Procedure Code B.E. 2559 (2016); the Police Procedure Code concerning the case: No. 70 prescribes that whenever a woman is searched, the search must be made by another woman and the searching official must conduct the search with due gentleness and the searching place must be in a closed place in order to avoid the embarrassment of the person to be searched.

213 Chaiyajit, N. and Yodmuang, W. (2016). Interview Pol. Col. Apicha Thawornsiri, a Superintendent of Case Inspection Sub-division 3, Criminal Affairs Division, 25 February 2016.

214 This is based on the criteria prescribed in Section 85 of the Criminal Procedure Code together with the Police Procedure Code Concerning the Case: Regulation No. 70. Both of these regulations are drawn from discussions of issues such as who should perform a body search of a transgender individual. In order to secure the safety of the individual and to prevent unfair violations against their gender, transgender men will be detained without consideration of their appearance, characteristics and whether they have had gender-affirming surgeries. Ibid.

approach that respects a transgender person's gender identity and personal autonomy while also considering their right to safety. This should then be applied to all transgender prisoners regardless of their gender identity or surgical status. This would reflect best practice in other jurisdictions.<sup>215</sup>

The UNODC international guidelines on the detention of transgender people recommend that transgender prisoners be provided with a choice regarding the gender of the person conducting the search.<sup>216</sup> This should occur regardless of whether the transgender person has undergone gender-affirming surgeries or not. Additionally, the Special Rapporteur on Torture has called on state parties to the Convention Against Torture to “guarantee all transgender detainees the choice of being searched by male or female officers” as well as to “take individuals’ gender identity and choice into account prior to placement and provide opportunities to appeal placement decisions.”<sup>217</sup>

## 9.5 Access to hormones and transgender health-related check-ups

Additionally, the researchers spoke to transgender women who reported that rules and regulations in detention affected transgender people disproportionately beyond the initial search and detention. These rules included strict uniform regulations that limited the gender expression of transgender inmates including forcing transgender women to cut their hair as well as a prohibition on hormonal therapy while in detention. For many transgender people, transition-related health care such as hormonal therapy and relevant health check-ups are essential for the maintenance of their physical and mental health. By denying access to hormones to transgender people in detention, officials are also essentially violating their right to the highest attainable standard of health.<sup>218</sup>

As a result, while it appears that the Ministry of Justice recognizes the challenges faced by transgender people in detention, the current lack of transgender-inclusive protective regulations regarding their search and detention leaves transgender prisoners particularly vulnerable to the discretionary decisions of prison officials and resource constraints. Therefore, it is highly recommended that policies with greater enforcement potential than ‘guidelines’ are formulated, enforced and monitored across prisons and detention facilities.

These experiences of transgender women in detention highlight the importance of legal gender recognition for transgender people in Thailand. Importantly, during the 2nd experts’ meeting held during consultation on this report, the Ministry of Justice indicated that it intends, in the short term, to develop and issue guidelines on the protection of the rights of transgender people in prison. This would be developed in consultation with the Department of Juvenile Observation and Protection, the Department of Corrections and transgender civil society. This represents an advocacy opportunity to highlight one of the significant positive impacts legal gender recognition could have on the welfare of transgender people. It is important that such guidelines encompass all transgender people, whether or not they have had gender-affirming medical interventions.

Currently, no information has been identified regarding the experiences of transgender men when being searched or detained in custody. However, considering the lack of clear guidelines and regulations, it is likely that transgender men face similar challenges to transgender women during searches as well as in the allocation of detention area and access to transition-related health care. As a result of the lack of information available, the experiences of transgender men in detention in Thailand has been identified as an area in which further targeted research is necessary.

215 HPP, APTN, UNDP (2015) p. 18.

216 UNODC (2009) pp. 117–118.

217 Thailand ratified the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment in 2007; UN Human Rights Council, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, 5 January 2016, A/HRC/31/57*, para. 70 (s) and (u).

218 HPP, APTN, UNDP (2015).

# Chapter 10: Legal gender recognition and its relationship to medical diagnosis (psychopathologization) in Thailand<sup>219</sup>

In Thailand, medical and scientific evidence plays an important role in the development and interpretation of laws and regulations. As a result, the role of medical evidence has often been central to discussions around transgender legal gender recognition in Thailand. As demonstrated throughout this research report, transgender individuals have often been required to provide medical certification of GID in order to have their gender identity recognized.<sup>220</sup> Additionally, surgeons have often verified a transgender person's medical transition as supporting evidence in individual cases.<sup>221</sup> In many incidences, transgender activists and policymakers in Thailand have asserted that psychopathologizing transgender people, by defining gender diversity as a mental illness, is the only way to prove that transgender people exist and that they have specific needs that need to be addressed and recognized.

However, there is an important distinction to be made between supporting medical evidence and its requirement as a prerequisite for realizing fundamental human rights. And increasingly, international, regional and national human rights standards are calling for the de-psychopathologization of gender identity, and elimination of medical diagnosis or medical interventions as a precondition of legal gender recognition.<sup>222</sup> In both 2010 and 2015, medical professionals around the world who specialize in transgender health affirmed this distinction, when the World Professional Association for Transgender Health (WPATH) issued statements opposing both surgeries and sterilization as prerequisites for legal gender recognition. Multiple human rights experts and United Nations agencies have also confirmed that such mandatory requirements are abusive and violate the human rights of transgender people to self-determination and recognition before the law.<sup>223</sup>

In May 2010, the Board of Directors of WPATH issued the following statement calling for the 'de-psychopathologization' of transgender people:

“The expression of gender characteristics, including identities that are not stereotypically associated with one's assigned sex at birth, is a common and culturally diverse human phenomenon which should not be judged as inherently pathological or negative. The psychopathologization of gender characteristics and identities reinforces or can prompt stigma, making prejudice and discrimination more likely, rendering transgender and transsexual people more vulnerable to social and legal marginalization and exclusion, and increasing risks to mental health and physical well-being. WPATH urges governmental and medical professional organizations to review their policies and practices to eliminate stigma toward gender-variant people.”<sup>224</sup>

The *International Classification of Diseases and Related Health Problems* (ICD) issued by the World Health Organization and the *Diagnostic and Statistical Manual of Mental Disorders* (DSM) of the American Psychiatric Association are used by public health systems around the world, including Thailand. The ICD and DSM both formerly coded transgender identities as 'gender identity disorder' or GID.<sup>225</sup> In 2013, the DSM was updated and GID was replaced with the term 'gender dysphoria'.<sup>226</sup> This is widely viewed as a positive step because GID was seen as a negative label placed on the gender identities of transgender people while gender dysphoria

219 Psychopathologization is the practice of defining transgender people's gender identity as a mental illness.

220 Please see Section 7.2 on 'Recognition and protection of transgender people in the military' and Chapter 6 on 'Legal gender recognition in education.'

221 Chaiyajit, N. and Yodmuang, W. (2016). Interview with Asst Prof. Dr. Sirachai Jindarak, Aesthetic Plastic Surgery, PAI Institute, 15 March.

222 Winter, Sam et al. (2016). Transgender people: health at the margins of society, *The Lancet*, Volume 388, Issue 10042, pp. 390–400.

223 Please see Section 1.7 on the 'International Context' for more information.

224 HPP, APTN, UNDP (2015), pp. 32–33

225 As demonstrated in this report, GID is the diagnosis currently utilized in Thailand.

226 HPP, APTN, UNDP (2015) p. 32.

focuses more specifically on the distress felt by some transgender people when their gender identity does not match their body. However, this change has not been reflected in Thailand.

The ICD is also currently under revision, and it has been indicated that ICD 11 will remove ‘gender identity disorder’ from the mental health chapter and that the new redefined code will not pathologize gender expression. Instead, the proposal is to place it under the chapter ‘Conditions related to sexual health’ in order to maintain the opportunity for transgender people to access transition-related health services.<sup>227</sup>

A growing number of best practice approaches to legal gender recognition have emerged globally over the last few years that are based on the principles of self-determination and bodily autonomy. In May 2012, Argentina became the first country to pass a gender identity law that allowed transgender people to alter the gender markers on their birth certificates and all associated documents, based solely on a person’s self-determined request.<sup>228</sup> Importantly, there is no requirement for diagnosis, surgeries or hormonal treatment. Denmark,<sup>229</sup> Malta,<sup>230</sup> Ireland<sup>231</sup> and Norway<sup>232</sup> have also enacted gender recognition laws that allow transgender people to legally self-define their gender identity without requiring medical diagnosis, surgeries or hormonal treatment.

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227 With this change in codification, ‘gender identity disorder’ or the new suggested term ‘gender incongruence’, transgender identities will no longer be defined as mental or behavioural disorders; Transgender Europe (TGEU) (2014a). A step in the right direction: WHO proposes to remove FG “Gender Identity Disorders” from the mental and behavioural disorders [Press Release]; Drescher, Jack et al. (2012). Minding the Body: Situating Gender Identity Diagnoses in the ICD-11. *International Review of Psychiatry*, 24 (6), pp. 568–77.

228 *Ley 26743: Derecho a la identidad de género*. [Law No. 26743: Right to gender identity]. An English translation of this Act is available at: <https://globaltransaction.files.wordpress.com/2012/05/argentina-gender-identity-law.pdf> (Accessed 7 July 2016).

229 The Danish law, including an unofficial English language translation are available at TGEU (2014) *Danish Trans Law Amendments 2014*, 26 September, <http://tgeu.org/danish-trans-law-amendments-2014-l-182-motion-to-amend-the-act-on-the-danish-civil-registration-system> (Accessed 9 August 2016).

230 Malta’s Gender Identity, Gender Expression and Sex Characteristics Act; TGEU (2015) *Malta Adopts Ground-breaking Trans and Intersex Law* [Press Release] 1 April. Available at: <http://tgeu.org/malta-adopts-ground-breaking-trans-intersex-law/> (Accessed 9 August 2016).

231 Ireland’s 2015 Gender Recognition Act is available at: Transgender Equality Network Ireland (2015) *Legal Gender Recognition in Ireland*, <http://www.teni.ie/page.aspx?contentid=586> (Accessed 9 August 2016).

232 *Lov om endring av juridisk kjønn 17.juni 2016. Nr. 46* [Law amending legal status] 17. June 2016. Nr. 46]. There is currently no English language translation available for this law. However, the Norwegian law is available at: <https://lovdata.no/dokument/NL/lov/2016-06-17-46> (Accessed 20 December 2016).

# Chapter 11: Intersex persons and legal gender recognition

This study has been designed to look at legal gender recognition for transgender people in Thailand. It has not proactively sought to collect data about laws, policies, regulations and court decisions that enable intersex people to amend their name, sex or title on official documents. However, when existing provisions were found that dealt with intersex persons, the researchers decided to capture this data and present them in the report for future reference. However, a deeper analysis of the legal ramifications of legal gender recognition for intersex people in Thailand is outside the scope of this study.

Intersex is an umbrella term that describes a wide range of natural bodily variations. What these have in common is that an intersex person's physical, hormonal or genetic features do not fit stereotypical notions for male or female bodies.<sup>233</sup> However, within the Thai context, the terms 'intersex' and 'transgender' share the same cultural root and are commonly conflated under the single term '*kathoey*'. There remains a lack of knowledge regarding the existence and challenges faced by intersex people in Thailand.

With regards to legal gender recognition in Thailand, while a transgender person cannot amend their name, title or gender marker on their birth certificate, people born with intersex variations have very different legal options.

Some intersex people may amend their registered sex on all documents. However, this ability to amend documents is only available to intersex people who are identified (the term used is 'diagnosed')<sup>234</sup> as intersex at birth (based on 'ambiguous genitalia') and who undergo so-called 'sex normalizing' surgeries so that their genitals conform to dominant ideas of a male or a female body. Internationally, such surgeries are often performed when an intersex person is too young to give consent. This practice is increasingly being criticized by UN mechanisms and agencies as a human rights violation.<sup>235</sup>

This study found that there is no law in Thailand providing legal gender recognition for people with intersex variations without also requiring such invasive medical and surgical requirements.<sup>236</sup> Research undertaken for this project identified one relevant 1992 administrative document issued by the Ministry of Interior.<sup>237</sup> The scope of that document is limited to a minority of intersex people as it only applies to those intersex variations that result in 'ambiguous genitalia'.

This administrative order was developed in response to a 1992 case brought to the NHRC of Thailand by an intersex adult wishing to change their name title in legal documents.<sup>238</sup> The Commission asked the Department of Provincial Administration to clarify whether the change in civil registration data and legal documents such as the National ID card was allowed for intersex people and, if so, which laws and regulations would apply.

In an official letter issued by the Bureau of Registration Administration, it clarified that the intersex person in this specific case was identified as male on their birth certificate, but was "diagnosed" as having "abnormal

233 APF (2016). p. 65.

234 Many intersex activists reject medicalized language to describe intersex bodies. The pathologizing of intersex bodies has commonly been used to justify 'normalizing' treatments to force intersex people's bodies to conform to dominant notions of what male and female bodies look like. These treatments commonly occur without informed consent and may have long-term ramifications on the mental, physical, emotional and sexual health of an intersex person. As a result, the authors of this report have chosen not to perpetuate inaccurate pathologizing terms for intersex people's naturally occurring biological variations. When such terms are used, they are a direct quotation from a referenced text; Astraea Lesbian Foundation for Justice (2016).

235 UN Human Rights Council (2013); WHO, OHCHR, UN Women, UNAIDS, UNDP, UNFPA and UNICEF (2014); UN Office of the High Commissioner for Human Rights (2015); WHO (2015).

236 Mandating specific medical and surgical requirements so that intersex persons can rectify their identification documents violates international human rights law. Please see Section 1.7 on the 'International Context' for more information.

237 By the Bureau of Registration Administration under the Department of Provincial Administration of the Ministry of Interior.

238 Chaiyajit, N. and Yodmuang, W. (2016). Interview with Kitiporn Boon-am, Human Rights Officer, National Human Rights Commission of Thailand, Office of National Human Rights Commission of Thailand, 4 March 2016.

genitalia”, and had surgery “removing the person’s abnormal genitals”.<sup>239</sup> The letter explicitly clarified that the operation undertaken was “not the sex reassignment surgery”. On the basis of this evidence, “the registrar is able to revise the evidence in birth certificate and house registration according to the actuality in accordance with the regulations of the Bureau of Registration Administration”.<sup>240</sup>

The NHRC has confirmed that this administrative order limits correction of records in this regard to intersex people whose intersex variations resulted in so-called ‘ambiguous genitalia’ which were identified at birth, and who have had some form of genital surgery to conform their bodies to dominant notions of male or female.<sup>241</sup> This excludes most intersex people from being able to revise sex-specific details on their civil registration documents.<sup>242</sup>

Subsequently, the NHRC produced a pamphlet with the aim of providing information on the process. This pamphlet lists the documents that an intersex person who qualifies for amending details on their civil registration record is required to submit, as follows:<sup>243</sup>

1. A medical certificate concerning the consideration of gender and sexual orientation together with the opinions of professional doctors in order to determine which title should be used. As well, the person requesting the change needs to have genital reconstruction surgery to have unambiguous genitals: either male or female.
2. Their 13-digit identification number.
3. The name of the person who will act as a witness and be present at the district office or domicile’s district office.

This administrative guideline is problematic on many levels. It stigmatizes the depiction of intersex variations, or so-called ‘ambiguous genitalia’, as abnormalities that should be surgically corrected. This is at stark odds with a growing body of international human rights evidence that such surgeries are typically performed before an intersex person is old enough to give informed consent. In such conditions, they violate multiple human rights standards.

While the process is laid out clearly, the requirement to consider the gender and sexual orientation of the intersex individual before permitting a change in document ignores the right to self-determination of the intersex person. It also suggests that a person’s sexual orientation will be taken into account when deciding whether an application will be granted. This aligns with the lived experiences of both transgender and intersex people in Thailand where gender identity and sexual orientation are perceived within a heteronormative framework. As a result, the granting of an application in which the intersex person is heterosexual appears more likely than if the intersex person is sexually oriented towards people of the same gender.<sup>244</sup> Intersex people have the same diversity of sexual orientations and gender identities as the rest of the population, and they should not be discriminated against on either of these grounds when seeking legal recognition. If an intersex person wishes to change the sex details on their documents, medical evidence of their sexual orientation should not be a requirement.

The primary example of international best practice for legal gender recognition of intersex people is the gender recognition law of Malta. The Maltese law explicitly considers the human rights of intersex people and is the first in the world to prohibit so-called ‘sex-normalizing’ genital surgeries on intersex infants. It was the

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239 Deputy Director, Bureau of Registration Administration (1992). Letter to Phisanulok Provincial Registration Administration No. Mor.Tor 0322/9158, 21 October.

240 Bureau of Registration Administration B.E. 2535 (1992). No. 115: this regulation states that in order to revise the content in the civil registration document, the requesting person shall submit the document to a district registrar or local registrar. If the registration has been considered and approved, the revision of the content in the civil registration document shall be made afterwards.

241 Chaiyajit, N. and Yodmuang, W. (2016). Interview with Kitiporn Boon-am, Human Rights Officer, National Human Rights Commission of Thailand, Office of National Human Rights Commission of Thailand, 4 March 2016.

242 There are numerous intersex variations including chromosomal and hormonal variations that do not result in an intersex person being born with ambiguous genitalia. As a result, many intersex people may not discover that they are intersex until puberty or adulthood, if at all.

243 National Human Rights Commission of Thailand (2012). *Request for the revision of the civil registration record: in case of the request for the revision of name title of intersex persons at birth* [Pamphlet].

244 2<sup>nd</sup> Multi-stakeholder Roundtable Discussion on Gender Identity Recognition in Thailand, 15 June 2016 United Nations Secretariat Building, Bangkok.

second country in the world, after Australia, to protect intersex people under a specific prohibited ground of discrimination.<sup>245</sup>

The December 2013 Public Statement by the Third International Intersex Forum, which included participants from Asia, framed legal recognition issues for intersex people around the rights of bodily integrity, physical autonomy and self-determination. This statement made the following best practice recommendations for intersex legal gender recognition:

- 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 for anyone on birth certificates or identification documents.

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<sup>245</sup> Intersex people are protected under the ground of 'sex characteristics' under the 2015 Malta law. In Australia, 'intersex status' was added as a prohibited ground to the federal Sex Discrimination Act 1984 (Cth) in 2013, as were sexual orientation and gender identity; Malta's Gender Identity, Gender Expression and Sex Characteristics Act 2015; TGEU (2015); Open Society Foundation (2014).

# Conclusions

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This report has captured and explored the small number of laws, regulations and policies in Thailand that include transgender people within their scope and which may be relevant to legal gender recognition.

Over recent years, Thailand has introduced the Gender Equality Act that should provide anti-discrimination protection to transgender people and introduced regulations clarifying how gender-specific military conscription laws apply to transgender women. However, while this represents progress, there is of yet no comprehensive attention paid in any regulation, law or policy towards protection from discrimination and legal gender recognition for transgender people.

Rather, as this report has revealed, Thailand has many laws, regulations and policies that directly and indirectly discriminate against transgender people. For instance, name title acts that mandate the use of a name title according to sex assigned at birth, the separation of dress codes based on binary concepts of male and female according to sex assigned at birth in the educational and public sector, and the military's practice of screening out transgender applicants from general recruitment.

Additionally, the new Constitutional drafting process has led to transgender people worrying whether the concept of *phet* will once more be interpreted as including transgender identity as was the case in the now abrogated Constitution of 2007. An inclusive interpretation is important for recognizing transgender identity and issues.

The report also positions the Gender Equality Act B.E. 2558 as the strongest tool for advocating for legal gender recognition, as well as a tool for amending provisions that discriminate against transgender people across all sectors. However, as a new law, the strength and breadth of its use remains to be seen. Additionally, Section 17 of the law sets out specific exemptions, including based on religious belief, that allow discrimination which is not compliant with international human rights standards of non-discrimination.<sup>246</sup>

Through the process of writing this report and in consultation with key stakeholders as part of the multi-stakeholder roundtable discussions, the following key issues and recommendations have been identified.

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<sup>246</sup> Universal Declaration of Human Rights, Articles 1, 2 and 7; International Covenant on Civil and Political Rights (ICCPR, 1966) Article 26; International Covenant on Economic, Social, and Cultural Rights (ICESCR, 1966) Article 2 (2),3; CEDAW Articles 1-4; CRC Article 1.



# Key issues and recommendations

## 1. Anti-Discrimination

### Constitution of the Kingdom of Thailand

#### *Parliament*

- Retain the interpretation of *phet* as transgender-inclusive in the intentions document of the new constitution.
- Ensure all laws, regulations and policies adhere to the principle of non-discrimination enshrined in the Constitution and international human rights law.

### Gender Equality Act

#### *The Ministry of Social Development and Human Security*

- Clarify and raise awareness to transgender people, government agencies, employers, employees, trade unions and the wider public that the definition of unfair gender discrimination in the Gender Equality Act also extends to transgender employees.
- Review and, if necessary, revise exemptions in Section 17 of the Gender Equality Act to ensure that it complies with international human rights standards and that it could not be used to unfairly discriminate against transgender people.
- Ensure members of the *Committee on Consideration of Unfair Gender Discrimination* and the *Gender Equality Promotion Committee* are sensitized on transgender issues to inform the scope of their work.
- Ensure that the complaints mechanism of the Gender Equality Act is universally accessible to all.
- Clarify that Section 30 of the Gender Equality Act regulating the *Gender Equality Promotion Fund* can be used to support, compensate and rehabilitate any victims of gender discrimination, including transgender people.
- Review existing legal provisions to ensure that they do not negatively impact upon the human rights and dignity of transgender people. When negative impacts are identified, utilize the mechanism provided in the Gender Equality Act under Article 21 to challenge the constitutionality of relevant provisions and seek positive reform.

### 3rd National Human Rights Plan

#### *The National Human Rights Commission of Thailand; Ministry of Justice*

- Clarify if advancing legal gender recognition is prioritized within Thailand's 3rd National Human Rights Plan, as part of its sub-plan on sexual diversity and gender identity.
- Monitor, document and promote initiatives where agencies have adopted or implemented their own human rights plan for sexual diversity and gender identity groups.

## 2. Legal gender recognition in the workplace

### *Ministry of Labour*

- Monitor, document and promote the implementation of the Thai Labour Standard: Thai Corporate Social Responsibility TLS 8001:2010 among all public and private sector employers.

- Ensure that the Thai Labour Standard is implemented in the hiring practices of the Ministry of Labour in order to provide an example of good practice for others to emulate.
- Consider reviewing civil service dress codes and provide guidance on their implementation to ensure that transgender applicants and employees can observe the dress code that accords with their gender identity.
- Encourage organizations to put policies in place that specifically protect transgender people from all kinds of harassment as well as to set up mechanisms for reporting discriminatory behaviour.
- Set out specific measures and put policies in place that protect transgender migrant workers and those working for international organizations who are not covered by the Thai Labour Standard.

### ***Ministry of Social Development and Human Security***

- Promote the Gender Equality Act and its applications to all private and public employers and employees, including developing a guidance note on the roll out of the Act for all private and public employers.
- Collaborate with the Ministry of Labour to utilize the redress mechanisms of the Gender Equality Act to challenge law, regulations and provisions that discriminate against transgender employees.

## **3. Education**

### ***Ministry of Education***

- Collaborate with universities, particularly the Council of University Presidents of Thailand, and schools to draft clear guidelines on uniform policies for transgender students that coincide with international best practice as well as the best interest and welfare of transgender students.
- Develop and enforce clear anti-bullying policies covering students of all genders, emphasizing management of bullying perpetrators (including faculty) without discrimination on the basis of the sex, sexual orientation or gender expression of either perpetrators or victims.
- Ensure enforcement of the National Social Welfare Promotion Commission Regulation (2012)<sup>247</sup> that states that there should be increased opportunity in education for persons of diverse sexualities.

### ***Ministry of Education; Ministry of Social Development and Human Security; Council of University Presidents of Thailand***

- Work with universities and schools to ensure their regulations and provisions are in alignment with the Gender Equality Act. While universities are governed by their own Act of Establishment and cannot be amended by the Gender Equality Act as it is of the same hierarchy of law, the Gender Equality Act can be considered as the guiding document for best practice for gender equality in Thailand.
- Ensure teachers, school administrators and other individuals involved in education institutions are sensitized on the diversity of sexual orientation and gender identity.
- Ensure that students are allowed into classes, exam rooms and in public spaces regardless of their chosen uniform.
- Ensure that gender-neutral or transgender-friendly toilets and other necessary facilities are designated or constructed in order to uphold the dignity of transgender individuals.
- Promote international best practice, taking into account the mental health and well-being of transgender students, by allowing transgender students to wear the uniform in accordance with their gender identity.

<sup>247</sup> National Social Welfare Promotion Commission Regulations on prescribing a target person or group of persons to receive social welfare B.E. 2555 (2012).

## 4. Recognition before the law: Definitions

### *The Ministry of Social Development and Human Security*

- Utilize the power provided under Section 5 of the Gender Equality Act to develop a comprehensive, inclusive definition of transgender people, gender identity, gender expression, sexual orientation and sex characteristics that can be used across the legal system to ensure consistency and accuracy. Once developed, these definitions may be published in the Royal Gazette as the standard for other legislation and legal issues. The inclusion of these definitions could also be included in future editions of Thai Legal dictionaries.
- Develop a draft law for the legal gender recognition of transgender people, in consultation with transgender communities, that:
  - Enables transgender people to amend their sex assigned at birth and name title on their birth certificate, civil registration entry and all other official identity documents.
  - Includes a comprehensive, inclusive definition of transgender people.
  - Is based on international human rights standards including the right to recognition before the law, privacy, self-determination and bodily autonomy.
  - Is available to all transgender people without evidence of a medical diagnosis or treatment and regardless of whether they require or seek gender-affirming surgeries or not.
  - Involves a simple administrative procedure at the request of the person concerned based on self-defined gender identity, as confirmed by a witnessed statutory declaration.
  - Complies with the anti-discrimination protections in the Gender Equality Act.

## 5. Official documentation: Name title

### *Ministry of Social Development and Human Security; Ministry of Interior*

- Develop a law, regulation or policy enabling transgender people to amend their name title:
  - Based on their self-defined gender identity, as confirmed by a witnessed statutory declaration.
  - Without requiring evidence of gender-affirming surgeries or a medical diagnosis.

## 6. Education and training of decision makers

### *Ministry of Social Development and Human Security*

- Sensitize law and policymakers on issues of gender identity, sexual orientation and sex characteristics so that laws and decisions can be formulated with accurate and clear intent, providing clarity to interpretation and implementation, and in line with international human rights standards and in accordance with Section 10 of the Gender Equality Act.
- Develop and provide judicial training or a guidance note on the human rights of transgender people and the implementation of the Gender Equality Act, including their relationship to international human rights standards.

## 7. Transgender people and the military

### *Ministry of Defence*

- Consider revising military recruitment practices to recognize the gender identity of transgender individuals in a manner that does not prevent transgender men or women from voluntarily serving. This would include:
  - Recognizing that transgender women are exempt from military service as they are women, and women are not subject to military conscription in Thailand. This includes developing a national guideline for transgender women in national army recruitment.
  - Ending the informal process of screening all transgender people from general recruitment simply for being transgender
  - Allowing transgender men and transgender women to undergo the same voluntary recruitment process to enter the armed forces of Thailand as other citizens, subject to the same requirements and without restrictions based solely on the fact that their gender identity does not conform to their sex assigned at birth.

## 8. Transgender people in detention

### *Ministry of Justice*

- Include transgender people who are incarcerated or institutionalized in any proposed gender recognition provisions.
- Develop guidelines for the respectful and sensitized search and detention processes for transgender people based on the need to ensure the safety of all people in detention, including those whose gender identity differs from their sex assigned at birth.
- Promote gender identity sensitivity among detention officers through the provision of training on sexual and gender diversity, with a specific focus on the search, detention, rehabilitation, and access to health care for transgender people in detention.
- Afford transgender prisoners the right to a safe place of detention, including to choose to be placed in a women's prison, men's prison or other safe place.
- Ensure that transgender people have access to the equivalent level of gender-affirming health care while in detention that is available to the general Thai transgender population, including access to hormonal therapy and relevant health check-ups. Ensure that transgender people are made aware of Regulation No. 139 upon arrest so that, when possible if they so wish, they can be detained separately from other alleged offenders in police stations.

## 9. Stakeholder consultation

### *All government agencies*

- Ensure that transgender people and their organizations are consulted at every stage in the development, revision or amendment of laws and policies that may directly affect them.

## 10. Intersex people

### *Ministry of the Interior; Ministry of Social Development and Human Security*

- Ensure that sex or gender classifications, including name titles, are amendable through a simple administrative procedure at the request of the intersex individual. This administrative procedure should be in line with international human rights standards including:

- Expanding the ability to change documents to all intersex people rather than only those whose specific intersex variations result in ambiguous genitalia at birth.
- Removing the requirement for intersex people with ambiguous genitalia to undergo surgical procedures aimed at conforming their bodies to dominant notions of male or female bodies in order to have their gender recognized.
- Removing the requirement for a medical certificate detailing both the gender and sexual orientation of the intersex individual before the ability to change name title and sex or gender classification is granted.

## 11. Medical diagnosis and legal gender recognition

### *All government agencies*

- Ensure that medical diagnosis of 'Gender Identity Disorder' or other psychopathologization is not a requirement for the recognition of a transgender person's gender identity, including the ability to express their gender identity in accordance with dress code or uniform requirements.

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## Legal provisions, policies and guidelines

### Thailand

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Administrative Court Decision No. 1540/2554 (2011)

Administrative Procedure Act B.E. 2539 (1996)

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Child Title Act B.E. 2464 (1921)

Civil and Commercial Code

Civil Code

Civil Registration Act B.E. 2534 (1991)

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Regulations of Department of Provincial Administration on Issuance of the National Identity Card B.E. 2554 (2011), No. 11

Regulations of the Medical Council Concerning Ethics in the Medical Profession Rules for Treatment in Sex Change Operations B.E. 2552 (2009)

Regulation of Ministry of Foreign Affairs on Issuance of Passport B.E. 2548 (2005)

Supreme Court Judgment No. 157/2524 (1981)

Thai Labour Standard: Thai Corporate Social Responsibility TLS 8001:2010

## **European Court of Human Rights**

*Affaire A.P., Garçon et Nicot v. France* (79885/12, 52471/13 and 52596/13), 6 April 2017

## **Argentina**

*Ley No. 26743: Derecho a la identidad de género* [Law No. 26743: Right to gender identity], Boletín Oficial [Official Bulletin] No. 32.404, 24 May 2012, pp. 2–3.

## **Australia**

Births, Deaths and Marriages Registration Amendment Bill 2016 (Victoria, Australia)

## **Bolivia**

*Ley No. 807 de 21 Mayo 2016: Ley de Identidad de Género* [Law No. 807 of 21 May 2016: The Gender Identity Law]. Official Gazette Edition 0861NEC.

## **Colombia**

*Ministerio de justicia y del derecho decreto 1227 de 2015, 4 Junio 2015* (Ministry of Justice Decree 1227 of 2015, 4 June 2015)

## **Denmark**

*Lov om ændring af lov om Det Centrale Personregister ((Tildeling af nyt personnummer til personer, der oplever sig som tilhørende det andet køn), Til lovforslag nr. L 182, Folketinget 2013-14* (Motion to amend the Act on the (Danish) Civil Registration System (Granting a new social security number to people who experience themselves as belonging to the opposite sex) Bill Nr. 182, Danish Parliament 2013–14)

## **Ireland**

Gender Recognition Act 2015

## **Malta**

Gender Identity, Gender Expression, and Sex Characteristics Act 2015

## **Norway**

*Lov om endring av juridisk kjønn* [Law amending legal status] 17 June 2016. Nr. 46

# Annexes

## List of participants – 1st Multi-stakeholder Roundtable Discussion on Gender Identity Recognition in Thailand

United Nations Secretariat Building, Bangkok, 21 October 2015

Ajcharachawee Hasunha	Social Development Worker Specialist	Department of Women's Affairs and Family Development, Ministry of Social Development and Human Security
Kantapong Rangsisawang	Head of Legal Division	Department of Women's Affairs and Family Development, Ministry of Social Development and Human Security
Kannikar Saengthong	Director General	Rights and Liberties Protection Department, Ministry of Justice
Punpong Asavachaisophon	Plan And Policy Analyst, Practitioner Level	Department of Provincial Administration, Ministry of Interior
Tippawan Jitrat	Government Officer	Bureau of Registration Administration, Department of Provincial Administration, Ministry of Interior
Dr. Tairjing Siripanich	Commissioner	Office of the National Human Rights Commission of Thailand (NHRC)
Molsawan Wutyinyong	Field Officer	M Plus (Chiang Mai)
Kath Khangpiboon	Co-Founder and Working Group Member	Thai Transgender Alliance (Thai TGA) (Ubon or BKK)
Natt Kraipet	Network Coordinator	Asia Pacific Transgender Network (APTN) (BKK)
Thitiyanun Nakpor (Doi)	Director	SISTERS Center for Transgenders (Pattaya)
Wannapong Yodmuang	Advocacy and Human Rights management officer	Rainbow Sky Association of Thailand (RSAT) (BKK)
Ronnapoom Samakkeekarom	Lecturer	Faculty of Public Health Thammasat University (BKK)
Nada Chaiyajit	Transgender and intersex activist and consultant	Transmen Alliance of Thailand (TMAT) Health and Opportunity Network (HON) Core member of Togetherness for Equality and Action (TEA) (Chiang Rai)
Busakorn Suriyasarn	Consultant	ILO
Jack Byrne	International Consultant	UNDP BRH
Eszter Kismodi	International Consultant	UNDP BRH
Katri Kivioja	Programme Specialist	UNDP BRH
Jensen Byrne	LGBTI and Human Rights Project Officer	UNDP BRH
Ernest Noronha	Human Rights Policy Analyst	UNDP BRH
Tivea Koam	Intern	UNDP BRH

Suparnee Pongruengphant	National Project Officer on Governance, Human Rights and LGBTI	UNDP Thailand
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## List of participants – 2<sup>nd</sup> Multi-stakeholder Roundtable Discussion on Gender Identity Recognition in Thailand

United Nations Secretariat Building, Bangkok, 15 June 2016

Pol. Col. Apicha Tavornsiri	Superintendent	Case Inspection Sub-Division 3, Criminal Affairs Division, Royal Thai Police
Dr. Dol Bunnag	Chief Judge, The Office of the President of Supreme Court	Office of the Judiciary
Kamnuan Wiboonpan	Chief of Rights and Person Status Registration	Bureau of Registration Administration, Department of Provincial Administration, Ministry of Interior
Kannika Charoenluk		Department of Women's Affairs and Family Development, Ministry of Social Development and Human Security
Kerdchoke Kasemwongjit		Rights and Liberties Protection Department, Ministry of Justice
Kitiporn Boonum	Officer	Office of the National Human Rights Commission of Thailand (NHRC)
Lt. Col. Piyachat Prasannam		Military Recruitment Division, Ministry of Defence
Pongthorn Chanlearn	Committee Member	Gender Equality Promotion Committee
Dr. Surachet Satitniramai	Commissioner	National Human Rights Commission of Thailand
Jetsada Taesombat	Co-Founder and Working Group Member	Thai Transgender Alliance (Thai TGA)
Kritipat Chotidhanitsakul		Transmen Alliance of Thailand (TMAT)
Molsawan Wutyinyong	Field Officer	M Plus (Chiang Mai)
Naiyana Supapueng	Director	Teerarat Kanjana-aksorn Foundation
Natt Kraipet	Network Coordinator	Asia Pacific Transgender Network (APTN) (BKK)
Thanakarn Vongvisitsin	Member	Transpiration Power
Thissadee Sawangying	Director	HON Pattaya (Chonburi)
Yollada Suanyot		Transgender People Association of Thailand
Boonchoo Changcharoenkit	Director of the Legal Affairs, Division of the Information Center	Mahidol University
Ronnapoom Samakkeekarom	Lecturer	Faculty of Public Health Thammasat University (BKK)
Assoc. Prof. Sirichai Jindarak, M.D.	Head of Surgery Department, Faculty of Medicine, Chulalongkorn University, and Preecha Aesthetic Institute	Preecha Aesthetic Institute (PAI)
Dr. Wimolreka Sirichairawan	Director of the Legal Aid Center and Legal Training Center	Faculty of Law, Graduate School, Payao University

Busakorn Suriyasarn	Consultant	ILO
Suparnee Pongruengphant	National Project Officer on Governance, Human Rights and LGBTI	UNDP Thailand
Nada Chaiyakit	Transgender and intersex activist and consultant	UNDP Consultant
Wannapong Yodmuang	Advocacy and Human Rights Management Officer	UNDP Consultant

# Excerpts from the Thai Labour Standards Corporate Social Responsibility of Thai Business TLS 8001-2010

## 5.6 Discrimination

5.6.1 An establishment shall not engage in or support any discrimination in respect of employment, payment of wage and remuneration, providing welfare and opportunity for training and development, promotion, termination of employment or retirement and so on, due to national extraction, race, religion, language, age, sex, marital status, personal attitude on gender or sexual orientation, invalidity, HIV/AIDS, AIDS patients, trade union membership, employees committee, political affiliation or other personal opinions.

5.6.2 An establishment shall not obstruct, interfere, or perform any action affecting the use of the employees' rights, exercise of their practices related to nationality, race, religion, language, age, sex marital status, sexual orientation, disability, trade union membership, political affiliation or personal opinion, as far as the employees' activity does not cause any damage to the business.



## List of key informant interviews

**Key informant interviews were conducted in Thai by the national researchers Nada Chaiyajit and Wannapong Yodmuang.**

Pol. Col. Apicha Thawornsiri, Superintendent of Case Inspection Sub-division 3, Criminal Affairs Division, 25 February 2016.

Bella Thanakarn, an activist from the transgender organization, Transpiration Power Group and a former student of Mahidol University.

Boonchu Chaengcharoenkit, Director, Division of Legal Affairs Mahidol University, Office of Division of Legal Affairs Mahidol University, 19 February 2015.

Kantapong Rangsrirawang, Director of Legal Affairs, Division of Gender Equality, MSDHS, Office of Division of Gender Equality, 11 March 2016.

Kamnuan Wiboonphan, Chief of Individual Status and Rights Registration Group, General Registration Division, Bureau of Registration Administration, Department of Provincial Administration, Ministry of Interior, Office of Individual Status and Rights Registration Group, General Registration Division, 24 March 2016.

Kerdchok Kasemwongjit, Specialist on dispute settlement and Promotion of Rights and Liberties Protection Department, Office of Promotion of Rights and Liberties Protection Department, 22 January 2016.

Kitiporn Boon-am, Human Rights Officer, National Human Rights Commission of Thailand, Office of National Human Rights Commission of Thailand, 4 March 2016.

Kritipat Chotidhanitsakul, Chair of Transmen Alliance (Thailand), Rainbow Sky Association Office, 8 September 2016.

Lt. Col. Piyachat Prasannam, Military Recruitment Officer, Recruiting Department, The Royal Thai Armed Force, Office of Recruiting Department, 2 March 2016.

Asst. Prof. Dr. Sirachai Jindarak , Aesthetic Plastic Surgery, PAI Institute, 15 March.

Ronnapoom Samakkeekarom, Subcommittee on drafting subordinate legislation according to Gender Equality Act B.E. 2558 (2015), MSDHS, Thai Transgender Alliance Office, 27 January 2016.

Woranittha, transgender male student, Faculty of Law, Chiang Mai University, 19 November 2015.







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