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# UN Recommendations on Viet Nam's Draft Gender Affirmation Law

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Draft Law version from January 2018



**UNITED NATIONS**  
VIET NAM



The 2030 Agenda for Sustainable Development calls for attention to be given to ensuring non-discrimination and that no one is left behind.<sup>1</sup> This requires addressing the often systematic exclusion of trans, gender non-conforming, and lesbian, gay and bisexual persons affected by multiple and intersecting forms of discrimination.

Moreover, the obligations of States to safeguard, without discrimination, the human rights of all people, irrespective of their sexual orientation, gender identity and gender expression, are well established in international human rights law, including the Universal Declaration of Human Rights and treaties ratified by Viet Nam.<sup>2</sup> Human rights bodies have called on States to eliminate discrimination on these grounds.<sup>3</sup> Guiding the application of these binding international commitments, the **Yogyakarta Principles**, developed by a group of independent experts,<sup>4</sup> provide the key standards for upholding States' obligations related to sexual orientation, gender identity and gender expression (SOGIE).

In the second Universal Periodic Review, Viet Nam committed to enact a law to fight discrimination, including of lesbian, gay, bisexual, transgender and intersex (LGBTI) persons,<sup>5</sup> and in the last 5 years, Viet Nam has taken important legal steps towards protecting the human rights of LGBTI persons. The Marriage and Family Law (2014) was revised to remove the explicit prohibition on same-sex marriage.<sup>6</sup> The revised Penal Code (2015) extended protection to gay and bisexual men and transgender women by recognizing that men and male-to-female transgender persons can be victims of rape.<sup>7</sup> Importantly, the amended 2015 Civil Code (**art. 37**), which took effect in January 2017, allows for registering under a new gender marker.<sup>8</sup>

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<sup>1</sup> Transforming our world: the 2030 Agenda for Sustainable Development, preamble and para. 8, <https://sustainabledevelopment.un.org/post2015/transformingourworld>.

<sup>2</sup> Universal Declaration of Human Rights (UDHR), Art. 2; International Covenant on Civil and Political Rights (ICCPR), Art. 26; International Covenant on Economic, Social and Cultural Rights (ICESCR), art. 2(2); Convention on the Rights of the Child (CRC), Art. 2(1). The prohibition of discrimination on the basis of "other status" encompasses discrimination based on a person's actual or perceived gender identity or gender expression, as seen for example, in 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 32; 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.

<sup>3</sup> 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.

<sup>4</sup> Including judges, academics, a former UN High Commissioner for Human Rights, UN Special Procedures, members of treaty bodies, NGOs and others. For more on the principles, see 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*. Please also see Yogyakarta Principles Plus 10 (YP+10, 2017, <https://yogyakartaprinciples.org/principles-en/yp10/>).

<sup>5</sup> By accepting the recommendation to "Enact a law to fight against discrimination which guarantees the equality of all citizens, regardless of their sexual orientation and gender identity." Human Rights Council, A/HRC/26/6, para 143.88.

<sup>6</sup> Marriage and Family Law (2014), No. 52/2014/QH13. Art. 8. Please note that though marriage between persons of the same sex is not prohibited anymore, the law explicitly does not recognize such marriages.

<sup>7</sup> No gender-specific language was used in the 1999 Penal Code or the revised 2015 Penal Code regarding rape. The significant change was that the 2015 revision expanded the scope of rape to include 'other sexual activities' in addition to 'sexual intercourse' in article 141. Penal Code (2015), No. 100/2015/QH13.

<sup>8</sup> Civil Code (2015), No. 91/2015/QH13 of November 24, 2015 came into effect in January 2017. The Civil Code has two articles on redefining sex (Article 36) and changing sex (Article 37). Art. 36 is applied to people who were born with a combination of male and female biological characteristics (Intersex), and Art. 37 is applied to those wishing to change their sex assigned at birth (Transgender). Please see Article 37 (Sex reassignment) "The sex reassignment shall comply with regulations of law. Each surged transgender has the right and obligation to apply for change of civil status affairs as prescribed in law on civil status affairs and has the personal rights in conformity with the transformed gender as prescribed in this Code and relevant laws." Please note the Civil

Allowing legal gender marker change is important, as civil registration is a key requirement for accessing a number of basic services including Government support and healthcare. Without civil registration matching a person's gender presentation, transgender persons may be subjected to invasive questioning deterring them from accessing necessary social and health services. In addition, they face challenges and discrimination in relation to employment, housing and transportation, as their gender marker on identification cards does not reflect their gender identity. While there is no official estimate of the number of people in Viet Nam with a gender identity different from their sex assigned at birth, it is expected to number several hundred thousand.<sup>9</sup>

Despite progress, transgender people in Viet Nam still confront significant challenges, as there is no guiding legislation or decrees to implement the new provision of the Civil Code yet. This leaves transgender persons vulnerable and marginalized facing severe stigma and discrimination in access to justice, social security, health services, education, housing, and decent work.<sup>10</sup>

In this context, the Gender Affirmation Law has been drafted by the Ministry of Health of Viet Nam to implement the Civil Code with the explicit purpose to respect and ensure the rights of transgender people, who wish to undergo medical intervention.<sup>11</sup> The draft includes conditions related to legal gender recognition and access to health services regarding gender affirmation, critically important to protect the rights of people seeking gender affirming transitions, health services and change of their legal gender markers.<sup>12</sup>

This commitment shown by the Government to develop a Gender Affirmation Law, as a genuine effort to operationalize the Civil Code amendment and provide qualified medical interventions for transgender people wishing to undergo physical transition, must be commended. The services addressed in the Draft Law are in clear demand from the transgender community but not yet available in medical facilities in Viet Nam leading people to seek such interventions through unsafe channels.<sup>13</sup> Furthermore, the openness of the Ministry of Health in organizing consultations, including with the transgender community, must be recognized and further consultations are encouraged.

It is imperative that Viet Nam develop the Gender Affirmation Law in alignment with international laws and standards to ensure that transgender persons are equal members of society and protected

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Code does not require sex reassignment surgery or treatment for a change of legal gender recognition, as the word "transformed" can be interpreted very broadly.

<sup>9</sup> The Viet Nam Authority on HIV/AIDS Control (VAAC), under the MOH will conduct, with support from UNAIDS and the GFATM, a size estimation of the Transgender population in Viet Nam in 2019. In Asia and Pacific, it is estimated that there are 9 to 9.5 million trans people (0.3% of the adult population). 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.

<sup>10</sup> A previous research reveals that transgender people are suffering from worse discrimination than homosexual and bisexual people. The Institute for Studies of Society, Economy and Environment (iSEE) (2015), "Is it because I am LGBT?: Discriminations on Sexual Orientation and Gender Identity in Vietnam," page 62.

<sup>11</sup> Draft Law dated 15 January 2018, art. 3(4). English translation on file with the UN in Viet Nam.

<sup>12</sup> Further guiding documents on civil registration for persons who have undergone gender affirming medical interventions will need to be provided by the Ministry of Justice, art. 23(3) of the Draft Law.

<sup>13</sup> See for example, Huong Thu Nguyen (2019): From silicone and hormone injecting to sex reassignment surgery: the precarious road to becoming female of transgender funeral performers in Ho Chi Minh City, Vietnam, Culture, Health & Sexuality, page 11.

and free from any forms of violence and discrimination; no one should be discriminated against based on perceived gender identity or gender expression.

While it is recognized that the Draft Law is an important step towards ensuring the rights of transgender people and includes a number of areas of progress, the UN in Viet Nam would like to highlight key areas in which the current Draft Law (as of 15/1 2018) should be strengthened:

## 1. Scope of the Draft Law

The current draft law covers only those transgender people, who wish to undergo medical interventions, that is, transsexual persons.<sup>14</sup> Following this, recognition of gender affirmation, forming the basis for legal gender marker, i.e. civil status, change, is only permitted for persons undergoing medical intervention in the form of either hormonal treatment for two years or hormonal treatment and surgery (Art. 6, 8, 17).<sup>15</sup> After the legal gender marker change persons are required to continue hormonal treatment unless it seriously affects their health or in case of “other force majeure events” (art. 15(4)).<sup>16</sup> Moreover, a “complete biological sex”<sup>17</sup> is required (Art. 7(1)).

The term medical intervention is defined to cover part of or the whole process from hormonal treatment to breast or genital surgery (art. 2(5)). It is unclear whether this definition of medical intervention is meant to be exhaustive or cover a non-exhaustive continuum of medical interventions from hormonal treatment to breast or genital surgery. In any case, there are a number of other medical interventions that may form part or whole of the gender affirming process,<sup>18</sup> and with medical progress, presumably, more will become available over time. It should be made clear in the Draft Law that medical interventions are not limited to those specified in the Draft Law.

More important, however, is the fact that medical intervention, and subsequent continuous hormonal treatment, as well as a “complete biological sex” are required for changing legal gender marker. This Draft Law should also cover transgender persons,<sup>19</sup> who do not seek medical intervention, and intersex persons<sup>20</sup> identifying as transgender. As gender affirmation is a deeply

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<sup>14</sup> **Transsexual** is “A term that may be used to describe a person who has changed, or is in the process of transitioning, their physical sex to conform to their gender identity.” Proposed definition, United Nations Department of Economic and Social Affairs, Statistics Division, Meeting of the Expert Group on International Statistical Classifications New York, 19-22 May 2015, ESA/STAT/AC.289/Bk.2, 18 March 2015, p. 10 (<https://unstats.un.org/unsd/classifications/expertgroup/egm2015/ac289-Bk2.PDF>).

<sup>15</sup> Except when undergoing breast surgery from female to male (art. 8(2)).

<sup>16</sup> It is unclear what would constitute a force majeure event in this sense.

<sup>17</sup> The term is defined in the Draft Law, art. 2(2), as “the sex of a person determined as a male or female by the completion of the reproductive organs and chromosomes”.

<sup>18</sup> Such as hysterectomies (“a surgical procedure to remove the womb (uterus).” <https://www.nhs.uk/conditions/hysterectomy/>), oophorectomies (“a surgical procedure to remove one or both of a woman's ovaries.”

<https://www.medicalnewstoday.com/articles/320555.php>) or chondrolaryngoplasties (“an operation to reduce the size of the Adam’s apple on the neck in transwomen.” <https://www.uwhealth.org/reconstructive-surgery/thyroid-cartilage-reduction/51291>).

<sup>19</sup> The term **transgender persons** is used to describe “persons whose sense of gender identity does not correspond to their sex assigned at birth.”

<http://www.th.undp.org/content/dam/thailand/docs/legal-gender-recognition-in-thailand-2018.pdf>.

<sup>20</sup> **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

personal and individual process, the necessary and desired process for gender affirmation varies between transgender persons. Some may wish to undergo medical interventions as part of their gender affirming transition whereas for others this may be neither necessary nor desired, as, for example, a social transition<sup>21</sup> would suffice. Moreover, some intersex persons may identify as transgender and wish to change their legal gender marker and should not be excluded from the services and protection in this law.

Including medical procedures as an *option* for persons seeking to change their legal gender marker is an important step and highly encouraged, and efforts should be made to make these procedures safe, affordable and accessible. However, making them a *requirement*, even for those who find it unnecessary or undesirable, restricts transgender persons' right to legal recognition of their gender identity, thereby restricting one of the most basic aspects of self-determination, self-perception, dignity and freedom. Given such profound and life-altering decisions, the Law should recognize that no one option fits all transgender persons at all times, and the Draft Law should respect this, including by making legal gender marker change reversible.

In this regard, it should also be noted that medical interventions are not without health risks and hormone treatment with oestrogen/testosterone may render transgender persons permanently sterile.<sup>22</sup> Consequently, medical interventions should only be undertaken after obtaining explicit, free and informed consent. Requiring medical intervention forces transgender persons to choose between undergoing potentially unwanted medical interventions with serious health risks, including sterilization, and being legally recognized in accordance with their gender identity. Such requirements are inconsistent with human rights standards, which indicate that states shall "Ensure that no eligibility criteria, such as medical or psychological interventions, a psycho-medical diagnosis, minimum or maximum age, economic status, health, marital or parental status, or any other third party opinion, shall be a prerequisite to change one's name, legal sex or gender".<sup>23</sup>

By emphasizing medical intervention and requiring a "complete biological sex" neither transgender nor intersex persons identifying as transgender, are sufficiently covered within the scope of the Draft Law, effectively excluding them from the protections provided by it.

#### **The UN in Viet Nam recommends that:**

- A) The scope of the law be expanded to include also transgender persons who do not wish to undergo medical interventions or wish to only undergo partial medical interventions as well as intersex persons identifying as transgender, and it should be clarified that legal gender marker change is reversible.**

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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." <http://www.th.undp.org/content/dam/thailand/docs/legal-gender-recognition-in-thailand-2018.pdf>.

<sup>21</sup> Such as changing their name, the way they dress or their preferred pronoun.

<sup>22</sup> On risks associated with masculinizing hormone therapy, see for example <https://www.mayoclinic.org/tests-procedures/ftm-hormone-therapy/about/pac-20385099>, on testosterone, see for example [https://apps.carleton.edu/campus/gsc/assets/hormones\\_FTM.pdf](https://apps.carleton.edu/campus/gsc/assets/hormones_FTM.pdf), page 8, and for estrogen, see for example <https://transcare.ucsf.edu/article/information-estrogen-hormone-therapy>.

<sup>23</sup> Yogyakarta Principles plus 10, Principle 31.

- B) Transgender persons be defined as “persons whose sense of gender identity does not correspond to their sex assigned at birth”.**
- C) Gender affirmation be defined in article 2(1) without reference to medical intervention or a complete biological sex, as “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 gender affirming medical interventions that align the individual’s anatomy with their gender identity” to allow all transgender persons, including those who are also intersex persons, to change their legal gender marker.**
- D) All references in the Draft Law on requirements of medical intervention or complete biological sex for gender affirmation and change of legal gender marker be removed, including the requirement to continue hormonal treatment after a change of the legal gender marker.**
- E) Gender affirming medical intervention be defined in article 2(5) as, “any of the biomedical, surgical or health interventions transgender people may undertake to align their physical body and their gender identity. This may include, but is not limited to, access to counselling support, hormone therapy, and a range of surgery”.<sup>24</sup> Subsequent articles should be made consistent with this.**
- F) Gender identity be defined in Art 2(3), as “a person’s deeply felt sense of gender which could be male, female or non-binary.”**
- G) Gender expression be included in the Draft Law defined as “the way in which a person expresses their gender through actions and appearance.”<sup>25</sup>**
- H) The term “complete biological sex” be replaced with “sex assigned at birth”, and the term sex should be defined as “the different biological and physical characteristics used to categorize people as either male or female, which can include reproductive organs, chromosomal patterns and hormones.”**

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<sup>24</sup> See UNDP & APTN (2017). Legal Gender Recognition: A Multi-Country Legal and Policy Review in Asia, p. 17, [http://www.asia-pacific.undp.org/content/dam/rbap/docs/Research%20&%20Publications/hiv\\_aids/rbap-hhd-2017-legal-gender-recognition.pdf](http://www.asia-pacific.undp.org/content/dam/rbap/docs/Research%20&%20Publications/hiv_aids/rbap-hhd-2017-legal-gender-recognition.pdf).

<sup>25</sup> Gender expression can be any combination of masculine, feminine and androgynous. For a lot of people, their gender expression goes along with the ideas that our societies deem to be appropriate for their gender. For other people it does not. People whose gender expression does not fit into society’s norms and expectations, such as men perceived as ‘feminine’ and women perceived as ‘masculine’ often face harsh sanctions, including physical, sexual and psychological violence and bullying. A person’s gender expression is not always linked to the person’s biological sex, gender identity or sexual orientation, UN Free & Equal (<https://www.unfe.org/definitions/>).

## 2. Pathologization and self-determination

The current Draft Law provides that in order to qualify for gender affirming treatment medical professionals must establish that applicants have a gender identity different from their sex assigned at birth (**Art. 14**).<sup>26</sup> This means that transgender persons' own experienced gender identity is regarded as insufficient to establish their gender identity. Instead, this decision is placed in the hands of medical experts. In so doing, the burden is put on transgender persons to “prove” their gender identity to medical professionals who may not fully understand the nature of transgender issues or the experiences of transgender persons.

Requiring medical interventions and medical assessments of gender identity to be the basis of the gender affirming process, reinforces pathologization of gender-affirmation, that is, treating the incongruence between the sex assigned at birth and gender identity as a disease to be cured. This is clearly inconsistent with the Yogyakarta Principles, which state that “a person's sexual orientation and gender identity are not, in and of themselves, medical conditions and are not to be treated, cured or suppressed.”<sup>27</sup>

**Pathologization** creates an environment of discrimination and stigma for people seeking, undergoing, or having undergone gender-affirming transition. It denies transgender people their autonomy and self-determination – the importance of which is recognized in the Draft Law (**art. 3(1)**)<sup>28</sup> - and is a root cause of violence, discrimination and stigma against transgender people.<sup>29</sup>

Increasingly, there is an international call for the **de-pathologization** of gender identity and elimination of medical diagnoses or medical interventions as preconditions for legal gender change. A number of human rights experts have drawn attention to the detrimental effects of pathologization reducing transgender “identities to diseases”,<sup>30</sup> and emphasized the need to “ensure the provision of health services based on informed consent and free from stigma, pathologization and discrimination, including gender affirming procedures for trans people.”<sup>31</sup>

The International Classification of Diseases and Related Health Problems (ICD) issued by the World Health Organization and used by public health systems around the world, including Viet Nam, was recently revised, removing gender incongruence from the list of mental disorders.<sup>32</sup>

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<sup>26</sup> Which requires monitoring over a period of 6 months (art. 14(3)) of the Draft Law.

<sup>27</sup> Yogyakarta Principle 18.

<sup>28</sup> Stipulating that a basic principle of Gender Affirmation is to ensure transgender people can live up to the gender *they want* [our emphasis] art. 3(1).

<sup>29</sup> The detrimental effects of pathologization is not limited to transgender persons but includes also lesbian, gays and bisexuals. See for example, OHCHR, “Pathologization: being lesbian, gay, bisexual and/or trans is not an illness”, statement for the International Day against Homophobia, Transphobia and Biphobia, 12 May 2016. Available at

<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=19956&LangID=E>

<sup>30</sup> Human Rights Council, Thirty-fifth session, 6-23 June 2017, Agenda item 3, Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development, Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Note by the secretariat, A/HRC/35/21, para. 48.

<sup>31</sup> OHCHR, “Pathologization: being lesbian, gay, bisexual and/or trans is not an illness”, statement for the International Day against Homophobia, Transphobia and Biphobia, 12 May 2016. Available at

<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=19956&LangID=E>.

<sup>32</sup> <http://www.who.int/health-topics/international-classification-of-diseases>.

In line with this global trend towards de-pathologization and focus on **self-determination**, a number of countries have recently enacted gender recognition laws allowing transgender people to legally self-define their gender identity *without requiring* medical diagnosis, surgeries or hormonal treatment.<sup>33</sup> As one example, Argentina introduced a Gender Identity law in 2012 according to which “In no case will it be needed to prove that a surgical procedure for total or partial genital reassignment, hormonal therapies or any other psychological or medical treatment has taken place”<sup>34</sup> to have one’s gender identity legally recognized. Another example is Pakistan’s introduction, in 2018, of a law stating that a “transgender person shall have a right to be recognized as per his or her self-perceived gender identity [...]”<sup>35</sup>

When freely and voluntarily undergoing medical interventions, prior to providing gender-affirming health care services, consultations and counselling, both before, during and after medical intervention, should be provided by psychiatrists and clinical psychologists specialized in gender-related mental health and transition issues to ensure a patient-centered approach. In this regard, the Ministry of Health’s obligation, stated in **art. 23(2)d** of the Draft Law, to provide trainings for psychologists to support gender affirming applicants is welcomed. However, this support must be distinguished from psychological *assessments* of their gender identity, which should not be required.

Self-identification of gender based on informed consent should be clearly identified in the Draft Law as the key criterion for establishing a person’s gender identity removing the “gatekeeper” role from medical staff. In this regard, criteria such as whether a person enjoys activities stereotypically associated with the opposite sex, as currently included in the Draft Law (**art. 14**), are neither sufficient nor necessary conditions to establish a person’s gender identity.

The current Draft Law prohibits obstructing gender affirming medical interventions (**article 5(2)**). However, whereas, for example, the Law on Marriage and Family (2014) defines the meaning of obstructing marriage or divorce (**art. 3(10)**), no such definition of obstructing gender affirmation is provided in the Draft Law, nor is it clear whether such prohibited obstruction would be treated criminally or administratively. Indeed, it could be more clearly noted, that transgender persons enjoy *all* the same rights as any other citizen of Viet Nam. Otherwise, highlighting only some rights afforded to transgender persons along with everyone else, might give the mistaken impression that transgender persons have fewer rights than other citizens.

Regarding persons who have already undergone medical intervention, the Draft Law rightly provides a procedure to have this recognized in order for them to change their legal gender marker. However, this procedure is limited because of the requirement to seek to have the medical intervention recognized within 1 year from the law’s entry into force.<sup>36</sup> Moreover, the procedure

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<sup>33</sup> Notably, Argentina, Denmark, Malta, Ireland and Norway. See UNDP, MSDHS (May 2018). Legal Gender Recognition in Thailand: A Legal and Policy Review, page 58.

(<http://www.th.undp.org/content/dam/thailand/docs/legal-gender-recognition-in-thailand-2018.pdf>).

<sup>34</sup> Art. 4, Gender Identity Law, Unofficial translation,

<https://www.tgeu.org/sites/default/files/Argentina%20-%20Gender%20Identity%20Law%20ENG.pdf>.

<sup>35</sup> Bill to provide for protection, relief and rehabilitation of rights of the transgender persons and their welfare and for matters connected therewith and incidental thereto, art. 3(1). [http://www.na.gov.pk/uploads/documents/1526547582\\_234.pdf](http://www.na.gov.pk/uploads/documents/1526547582_234.pdf).

<sup>36</sup> It is unclear, what the consequences are for people who fail to follow the procedures for having their gender affirming medical intervention recognized within a year from the law’s entry into force, art. 24 of the Draft Law.



to do so is not clear (e.g. what documentation will be needed, will hormone therapy undergone by the transgender persons themselves be accepted).

In case of refusal to grant a certificate on medical intervention for gender affirmation or inability to provide hormonal treatment or surgery, the Draft Law states that a reply in writing must be provided clearly stating the reasons for this (**art. 9(2)c, 10(2)c, and 17(3)**). However, the current Draft Law contains no right to or procedure for appeal or alternative examination if an application is rejected or for redress in case of violation of rights. Moreover, though disclosure of private information is prohibited there are no clear provisions on who has access to applicants' private information.

In terms of accountability and redress, clear accountability measures and procedures for redress need to be in place for transgender persons seeking gender affirmation. These measures and procedures should be clearly described in the Draft Law, which is currently not the case. The Draft Law should i) articulate on what grounds medical facilities may refuse to grant certificates of medical intervention or to carry out medical intervention, ii) stipulate the appeals mechanisms in case medical facilities refuse to grant these certificates or to carry out medical interventions (identifying which body will handle such appeals), and iii) clarify the procedures for complaints and redress in case the rights of transgender persons are transgressed (e.g. in case their medical intervention is obstructed, their private information disclosed, etc.).

The Draft Law prohibits abusing gender affirmation to evade legal obligations (**art. 5(7)**). It should be noted that undergoing gender affirmation is not a process entered into lightly, that it does not erase legal obligations and that there is no evidence to suggest that it leads to increased illegal abuse.<sup>37</sup>

The requirements of medical intervention and medical assessment of gender identities in the Draft Law makes it even more crucial that a system of health care is in place to ensure appropriate and sufficient care for transgender persons. To ensure this, several issues must be addressed, including: i) education for health providers on transgender issues providing them with needed information,<sup>38</sup> ii) ensuring sensitization programs in facilities providing health care to LGBTI persons, iii) strengthening measures to reduce stigma and discrimination in healthcare facilities,<sup>39</sup> iv) ensuring accessible and affordable facilities and health services for transgender people, and v) monitoring stigma and discrimination while accessing health care services.

**The UN in Viet Nam recommends that:**

- I) Article 14 be changed to ensure assessment of gender identity based solely on the self-identified gender identity of the applicant and without requirements for medical diagnosis or psychological appraisals. As a consequence, that all provisions related to the medical appraisal of gender identities be aligned with this sole criterion of self-identified gender identity.**

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<sup>37</sup> See page 60, <https://tgeu.org/wp-content/uploads/2015/02/TGEU-Legal-Gender-Recognition-Toolkit.pdf>.

<sup>38</sup> This is already addressed in the Draft Law, art. 23(2)c, though it is not clear who exactly are the recipients of the information.

<sup>39</sup> The MOH Directive on strengthening HIV-related stigma and discrimination reduction in healthcare facilities is a good example and reference (Ref. No: 10/CT-BYT, 26 December 2017).

- J) National clinical guidelines be adapted or developed for gender-affirming health services responding to the needs of specific trans populations, reflecting international human rights standards and building on international guidance from the World Professional Association for Transgender Health (WPATH)<sup>40</sup> and the World Health Organization (WHO).<sup>41</sup> Regional guidance including from the Asia Pacific Trans Health Blueprint should also be sought.<sup>42</sup>**
- K) The capacity and capability of health professionals to provide general and gender-affirming health care services to transgender people should be ensured, including by integrating technical skills and cultural competency into medical education and in-service training for health care professionals, and focusing on the required competencies rather than the length of service, seniority or position.**
- L) Gender-affirming health services should be made affordable and accessible for transgender people, including through public health care systems, and public and private health insurance schemes that do not discriminate, pathologize or stigmatize based on a person’s gender identity or expression.**
- M) The procedures in place to protect the privacy and consent of individuals accessing gender-affirming services, the process for appeals in case applications are denied or there are complaints as well as the legal remedies for violations of rights should be clarified.**
- N) It should be made clearer in the Draft Law that *all* fundamental rights granted to any citizen of the Socialist Republic of Vietnam shall also be available, unequivocally, to every transgender person.**
- O) The time limit in art. 24 of 1 year to register a prior gender affirming medical intervention for recognition in order to change one’s legal gender marker should be removed, and the procedure for registering such a prior medical intervention in terms of accepted procedures and documentation should be made clear.**

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<sup>40</sup> See for example, The World Professional Association for Transgender Health, Volume 7 of the Standards of Care in Vietnamese [https://www.wpath.org/media/cms/Documents/SOC%20v7/SOC%20V7\\_Vietnamese.pdf](https://www.wpath.org/media/cms/Documents/SOC%20v7/SOC%20V7_Vietnamese.pdf).

<sup>41</sup> See for example, the World Health Organization, <https://www.who.int/hiv/topics/transgender/about/en/>.

<sup>42</sup> See for example, 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. [http://www.asia-pacific.undp.org/content/dam/rbap/docs/Research%20&%20Publications/hiv\\_aids/rbap-hhd-2015-asia-pacific-trans-health-blueprint.pdf](http://www.asia-pacific.undp.org/content/dam/rbap/docs/Research%20&%20Publications/hiv_aids/rbap-hhd-2015-asia-pacific-trans-health-blueprint.pdf).

### 3. The requirements to be single, healthy, and over 18-years old

The Draft Law, **articles 7 and 8**, require persons to be single, sufficiently healthy, and over 18-years old in order to undergo the gender affirming process.<sup>43</sup>

The **requirement to be single** implies that married transgender persons are excluded from the medical interventions, and in turn, excluded from changing their legal gender marker. This differentiation based on a non-medical characteristic significantly negatively impacts the rights of transgender persons, as requiring a person to be single can amount to forced divorce for those who are currently married but wish to change their legal gender marker. It forces married persons seeking a legal gender marker change to choose between terminating the lasting commitment of marriage and not being registered in accordance with their own experienced gender identity. For married transgender persons, who decide to undergo medical interventions counselling should be provided to support the couple, both the transgender person and their partner, undergoing these changes.

By legally recognizing gender affirmation for transgender persons, this Draft Law will provide much more needed protection against discrimination for transgender persons. However, by denying married transgender persons the protection afforded to unmarried transgender persons, the former group will be effectively denied equal protection under the law.

This is inconsistent with Viet Nam’s international obligations. The UN Human Rights Committee has observed “that the prohibition against discrimination under article 26 [of the International Covenant on Civil and Political Rights, which Viet Nam is a party to] encompasses discrimination on the basis of marital status and gender identity, including transgender status”<sup>44</sup> and emphasizes the “right to legal recognition of gender without the requirement of dissolution of marriage or civil partnership”.<sup>45</sup> Moreover, the Yogyakarta Principles state that no status “such as marriage or parenthood, may be invoked as such to prevent the legal recognition of a person’s gender identity”.<sup>46</sup> Such differential treatment thus restricts the fundamental human rights of those seeking gender affirmation including their rights to marriage, to privacy and to recognition before the law (including the dignity, equality and security such recognition provides).<sup>47</sup>

Regarding **the health requirement**, it is important to emphasize that once the requirement of undergoing medical intervention for legal gender marker change is removed, a person’s health becomes irrelevant for the gender affirmation process as such. However, for medical intervention to which free and informed consent is given, the requirement of sufficient health should be clearly defined to only cover situations in which the applicant’s health will be negatively impacted by the

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<sup>43</sup> In addition to the requirement of a “completely biological sex” as addressed above.

<sup>44</sup> Human Rights Committee, Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2172/2012\*, CCPR/C/119/D/2172/2012, para. 7.12.

<sup>45</sup> CCPR/C/IRL/CO/4, para. 7.

<sup>46</sup> Yogyakarta Principle 3.

<sup>47</sup> In some countries, for example Germany, a similar requirement was introduced to ensure different-sex marriages, as allowing married persons to change their legal gender marker could entail legally recognized same-sex marriages. However, in Germany, the Federal Constitutional Court struck this down, reasoning that the requirement to be single was an unreasonable restriction on the rights of transgender persons. 1 BvL 10/05, Federal Constitutional Court of Germany (27 May 2008), para. 65.

treatment. Other arising issues, including disability<sup>48</sup> or HIV status, should not be used as a bar to obtain gender affirmation.

The Draft Law also asserts that **applicants must be 18 years old**. Presumably, this requirement is meant to ensure that all persons receiving medical interventions are psychologically mature enough to make such important decisions and physically mature enough for their treatment to be effective and safe.

Research suggests that transgender youth struggle with “feelings of shame and unworthiness”,<sup>49</sup> are aware that their sex assigned at birth does not match their gender identity at a very early age (around 10 years old),<sup>50</sup> and already in their early teens (around the age of 13) notice that others label them as transgender.<sup>51</sup> Moreover, there is evidence that the effectiveness of some medical interventions for adolescents are consistent with and similar to findings on adult transgender persons.<sup>52</sup>

It should also be noted that age is not always a reliable determinant of psychological or physical maturity, as this varies among children. The appropriate age for gender affirming treatment will therefore vary. While medical intervention entails medical dilemmas and consequently a greater need to ensure that decisions are fully informed, some adolescents may be capable of making these important decisions, particularly as they concern reversible treatment, provided they are fully informed. Again, removing the requirement of medical intervention for gender affirmation provides the basis for legal gender marker change without it being irreversible or entailing medical risks.

Psychological and physical maturity as well as the capacity to give full, informed consent consistent with the Convention on the Rights of the Child should be the required criteria, and the Draft Law should consider a process for allowing children with informed parental consent or a court order to begin the process of gender affirmation consistent with the Convention on the Rights of the Child, as long as the child has explicitly consented to this.<sup>53</sup> As one example, Norway, inter

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<sup>48</sup> According to the CRPD Article 12, and further expounded in General Comment 1 of 2014 (para 12-15) from the Committee on the Rights of Persons with Disabilities, persons with disabilities should have legal capacity on an equal basis with others and States should take all necessary measures to ensure that persons with disability are provided with the necessary support to exercise their legal capacity.

<sup>49</sup> “Transgender Youth: Invisible and Vulnerable.” Grossman, Arnold H., and Anthony R. D’Augelli. Co-published simultaneously in *Journal of Homosexuality* (Harrington Park Press, an imprint of The Haworth Press, Inc.) Vol. 51, No. 1, 2006, pp. 111-128; and: *Current Issues in Lesbian, Gay, Bisexual, and Transgender Health* (ed: Jay Harcourt) Harrington Park Press, an imprint of The Haworth Press, Inc., 2006, pp. 111-128, Page 124.

[https://www.csusm.edu/gsr/irb/documents/policy\\_guidelines/trans\\_youth\\_article.pdf](https://www.csusm.edu/gsr/irb/documents/policy_guidelines/trans_youth_article.pdf).

<sup>50</sup> “Transgender Youth: Invisible and Vulnerable.” Grossman, Arnold H., and Anthony R. D’Augelli. Co-published simultaneously in *Journal of Homosexuality* (Harrington Park Press, an imprint of The Haworth Press, Inc.) Vol. 51, No. 1, 2006, pp. 111-128; and: *Current Issues in Lesbian, Gay, Bisexual, and Transgender Health* (ed: Jay Harcourt) Harrington Park Press, an imprint of The Haworth Press, Inc., 2006, pp. 111-128 Page 120-121.

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<sup>51</sup> *Ibid.*

<sup>52</sup> Young Adult Psychological Outcome After Puberty Suppression and Gender Reassignment, Annelou L.C. de Vries, Jenifer K. McGuire, Thomas D. Steensma, Eva C.F. Wagenaar, Theo A.H. Doreleijers and Peggy T. Cohen-Kettenis, *Pediatrics* 2014;134:696, page 701. <http://pediatrics.aappublications.org/content/pediatrics/134/4/696.full.pdf>.

<sup>53</sup> See for example, the example from Argentina, Legal Gender Recognition in Europe - Toolkit, Richard Köhler, Alecs Recher, Julia Ehrt, December 2013, TGEU Transgender Europe, p. 51 (<https://tgeu.org/wp-content/uploads/2015/02/TGEU-Legal-Gender-Recognition-Toolkit.pdf>).

alia, provides for children aged 16 to seek to change their legal gender marker, and for children aged 6-16 to seek legal gender marker change with their parents' consent.<sup>54</sup> Another example is Argentina, where minors can seek legal gender marker change "through their legal representatives and with explicit agreement by the minor, taking into account the evolving capacities and best interests of the child as expressed in the Convention on the Right of the Child [...]."<sup>55</sup> If the consent of any of the minor's legal representatives cannot be obtained, judges can decide, taking into account the evolving capacities and best interests of the child as expressed in the Convention on the Rights of the Child.<sup>56</sup>

**The UN in Viet Nam recommends that:**

- P) The requirement to be single as a prerequisite for gender affirmation and change of gender marker be removed.**
- Q) The requirement of sufficient health to undergo medical interventions be clearly defined so as to cover only situations in which the chosen medical intervention would negatively impact the health of the applicant.**
- R) The requirement to be over 18 years old as a prerequisite for gender affirmation and change of legal gender marker be removed. Instead, in line with the Convention on the Rights of the Child, include a provision considering the best interests of the child, their evolving capacities and giving due weight to the views of the child in accordance with their age and maturity, and with the child's explicit informed consent, children with informed parental consent or a court order can begin the process of gender affirmation.**

The UN in Viet Nam stands ready to support Viet Nam in implementing the recommendations presented in this document, should that be needed.

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<sup>54</sup> Lov om endring av juridisk kjønn, LOV-2016-06-17-46, § 4.

<sup>55</sup> Art. 5, Law on Gender Identity, unofficial translation, <https://www.tgeu.org/sites/default/files/Argentina%20-%20Gender%20Identity%20Law%20ENG.pdf>.

<sup>56</sup> Art. 5, Law on Gender Identity, unofficial translation, <https://www.tgeu.org/sites/default/files/Argentina%20-%20Gender%20Identity%20Law%20ENG.pdf>.