

350 Fifth Avenue, 34th Floor
New York, NY 10118-3299
Tel: 212-290-4700
Fax: 212-736-1300; 917-591-3452

**LESBIAN, GAY, BISEXUAL, AND
TRANSGENDER RIGHTS PROGRAM**

Graeme Reid, *Director*
Boris Dittrich, *Advocacy Director*
Neela Ghoshal, *Senior Researcher*
Kyle Knight, *Researcher*
Ryan Thoreson, *Fellow*
Yuvraj Joshi, *Fellow*
Adam Frankel, *Coordinator*

ADVISORY COMMITTEE

Alice M. Miller, *Co-Chair*
Bruce Rabb, *Co-Chair*
Stewart Adelson
Tamara Adrián
Ise Bosch
Mauro I. Cabral
Randall Chamberlain
Daniel Costello
Julie Dorf
Susana Fried
Allison Jernow
Pieter Ligthart
Wanja Muguongo
Sebastian Naidoo
Arvind Narrain
Andrew Park
Graham Robeson
Cynthia Rothschild
Sid Sheinberg
John Taylor
Maxim Thorne
Reid Williams
Masa Yanagisawa

HUMAN RIGHTS WATCH

Kenneth Roth, *Executive Director*
Bruno Stagno Ugarte, *Deputy Executive Director, Advocacy*
Michele Alexander, *Deputy Executive Director, Development and Global Initiatives*
Carroll Bogert, *Deputy Executive Director, External Relations*
Iain Levine, *Deputy Executive Director, Program*
Chuck Lustig, *Deputy Executive Director, Operations*

Dinah PoKempner, *General Counsel*
James Ross, *Legal & Policy Director*
Hassan Elmasry, *Co-Chair*
Joel Motley, *Co-Chair*

OHCHR-UNOG
8-14 Avenue de la Paix
1211 Geneva 10
Switzerland

February 17, 2016

Re: Legal Recognition of Transgender People in Japan

Complaint submitted to:

Juan Méndez
UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment

Dainius Pūras
UN Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health

Human Rights Watch (the “complainant”) submit that the provisions of the current Japanese legal gender recognition procedure and the manner in which it is implemented violate internationally protected human rights of transgender people in Japan, including the right to health and the prohibition on inhuman and degrading treatment or punishment. Human Rights Watch interviewed 38 transgender people in Japan between August and November 2015, as well as academic experts and psychiatrists who specialize in gender identity issues.

The Complainant

Human Rights Watch is an independent international human rights organization working to defend human rights of people worldwide. Our researchers investigate human rights abuses in some 90 countries around the world, including Japan, where we have an office.

The Alleged Victims

Transgender persons in Japan who wish to have their gender identity recognized on identification cards, school records, and other official documents and otherwise to be able to live their lives in a way that is consistent with their gender identity without being compelled to undergo psychiatric evaluation for the purposes of a diagnosis of a mental disorder.

State Agents Responsible



HRW.org

Summary

Legal gender recognition in Japan is regulated by Law No. 111 of 2003. The law came into effect one year after its promulgation, on July 16, 2004.¹

Law No. 111 requires a diagnosis of “Gender Identity Disorder” (GID) before any transgender person can apply to secure legal recognition of their appropriate gender. GID is defined in the law as “a person, despite his/her biological sex being clear, who continually maintains a psychological identity with an alternative gender, who holds the intention to physically and socially conform to an alternative gender.” The process requires the person to be “medically diagnosed in such respects by two or more physicians generally recognized as holding competent knowledge and experience necessary for the task.”²

The legal gender recognition decision is made by the Family Court. An applicant to the court must, in addition to providing a certificate attesting to the fact that the individual has been diagnosed with GID, meet the following qualifications:

- Be 20 years old or older;
- Be presently unmarried;
- Not presently have any underage children³;
- Not have gonads or permanently lack functioning gonads; and
- Have a physical form that is “endowed with genitalia that closely resemble the physical form of an alternative gender.”⁴

Cases of applicants who have been diagnosed with GID and are able to demonstrate that they meet all of the law’s other criteria are adjudicated by the family court. While this legal recognition is a full legal transition from one gender to the other, court cases and research by Japanese nongovernmental organizations have revealed that in practice, even legally recognized transgender people face discrimination in, for example, adopting children and obtaining life insurance.⁵ That is to say, while Law No. 111 is on its own terms abusive,

¹性同一性障害者の性別の取扱いの特例に関する法律 Sei Dōitsusei Shōgaisha no Seibetsu no Toriatsukai no Tokurei ni Kansuru Hōritsu [Act on Special Cases in Handling Gender for People with Gender Identity Disorder], Law No. 111 of 2003 (Japan). For a translation of the law, see *Asia-Pacific Law and Policy Journal*, vol. 14 (2013), pp. 203-204.

² Law No. 111 of 2003, art. 2.

³At the time of this writing “underage children” refers to people under the age of 20; however revisions planned for 2016 may adjust the age to 18 years.

⁴ Ibid., art. 3, as amended, 性同一性障害者の性別の取扱いの特例に関する法律の一部を改正する法律 Sei Dōitsusei Shōgaisha no Seibetsu no Toriatsukai no Tokurei ni Kansuru Houritsu no Ichibu wo Kaisei suru Houritsu [Partial Amendment to the GID Act] Law No.70 of 2008 (Japan) (changing the third condition from “have no children” to “does not presently have a minor child”).

⁵最3小決平成25年12月10日民集 第67巻9号1847頁 Saikō Saibansyo [Sup. Ct.] Dec. 10, 2013, Hei 25 (kyo) no. 5, 67 (9) SAIKŌ SAIBANSYO MINJI HANREISHŪ [MINSHŪ] 1847 (Japan). The Supreme Court held that a female-to-male transgender person could be recognized as the legitimate father of a child in the family registry. Previously, because the civil code clauses on marriage and children assumed regular reproductive activities between spouses and a sterilized (legally recognized) transgender person could not reproduce, authorities and lower courts had denied an applicant fatherhood status,

discriminatory and in need of reform, there is also a broader need to protect even those transgender people whose appropriate gender has been legally recognized from discrimination.

Law No. 111 is the first legal gender recognition procedure Japan has ever had, and its adoption represented a pivotal moment in Japan's public debate on sexual and gender minority issues.⁶ However, the procedure established under the law violates the rights of people in Japan who wish to be legally recognized as having a different gender from the one they were assigned at birth.

In a 2016 report, the Special Rapporteur on Torture noted that the refusal of transgender people's legal recognition in their appropriate gender, "leads to grave consequences for the enjoyment of their human rights, including obstacles to accessing education, employment, health care and other essential services." The report noted that: "In States that permit the modification of gender markers on identity documents abusive requirements can be imposed, such as forced or otherwise involuntary gender reassignment surgery, sterilization or other coercive medical procedures."⁷

The legal requirements for transgender people in Japan to obtain a GID diagnosis, involve unnecessary, arbitrary, and burdensome tests. The mandatory psychiatric evaluation and the law's requirement that applicants be unmarried, sterile and lacking any children under 20 are inherently discriminatory. These conditions—and in particular the maltreatment many transgender people must accept in order to meet them— also amount to cruel and inhuman treatment and to a violation of transgender people's right to health. The law forces all transgender people who want to secure legal recognition of their appropriate gender to secure diagnosis of a psychological disorder, to refrain from having children at any point during the two decades prior to securing recognition and to be unmarried. It forces many would-be applicants—including those who would not otherwise choose to take these steps— to undergo physically transformative surgical interventions, undergo sterilization, and contemplate the breakup of existing marriages.

Law No. 111's requirements are particularly harmful for transgender children. It sets a mandatory minimum age of 20 for achieving legal gender recognition, and requires extra steps for people under 20 years of age to obtain a GID diagnosis (the first step in the process). Moreover, a GID diagnosis can only be given if the individual holds "the intention to physically and socially conform to an alternative gender,"⁸ which sets children up to understand surgeries as inevitable and puts intense pressure on them to conform to gender stereotypes. These requirements cannot be squared with the principle that the best interests of children be a primary consideration in all administrative and legal decisions that impact

rendering the child he was raising with his (legally recognized) wife illegitimate in state data sets. An April 2014 case in the Osaka Family Court ruled that a male-to-female transgender person could legally adopt her spouse's child under the "special adoption" law. This action, which is technically allowed by any married couple, legally became possible with the passage of Law No. 111 and legal gender recognition, but the case is illustrative of the barriers even legally-recognized transgender people have faced subsequently.

6 M.J. McLelland, "The Role of the 'Tōjisha' in Current Debates about Sexual Minority Rights in Japan," *Japanese Studies*, vol. 29 (2009), pp. 193-207, <http://ro.uow.edu.au/cgi/viewcontent.cgi?article=1213&context=artspapers> (accessed January 12, 2016).

7 Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, "the prohibition of torture and other cruel, inhuman or degrading treatment or punishment in international law to the unique experiences of women, girls, and lesbian, gay, bisexual, transgender and intersex persons," January 5, 2016, A/HRC/31/57.

8 Law No. 111 of 2003, art. 2.

them. Law No. 111 negatively impacts childrens' rights to physical integrity, privacy, and autonomy. These problems are also reflected in how Law No. 111 has been interpreted by the government with regard to gender non-conforming children in statements issued by the Ministry of Education, and the guidance issued to psychiatrists on GID patients.⁹

Human Rights Watch has thoroughly documented the harmful impact of these interpretations of Law No. 111 by the Education Ministry in a forthcoming report about bullying and exclusion from education in Japan, which we will send to your offices this Spring. We are sending this letter now, in advance of our report, because the need for the special rapporteurs' intervention in Japan is urgent. This is because in 2016, a bi-partisan group of Japanese Members of Parliament will consider revisions to Law No. 111 that could relax the requirements for legal gender recognition in Japan.¹⁰

The special rapporteurs' timely intervention in this matter could guide Japan to becoming a regional leader on human rights-based legal gender recognition for transgender people—and to eliminate ongoing patterns of cruel and inhuman treatment and violations of the right to health. Emerging international standards and best practices for legal gender recognition, including recommendations made by these special rapporteurs, call for a separation of legal recognition procedures from medical interventions while still providing healthcare support for those who wish to pursue medical interventions as part of their transition.

Recommendations

Human Rights Watch urges the special rapporteurs to encourage the government of Japan to implement three major recommendations related to improving access to legal gender recognition for transgender people, by:

- Urging the Japanese government to revise or replace its legal gender recognition law in a way that is consistent with its international human rights obligations and in accordance with international best practices for legal gender recognition by separating the legal recognition process from medical interventions and GID diagnosis. The legal gender recognition process should be based on the self-declared gender identity of the applicant. Japan should also eliminate the legal requirements that transgender people be unmarried and without children under 20.
- Urging the government to liaise with international health experts, including the Special Rapporteur on the Right to the Highest Attainable Standard of Health and the World Professional Association of Transgender Health in its efforts to revise or replace Law No. 111.
- While these revisions are underway, instruct the Ministry of Education to issue an urgent clarifying interim directive with clear instructions for school officials to accommodate and respect gender identity of children without requiring a GID diagnosis or any consultation with medical experts. Parents may be consulted where

⁹ Nakatsuka, "Puberty-delaying hormone therapy in adolescents with gender identity disorder," *Seishin Shinkeigaku Zasshi*, vol. 115 (2013), pp. 316-22, <http://www.ncbi.nlm.nih.gov/pubmed/23691819> (accessed February 18, 2016).

¹⁰ Asahi News, "Bipartisan MPs group to consider relaxation of gender change requirements," January 28, 2016, <http://www.asahi.com/articles/AS1X2DW2JXUBQUoo8.html> (accessed February 2, 2016).

appropriate but the child's gender identification should be the predominant factor in determining what accommodations are necessary.

International Law and Best Practices for Legal Gender Recognition

International human rights standards are increasingly understood to require the separation of legal and medical processes of gender reassignment for transgender people. Several countries have adopted best practices that reflect this. Sweden, the Netherlands, Ireland, Colombia, Malta, and Denmark recently changed their legal recognition procedures to remove invasive medical requirements; Denmark and Malta, along with Argentina, do not require a medical diagnosis for legal gender recognition.¹¹ Argentina and Malta are widely considered to set best standards in legal gender recognition procedures.¹² Domestic lawmakers in some countries have adopted these standards in legislation, while in other cases domestic courts have required their application under existing legal frameworks.

In 2013, the UN Special Rapporteur on Torture stated 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."¹³ The Special Rapporteur noted a trend of finding such compulsory sterilization a violation of human rights, including non-discrimination rights and physical integrity, and called upon governments to "to outlaw forced or coerced sterilization in all circumstances and provide special protection to individuals belonging to marginalized groups."¹⁴

A 2012 Office of the High Commissioner for Human Rights (OHCHR) report, prepared in response to a 2011 Human Rights Council resolution calling for an end to violence and discrimination on the basis of sexual orientation and gender identity and expression, noted that "[r]egulations in countries that recognize changes in gender often require, implicitly or explicitly, that applicants undergo sterilization surgery as a condition of recognition. Some States also require that those seeking legal recognition of a change in gender be unmarried, implying mandatory divorce in cases where the individual is married."¹⁵

11 Government of Denmark, Parliamentary Gazette, Law 182, Motion to Law amending the Law on the Central Office (Assigning new personal number for people who experience themselves as belonging to the other sex), April 30, 2014, http://www.ft.dk/Rl/pdf/samling/20131/lovforslag/L182/20131_L182_som_fremsat.pdf; and for Malta see: <http://justiceservices.gov.mt/DownloadDocument.aspx?app=lp&itemid=26805&l=1> (accessed February 17, 2016);

Government of Ireland, Oireachtas, Act No. 25 of 2015, Gender Recognition Act of 2015, <http://www.oireachtas.ie/documents/bills28/acts/2015/a2515.pdf> (accessed February 17, 2016);

12 IDENTIDAD DE GENERO Ley 26.743 Establécese el derecho a la identidad de género de las personas. Available online at: <http://tgeu.org/argentina-gender-identity-law/>; Republic of Colombia, Ministry of Justice and Law, Decree 1227, June 4, 2015, <http://www.minjusticia.gov.co/Portals/o/Ministerio/decreto%20unico/%23%20decretos/1.%20DECRETO%202015-1227%20sexo%20oc%C3%A9dula.pdf> (accessed February 17, 2016); Kingdom of the Netherlands, Law of December 18, 2013 amending Book 1 of the Civil Code Act and the municipal personal records database in connection with the changing conditions and the competence of amending the entry of sex in the birth certificate, <http://wetten.overheid.nl/BWBR0034670/2014-07-01> (accessed February 17, 2016);

13 Report of the Special Rapporteur on Torture, UN Doc. A/HRC/22/53, para. 78.

14 Ibid., para. 88.

15 Human Rights Council, Discriminatory Laws and Practices and Acts of Violence against Individuals Based on Their Sexual Orientation and Gender Identity: Report of the United Nations High Commissioner for Human Rights, UN Doc. A/HRC/19/41 (November 17, 2011), para. 72.

In a 2014 joint statement, OHCHR, the World Health Organization, UN Program on HIV/AIDS (UNAIDS), the UN Development Program, UNICEF, and UNFPA said: “States parties’ obligation to respect the right to health requires that they abstain from imposing discriminatory practices. This includes an obligation to respect the rights of persons with disabilities and transgender and intersex persons, who also have the right to retain their fertility....”¹⁶ The agencies called on governments to “[p]rovide legal guarantees for full, free and informed decision-making and the elimination of forced, coercive and otherwise involuntary sterilization, and review, amend and develop laws, regulations and policies in this regard.”¹⁷

In a 2015 report, mandated by a 2014 Human Rights Council resolution on sexual orientation and gender identity, OHCHR recommended that states begin immediately “[i]ssuing legal identity documents, upon request, that reflect preferred gender, eliminating abusive preconditions, such as sterilization, forced treatment and divorce.”¹⁸ The 2015 “Blueprint for the Provision of Comprehensive Care for Trans People in Asia and the Pacific,” co-published by WHO, UNDP, USAID, PEPFAR, the Asia-Pacific Transgender Network, and the Health Policy Project recommended that governments “[t]ake all necessary legislative, administrative, and other measures to fully recognize each person’s self-defined gender identity, with no medical requirements or discrimination on any grounds.”¹⁹

Similarly, principle 3 of the Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity states that:

Everyone has the right to recognition everywhere as a person before the law. Persons of diverse sexual orientations and gender identities shall enjoy legal capacity in all aspects of life. Each person’s self-defined sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity, and freedom. *No one shall 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. No one shall be subjected to pressure to conceal, suppress, or deny their sexual orientation or gender identity [emphasis added].²⁰

In June 2013, the Parliamentary Assembly of the Council of Europe, a regional body comprised of 47 member states, passed Resolution 1945, calling for an end to coercive

¹⁶ OHCHR et al., *Eliminating Forced, Coercive and Otherwise Involuntary Sterilization*, p. 10.

¹⁷ *Ibid.*, p. 13.

¹⁸ Human Rights Council, *Discrimination and Violence against Individuals Based on Their Sexual Orientation and Gender Identity: Report of the Office of the United Nations High Commissioner for Human Rights*, UN Doc. A/HRC/29/23 (May 4, 2015), para. 79(i).

¹⁹ Health Policy Project, Asia Pacific Transgender Network, United Nations Development Programme, *Blueprint for the Provision of Comprehensive Care for Trans People and Trans Communities in Asia and the Pacific* (Washington, DC: Futures Group, Health Policy Project, 2015), p. 112, http://www.healthpolicyproject.com/pubs/484_APTBFINAL.pdf (accessed January 12, 2016).

²⁰ Principle 3 of The Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity, http://www.yogyakartaprinciples.org/principles_en_principles.htm.

sterilization and castration. Transgender people are listed as one of the groups in the Council of Europe countries disproportionately affected by coercive sterilization.²¹

International expert bodies have in recent years strengthened their positions against medical models for legal gender recognition. The World Professional Association for Transgender Health (WPATH), an international multidisciplinary professional association aimed at promoting evidence-based care, education, research, advocacy, public policy, and respect in transgender health and comprised of over 700 members worldwide, called for removal of any sterilization requirements as part of legal gender recognition in a 2010 statement.²² WPATH stated:

No person should have to undergo surgery or accept sterilization as a condition of identity recognition. If a sex marker is required on an identity document, that marker could recognize the person's lived gender, regardless of reproductive capacity. The WPATH Board of Directors urges governments and other authoritative bodies to move to eliminate requirements for identity recognition that require surgical procedures.²³

In 2015 WPATH updated the statement, reiterating its condemnation of forced sterilization, and expanding its critique of arduous and medicalized procedures for legal gender recognition, saying: "No particular medical, surgical, or mental health treatment or diagnosis is an adequate marker for anyone's gender identity, so these should not be requirements for legal gender change" and "Marital status and parental status should not affect legal recognition of gender change, and appropriate legal gender recognition should be available to transgender youth."²⁴

As the special rapporteur on torture noted in his 2013 report, national courts in several countries have begun to reflect these standards in their decisions as well. The special rapporteur's report refers to the following domestic cases:

- In 2009, the Austrian Administrative High Court ruled that mandatory gender reassignment, as a condition for legal recognition of gender identity, was unlawful.²⁵
- In 2011, the Constitutional Court in Germany found that the requirement of gender reassignment surgery violated the rights to physical integrity and self-determination.²⁶

21 Parliamentary Assembly of the Council of Europe, Resolution 1945 (2013), June 2013.

<http://assembly.coe.int/ASP/Doc/XrefViewPDF.asp?FileID=19984&Language=EN>.

22 WPATH statement (June 10, 2010),

http://www.wpath.org/uploaded_files/140/files/Identity%20Recognition%20Statement%206-6-10%200n%20letterhead.pdf

23 WPATH statement (June 10, 2010).

24 WPATH statement on Legal Gender Recognition, 2015.

http://www.wpath.org/uploaded_files/140/files/WPATH%20Statement%200n%20Legal%20Recognition%20of%20Gender%20Identity%201-19-15.pdf (accessed January 12, 2016).

25 Austrian Administrative Court Cases (VwGH) 2008/17/0054 (decided on 27 January 2009); Austrian Constitutional Court (VfGH) Case B 1973/08-13 (decided on 3 December 2009). Cited in Transgender Europe (2013).

26 Federal Constitutional Court of Germany, 1 BvR 3295/07, 28.01.2011. Available online at:

<http://www.icj.org/sogicasebook/1-bvr-3295-07-federal-constitutional-court-germany-11-january-2011/>

- In 2012, the Swedish Administrative Court of Appeals ruled that forced sterilization could not be seen as voluntary.²⁷
- In September 2014 the Norwegian Equality Body ruled that the Ministry of Health had provided no justification for the sterilization requirement in its gender recognition law, and thus the sterilization requirement was deemed to contravene the Anti-Discrimination Act.²⁸

Courts in some Asian countries have demonstrated a similar commitment to medical non-interference in legal gender recognition processes, including in the following cases:

- In a 2007 judgment, the Nepal Supreme Court’s definition of a third gender category situated it as a minority encompassing a broad range of identities for transgender and gender non-conforming people.²⁹ A 2014 study found that respondents wrote in 16 different terms for their gender identities.³⁰ The court made clear that the sole criterion for being legally recognized as *third gender* on documents and in government registers was an individual’s “self-feeling.”³¹ The judgment cited the right to recognition before the law, guaranteed by article 16 of the International Covenant on Civil and Political Rights, as well as the Yogyakarta Principles.
- In 2013, India’s Supreme Court stated that undertaking medical procedures should not be a requirement for legal recognition of gender identity. The court said: “Few persons undertake surgical and other procedures to alter their bodies and physical appearance to acquire gender characteristics of the sex which conform to their perception of gender, leading to legal and social complications since official record of their gender at birth is found to be at variance with the assumed gender identity.” It continued: “Gender identity, therefore, refers to an individual’s self-identification as a man, woman, transgender or other identified category.” The court made it clear that mandatory sterilization was not acceptable: “no one shall be forced to undergo medical procedures, including SRS, sterilization or hormonal therapy, as a requirement for legal recognition of their gender identity.”³²

27 Mål nr 1968-12, Kammarrätten i Stockholm, Avdelning 03, 19 December 2012. Available online at:

<http://tgeu.org/administrative-court-of-appeal-in-stockholm-on-sterilisation-requirement-in-gender-recognitionlegislation-19-dec-2012/>

28 Transgender Europe, Norwegian Ombud decides forced sterilisation is discrimination, September 13, 2013, available online at: <http://tgeu.org/tgeu-statement-norwegian-ombud-decides-forced-sterilisation-isdiscrimination/>

29 Michael Bochenek and Kyle Knight, “Establishing a Third Gender Category in Nepal: Process and Prognosis,” *Emory International Law Review*, Vol. 26, Issue 1, 2012: http://law.emory.edu/eilr/_documents/volumes/26/1/recent-developments/bochenek-knight.pdf (accessed January 12, 2016).

30 Kyle Knight, Andrew Flores, and Sheila Nezhad, “Surveying Nepal’s Third Gender,” *Transgender Studies Quarterly*, Vol 2. No. 2, 2015; The Williams Institute, “Surveying Nepal’s Sexual and Gender Minorities: An Inclusive Approach,” October 2014: <http://williamsinstitute.law.ucla.edu/research/international/surveying-nepals-sexual-and-gender-minorities/> (accessed January 12, 2016).

31 *Pant v. Nepal*, Writ No. 917 of the Year 2064 BS (2007 AD), translated in NAT’L JUD. ACAD. L.J., 2008, at 262. <http://www.gaylawnet.com/laws/cases/PantvNepal.pdf> (accessed January 12, 2016).

32 *National Legal Services Center v. Union of India and Others*. WRIT PETITION (CIVIL) NO.400 OF 2012, <http://www.lawyerscollective.org/wp-content/uploads/2014/04/Transgender-judgment.pdf> (accessed January 12, 2016).

- In 2015, the Delhi High Court reinforced that, “Everyone has a fundamental right to be recognized in their gender” and that “gender identity and sexual orientation are fundamental to the right of self-determination, dignity and freedom.”³³

Psychiatrists in Japan use both the International Classification of Diseases, which is published by the UN World Health Organization, and the Diagnostic and Statistical Manual (DSM), which is published by the American Psychiatric Association (APA). The DSM has eliminated the diagnosis of GID altogether, and the ICD’s draft version for an upcoming revision proposes removing GID as well.

In 2012 the APA’s board’s changes to the latest DSM removed the term “Gender Identity Disorder.” APA instead added the term “Gender Dysphoria” with the specific definition that it refers to emotional distress over “a marked incongruence between one’s experienced/expressed gender and assigned gender.” The APA specifically clarified: “It is important to note that gender nonconformity is not in itself a mental disorder. The critical element of gender dysphoria is the presence of clinically significant distress associated with the condition.”³⁴

The World Health Organization is currently revising the ICD. When the new ICD is published in 2017, the global standards will no longer contain a diagnostic category for “Gender Identity Disorder,” and all diagnostic codes related to experiences of transgender people will appear in a sexual health chapter, not the current mental disorders chapter.³⁵

The Facts and Alleged Violations in Japan’s Pathologizing Approach to Gender Recognition

A. Mandatory Psychiatric Evaluation

Law No. 111 requires transgender people in Japan who seek legal recognition of their gender identity to obtain a diagnosis of “Gender Identity Disorder” (GID) as a prerequisite. Some people in Japan do understand their gender identity as a psychiatric condition and seek services accordingly. However, such a framework can stigmatize transgender people. Many of the people Human Rights Watch interviewed, including psychiatrists who work with transgender people, discussed this stigma. Our research also found that the process associated with obtaining a medical certificate for GID was itself burdensome and abusive.

Transgender people Human Rights Watch interviewed reported a variety of experiences in obtaining the GID diagnosis. For example, one was able to obtain the diagnosis certificate on their first visit to a psychiatrist,³⁶ while in other instances clinic staff and psychiatrists forced applicants to undergo a lengthy and humiliating procedure. The 2012 edition of the

33 Bhat v. State of NCT of Delhi and Others. W.P.(CRL) 2133/2015, <http://lobis.nic.in/dhir/dhc/SID/judgement/05-10-2015/SID05102015CRLW21332015.pdf> (accessed January 12, 2016).

34 The American Psychiatric Association. Gender Dysphoria Fact Sheet, 2012. <http://www.dsm5.org/documents/gender%20dysphoria%20fact%20sheet.pdf>

35 World Health Organization ICD-beta: <http://apps.who.int/classifications/icd11/browse/l-m/en>

36 For example, one interviewee explained he was able to obtain a preliminary GID diagnosis certificate after a 10-minute conversation with a psychiatrist, even though he was under the legal age for gender recognition at the time. Human Rights Watch interview with Akemi N., 18, Okinawa, November 10, 2015.

Diagnosis and Treatment Guidelines for Gender Identity Disorder, which are non-binding, recommend three tests for a GID diagnosis: 1) a gender identity test, which is based on the testimony of the individual; 2) a biological gender test, which can contain an examination of chromosomes, an examination of hormonal action, an inspection of internal and external genitals, and “other examinations that doctors find necessary”; 3) and an exclusion of other diagnoses test to “confirm that the denial of gender identity/request for the surgery is not coming from schizophrenia nor other cultural, social, or occupational reasons.” The only test that contains a reference to the time it can take is test 1, which “may last until enough information will be collected.”³⁷

Kiyoshi M., a 24-year-old transgender man in Tokyo, told Human Rights Watch of his year-long effort to obtain the GID diagnosis four years ago, when he was 20 years old. On his first visit to a gender clinic in Tokyo, the psychiatrist told him to write his personal history, then return a few weeks later with a series of photos of himself from when he was a toddler through present day. “At every session I had to fill out a 100-question questionnaire,” Kiyoshi M. said. According to him, the questions on the survey queried stereotypical understandings of gender-specific behaviors and appearances: “All of them were open ended questions about gender, such as ‘when I was little, people told me I was ____’ or ‘if my parent died, I would react by ____.’”

Kiyoshi M. continued to visit that hospital for six months. “On my first time at the hospital, I told the doctor I wanted the diagnosis as soon as possible,” he said. “But the doctor said to come every two weeks, then even after six months they needed more time and said they couldn’t give [the diagnosis] to me so they told me to keep coming back.” After six months, he gave up and started going to a second hospital in Tokyo, where the psychiatrist at the gender clinic tested him (through oral therapy sessions and interviews) for an additional six months before giving him the GID diagnosis. “Clinic staff constantly asked me at every step of the process—‘are you sure?’”³⁸

Yasuhiro D., a 30-year-old transgender man, traveled to a gender clinic 520 kilometers away from his home for six appointments over the course of two months, where he was subjected to psychiatric tests. “They showed me drawings and I had to talk to the therapist about them many times, it was extremely time consuming and repetitive” he said. “The drawings were of several people and they asked me which ones looked like my family members.” Once he obtained the GID diagnosis certificate, he went to a clinic closer to Kyoto to request hormone therapy, but they told him he would have to redo all of the tests. “They said it was for a second opinion,” Yasuhiro told Human Rights Watch. “Then after that second opinion was affirmative, they sent me to an external psychiatrist for a third opinion.”³⁹

Hanae T., a 29-year-old transgender woman living in the Ishikawa Prefecture, told Human Rights Watch that it took her nearly a year to get the diagnosis. “I saw the psychiatrist almost

³⁷ The Japan Society for Psychiatry and Neurology, *Diagnosis and treatment guidelines for gender identity disorder* (4th edition), 2012, https://www.jspn.or.jp/uploads/uploads/files/activity/journal_114_11_gid_guideline_no4.pdf (accessed February 17, 2016).

³⁸ Human Rights Watch interview with Kiyoshi M., 24, Tokyo, August 18, 2015.

³⁹ Human Rights Watch interview with Yasuhiro D., 30, Osaka, August 8, 2015.

the whole year. I kept seeing the psychiatrist until right before the beginning of 2011. It was in December 2010 that I got the diagnosis of GID,” she said.⁴⁰

B. Coerced Sterilization and Compulsory Surgery

International human rights authorities have called for an identity-based model for legal recognition of gender. European regional human rights mechanisms have also developed a comparable body of work on this theme; while these have no authority over Japan’s government, their work is a persuasive elucidation of the human rights arguments.⁴¹ Japan’s legal recognition procedure is out of step with that recommended model on multiple levels, including because it effectively requires transgender people to undergo medical procedures in order to secure legal recognition of their gender identity. This has contradictory effects. To some extent the fact that gender-affirming medical procedures are available in Japan reflects advances in medical practices and the medical community’s embrace of care for transgender people. But it also reinforces a pathological model that contributes to stigmatization of transgender people.

The policy of requiring individuals to be sterilized to gain legal recognition⁴² is a coercive practice that violates the rights to bodily integrity, health, and freedom from torture and other ill-treatment, among other human rights, as well as the fundamental human rights principles of autonomy and dignity.⁴³

Human Rights Watch interviewed transgender people in Japan who told us that they would not have chosen sterilization if they had had the option to have their gender legally recognized without doing so. For example, Yasuhiro D., a 30-year-old transgender man in Osaka, told Human Rights Watch that the recent birth of his brother’s second daughter made him reflect on how his reproductive rights were compromised in his quest to be legally recognized as a man. “Since I had my ovaries when my first niece was born, I even thought about stopping the hormones to make my body able to have children,” Yasuhiro said. “I

40 Human Rights Watch interview with Hanae T., 29, Kanazawa, September 27, 2015.

41 See, for example, Human Rights Council, Report of the Special Rapporteur on Torture, UN Doc. A/HRC/22/53 (February 1, 2013), paras. 78, 88; Global Commission on HIV and the Law, *HIV and Law: Risks, Rights and Health* (New York: UN Development Programme, 2012), p. 54 (calling on states to “[e]nsure transgender people are able to have their affirmed gender recognised in identification documents, without the need for prior medical procedures such as sterilisation, sex reassignment surgery or hormonal therapy.”); Letter from Nils Muižnieks, commissioner for human rights, Council of Europe, to Joan Burton, minister for social protection, Republic of Ireland, November 16, 2012 (“It is my position that legal recognition of the preferred gender should not require infertility or compulsory medical treatment which may seriously impair the autonomy, health or well-being of the individuals concerned.”), http://www.tgeu.org/sites/default/files/2012_11_16_letter_Commissioner_HR_to_Burton.pdf (accessed January 12, 2016); *Van Kück v. Germany*, App. No. 35968/97 (Eur. Ct. H.R. June 12, 2003), paras. 73-86. See also Yogyakarta Principles, princ. 3 (“Each person’s self-defined sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom. No one shall be forced to undergo medical procedures, including sex reassignment surgery, sterilisation or hormonal therapy, as a requirement for legal recognition of their gender identity.”); the Parliamentary Assembly of the Council of Europe, *Discrimination Against Transgender People in Europe*, Resolution 2048 of April 22, 2015 (“develop quick, transparent and accessible procedures, based on self-determination, for changing the name and registered sex of transgender people on birth certificates, identity cards, passports, educational certificates and other similar documents; make these procedures available for all people who seek to use them, irrespective of age, medical status, financial situation or police record.”) <http://assembly.coe.int/nw/xml/XRef/Xref-DocDetails-EN.asp?FileID=21736&lang=EN> (accessed January 12, 2015).

42 Law No. 111 of 2003 mandates that an applicant “Not have gonads or permanently lacks functioning gonads.” Law No. 111 of 2003, art. 3(1)(iv).

43 See generally OHCHR et al., *Eliminating Forced, Coercive and Otherwise Involuntary Sterilization: An Inter-Agency Statement* (Geneva: WHO, 2014).

thought about this issue of having a child even as I sat waiting in the hospital for the SRS [sex reassignment surgery]. I didn't have any doubt that I wanted to live as a man, but I also wanted to preserve my ability to have a baby. I had to choose between being legally recognized for who I am and keeping my body the way I wanted it." He added, "I think a lot of transgender people want to have the surgery; however, having it as a prerequisite for LGR [legal gender recognition] means our reproductive rights are stripped away."⁴⁴

As Yasuhiro's account illustrates, compulsory surgery requires transgender individuals who seek legal gender recognition to make an unacceptable choice between exercising their right to recognition as a person before the law and their right to bodily autonomy.

Tamaki I., 27, a transgender woman in Osaka, said, "The hurdle is really high. I read that in America you don't need to have surgery to change your gender; you can just change your gender on the family register. If that comes true in Japan, I would want to change my gender right now. I can't understand why the government is asking for such high conditions. I do want to change my legal gender, but surgery has such a high risk, so I don't know yet."⁴⁵

Naoko R., 22, said, "I want to get my identification card changed. To change it on the family register, we have to get surgery. It's really a lot of pressure for me. It costs a lot, and I can't rely on my parents for help. My transgender friends are waiting for surgery, but I can't do that, so I feel like I'm becoming isolated, falling behind them. In Japan to be seen as GID we have to have a documented diagnosis. Everyone here [at the transgender support group Naoko attended] has some level of pressure about the surgery. Everyone thinks we'll have to undergo surgery in the future. That's very tough for us."⁴⁶

Kiyoshi M., who obtained the GID diagnosis after he spent a year visiting two clinics, and is currently taking hormones but has not had surgery explained: "Ideally I would want to just change my legal gender right now. All of these procedures are putting a lot of strain on my body that I don't want."⁴⁷

C. Age Restrictions on Legal Gender Recognition

Law No. 111 bars all transgender people who are younger than 20 from securing legal recognition of their gender identity. People under 20 can obtain a diagnosis (or in some cases, interviewees indicated that their psychiatrist issued them a "preliminary diagnosis) of GID, and interviewees told Human Rights Watch they used their GID diagnosis certificates to advocate for access to education according to their gender identity—including through restroom access and school uniforms according to their gender identity. . In addition, the law adds an extra requirement that people under 20 need two signatures from physicians for a valid diagnosis. People who have reached Japan's age of majority (20) can independently pursue hormone treatment and surgical procedures—steps they are required by law to take in order to be legally recognized. After obtaining a GID diagnosis, a process which varies in length, the subsequent requisite medical procedures can take years and cost thousands of dollars, meaning legal gender recognition is sometimes not possible until the mid-20s even

⁴⁴ Human Rights Watch interview with Yasuhiro D., 30, Osaka, August 8, 2015.

⁴⁵ Human Rights Watch interview with Tamaki I., age 27, Osaka, August 8, 2015.

⁴⁶ Human Rights Watch interview with Noriko R., age 22, Osaka, August 8, 2015.

though people have expressed their gender identity and desire to legally transition more than a decade earlier.

The solution in Japan's case, however, is not simply to reduce the age at which applicants can pursue legal gender recognition under a procedure that continues to mandate GID diagnosis and medical interventions. Japan's process is coercive and invasive, and the combination of a lack of access to legal recognition for gender non-conforming children, the abuses they suffer as a result, and the rigid medical requirements for legal recognition as an adult creates significant anxiety for young people, which was evident in those Human Rights Watch interviewed.

Law No. 111's age limit is discriminatory, does not allow for the best interests of the child to be considered. This can have a harmful impact on children who are exploring and questioning their gender. A strict age limit can also violate the right to education for those transgender children who desire to attend school according to their gender identity.

In 2010 the Council of Europe Committee of Ministers called on member states to “ensure that the right to education can be effectively enjoyed without discrimination on grounds of sexual orientation or gender identity; this includes, in particular, safeguarding the right of children and youth to education in a safe environment, free from violence, bullying, social exclusion or other forms of discriminatory and degrading treatment related to sexual orientation or gender identity.”⁴⁸ In its 2015 statement on gender recognition, WPATH stated that “appropriate legal gender recognition should be available to transgender youth.”⁴⁹ In the context of Japan's education system, the state's failure to accord legal recognition of transgender children's gender identity contributes to discrimination and degrading treatment of transgender children. Both the age restriction and the rigid medical criteria inflict significant harm on young people who instead need information, support, and safe spaces to explore and express gender—all elements of inclusive and supportive schools. What is more, the current requirement of mandatory medical procedures can cause gender non-conforming children to feel intense pressure to pursue otherwise unwanted medical procedures at a young age.

Japan's schools feature deeply -engrained gender separation and stereotypes. Nearly all junior high and high school students are required to wear gender-specific uniforms, and school activities are often gender-segregated.⁵⁰ For children exploring their gender identity or those who identify as transgender, such an environment can be harsh. “The Japanese school system is really strict with the gender system,” a transgender high school teacher told Human Rights Watch. “It imprints on students where they belong and don't belong – in later years when gender is firmly tracked, transgender kids really start suffering. They either have to conceal and lie or act like themselves and invite bullying and exclusion.”⁵¹

48 Recommendations of the Committee of Ministers to member states on measures to combat discrimination on grounds of sexual orientation or gender identity. March 31, 2010. Available online at: <https://wcd.coe.int/ViewDoc.jsp?id=1606669>

49 WPATH Statement on Legal Recognition of Gender Identity. January 19, 2015. Available online at: http://www.wpath.org/uploaded_files/140/files/WPATH%20Statement%20on%20Legal%20Recognition%20of%20Gender%20Identity%201-19-15.pdf

50 Peter Cave. *Primary School in Japan: self, individuality and learning in elementary education*. Japan Anthropology Workshop Series. Routledge, 2007.

51 Human Rights Watch interview with Kiwako L., 53, Osaka, August 8, 2015.

Additionally, Law No. 111's mandate of psychiatric and surgical intervention for transgender people who wish to secure legal recognition of their gender identity causes anxiety for some young people. Dozens of interviewees described to Human Rights Watch how their negative experiences in school when they were forced to dress and present as their birth-assigned sex instead of their gender identity informed their anxieties about the future, including university life and employment. Transgender children as young as 14 explained that while they do not necessarily want to undergo the medical procedures required by Law No. 111, they anxiously weigh that decision against continuing the abuse, discrimination, and exclusion they have already faced at school.

In 2015, the Ministry of Education sent a directive to all school boards titled "Regarding the Careful Response to Students with Gender Identity Disorder."⁵² The Education Ministry directive is non-binding, but sends a serious message from the ministry about schools' responsibility to care for transgender children. However, the directive's focus on diagnoses, and medical institutions as the primary source of information about gender and sexuality, reflects the government's continued reliance on the harmful pathological model of understanding transgender people's gender identity as enshrined in Law No. 111. For example, the 2015 Education Ministry directive states: "The diagnosis and advice from medical institutions is a very crucial opportunity for the school to get a professional knowledge."

In addition to the fact that the 2015 Education Ministry directive is predicated on a medical model and views children who are exploring and expressing their gender identity as "disordered," the directive's examples of support for schools to follow are not binding policy, but nonbinding recommendations. Human Rights Watch interviews with transgender children in Japan revealed that school officials issue varied responses to transgender students' requests to use facilities according to their gender identity, and in cases that occurred since its issuance, a piecemeal implementation of the new directive. Enshrining a right to legal recognition of gender based on their self-declared identity alone would substantially improve the situation for transgender children.

The right to recognition as a person before the law is articulated in the Universal Declaration of Human Rights and guaranteed in the International Covenant on Civil and Political Rights (ICCPR) and the Convention on the Rights of the Child.⁵³ The right to preserve one's identity is guaranteed by article 8 of the Convention on the Rights of the Child, which specifies three aspects of identity—nationality, name, and family relations—but that list is not exhaustive. Together with the right to protection from arbitrary interference in privacy, such as ICCPR article 17, the right to preserve one's identity extends to the way one's identity is reflected on state-issued documents—including for children.

⁵² Government of Japan, Ministry of Education, Science, Sports, Science, and Technology, "For detailed of fine-grained response to students according to gender identity disorder," April 30, 2015, http://www.mext.go.jp/b_menu/houdou/27/04/1357468.htm

⁵³ Universal Declaration of Human Rights, art. 6, G.A. Res. 217(III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) [hereinafter UDHR]; see also Convention on the Rights of the Child (CRC), adopted November 20, 1989, G.A. Res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), entered into force September 2, 1990, ratified by Japan on April 22, 1994, see also Convention on the Rights of the Child arts. 7–8, opened for signature Nov. 20, 1989, 1577 U.N.T.S. 3 (entered into force Sept. 20, 1990); International Covenant on Civil and Political Rights art. 16, opened for signature Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976). Add when Japan ratified these agreements.

As the Convention on the Rights of the Child makes clear, “In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”⁵⁴ This includes decisions about legal recognition of the gender identity of transgender children.

Article 12 of the Convention on the Rights of the Child provides that in determining the child’s best interest, the child itself should be heard and taken into account:

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

The Committee on the Rights of the Child has clarified the relation between articles 3 and 12 of the convention:

The purpose of article 3 is to ensure that in all actions undertaken concerning children, by a public or private welfare institution, courts, administrative authorities or legislative bodies, the best interests of the child are a primary consideration. It means that every action taken on behalf of the child has to respect the best interests of the child.... The Convention obliges States parties to assure that those responsible for these actions hear the child as stipulated in article 12. This step is mandatory.⁵⁵

Japan should make allowance for the fact that it may be in the best interest of many transgender children to change their legal gender before they reach 20 years old. The law should set no absolute minimum age for legal recognition of a transgender person’s gender identity. Instead, in the case of children the individual circumstances of each child should be assessed to determine whether it is in that child’s best interest to change their legal gender. The government should also amend its school-based policies and directives for transgender children to make it clear that no child should be required to provide a diagnosis of Gender Identity Disorder in order to wear uniforms, or access school facilities or activities according to his or her gender identity.

D. Discrimination on the Basis of Relationship Status and Parental Status

Japan’s requirement that all applicants for legal gender recognition are single implies mandatory divorce for transgender people who wish to be recognized. Such a requirement is discriminatory, and has been condemned by major human rights bodies, including the 2011

⁵⁴ Convention on the Rights of the Child, art. 3(1).

⁵⁵ UN Committee on the Rights of the Child, General Comment No. 12, The Right of the Child to Be Heard, U.N. Doc. CRC/C/GC/12 (2009), para. 70.

and 2014 Human Rights Council resolution reports—both of which Japan voted for.⁵⁶ The requirement that a transgender person not have biological children under the age of 20 if they wish to secure legal recognition of their gender identity violates transgender people’s right to private and family life and the right to found a family, and discriminates on those grounds.

The revision of Law No. 111 in 2008 to clarify that transgender people seeking legal gender recognition must not have any children under 20 (previously the law mandated no children whatsoever), demonstrated that the government is willing to consider changes to the law, but it was an insufficient step.⁵⁷

Conclusion

Japan’s current legal gender recognition procedure violates the rights of transgender people. It treats the fact of being transgender as a disorder—one that transgender people are required to certify that they suffer from as a prerequisite to securing legal recognition of their gender identity. It forecloses legal recognition to transgender people who are married, who have children or who have the capacity to reproduce. Not only is this discriminatory, but it forces many transgender people who want to secure legal recognition of their gender identity to contemplate invasive surgical procedures they may not want and, in some cases, requires the breakup of their families.

Human Rights Watch urges the Special Procedures mandate holders to urgently engage with the government of Japan to encourage it to separate the legal process for gender recognition from all gender-affirming healthcare-related procedures, to ensure the right of transgender children to secure recognition of their gender identity and to eliminate all discriminatory provisions from the law. Japan, a supporter of the human rights of lesbian, gay, bisexual, and transgender people globally, should become a regional leader in Asia on this issue by making transgender people’s self-declared gender identity the sole criteria for legal recognition.

⁵⁶ Resolution adopted by the UN Human Rights Council. Human rights, sexual orientation and gender identity. July 14, 2011. A/HRC/RES/17/19; Resolution adopted by UN Human Rights Council. Human rights, sexual orientation and gender identity. October 2, 2014. A/HRC/RES/27/32

⁵⁷ “The ‘no-child’ policy was mitigated in June 2008 when the House of Councilors voted in favour of a Bill that proposed allowing gender identity disorder (GID) patients with children to change their sex registration in their family registries. However, this was conditional on their children being adults at the time of the change.” See: Mark McLelland & Katsuhiko Sukanuma (2009) Sexual minorities and human rights in Japan: an historical perspective, *The International Journal of Human Rights*, 13:2-3, 329-343, DOI: 10.1080/13642980902758176