

Keeping the Promise of Dignity and Freedom for All

A Position Paper on Legal Gender Recognition in South Africa

PRONOUNS
GENDER IDENTITY

GENDER NONCONFORMING
PREFERRED PRONOUNS
INTERNAL SENSE
MALE ASSIGNED FEMALE AT BIRTH

Liberty Matthyse, Amy-Leigh Payne,
Mandivavarira Mudarikwa, Estian Smit, B Camminga
and Ricardo Rossouw



**GENDER
DYNAMIX**

LRC

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Keeping the Promise of Dignity and Freedom for All: A Position Paper on Legal Gender Recognition in South Africa

Preface

This Position Paper was developed and published by Gender Dynamix (GDX) and the Legal Resources Centre (LRC). It outlines the organisations' position on the right to legal gender recognition in South Africa. The paper advances a model of legal gender recognition based on self-determination enabling individuals in South Africa to have their gender legally recognised and reflected on identity documents based on a simple process of self-declaration. The model advanced here would include options for non-binary genders, as well as an option to omit gender markers completely in identity documents and in the identification number issued at birth registration.

This Position Paper demands a fast, efficient, accessible, cost-effective and non-discriminatory administrative procedure that respects the human rights of trans and gender diverse persons. It rejects all medical, psychosocial, marital or other requirements as preconditions for legal gender recognition. The Position Paper is situated within international human rights frameworks and best practices on the rights to gender identity and gender expression, particularly those set out in the Yogyakarta Principles (2007) and Yogyakarta Principles Plus 10 (2017).

About Gender Dynamix

GDX is the first registered trans and gender diverse-led organisation in Africa that specifically focuses on advancing, promoting and securing the human rights of trans and gender diverse persons both within South Africa and Southern Africa. The organisation's four strategic priority areas include legal gender recognition based on self-determination, accessible gender affirming healthcare, inclusive quality education and regional movement strengthening. GDX's strategic drivers include advocacy and research, capacity enhancement, facilitating community access to direct services and organisational development. The organisation has a track record spanning 15 years. We firmly believe that positive change for trans and gender diverse persons is only possible through the development and maintenance of multidisciplinary and intersectoral partnerships. The organisation, therefore, partners with diverse stakeholders to bring about positive change.

About Legal Resources Centre

LRC is a public interest, non-profit law clinic in South Africa that was founded in 1979. The LRC has since its inception shown a commitment to work towards a fully democratic society underpinned by respect for the rule of law and constitutional democracy. The LRC uses the law as an instrument for justice to facilitate the vulnerable and marginalised to assert and develop their rights; promote gender and racial equality and oppose all forms of unfair discrimination; as well as to contribute to the development of human rights jurisprudence and to the social and economic transformation of society.

Authors: Liberty Matthyse, Amy-Leigh Payne, Mandivavarira Mudarikwa, Estian Smit, B Camminga & Ricardo Rossouw

Reviewers: B Camminga & Sandile Ndelu

Editors: Anil Padavatan, Sondré Bailey & Zoey Black

Copy editor: Rachel Sloth-Nielson

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Gender Dynamix
Unit 21, Collingwood Building
10 Anson Street
Observatory
Cape Town, South Africa
Tel: +27 (0) 21 447 4797
Email: info@genderdynamix.org.za
Website: <https://www.genderdynamix.org.za/>

Legal Resources Centre
Ground Floor, Block D,
Aintree Business Park
c/o Doncaster & Loch Road
Kenilworth
Email: info@lrc.org.za
Website: <https://www.lrc.org.za>

Abbreviations

ACHPR – African Commission on Human and People’s Rights

Act 49 – Alteration of Sex Description and Sex Status Act 49 of 2003

APA – American Psychiatric Association

DHA – The South African Department of Home Affairs

CEDAW – Convention on the Elimination of all forms of Discrimination Against Women

CESCR – Committee on Economic, Social and Cultural Rights

DSM-5 – Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition

Equality Act – Also known as PEPUDA which refers to the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000

GBVF-NSP – Gender-based Violence and Femicide National Strategic Plan

GDX – Gender Dynamix

ICCPR – International Covenant on Civil and Political Rights

ICD – International Classification of Diseases

ICESCR – International Covenant on Economic, Social and Cultural Rights

IGM – Intersex Genital Mutilation

LGBTI+ – Lesbian, Gay, Bisexual, Transgender and Intersex

LHR – Lawyers for Human Rights

LRC – Legal Resources Centre

NPR – National Population Register

PAJA – The Promotion of Administrative Justice Act 3 of 2000

PEPUDA – Promotion of Equality and Prevention of Unfair Discrimination Act, Act No. 4 of 2000

PrEP – Pre-Exposure Prophylaxis

PsySSA – Psychological Society of South Africa

RSA – Republic of South Africa

SALC – South African Law Commission

SOGIESC – Sexual Orientation, Gender Identity, Gender Expression and Sex Characteristics

UDHR – Universal Declaration of Human Rights

UNHRC – United Nations Human Rights Committee

WHO – World Health Organisation

Terminology

Biomedical – Relating to both biology and medicine

Cisgender – A person whose gender identity is the same as the gender assigned to them at birth.

Cisnormativity – Discriminatory assumption that all people are or should be cisgender (i.e. that all persons should identify with the gender they were assigned at birth).

Depathologisation – To no longer view something as a medical condition or illness

Gender – Socially constructed roles, behaviours, activities and attributes that a particular society or community ascribes to individuals on the basis of their sex characteristics.

Gender affirmation – Refers to the process of socially, medically, surgically and/or legally affirming one's gender identity based on the right to gender self-determination.

Gender diverse – A person whose gender identity and/or gender expression is different from or more diverse than dominant social gender norms.

Gender expression – The way in which a person expresses their gender identity through their appearance (e.g. clothing, hairstyle and cosmetics), gestures and social behaviour.

Gender identity – A person's internal, deeply felt sense of being a woman, or a man, another gender, a combination of genders, or not having a gender.

Gender marker – The marker (generally 'M' or 'F' but in some countries also 'X') that appears on a person's identity documents (e.g., birth certificate, driver's license, passport, travel or work visas etc.).

Gender recognition – Social recognition of individuals' gender identities through addressing and treating them as their self-identified gender.

Gender self-determination – A model for legal gender recognition that enables individuals to change their legal gender in their identity documents based on self-declaration of their gender identity without any additional medical, psychosocial, relationship status or other requirements or reports.

Intersex – A person born with a natural variation of sex characteristics that is more diverse than dominant social constructions of male and female bodies. Also called differences of sex development.

Legal gender recognition – Legal recognition of individuals' gender identities through making legal and administrative provision for individuals to capture or change the gender markers on their identity documents to reflect their gender identity or to omit gender.

Medical gender affirmation – Refers to the extent to which trans and gender diverse persons may make use of medical care in the form of hormonal care and/or mental health support to affirm their gender identity.

Medico-legal pathologisation – When legislation treats something as a medical condition or pathology; or treats a certain group as if they have a medical condition or pathology.

Non-binary – People whose gender identity falls outside the binary categories of man and woman. They may define their gender as falling somewhere in between man and woman, or they may define it as wholly different from these terms.

Pathologisation – Treating something as a pathology or illness; or treating a certain group as if they have a pathology, medical condition or illness.

Primary sex characteristics – Sex characteristics present at birth, including chromosomes, genitals and gonads.

Secondary sex characteristics – Sex characteristics that develop in puberty and throughout life (generally influenced by a person's hormonal base), for example, breasts, facial hair, musculature, fat distribution, body contours and voice pitch.

Sex – Various combinations of sex characteristics that include the conventionally defined sexes of female and male, as well intersex variations.

Sex characteristics – Anatomical, biological, physiological and chromosomal characteristics related to the sexual and reproductive system, including those present at birth (primary sex characteristics) and those developing in puberty and throughout life (secondary sex characteristics).

Sex Descriptor – The way in which the marker of 'M' or 'F' is currently described on South African identity documents

Sexual Orientation – A person's emotional, affectional and sexual attraction to individuals of the same gender, a different gender or more than one gender.

Social gender affirmation – Refers to practices adopted by trans and gender diverse persons to affirm their gender identity through expression without medical and surgical care.

Surgical gender affirmation – Refers to the extent to which trans and gender diverse persons have accessed and undergone surgical procedures aligning their physical bodies to their gender identity.

Trans/Transgender – A person whose gender identity differs from the gender assigned to them at birth.

Trans and gender diverse – This is an inclusive phrase to reference, in short, all persons who do not identify with the gender they were assigned at birth.

Law and its application

Bill of Rights: The Bill of Rights is found in Chapter 2 of the Constitution. Along with the rest of the Constitution, it establishes a set of values and rights that must be respected whenever any law, policies, regulations etc are interpreted, developed, or applied. Central among these values are the democratic ideas of human dignity, equality, and freedom. Any law or conduct which is inconsistent with the Bill of Rights can be declared unlawful and invalid by the courts.

Discrimination: Any action or lack of action including laws, policies, rules or practices which directly or indirectly imposes burdens, obligations or disadvantages, or which withholds benefits, opportunities or advantages from a person based on certain characteristics. In other words, the unjust or prejudicial treatment of different categories of people on the grounds of race, age, sex, sexual orientation, gender, gender identity, and presentation.

Forced Divorce: Legal gender recognition laws and policies often exclude people who are already married as a heterosexual couple in the eyes of the law. Trans and gender diverse people are then forced to choose between legal gender recognition and their marriage. In essence, trans and gender diverse persons are often forced to divorce in order to access legal gender recognition.

Executive Summary

South Africa is one of the very few countries in Africa that offers protection to trans and gender diverse persons. The current model of legal gender recognition, facilitated by the Alteration of Sex Description and Sex Status Act 49 of 2003, is however highly pathologising and incompatible with the country's priority of achieving social equity. Gender identity and gender expression are protected grounds in the South African Constitution. Global shifts suggest that the pathologisation model as is applied to trans and gender diverse persons is increasingly outdated as healthcare discourses catch up with human rights imperatives. Act 49 is however premised on this model. On 18 June 2018, the World Health Organisation (WHO) confirmed the depathologisation of trans identities in the International Classification of Diseases, Eleventh Revision (ICD-11). Globally, several countries including Malta, Spain, Iceland, Norway, Argentina, Portugal, Belgium, Luxembourg, Pakistan, India, Nepal, Colombia, Uruguay and parts of Canada, Spain and the USA have shown a commitment to human rights and the dignity, freedom and equality of trans and gender diverse people by already implementing a model of self-determination for legal gender recognition. Best practice models thus exist. These can act as examples for how South Africa, in compliance with the country's commitment to transformative constitutionalism, might go about making the human right to dignity, equality and freedom of its trans and gender diverse people a reality in the context of legal recognition.

Act 49, South Africa's current option for legal gender recognition, defines and outlines the requirements necessary for those living in South Africa to adjust what the Act refers to as their 'sex marker'. Rather than alleviate the burdens of trans and gender diverse people in South Africa, since its inception the Act has suffered from a lack of accompanying directives and regulations, a narrow interpretation and discriminatory implementation. Given this, trans and gender diverse people in South Africa regularly experience human rights violations on account of their gender identity not being legally recognised in practice by the Department of Home Affairs (DHA). The lack of legal gender recognition experienced is directly associated with the following:

1. A legal model that pathologises trans and gender diverse identities through an over-reliance on extraneous medical requirements;
2. Under-equipped Home Affairs officials who do not understand gender diversities or are not aware of the Act and are not sensitised;
3. Refusal by DHA officials to accept or efficiently process gender marker and name change applications;
4. Non-existent guidelines for the current legal gender recognition law, Act 49;
5. Gender oppression resulting from the promotion of discriminatory binary models of legal gender recognition; and
6. Costs associated with legal gender recognition.

When persons are deprived of legal recognition of their self-identified gender/sex, it results in a multitude of social, economic, political and legal challenges. Models of legal gender recognition that are premised on rigid, outdated biomedical frameworks and binary concepts of sex and gender are discriminatory and exclusionary. They function to deny legal recognition to the majority of trans, gender diverse and intersex persons who require access to gender marker changes on their identity documents. This exposes them to a range of human rights violations on the continuum of violence from societal prejudices to discriminatory practices within institutions, coercive medical treatments, incidents of gender-based violence and heinous hate crimes. Non-recognition and inadequate protections maintain gender-based violence and gender oppression by causing undue exposure to a range of violations. Gender recognition law and policy reform is a fundamental step towards ensuring that every person's gender identity, gender expression and sex characteristics are respected and protected. The Position Paper, therefore, calls for a model of legal gender recognition:

1. Which enables individuals in South Africa to have their gender legally recognised
2. Based on self-determination and self-declaration
3. That would include options for X (which would indicate 'unspecified')
4. That would also include an option to completely omit gender from Identity Documents

The *Position Paper* calls for:

A fast, efficient, accessible, cost-effective and non-discriminatory administrative procedure that respects the human rights of trans and gender diverse persons in South Africa to legal gender recognition. It rejects all medical, psychosocial, marital or other requirements as preconditions to legal gender recognition. It recognises the right to gender self-determination, bodily autonomy and self-declaration for trans, gender diverse and intersex people in South Africa.

In line with this we are calling for the creation of new legislation, which would incorporate the following 20 recommendations:

Recommendation 1: Develop a new piece of legislation addressing legal gender recognition, aligned with the constitutional rights, values and ideals, international human rights standards and global best practices on legal recognition for trans and gender diverse persons, and repeal the Alteration of Sex Description and Sex Status Act 49 of 2003.

Recommendation 2: The requirement of medical proof is out of date with global best practices and is misaligned to both human rights-based understandings and a constitutional discourse of equality, dignity and freedom in South Africa. We therefore recommend that a new application provision be developed that is devoid of medical requirements and that speaks to diverse gender identities, gender expressions and bodily diversities based on the right to self-identification, self-determination, bodily autonomy, freedom and dignity.

Recommendation 3: The new law should not place any limitations on a person's ability to freely and voluntarily change their gender marker or name as recognition that gender identity is fluid in relation to a person's right to self-determination.

Recommendation 4: A quick, transparent and accessible procedure accompanied by regulations with clear timeframes to assist in guiding officials.

Recommendation 5: Legal gender recognition must encapsulate the diversities of identities and expression in South Africa. These include:

1. People who may medically OR surgically affirm their gender;
2. People who may seek to legally affirm and confirm their lived gender without undergoing any medical OR surgical procedures and who may seek to do so within the gender binary; and
3. People seeking to legally affirm their lived gender without undergoing any medical or surgical procedures and who may seek recognition beyond the limitations of a binary model of gender.

In recognising the above under a new Gender Recognition Law, no mention of any medical or surgical requirements must be made unless such reference is used to expressly specify that no medical or surgical reports are necessary to process an application successfully.

Recommendation 6: Legal gender recognition must make provision for refugees and asylum seekers to change their names and gender markers.

Recommendation 7: The age of consent for gender marker or name change should be brought in line with broader South African policy on the rights of children. Currently, anyone under the age of 18 in South Africa cannot change their gender marker without the consent of a parent or legal guardian.

Recommendation 8: Trans and gender diverse persons must be able to legally change their gender markers whilst imprisoned with or without accessing gender-affirming medical and/or surgical care.

Recommendation 9: Trans and gender diverse persons should be able to decide in which detention facility they are to be detained as a means to secure safety and dignity.

Recommendation 10: A third category for gender identification outside of the binary model must be adopted. The Department of Home Affairs must incorporate a third 'X' unspecified category of gender recognition alongside male and female in the National Population Register, which is to be reflected in a person's identification number, to indicate 'unspecified'. This third option should be available to parents upon the registration of their children at birth to indicate 'unspecified'.

Recommendation 11: The effect of Act 49 currently allows for a person's "sex marker" and name change to be recorded in the National Population Register. This should remain the legal effect of the Gender Recognition Law. This mechanism should also allow for the correction of a person's gender marker in relation to electing an alternative gender marker option entitled 'X' to indicate 'unspecified'.

Recommendation 12: The omission of gender markers from Identity Documents (the Smart Card ID). The Identification Act is not prescriptive regarding the need for a person's gender to be reflected on their Identity Card. In light of the old Identity Books (the Green ID Book) not having indicated a person's gender at all, there is precedent for this.

Recommendation 13: If an applicant requires both gender marker and name change, these must be done simultaneously.

Recommendation 14: The internal appeals procedure can be exhausting, traumatic and costly. The Department of Home Affairs should ensure that frontline staff and the Director-General are capacitated to effectively grant the application. A process of self-determination would drastically reduce the number of rejections and, by extension, the bureaucratic caseload for the Department. This would also mean the process would be more cost-effective overall. The initial cost of an application for a gender marker and name change should be waived.

Recommendation 15: Any new Act must be accompanied by a set of regulations and guidelines clearly outlining implementation.

Recommendation 16: In the event where a new ID number is issued, the old ID number must be deleted entirely and not linked to the applicant in any way. The new law must put the onus on the State to ensure that safeguards in the form of constitutionally sound procedures and systems are put in place. These should ensure that a person's rights are not infringed upon, and benefits are not forfeited, on account of a change in ID number.

Recommendation 17: Legal gender marker change must not result in forced divorce or the duplication of a person's identity by retaining both the old and new identification numbers to ensure compliance with discriminatory administrative systems and practices.

Recommendation 18: Act 49 does not require the publication of changes in particulars made in terms of the Act. This should continue as a sound legal mechanism to protect trans, gender diverse and intersex people from social stigma, discrimination and violence. To this extent, the new Gender Recognition Law should incorporate such protective provision and extend this name change.

Recommendation 19: No record of any amendment made in terms of the Gender Recognition Law should be retained to ensure that such particulars are never used against applicants. In the event where records are kept, such particulars should only be available to the document holder.

Recommendation 20: Drawing from the process in 2003, as civil society we demand meaningful inclusion and meaningful participation at a strategic level in the review and repeal process of Act 49 and the development of new legislation to address gender recognition in South Africa.

Belonging and recognition are fundamental concepts that determine the experiences of people to participate in the life of a nation and society and to be valued for who they are regardless of their bodies, their sexuality, their gender identity and gender expression, amongst others. Should South Africa continue to overlook appropriate and accurate legal redress for trans and gender diverse persons in refusing to redesign and implement new law addressing legal gender recognition based on the principles highlighted, it will reveal government's gender repressive power in relation to difference and diversity, and a flagrant disregard of its obligation in advancing transformative constitutionalism. The Position Paper outlines the need for law reform and further policy development to ensure access to legal gender recognition and protection of the human rights of trans and gender diverse people as an extremely marginalised population in South African society. By implementing international human rights standards and global best practices on gender identity and gender expression, as outlined in this document, South Africa has an opportunity to re-establish its commitment to championing human rights and solidifying itself as a global leader.

Background to the Legal Gender Recognition Position Paper

The Alteration of Sex Description and Sex Status Act 49 of 2003 defines and outlines the requirements necessary for South Africans to adjust, what Act 49 refers to, as their 'sex marker'. Act 49 applies to anyone whose details have been captured on the South African National Population Register (NPR). Since its inception, Act 49 has failed to alleviate the burdens of trans and gender diverse people in South Africa. Many shortfalls exist in both the substantive content of Act 49 and the manner in which it has been implemented. Some of these shortfalls include the lack of accompanying directives and regulations, a narrow and limited interpretation, discriminatory implementation, its lack of clarity, an over-reliance on medicalisation and the language used.

As an organisation, GDX has worked, since the genesis of the Act, to bring these issues to light with the Department of Home Affairs (DHA), the state body tasked with the implementation of Act 49¹. Though there have been some gradual improvements², it has increasingly become apparent that Act 49 struggles due to issues internal to its structure and substantive content. These issues are compounded further by the fact that it is also out of step with international best practice and human rights. Due to both factors, that is Act 49's inherent internal shortcomings and its dissonance with both international models of best practices and human rights, GDX in partnership with LRC has, since November 2015, undertaken strategic litigation to rectify some of these issues.

The organisations' aim has been to challenge the misinterpretation, narrow reading and discriminatory implementation of Act 49 by the DHA with the aim, at the time, of demanding the development of clear directives and regulations to ensure a more accurate and efficient implementation of the Act. At the time we had hoped that the development of directives would alleviate some of the challenges of Act 49. Over time it has become abundantly clear that more is needed to address the lived realities that Act 49 ignores. Lived realities have caused legal gender recognition to be a daily challenge for many trans and gender diverse persons. Preparatory work included the co-production of the 2015 publication *Briefing Paper: Alteration of Sex Description and Sex Status Act*, No 49 of 2003 by GDX and LRC, available in hard copy and on the websites of both organisations³. The Briefing Paper details the on-going obstacles, including discrimination, to the implementation of Act 49 and outlines recommendations to ensure better implementation. These include the need for law reform with regards to marriage legislation in order to remedy the problem of the DHA practice of nullifying the marriage of transgender people married under the Marriage Act 25 of 1961 or forcing them to divorce in order effect a legal gender marker change⁴. The Briefing Paper also touches on the need for more far-reaching gender recognition law reform that meets international best practices based on self-identification.

¹ Klein T 'Intersex and Transgender Activism in South Africa' (2009) 3 *Liminalis* 16.

² Department of Home Affairs of the Republic of South Africa 'Press Release Minister Malusi Gigaba: LGBTI Representatives Meeting' available at <https://www.gov.za/speeches/lesbian-gay-bisexual-transgender-and-intersexed-7-jun-2016-0000> (accessed on 7 June 2016).

During the course of 2015, a number of legal gender recognition cases were identified as ripe for litigation. The first case, filed by LRC in December 2015 at the Western Cape High Court, aimed at challenging unreasonable administrative obstacles and delays in accessing identity documents with a new gender marker. This case was settled because the client received their amended identification documents. The second and third cases, launched by LRC in early 2016, fell away. In the second instance, similar to the first case, the client received their identification documents and in the third the client withdrew for personal reasons. The LRC filed two more cases in 2017 and in 2018. The 2017 case, the fourth case, was settled once the client had received their amended identification documents. The fifth case will likely be settled as the client has received an indication from DHA that their documents have already been amended. Since then, a number of other cases have been referred to LRC for intervention. All of these address issues inherent to the shortcomings of Act 49 itself. As more and more cases have been referred, additional challenges with Act 49 have become clear. Examples include the obstacles to accessing legal gender recognition at South African embassies for South African citizens living outside of South Africa. Along with this, South African citizens born outside the country have also been told that they cannot change their legal gender in South Africa, but must do so in their birth country. There have also been issues with refugees and asylum seekers, as well as children and detained persons not being accommodated by Act 49.

Given that these cases and concerns clearly indicate that Act 49's problems are bigger than just haphazard implementation and widespread misreading, in 2016 GDX began to lay the groundwork for law reform. That law reform is the creation of new legislation, which would offer:

- a quick, transparent and accessible model of legal gender recognition.
- recognising the right to gender self-determination, bodily autonomy and self declaration for trans, gender diverse and intersex people in South Africa.

The approach towards law reform has been two-fold, the first focusing on public interest litigation strategy development and law reform engagement and the second, as a way of building understanding and collective ownership from the ground up, focusing on a series of consultations and qualitative research engagement across South Africa between 2016 and 2017. To date GDX, LRC, LHR and Sistazhood have successfully partnered in supporting trans and gender diverse persons in obtaining justice and laying this groundwork. In 2017, this was evident in a case regarding forced divorce filed by LRC: *KOS and Others v Minister of Home Affairs and Others*⁵. It was followed in 2019 with the case concerning the vindication of the right to gender expression of transgender people in prisons: *September and Others v Subramoney NO and Others*⁶. In the KOS case GDX supported the couples as an applicant who offered more information to court about gender identity, experiences of transgender and gender diverse persons in South Africa and the history of Act 49. In the *September* case GDX was amicus curiae (friend of the court) represented by the LRC. Alongside this, consultations have been held at a national and provincial level with trans-specific community groups and organisations in the Western Cape, Northern Cape, Limpopo, Gauteng, Kwa-Zulu Natal and the Free State. These outcome of these consultations was the GDX publication, *Amarights Amarights*⁷ explaining the process of changing one's gender marker in the context of Act 49.

³ Deyi B et al Briefing Paper: Alteration of Sex Description and Sex Status Act, No 49 of 2003 (2015).

⁴ Ibid at 24.

⁵ *KOS and Others v Minister of Home Affairs and Others* (2298/2017) [2017] ZAWCHC 90; [2017] 4 All SA 468 (WCC); 2017 (6) SA 588 (WCC) (6 September 2017).

⁶ *September v Subramoney NO and Others* (EC10/2016) [2019] ZAEQC 4; [2019] 4 All SA 927 (WCC) (23 September 2019).

⁷ Shimange ZA & Matthyse GL 'Amarights Amarights' (2016).

This was followed, in 2017, by LRC and GDX presenting on the assessment of the Alteration of Sex Description and Sex Status Act 49 of 2003 to the National High Level Panel on Law Reform. Recommendations were made to advance legal gender recognition for trans and gender diverse persons in South Africa. Submissions were made to Committee 3 on Social Cohesion and Nation Building. The presentation was entitled “The Impact of the Alteration of Sex Description and Sex Status Act 49 of 2003 on the Lives of Transgender and Intersex Persons in South Africa”⁸. Consequently, in 2018 and 2019, GDX further conducted qualitative research for a book on the experiences of trans and gender diverse persons living in rural areas across South Africa⁹. The book details the unique experiences of rural-based trans and gender diverse persons in relation to legal gender recognition and law reform in the context of the right to gender affirming healthcare, safe and enabling education systems and freedom from discrimination, violence and hate crimes.

Given the work detailed above, this Position Paper outlines the need for law reform and further policy development to ensure access to legal gender recognition and protection of the human rights of trans and gender diverse people as an extremely marginalised population in South African society. By implementing international human rights standards and global best practices on gender identity and gender expression, as outlined in this document, South Africa has an opportunity to re-establish its commitment to championing human rights and solidifying itself as a global leader.

1. Introduction

In the beginning of the new millennium, South Africa recognised the right to legal gender recognition with the passing of the Alteration of Sex Description and Sex Status Act 49 of 2003. In doing so it became the first African country to expressly recognise the rights of transgender persons in law¹⁰. These legal victories build on the Constitutional protection, provided for by the equality clause, that gender, sex, sexual orientation, age, ethnic or social origin, colour, disability, language, and nationality, amongst other grounds, are prohibited grounds of discrimination¹¹.

Despite the existence of Act 49, trans and gender diverse people regularly experience human rights violations on account of their gender identity not being legally recognised in practice by the DHA¹². The lack of legal gender recognition experienced is directly associated with the following:

- i) A legal model that pathologises trans and gender diverse identities through an over-reliance on extraneous medical requirements¹³;
- ii) Under-equipped DHA officials who do not understand gender diversities and are not sensitised¹⁴;
- iii) Refusal by DHA officials to accept or efficiently process gender marker and name change applications due to having poor understanding of the existence and implementation of Act 49, coupled with conservative beliefs about gender identity and gender expression¹⁵;
- iv) Non-existent guidelines for the current legal gender recognition law, Act 49¹⁶;
- v) Gender oppression resulting from the promotion of discriminatory binary models of legal gender recognition¹⁷; and
- vi) Costs associated with legal gender recognition¹⁸.

⁸. Speaker’s Forum ‘High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change’ available at https://www.parliament.gov.za/storage/app/media/Pages/2017/october/High_Level_Panel/HLP_Report/HLP_report.pdf (accessed September 2020).

⁹. Strand M & Smit E *Trans Rural Narratives* (2020).

¹⁰. See Camminga B “The Stigma of Western Words”: Asylum Law, Transgender Identity and Sexual Orientation in South Africa (2018) 8 (3) *Global Discourse*.

¹¹ Constitution of the Republic of South Africa, Act 108 of 1996 at Section 9.

¹² Supra 3.

¹³. Klein T ‘Who Decides Whose Gender? Medico-Legal Classifications of Sex and Gender and Their Impact on Transgender South Africans’ Family Rights’ (2012) 14 (2) *Ethnoscripts* 12.

¹⁴. See Hamblin R & Nduna M ‘Alteration of Sex Description and Sex Status Act and Access to Services for Transgender People in South Africa’ (2013) 6 *New Voices in Psychology*.

The current conceptualisation and application of the law on gender recognition in the form of Act 49 advances indignity, inequality and curtails the enjoyment of constitutional and other freedoms for trans and gender diverse persons¹⁹. This law promotes approaches to legal recognition that are misaligned to human rights imperatives, including the right to self-identification, self-determination and non-pathologisation, bodily autonomy and bodily integrity²⁰. It is evident that the law does not take into account gender diversity and therefore compromises and undermines the constitutional rights of trans and gender diverse persons. At a moment in which the country is renegotiating its strategic and tactical responses to challenging and eradicating gender-based violence and femicide²¹, necessary attention must be placed to ensuring that trans and gender diverse persons too can live free from all forms of violence, which include structural and systemic violence.

This *Position Paper* focuses primarily on the legal challenges to gender recognition experienced by trans and gender diverse applicants, but it is important to be cognisant of the fact that Act 49 also addresses and impacts intersex applicants. Although there are challenges that may apply to both groups, intersex applicants face a different set of legal requirements and challenges at DHA. Unlike trans and gender diverse applicants, intersex applicants are not required to undergo any form of “gender reassignment”²². However, in some instances, due to ignorance, officials confuse intersex applicants with trans and gender diverse applicants. As a result, they unlawfully demand that intersex applicants comply with Act 49’s “gender reassignment” requirements which pertain to trans and gender diverse individuals, instead of its’ intersex requirements²³. In the case of intersex people, Act 49 only allows for the legal affirmation of an intersex person’s gender if medical and psychosocial evidence can be produced. In essence, intersex persons are required to submit a medical report confirming that they are intersex, as well as a report from a psychologist or social worker confirming that they have lived for at least two years in the gender role corresponding to the gender marker under which they apply to be registered. These requirements are not only extraneous but fall outside of international best practice models. In many instances, gross human rights violations are committed against intersex persons such as intersex genital mutilation (IGM), sterilisation and other coercive medical practices²⁴. They subject intersex persons to unnecessary medicalisation and pathologisation of their sex characteristics, as well as pathologisation and gender policing by mental health and social services professionals. This constitutes a violation of an intersex person’s inherent rights to self-identification, self-determination, bodily autonomy, bodily integrity, privacy and dignity.

¹⁵ Rubin M ‘Right to Identity: The Implementation of the Alteration of Sex Description Act’. The Legal Resources Publication Library (20 June 2017) available at <http://resources.lrc.org.za/right-to-identity-the-implementation-of-the-alteration-of-sex-description-act/>.

¹⁶ Hamblin R ‘Short Look at Recommendations: Regulations for Act 49’ presented at *Gender Dynamix and Department of Home Affairs Meeting* (8 November 2011) in Pretoria.

¹⁷ Camminga B ‘Decolonising and Depathologising Transgender in Africa’ presented at *Third Africa Trans Health, Advocacy and Research Conference* (2017) in Johannesburg.

¹⁸ Davids L ‘Trans Violent Exclusion’ at Third African Trans Health, Advocacy and Research Conference (2017) at Johannesburg available at <https://www.youtube.com/watch?v=ZbjABrwYOCU>. Leigh spoke as a member Sex Workers Education & Advocacy Task force (SWEAT).

¹⁹ Kings S ‘Transgender Woman Goes on Hunger Strike over ID Application’ Mail and Guardian 9 October 2014 available at <http://mg.co.za/article/2014-10-09-transgender-goes-on-hunger-strike-over-id-application/>.

²⁰ International Commission of Jurists *Yogyakarta Principles: Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity* (2006).

²¹ Interim GBVF Steering Committee ‘National Gender Based Violence and Femicide Strategic Plan 2020-2030’ (2019) available at https://www.gov.za/sites/default/files/gcis_document/201909/nspongbvfdraft.pdf.

²² Alteration of Sex Description and Sex Status Act 49 of 2003 at section 2(1).

²³ Sehoole J *et al* ‘Recognition of Economic, Social and Cultural Rights: A Continued Struggle for Transgender, Gender Diverse and Intersex Persons in South Africa’ Working Group on South Africa’s Committee on Economic, Social and Cultural Rights (2017) 5 available at https://tbinternet.ohchr.org/Treaties/CESCR/Shared%20Documents/ZAF/INT_CESCR_CSS_ZAF_28796_E.pdf.

²⁴ Gender Dynamix, Legal Resources Centre & Iranti-Org. ‘Recognition of Civil and Political Rights: A Continued Struggle for Transgender and Intersex Persons in South Africa: An Alternative Report to the United Nations Human Rights Committee’ (2016) 18-19 available at https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/ZAF/INT_CCPR_CSS_ZAF_23065_E.pdf.

In 2019, the South African election results saw three political parties taking a combined total of almost 90% of national votes of the total national electoral votes with the African National Congress (ANC) taking 57.5%, official opposition the Democratic Alliance (DA) taking 20.77%, the Economic Freedom Fighters (EFF) taking 9.07% and the remaining 10.93% being split between various other political parties²⁶. The latter is inclusive of the Congress of the People (COPE), the party instrumental in tabling a private members bill in 2018 for the repeal of section 6 of Civil Union Act 17 of 2006, which only managed to secure two seats in parliament.²⁷

During these elections, it was very evident from the Election Manifestos that all major political parties supported the recognition and protection of human rights as they relate to LGBTI+ people. Whilst the ANC-led government's Election Manifesto focused on growing South Africa together, it highlighted the need for parental leave benefits to be extended to LGBTI+ people, the finalisation and passing of hate crimes legislation and training of teachers on how to deal with all forms of discrimination²⁸. The DA in turn situated LGBTI+ people in the context of securing 'One South Africa for All' by eliminating gender-based inequalities, violence and femicide. Tangible targets to meet this goal for LGBTI+ people included fully resourcing the Task Teams on LGBTI+ people and Gender-based Violence and combatting discrimination to create safe and non-discriminatory environments²⁹. With this in mind, it was however the EFF's Election Manifesto that highlighted transgender-specific human rights issues in need of being addressed³⁰. With a strong focus on land rights and job creation, the EFF highlighted their commitment to the amendment of Act 49 to expedite identity document applications for transgender people, whilst also recognizing the need to conceptualise and implement laws and policies outside of the gender binary and to increase investment in the public healthcare system to improve access to gender affirming healthcare.

The intent of political parties necessarily aligns, in principle, to the Constitution of the Republic of South Africa in the context of advancing dignity, equality and freedom for all people, especially the most marginalised. They also have bearing on further enhancing and advancing the implementation of the National Action Plan to combat Racism, Racial Discrimination, Xenophobia and Related Intolerance (2019) which also specifically references sexual orientation and gender identity as part of the national discourse of combating structural and systemic inequalities.³¹

Global shifts such as the World Health Organisation (WHO) confirming the depathologisation of trans identities in the International Classification of Diseases 11 (ICD-11) in June 2018, deleting all trans-related categories from the Chapter on Mental and Behavioural Disorders, and shifting them to a chapter on Sexual Health and Related Matters, suggest that the pathologisation model which Act 49 relies on has become outdated.³²

²⁵ Sehoole J & Maquba L 'National Dialogue on the Protection and Promotion of the Human Rights of Intersex People' (2018) Johannesburg: Iranti-org..

²⁶ Chutel L 'South Africa's Election Result Had Few Surprises, except One Rude Awakening' Quartz Africa 11 May 2019 available at <https://qz.com/africa/1617103/south-africa-election-anc-down-eff-up-democratic-alliance-down/>.

²⁷ Khumalo S 'Press Statement: Centre For Human Rights Welcomes South Africa's Repeal of Section 6 of The Civil Union Act' 14 July 2020 available at <https://www.chr.up.ac.za/latest-news/2159-press-statement-centre-for-human-rights-welcomes-south-africa-s-repeal-of-section-6-of-the-civil-union-act>.

²⁸ African National Congress (ANC) 'Election Manifesto Summary: Let's Grow South Africa Together' (2019) available at https://voteanc.org.za/assets/manifesto-summaries/A5_Manifesto_English.pdf (accessed 28 September 2020).

²⁹ Democratic Alliance (DA) 'The Manifesto for Change: One South Africa for All' (2019) available at <https://cdn.da.org.za/wp-content/uploads/2019/02/22160849/A4-Manifesto-Booklet-Digital.pdf> (accessed 28 September 2020).

³⁰ Economic Freedom Fighters (EFF) 'Election Manifesto: Our Land, Our Jobs Now' (2019) available at <https://www.dailymaverick.co.za/wp-content/uploads/2019-EFF-MANIFESTO-FINAL.pdf> (accessed 28 September 2020).

³¹ Republic of South Africa 'National Action Plan to Combat Racism, Racial Discrimination, Xenophobia and Related Intolerance' (2019) available at https://www.gov.za/sites/default/files/gcis_document/201903/national-action-plan.pdf (accessed 28 September 2020).

³² Haynes S 'WHO Drops Being Transgender from List of "Mental Disorders"' *Time Magazine* 28 May 2019 available at <https://time.com/5596845/world-health-organization-transgender-identity/>.

Positive global legislative developments in several countries including Malta, Spain, Iceland, Norway, Argentina, Portugal, Belgium, Luxembourg, Pakistan, India, Nepal, Colombia, Uruguay and parts of Canada, Spain and some states in the USA, have shown a commitment to human rights and the dignity, freedom and equality of trans and gender diverse people by already implementing a model of self-determination for legal gender recognition. This complies with the *Yogyakarta Principles (2006)*³³ and *Yogyakarta Principles Plus 10 (2017)*³⁴, a set of international principles guiding the application of international human rights law as it relates to lesbian, gay, bisexual, transgender and intersex (LGBTI+) people and communities. Best practice models thus exist which may act as examples for how South Africa might go about making the dignity, equality and freedom of its trans and gender diverse people a reality in the context of legal gender recognition.

2. Research Methodology

2.1. Problem Statement

The first two decades of the 21st century have seen significant global advances in the application of human rights frameworks for sexual orientation, gender identity, gender expression and sex characteristics (SOGI-ESC). The *Yogyakarta Principles* and *Yogyakarta Principles Plus 10* are invaluable international human rights instruments that clarify principles and countries' obligations in realising SOGIESC rights and outlining different aspects of these rights that are often misunderstood or conflated. Principle 31 of the Yogyakarta Principles Plus 10 highlights that it is the responsibility of States, with regards to gender identity and the right to legal recognition, to:

*Ensure that official identity documents only include personal information that is relevant, reasonable and necessary as required by the law for a legitimate purpose, and thereby end the registration of the sex and gender of the person in identity documents such as birth certificates, identification cards, passports and driver licences, and as part of their legal personality*³⁵

In essence the principles act as a guide and outline the need for States to end the registration of sex and gender in personal identity documents and as part of a person's legal personality. In the interim, while moving away from the registration of sex or gender, States must "ensure a quick, transparent, and accessible mechanism that legally recognises and affirms each person's self-defined gender identity"³⁶. In order to actualise this, States are required to "make available a multiplicity of gender marker options".³⁷ This is a model of self-determination. As mentioned above, several countries have passed gender recognition laws or decrees that implement this model of self-determination for gender recognition in recent years, thus complying with the *Yogyakarta Principles Plus 10*.

³¹ Republic of South Africa 'National Action Plan to Combat Racism, Racial Discrimination, Xenophobia and Related Intolerance' (2019) available at https://www.gov.za/sites/default/files/gcis_document/201903/national-action-plan.pdf (accessed 28 September 2020).

³² Haynes S 'WHO Drops Being Transgender from List of "Mental Disorders"' *Time Magazine* 28 May 2019 available at <https://time.com/5596845/world-health-organization-transgender-identity/>.

³³ Supra 20.

³⁴ International Commission of Jurists 'Yogyakarta Principles Plus 10: Additional Principles and State Obligation on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Expression and Sex Characteristics to Complement the Yogyakarta Principles' (2017).

³⁵ Ibid at 9.

³⁶ Loc cit.

³⁷ Loc cit.

Act 49 was informed by a model invested in medical pathologisation linking this to legal affirmation or what is also referred to as a medico-legal model rather than the recognition of gender self-determination and bodily autonomy, fundamentally rooted within human rights. As a result, many trans, gender diverse and intersex persons in South Africa are still unable to fully exercise their right to amend their gender marker, or what Act 49 refers to as “sex description”,³⁸ in the National Population Register (NPR), and by extension their birth certificates and identification documents. The medico-legal model of the Act is also invested in an understanding of gender as binary. It limits options to either ‘M’ or ‘F’. This is further reflected in South African Identification Numbers, which indicate either M or F depending on the structure of the middle group of digits.

The problem caused by this is two-fold:

- i. Conceptual: Firstly, the medico-legal and binary ideological underpinnings of Act 49 undermine the fundamental human rights to gender self-identification and self-determination. This is partly a result of other pieces of legislation such as the Identification Act 68 of 1997, which limits the scope of affirming legal gender recognition.

It is important to note that the medico-legal ideological underpinning of Act 49 has the effect of compulsory cisnormativity. This means that in order to meet the requirements in Act 49, an applicant must express their gender within a very restrictive medicalised binary imagining.

- ii. Implementation: Secondly, in the absence of guidelines, trans and gender diversity sensitisation training, education programmes and effective monitoring mechanisms, the implementation of a constitutionally sound and affirming gender recognition law will remain ineffective much like Act 49.

2.2. Purpose of the Position Paper

Accordingly, this *Position Paper* seeks to:

- a) Provide a comprehensive understanding of the challenges trans and gender diverse persons in South Africa encounter when seeking legal gender recognition;
- b) Guide policy-makers and policy-implementers on how they can review, conceptualise and develop legislation that protects the right to gender self-determination of trans, gender diverse, intersex and other persons through a quick, accessible and non-discriminatory procedure; and
- c) Assist the DHA in developing guidelines or regulations for the consistent and efficient implementation of the new depathologised and human-rights centred gender affirming and inclusive legal recognition laws and policies to be passed by the legislature.

2.3. Research Questions

The following key questions have guided the development of the *Position Paper*:

- a) What is the current South African legal framework pertaining to recognition of trans and gender diverse persons?
- b) What challenges do trans and gender diverse persons in South Africa encounter when seeking to change their legal gender marker?
- c) What model(s) of legal recognition do trans and gender diverse persons in South Africa support?
- d) What form should South Africa’s gender recognition legislation take to realise and protect individuals’ rights to a legal identity that is reflective of who they are, based on their gender identity?

³⁸. Supra 22 at section 2.

2.4. Research Methods

Building on the 2015 GDX and LRC *Briefing Paper*,³⁹ which provided a critical overview and analysis of Act 49, this Position Paper primarily employs desktop research alongside a qualitative analysis of data focusing on the lived realities of trans and gender diverse people in South Africa using the following materials:

1. Various organisational and academic papers, research reports and consultation documents.
2. GDX's internal reports of and observations during gender recognition law reform consultations with trans and gender diverse persons across South Africa in 2016 and 2017.
3. The findings of qualitative research conducted by GDX in 2018 and 2019 for a book documenting South African rural trans narratives and experiences in relation to legal recognition and access to services⁴⁰.
4. Several trans, gender diverse and intersex human rights submissions submitted to international and regional human rights bodies, including various United Nations Treaty Bodies, Special Mechanisms and Universal Periodic Review process and the African Commission on Human and People's Rights (ACHPR), as well as the South African Policy Review forums.
5. The Position Paper takes cognisance of foreign national legislation and jurisprudence, and best practices on legal gender recognition as reflected in various gender recognition laws and reports in various jurisdictions.
6. Lastly, this *Position Paper* takes into account international and regional human rights instruments.

2.5. Rationale: Why the need for gender recognition law reform and policy development?

The need for law and policy reform on the basis of an efficient, human rights-based, depathologised, gender expansive and self-determined model of legal gender recognition in South Africa is based on the following:

2.5.1. Barriers to gender recognition lead to exposure to violence

When persons are deprived of legal recognition of their self-identified gender, it results in a multitude of social, economic, political and legal challenges. Models of legal gender recognition that are premised on rigid, outdated biomedical frameworks and binary concepts of sex and gender are discriminatory and exclusionary.⁴¹ They function to deny legal recognition to the majority of trans, gender diverse and intersex persons who require access to gender marker changes on their identity documents. This exposes them to a range of human rights violations on the continuum of violence, from societal prejudices to discriminatory practices within institutions, coercive medical treatments, incidents of gender-based violence and heinous hate crimes. Non-recognition and inadequate protections maintain gender-based violence and gender oppression by causing undue exposure to a range of violations.⁴² Gender recognition law and policy reform is a fundamental step towards ensuring that every person's gender identity, gender expression and sex characteristics are respected and protected.

2.5.2. Comprehensive and inclusive models uphold constitutional rights

South Africa is one of the very few countries in Africa that offer protection to trans and gender diverse persons. The current model of legal gender recognition is however highly pathologising and incompatible with the country's priority of achieving social equity. Gender identity and gender expression are protected grounds in the South African Constitution. They are also protected in the Bill of Rights under section 9, the Equality Clause, section 16, the Right to Freedom of Expression, and section 12, the Right to Freedom and Security of the Person. This has been further confirmed in both *KOS v Minister of Home Affairs* and *September v Subramoney*. Legislating more inclusive non-pathologising laws which recognise gender diversity will ensure the human rights to dignity, equality and freedom for trans and gender diverse persons in compliance with the country's commitment to transformative constitutionalism.

³⁹ Supra 3.

⁴⁰ Supra 9.

⁴¹ Blincoe E 'Sex Markers on Birth Certificates: Replacing the Medical Model with Self-Identification' (2011) 46 (1) *Victoria University of Wellington Law Review* 63.

⁴² See Chakuwamba AK & Van der Merwe LA *Transilience: The Realities of Violence Against Transgender Women in South Africa* (2015). Report published by Social, Health and Empowerment Feminist Collective of Transgender Women of Africa (SHE).

3. Brief Historical Overview of Legal Gender Recognition in South Africa

In order to understand Act 49 and its on-going issues, it is critical to fully grasp its development and the adoption of law regarding gender recognition in South Africa. Spanning the apartheid regime, the early democratic era and our subsequent democracy to date, different laws have regulated access to legal gender recognition in South Africa. All of these, in varying ways, have enacted very restrictive requirements that excluded the majority of those they were intended to cater for in accessing legal recognition of their gender identities.

3.1. Inception Period (1974 – 1992): ‘Sex Change’

The first period (1974-1992) commenced with South Africa’s first legal provision for gender recognition, which was made on 16 October 1974 through an amendment to the Births, Marriages and Deaths Registration, Act 51 of 1974. This amendment allowed for the alteration of what was then called a person’s sex description on condition that the person had undergone a “change of sex”. The amendment was enacted through the insertion of Section 7B, stipulating that:

*The Secretary (for the Interior) may on the recommendation of the Secretary for Health alter, in the birth register of any person who has undergone a change of sex, the description of the sex of such person and may for this purpose call for such medical reports and institute such investigations as he may deem necessary.*⁵⁵

This amendment was the first express legal provision enabling some persons to access legal gender recognition in a highly conservative sex/gender-segregated political context. During this period, medical evidence of the completion of medical treatment and surgical procedures resulting in what was then understood as a “change of sex”⁵⁴ was required before a legal alteration was granted.⁵⁶

3.2. Second Period (1992 – 1993): Perceived eccentricity of apartheid

In 1992, The Minister of Home Affairs repealed the 1974 Act in an effort to streamline registrations.⁵⁷ The possibility of legal gender recognition for anyone, including those who had affirmed their gender identity through “sex reassignment” was now completely removed. Notably, this was despite the fact that affirming healthcare remained accessible in the public sector.⁵⁸

3.3. Third Period (1993 – 2003): Exception to the rule

A third period (1993-2003) followed shortly, which introduced an amendment to the blanket exclusion of the Births and Deaths Registration Act 51 of 1992. The new amendment granted one exception under Section 33(3), namely, anyone who had been in the midst of “undergoing a change of sex” before the Act was adopted, was still allowed to apply for an “alteration of sex description” in terms of section 7b of the 1963 version of the Act upon completion of “the process”. Those commencing such a process after 1992 would however not be allowed to alter their gender markers.⁵⁹ What followed was ostensibly over a decade of trans and gender diverse South Africans being abandoned to a legal limbo.⁶⁰

⁵⁴ Camminga B *Transgender Refugees and the Imagined South Africa: Bodies over Borders and Borders over Bodies* (2019) 98.

⁵⁵ House of Assembly second reading and debates on the *Births, Marriages and Deaths Registration Amendment Bill* (3 October 1974) 4443.

⁵⁶ See Taitz J ‘The Legal Determination of the Sexual Identity of a Post-Operative Transsexual Seen as a Human Rights Issue’ (1988) 7 *Medicine and Law* 467–74; Taitz J ‘The Legal Consequences of A Sex Change- A Judicial Dilemma’ 1980 (97) *South African Law Journal* 65–76.

⁵⁷ Lock Swarr *A Sex in Transition: Remaking Gender and Race in South Africa* (2012) 62.

⁵⁸ Gardener A ‘South African Transgender Rights Advocate Quits’ June 1993 *Renaissance News*, Digital Trans Archive.

⁵⁹ South African Law Commission (Project 52) *Report on the Investigation into the Legal Consequences of Sexual Realignment and Related Matters* (1995) 19.

⁶⁰ *Supra* 57 at 63.

In 2003, due to the rising costs of legal battles brought by South Africans wishing to update their identity documents with the correct gender marker, as part of legislation tabled by the DHA, the report (and Bill) reappeared.⁶⁵ Changed in name only, the Alteration of Sex Description and Sex Status Bill was opened to minimal consultation by civil society. In the DHA's rush to have the Bill passed, three options were offered by civil society to the Home Affairs Portfolio Committee to improve the outdated Bill:

1. The "most far-reaching and is expressed in very general terms only – requesting that no conditions whatsoever be imposed on any individual who desires to have their legal sex description changed".⁶⁶
2. Significant amendments to the Bill "seeking to steer it away from the undesirable focus on "sex organs" towards an emphasis on the day-to-day social or lived identity of the applicant".⁶⁷
3. Child amendments constituting the bare minimum, acceptable as a provisional measure only. On the basis that the Bill be passed before the end of 2003, that a process to undertake revisions be set in motion with immediate effect and that this revision process involve a working group of trans and intersex people.⁶⁸

The Portfolio Committee opted for option three and as sign of good faith, Act 49 was passed into law in 2003. It was acceptable, even at the time, as a provisional measure only. It is clear that the promise of return inherent in this version of Act 49 has not, as yet, been fulfilled. It is however part of the underlying impetus to the present Act and it is this process, this promise, on the basis of acknowledging the human rights of trans, gender diverse and intersex people, that this *Position Paper* now calls for.

This history is important because it highlights the groundwork for the present Act 49 in apartheid perceptions and legislative understandings. This has promoted a heavily medicalised and restrictive model of existence for trans and gender diverse people in South Africa, in that it has required those wishing to access legal recognition to undergo prohibitively expensive medical procedures and inhabit binary expressions of sex and gender. Ultimately it establishes trans and gender diverse people as social dissidents requiring medical intervention to fit into the law. The link between the medical and the legal is unsurprising as scholar Carol Johnson explains - models of citizenship are often heteronormatively (and cisnormatively) conceptualised forming the basis for political systems and associated discourses which include the law.⁶⁹

It follows then that in the early post-1994 era "sexual orientation" usurped "gender identity" as a separate rights-discourse. During the early years of democracy, when sexual orientation was the key rights battle ground for many, only those bodies that fit the gender/sex binary schema mattered. Consequently, the complexities that belie gender identity and expression have never truly been meaningfully engaged with or addressed with civil society organisations by the South African government. The outcome has been a reliance on medical discourse, a limited understanding of gender and sex, and a restrictive formulation of rights provided for by the Alteration of Sex Description and Sex Status Act 49 of 2003. This law, in essence, only recognizes two genders, men and women, and limits the expression of these through extraneous medical requirements. In doing so, the law limits rather than provides for access to legal gender recognition and gender marker change.

⁶⁵ Supra 54 at 98.

⁶⁶ Cape Town Transsexual Transgender Support Group *Alteration of Sex Description and Sex Status Bill Oral Presentation for the South African Home Affairs Portfolio Committee Hearings* (9 September 2003) available at <https://pmg.org.za/committee-meeting/2849/>

⁶⁷ Loc cit.

⁶⁸ Loc cit.

⁶⁹ Johnson C 'Heteronormative Citizenship and the Politics of Passing' (2002) 5(3) *Sexualities* 317.

Since Act 49's implementation there is ample evidence, as this *Position Paper* indicates, that the manner in which recognition and belonging have been conceptualised by Act 49 has enabled stigma, discrimination, bullying and violence. This has had an adverse effect on those that Act 49 excludes through its limited definition of gender and its limited scope and application. This includes transgender and gender diverse persons, refugees, asylum seekers and migrants,⁷⁰ as well as children⁷¹. Indeed, despite South Africa offering the possibility of asylum to persons on the basis of sexual orientation or gender identity, transgender and gender diverse refugees continue to experience challenges to their survival and a similar outcome to that faced in their countries of origin.⁷² The hope and expectations carried by transgender and gender diverse asylum seekers to South Africa is to establish a new sense of home in a context considered to be more enabling. However, the constitutional promise of recognition and protection remains unfulfilled as transgender and gender diverse refugees face a web of legal issues directly related to their inability to have their refugee documents accurately reflect their gender.⁷³

In relation to transgender and gender diverse children, due to a lack of information about gender identity, children often have great difficulty in defining, affirming and asserting themselves.⁷⁴ Transgender and gender diverse children experience high levels of stigma, discrimination and bullying when navigating strictly gendered spaces. Some examples include sex-segregated public toilets, sporting codes and administrative systems.⁷⁵ Due to rapid access to information in this digital technological era, more children are coming out as transgender and gender diverse at a younger age. This necessarily means that increased support at a younger age to affirm their gender identity in safe and enabling ways is critical. Studies indicate that a lack of support for LGBTI+ youth results in increased anxiety, depression, suicidal ideation and suicide.⁷⁶

With regards to Act 49's investment in medicalisation, not only is the requirement unnecessary, prohibitive and out of touch with international human rights standards, but nearly impossible for the vast majority in South Africa to fulfil. The waiting list for accessing gender affirming medical and surgical care in the public healthcare system in South Africa currently stands at beyond 20 years.⁷⁷

⁷⁰ See Camminga, B 'Marooned: Transgender Asylum Seekers in Johannesburg' in Nicky Falkoff & Cobus Van Staden (eds) *Anxious in Joburg: The Inner Lives of a Global South City* (2020) 187–207; Camminga B 'Shifting in the City: Being and Longing in Cape Town' in Zethu Matebeni & B Camminga (eds) *Beyond the Mountain: Queer Life in Africa's 'Gay Capital'* (2019) 60–70.

⁷¹ Shimange ZA 'South Africa: Transgender and Gender Variant Children and Teenagers Needs Analysis' (2020). Matimba.org.

⁷² See Camminga B "'Gender Refugees'" in South Africa – The "Common Sense" Paradox' (2018) 53 (1) *Africa Spectrum* 89–112.

⁷³ See Camminga B 'Categories and Queues: The Structural Realities of Gender and the South African Asylum System' (2017) 4 (1) *TSQ: Transgender Studies Quarterly* 61–77.

⁷⁴ Sanger N 'Young and Transgender: Understanding the Experiences of Young Transgender Persons in Educational Institutions and the Health Sector in South Africa' (2015).

⁷⁵ Mafolo K 'Transgender Learners Make Inroads in Reshaping Rigid Binaries in Schools' *Daily Maverick* 3 June 2019 available at <https://www.dailymaverick.co.za/article/2019-06-04-transgender-learners-make-inroads-in-reshaping-rigid-binaries-in-schools/>.

⁷⁶ See Msibi T "'I'm Used to It Now": Experiences of Homophobia among Queer Youth in South African Township Schools' (2012) 24 (5) *Gender and Education* 515–33; 'Parents Urged to Help Transgender Kids Flourish' *CapeTalk* 18 December 2018 available at <https://www.capetalk.co.za/articles/331257/parents-urged-to-help-transgender-kids-flourish>.

⁷⁷ Wilson D et al. 'Transgender Issues in South Africa, with Particular Reference to the Groote Schuur Hospital Transgender Unit' (2013) 104 (6) *South African Medical Journal*.

4. The current state of law regarding legal gender recognition in South Africa

There are three major pieces of legislation that govern legal gender recognition in South Africa presently.

4.1. Alteration of Sex Description and Sex Status Act 49 of 2003

In 2003, as noted, Act 49 officially became the legal mechanism through which amendments to gender markers in the National Population Register (NPR) became possible, although this was confined to binary gender options and subject to certain medical requirements being met. To this extent, the Act works in tandem with the Births and Deaths Registration Act 51 of 1992 and the Identification Act 68 of 1997.

Over time however, as understandings with regards to gender have advanced globally, more progressive and inclusive gender-recognition laws based on the principle of self-identification have been enacted in countries such as Argentina⁹⁰ and Malta⁹¹. Although South Africa has imported the *Yogyakarta Principles* into its human rights jurisprudence,⁹² the country still has a long way to go in producing laws and policies that comply with the aspirations as set out in the principles, which include the promotion of the human rights to self-identification, self-determination, bodily autonomy, bodily integrity. The human rights aspirations contained in the Yogyakarta Principles complement the country's constitutional values as well as individual rights focused on the advancement of human dignity, substantive equality and freedom without any undue limitations.

4.2. Births and Deaths Registration Act 51 of 1992 and the Regulations on the Registration of Births and Deaths of 2014

Section 5(1) of the BDRA stipulates that the Director-General is the custodian of all records related to births and deaths, from which these particulars will be incorporated into the NPR as a means of registering such birth or death in terms of section 5(2). The BDRA is accompanied by Regulations on the Registration of Births and Deaths which came into effect on 1 March 2014. The BDRA and Regulations apply to all South African citizens and any person who resides in the country either permanently or temporarily.⁹³ This process includes sex on the official form that parents must fill out when a child is born. If not filled out, the form is defective. This forces parents to assign a sex/gender to their new-born child.

The BDRA makes provision for a forename change⁹⁴ using the DHA-85 Application Form. Regulation 16(2) stipulates that a person can only change their forename(s) once they can prove exceptional circumstances, or that they were a child at the time when the initial amendment was made⁹⁵. Once forenames and surnames are amended, they are published in the Government Gazette. The BDRA and its accompanying Regulation also allows for a sex descriptor (interchangeably referred to as a gender marker) change⁹⁶ using the DHA-526 Application Form. When a "sex descriptor" change is done in terms of sections 2 and 3(1) of Act 49, section 27A of the BDRA and regulation 19 of the Regulations on the Registration of Births and Deaths of 2014, such change ultimately needs to be reflected in the NPR. This is done in accordance with sections 7 and 8 of the Identification Act 68 of 1997.

In accordance with section 7(2) of the BDRA, if the particulars originally submitted at birth are not correctly reflected then a person may apply for such particulars to be changed through supplementation and correction. The effect of a successful application in terms of Act 49 results in the NPR being corrected to reflect a person's affirmed gender and/or chosen name.

⁹⁰ Argentina's Gender Identity Law No. 26.743 of 2012.

⁹¹ Malta's Gender Identity, Gender Expression and Sex Characteristics Act CAP. 540 (14 April 2015) available at: <https://www.refworld.org/docid/5d36fbc57.html> (accessed 17 November 2020).

⁹² Supra 6.

⁹³ Birth and Deaths Act 51 of 1992 at section 2.

⁹⁴ Act 51 of 1992 at section 24 and Regulations on the Registration of Births and Deaths of 2014 at regulation 16.

⁹⁵ Regulations on the Registration of Births and Deaths of 2014 at regulation 16(2).

⁹⁶ Act 51 of 1992 at section 27 & Regulations on the Registration of Births and Deaths of 2014 at regulation 19.

5. Situating Legal Gender Recognition for trans and gender diverse identities and expressions within South Africa’s Human Rights and Transformative Constitutionalism Discourse

At present, South Africa does provide access to gender marker and name changes subject to a number of barriers and limitations as outlined above. As a historic leader in the realm of LGBTI+ rights, the country once more has an opportunity to set global precedent by aligning constitutionalism and human rights for the realisation of dignity, equality and freedom of trans and gender diverse persons. This section discusses the different instruments applicable to shaping the future of legal recognition for trans and gender diverse persons in the country.

The lived realities of transgender and gender diverse persons crosscut a range of issues in the context of legal recognition and therefore various human rights must be discussed. Human rights are not divisible and disconnected and therefore should, at all times, be read and interpreted relationally. To this extent, different constitutional rights are discussed in this section.

5.1. South African Constitution

The South African Constitution is the supreme law of the Republic and cornerstone of our democracy.¹⁰⁰ It is binding and imposes certain obligations on all three organs of the state, namely the legislature, executive and judiciary. The obligations must be fulfilled as a means to promote its spirit, purport and objects.¹⁰¹ In so doing, the Constitution also requires that all law, including common and customary law, be developed whenever they are inconsistent with the democratic values of human rights to dignity, equality and freedom in an open and democratic society.¹⁰² As the Constitution guarantees a range of elaborate human rights for all people falling within the country’s jurisdiction, any law or conduct that is inconsistent with its aspiration are considered invalid.¹⁰³ While all human rights must be respected and protected, certain human rights such as the right to equality, dignity, life, freedom and security of the person, children’s rights and the rights of arrested and detained persons are defined as non-derogable rights.¹⁰⁴ This means that these rights cannot be taken away from a person, nor can they be compromised. In considering the binding nature of the Constitution on all three organs of state, it also provides for the consideration of international law when interpreting the rights contained in the Bill of Rights. Foreign law may be consulted and incorporated based on judicial discretion.¹⁰⁵

South Africa’s Constitution is charged with enacting social transformation, also called “transformative constitutionalism”.¹⁰⁶ This is a long-term commitment to the use of the Constitution to transform South African society from a past marked by inequality and discrimination, to a future characterised by equality of access to resources and respect for human dignity.¹⁰⁷ Thus, transformative constitutionalism, in the words of the former Chief Justice of the Constitutional Court Pius Langa, requires change, sometimes incremental and at other times radical. The change is presaged in the epilogue to South Africa’s interim constitution, which describes the constitution as:

^{100.} Supra 11 at section 2.

^{101.} Supra 11 at sections 8 and 39(1)(a).

^{102.} Supra 11 at sections 7(1), (2), 8(3) and 39(2).

^{103.} Supra 11 at section 2.

^{104.} Supra 11 at section 37(5).

^{105.} Supra 11 at section 39(1)(b) and (c).

^{106.} See Langa P JA ‘Transformative Constitutionalism’ (2006) 17 Stellenbosch Law Review 351 – 60.

^{107.} Ibid at 352.

*A historic bridge between a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans irrespective of colour, race, class, belief or sex.*¹⁰⁸

The transformative power of the Constitution can be seen in the decriminalisation of same-sex consensual conduct,¹⁰⁹ the extending of adoption and inheritance rights to same-sex couples¹¹⁰ and marriage rights for same-sex couples,¹¹¹ legislated in the form of the Civil Union Act 17 of 2006. Trans and gender diverse persons and communities across South Africa once more look to transformative constitutionalism to secure dignity, equality and freedom by fully recognising them beyond the binary model of gender and in doing so, eliminating the social stigma and inequalities that the current pathologising model of legal gender recognition proliferates.

5.2. Freedom, Human Dignity and Equality

The rights to human dignity, equality and freedom are not only human rights. They are also foundational values and principles underpinning the Constitution, binding a pluralistic (different and diverse) society.¹¹² The effect of these rights, values and principles allows for the legal recognition, respect and protection of minority groups. Together they seek to ensure that all South Africans and all those who live in the country can peacefully coexist, be seen and be counted despite the differences they embody. The combined effect of these three human rights is not only directed towards securing formal equality (equality on paper) but also the emergence, development and entrenchment of substantive equality (true equality of outcome). At present the current state of legal gender recognition for transgender and gender diverse persons reflects neither formal let alone substantive equality because of the inequality that is perpetuates for transgender and gender diverse persons, as well as the poor outcomes of legal gender recognition narrated above.

5.2.1. Right to Freedom

The extent to which a person or community is able to enjoy freedoms and equality is a measuring stick of the extent to which they are able to enjoy their human dignity. Particular to this *Position Paper*, freedom is constitutionally defined as:

- i. The right to be free from all forms of violence from either public or private actors.¹¹³ This also includes freedom from institutional and structural forms of violence driven by state organs and functionaries. The current law on legal gender recognition in South Africa promotes a binary model of gender and justifies state policing of trans and gender diverse persons through medical requirements. This acts contrary to the right to freedom from all forms of violence and in effect has degrading and dehumanising outcomes for trans and gender diverse persons.

¹⁰⁸. Loc cit.

¹⁰⁹. *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* (CCT11/98) [1998] ZACC 15; 1999 (1) SA 6; 1998 (12) BCLR 1517 (9 October 1998).

¹¹⁰. *Du Toit and Another v Minister of Welfare and Population Development and Others* (CCT40/01) [2002] ZACC 20; 2002 (10) BCLR 1006; 2003 (2) SA 198 (CC) (10 September 2002).

¹¹¹. *Minister of Home Affairs and Another v Fourie and Another* (CCT 60/04) [2005] ZACC 19; 2006 (3) BCLR 355 (CC); 2006 (1) SA 524 (CC) (1 December 2005).

¹¹². Supra 11 at section 12(1).

¹¹³. Supra 11 at, section 12(2).

- ii. The right to bodily and psychological integrity which includes the right to make decisions concerning one's reproduction, security and control over one's body and not to be subjected to medical and scientific experiments without one's consent.¹¹⁴ The impact of the current biomedical model is such that by requiring and therefore forcing all trans and gender diverse persons to undergo medical or surgical 'treatment', it compromises their bodily and psychological integrity. In doing so the law effectively denies trans and gender diverse people in South Africa the right to exercise autonomous control over their bodies in ways that they deem fit. The right to gender self-determination and autonomous control over one's body is incompatible with a requirement for medical and/or surgical care in the process of social and legal affirmation.
- iii. The right to freedom of expression¹¹⁵ is equally critical in the context of this paper. As confirmed in the case of *September v Subramoney*, the Western Cape High Court held that the right to express one's gender identity enjoys constitutional protection. Specifically, Fortuin J stated:

*The infringement of the right to freedom of expression is particularly severe when it is connected to another constitutional right such as the right to freedom of culture or religion. In this case, it is linked to the rights to dignity and equality. The applicant's choice of clothing is not merely an expression of taste or fashion but the expression of her basic gender identity.*¹¹⁶

5.2.2. Right to Human Dignity

Section 10 of the Constitution ensures the right to human dignity. It states that: "Everyone has inherent dignity and the right to have their dignity respected and protected".¹¹⁷ This right is expansive because dignity could be interpreted broadly in relation to many aspects of human life.

As highlighted by Fortuin J, the rights to dignity and equality act as important central reference and foundational points in understanding the ways in which other human rights listed in the Constitution are to be enjoyed. Human dignity is inherent and cannot be ceded, lost or given away. It can, however, be disrespected or denied in the way in which individuals or classes of persons are treated in society. This can result in people or whole communities feeling as though they have no dignity, or that their dignity is not worthy of the protection of the law. Nowhere else is it more apparent than in the bureaucratic processes and narrow conceptualisation of gender in terms South African law pertaining to gender recognition. Trans and gender diverse persons have inherent human dignity. However, the effects of the law are such that it inheres a very real feeling of having no dignity for both the individual and communities. The government of South Africa therefore carries a responsibility to promote human dignity by enacting laws that not only allow for the recognition of trans and gender diverse persons but that allow for this recognition aligned with affirmation on the basis of self-actualisation.

¹¹⁴ Supra 11 at, section 12(2).

¹¹⁵ Supra 11 at section 16.

¹¹⁶ Supra 6 at paragraph 114.

¹¹⁷ Supra 11 at section 10.

Article 5 of the African Charter on Human and Peoples' Rights (ACHPR) also speaks to ensuring the dignity of all individuals:

*[e]very individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status...*¹¹⁸

The ability to ensure that one's official identity documents reflect one's gender identity is instrumental in promoting the right to dignity. Embodying the right to dignity should thus include the ability of a person to change their gender marker both within and outside of the gender binary model depending on the person's individual choice, without having to furnish medical evidence and without being subjected to invasive procedures that seek to police and (in)validate the right of trans and gender diverse persons to a legal identity that affirms who they are.

5.2.3. Right to Equality

The extent to which a person is able to enjoy their inherent right to human dignity is often measured by the extent to which they are able to exercise and enjoy their right to equality and freedom. South Africa's discourse of transformative constitutionalism is concerned with both equality on paper and equality of outcome. Over and above formal equality, equality of outcome is a safeguard for the right to human dignity. Equality of outcome means the ability of a person and community to fully experience equality in their everyday life. Trans and gender diverse persons who continue to experience high levels of social stigma, discrimination and brutal violence as a result of structural and systemic exclusion and hate motivated crimes do not at present experience this in South Africa. The Constitutional Court of South Africa uses a discourse of substantive equality which takes into account the structural inequalities in society that contribute to the economic, political and social marginalisation of people, and uses this analysis as an opportunity for redress.¹¹⁹ This outcome of gender equity redress is what this Position Paper seeks to achieve.

The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, also known as the Equality Act or the PEPUA, drives the implementation of Section 9, the Equality Clause, of the Constitution. The preamble, reaffirmed in section 4(2) of the Act, provides:

The consolidation of democracy in our country requires the eradication of social and economic inequalities, especially those that are systemic in nature, which were generated in our history by colonialism, apartheid and patriarchy, and which brought pain and suffering to the great majority of our people;

Although significant progress has been made in restructuring and transforming our society and its institutions, systemic inequalities and unfair discrimination remain deeply embedded in social structures, practices and attitudes, undermining the aspirations of our constitutional democracy;

*The basis for progressively redressing these conditions lies in the Constitution which, amongst others, upholds the values of human dignity, equality, freedom and social justice in a united, non-racial and non-sexist society where all may flourish*¹²⁰

The PEPUA provides for measures and procedures to facilitate access to courts in order to prevent and address discrimination. Section 6 of the PEPUA provides for a general prohibition against unfair discrimination and reiterates that "... neither the State nor any person may unfairly discriminate against any person."

¹¹⁸. Universal Declaration of Human Rights (1948) at article 1.

¹¹⁹. International Covenant on Civil and Political Rights (1966).

¹²⁰. International Covenant on Economic, Social and Cultural Rights (1966).

Section 7 (prohibition of unfair discrimination on the ground of race), section 8 (prohibition of unfair discrimination on ground of gender), section 9 (prohibition of unfair discrimination on the ground of disability), section 10 (prohibition of hate speech) and section 11 (prohibition of harassment) all address specific listed grounds of discrimination. Section 12 addresses the prohibition of the dissemination and publication of information that unfairly discriminates.

By acknowledging the oppressive history that the majority of people in South Africa have had to endure, the PEPUA is built on a corrective and restorative justice model that aims to ensure that everyone in South Africa is able to enjoy their human rights and associated freedoms fully.¹²¹ The preamble places a special duty on the state to advance human rights for historically disadvantaged individuals, communities and social groups who may have been deprived of their human dignity and who continue to endure such consequences. To ensure redress the state must put in place special legal and other measures to achieve substantive equality.¹²² The PEPUA also places a duty on all persons, non-governmental organisations, community-based institutions and traditional institutions to promote equality.¹²³

The PEPUA outlines the test for unfair discrimination and looks at the overarching aspects of discrimination. These are:

- i. The nature of the power that enables discrimination; and
- ii. The nature of the interests that have been affected by the discrimination.

In order to establish whether the discrimination experienced by a person or group of people is justified or unfair, the PEPUA provides for a whole range of factors to be taken into account. Section 14 of the PEPUA states that the nature of discrimination needs to be determined within the context in which it is situated. The PEPUA provides that for discrimination to be considered fair, the differentiation must be reasonable and justifiable in lieu of objectively determinable criteria. In determining whether an act or omission amounts to unfair discrimination, the PEPUA necessitates that the following factors be taken into account:¹²⁴

- i. The impact of the discrimination on the complainant and whether a person or community's human dignity has been impaired.
- ii. The position of the complainant in society, which includes whether they have suffered in the past due to patterns of disadvantage and whether discrimination is alleged on the basis of a listed ground or not.
- iii. The nature and extent of the discrimination, whereby a determination is to be made whether the discrimination is systemic in nature, whether it has a legitimate purpose, whether such purpose can be achieved through the discriminatory act or not, and whether or not there are less restrictive means to achieve the purpose of the discriminatory act.
- iv. The respondent must prove that it has taken reasonable steps to accommodate diversity and address the disadvantage that is alleged on the basis of or linked to one of the prohibited grounds of discrimination.
- v. In the case of the State, it must show that it has with the help of relevant institutions, developed and enacted a legislative framework and action plans in alignment with the objectives of PEPUA [to govern the particular matter].¹²⁵

¹²¹. African Charter on Human and Peoples' Rights "Banjul Charter" (1982).

¹²². De Vos P 'Same-Sex Sexual Desire and the Re-Imagining of the South African Family' (2004) 20 (2) *South African Journal on Human Rights* 184.

¹²³. Promotion of Equality and Prevention of Unfair Discrimination (PEPUA) Act 4 of 2000 at section 4(2).

¹²⁴. Ibid at section 2 and 4(1)(d).

¹²⁵. Ibid at section 25(1)(c)(ii).

In the light of Act 49, a surface level analysis of access to equality reveals that trans and gender diverse persons are required to medically prove that they are trans and gender diverse within a binary schema of gender in operation before an application will even be considered by the DHA. Such onus is not bestowed on cisgender people, who may continue to live uninterrupted and unquestioned lives as relates to their gender identity. There is clearly a distinction between the processes that define legal gender recognition for trans and gender diverse persons and those for cisgender people. Such distinction is based on the assumption that all people are cisgender. Thus, as a means to maintain cisnormativity, Act 49 subsequently details an onerous and bureaucratic process for legal gender recognition only for trans people who must either identify in or submit to the disciplinary power of the binary categories of gender available to the exclusion of those who do not identify as such. Such processes do not apply to cisgender people, which results in differential treatment. Furthermore, such differentiated treatment amounts to discrimination on the basis of gender identity and cannot be justified as fair discrimination because the group that is subject to such unfair discrimination has a history of marginalisation, social exclusion and oppression. The current legal framework as it relates to legal gender recognition for trans and gender diverse persons is therefore not constitutionally sound.

Over the years GDX and LRC have consistently highlighted their concerns regarding the state of legal gender recognition in South Africa, the various challenges it gives rise to and the adverse impact which it has on trans and gender diverse communities.¹²⁶ To this extent, the organisations, alongside leading allies such as LHR, have successfully sued both the DHA and Department of Correctional Services (DCS) on the basis of enforcing equality claims as a result of government departments breaching their constitutional duties in this regard.¹²⁷ Though access to the courts is a constitutional right, it is extremely costly in terms of time and resources. Litigation is never the ideal root to take in securing basic dignity, equality and freedom for people. As civil society, this is an absolute last resort, which is typically opted for only when all other administrative internal remedies have failed.¹²⁸ Generally, we hold an express expectation, like any other social actor, that the administration will act within the parameters of the law and in alignment with the promotion of the spirit, purport and object of the Bill of Rights¹²⁹ and that Parliament apply constitutionally-sound visionary leadership in creating an enabling legal landscape for social equity to be enjoyed by all.

5.3. Right to Healthcare

Everyone in South Africa has the right to healthcare including the right to reproductive healthcare.¹³⁰ The Constitution places an obligation on the state to take reasonable legislative steps and other measures to progressively realise the right to healthcare within its available resources. By virtue of the state requiring bio-medical evidence to support a person's application for a gender marker change, it would also be both logical and reasonable that the state provide access to gender affirming healthcare to all trans and gender diverse persons across the country. Not making adequate provision for this leads to the state actively depriving trans and gender diverse persons of dignity by making the prospect of legal recognition impossible.

¹²⁶ Ibid at section 2(7).

¹²⁷ Ibid at section 14.

¹²⁸ Ibid at section 24(c).

¹²⁹ CoRMSA 'Closure of refugee reception offices in metro areas' *Gender DynamiX on Alteration of Sex Description & Sex Status Act Implementation; Lawyers for Human Rights on Statelessness for the Parliamentary Monitoring Group* available at: <https://pmg.org.za/committee-meeting/15305/>

¹³⁰ Supra 5.

In South Africa, accessibility to and uptake of gender affirming healthcare is estimated at 57% for access to hormones, and 38% for surgical gender affirmation.¹³¹ These are considered conservative estimates and do not even account for the many trans and gender diverse persons situated in rural and peri-urban contexts far removed from the tertiary academic hospitals, which currently provide this healthcare. At present there are two dedicated trans health clinics: one situated at Groote Schuur Hospital and the other at Steve Biko Academic Hospital. Hospitals such as Baragwanath also offer gender affirming services but they do not have a dedicated multi-disciplinary team and, as such, services are limited. Overall access to hormonal gender affirmation is only available in four out of South Africa's nine provinces and surgical gender affirmation is even less widely available. Moreover, the waitlist for surgical gender affirmation, where it is available, is massively prohibitive, for instance, current estimates at Groote Schuur are beyond 20 years¹³². Other factors hampering the accessibility of gender affirming healthcare include:

- i. Financially under-resourced healthcare facilities;¹³³
- ii. Limited healthcare practitioners who are sensitised and clinically competent to provide care to trans and gender diverse persons;¹³⁴
- iii. Periodical stock out of gender affirming hormones;¹³⁵
- iv. The limited amount of theatre time allocated for gender affirming surgeries;¹³⁶
- v. Non-existent National Guidelines on Gender Affirming Healthcare;¹³⁷
- vi. Primary healthcare facilities and practitioners are not equipped to render gender affirming medical care;¹³⁸
- vii. Medical aid schemes expressly preclude transgender medical and surgical care from their out of hospital benefits lists;¹³⁹
- viii. Transgender healthcare is seen to be cosmetic and elective as opposed to lifesaving and medically necessary;¹⁴⁰
- ix. Under-prioritisation of sexual and reproductive health of trans and gender diverse persons, amongst others.¹⁴¹

¹³¹. Müller A, Daskilewicz K & Southern and East African Research Collective on Health 'Are We Doing Alright? Realities of Violence, Mental Health, and Access to Healthcare Related to Sexual Orientation and Gender Identity and Expression in East and Southern Africa: Research Report Based on a Community-Led Study in Nine Countries.' (2019) 61.

¹³². See Koch JM et al 'The Cost of Being Transgender: Where Socio-Economic Status, Global Health Care Systems, and Gender Identity Intersect' (2020) 11 *Psychology & Sexuality* 103 – 119.

¹³³. See Müller A 'Health for All? Sexual Orientation, Gender Identity, and the Implementation of the Right to Access to Health Care in South Africa' (2016) 18 (2) *Health and Human Rights* 195–208.

¹³⁴. See Jacob M & Cox SR 'Examining Transgender Health through the International Classification of Functioning, Disability, and Health's (ICF) Contextual Factors' (2017) 26 (12) *Quality of Life Research: An International Journal of Quality of Life Aspects of Treatment, Care and Rehabilitation* 3177–85.

¹³⁵. GroundUp 'Stockout of Testosterone Injections Used by Transgender' *Daily Maverick* 7 February 2019. available at: <https://www.dailymaverick.co.za/article/2019-02-07-stockout-of-testosterone-injections-used-by-transgender-people/>.

¹³⁶. Wilson, Don, Adele Marais, Arnaud de Villiers, Ron Addinal, and MM Campbell. 2013. 'Transgender Issues in South Africa, with Particular Reference to the Groote Schuur Hospital Transgender Unit' 104 (6): 449–51..

¹³⁷. Spencer S, Meer T & Müller A "The Care Is the Best You Can Give at the Time": Health Care Professionals' Experiences in Providing Gender Affirming Care in South Africa' (2017) 12 (7) available at <https://doi.org/10.1371/journal.pone.0181132>.

¹³⁸. Müller A 'Teaching Lesbian, Gay, Bisexual and Transgender Health in a South African Health Sciences Faculty: Addressing the Gap' (2013) 13 (1) *BMC Medical Education* 174-181.

¹³⁹. McLachlan, Chris/tine. 2019. 'Que(e)ring Trans and Gender Diversity' (2019). *South African Journal of Psychology* 49 (1): 10–13.

¹⁴⁰. Bateman, Chris. 'Transgender Patients Sidelined by Attitudes and Labelling' (2020) *South African Medical Journal* 101 (2): 91–93.

¹⁴¹. Luvuno ZPB, Ncama B & Mchunu G 'Transgender Population's Experiences with Regard to Accessing Reproductive Health Care in Kwazulu-Natal, South Africa: A Qualitative Study' (2019) 11 (1) *African Journal of Primary Health Care & Family Medicine*.

At present, South Africa's public healthcare policy places gender affirming care at a tertiary healthcare level. The focus should be to decentralise this model of care to make it more accessible to the majority of trans and gender diverse persons at a primary healthcare level. At present, trans and gender diverse persons requests around access to gender affirming medical care are two-fold in that:

- i. Legal gender recognition be demedicalised and depathologised;¹⁴² whilst
- ii. Gender affirming healthcare systems be decentralised to primary healthcare levels to make care more accessible to trans and gender diverse persons.

5.4. Right to Just Administrative Action

Government departments carry a responsibility of ensuring efficient administration.¹⁴³ As a means to hold government departments accountable for their administrative actions and to ensure that such actions are just, the Constitution guarantees everyone the right to administrative action that is lawful, reasonable and procedurally fair.¹⁴⁴ It places an onus on state departments to furnish a person with written reasons within stipulated time frames whenever a decision has been taken which negatively impacts a person. This has a particular bearing on issues concerning the refusal of the DHA to issue gender marker and name changes, as has been highlighted, or the violation of other rights, such as the right to marry and remain married, as in the case of *KOS v Minister of Home Affairs*, when administering legal recognition legislation.

The Promotion of Administrative Justice Act 3 of 2000 (PAJA) gives effect to section 33 of the Constitution and is a law that guides the parameters of power entrusted to the organs of state to ensure efficient administration. It outlines clear measures to ensure that organs of state are accountable for their administrative action. This includes judicial review. Just administrative action revolves around four key pillars:

- i. Lawfulness;
- ii. Reasonableness;
- iii. Procedural Fairness; and
- iv. The Right to Receive Written Reasons.¹⁴⁵

The PAJA ensures that government departments always act within the scope of the law, in a manner that is reasonable, following fair procedure and providing reasons for its actions when such actions negatively impact a party. All laws, regulations, systems and processes to be conceptualised and implemented must adhere to these pillars as a way to maintain constitutional alignment. The *KOS* matter is an example of how the DHA is ill-equipped to deal with issues concerning trans and gender diverse persons. Furthermore, it suggests that the DHA, under these circumstances, is more prone to engage in unlawful and unjust administrative action as opposed to realigning its regulations, systems and processes to be constitutional.

5.5. Right to Privacy

The right to privacy is concerned with not having one's personhood, home, property and communication unlawfully infringed upon without a valid warrant for search and seizure, for example.¹⁴⁶ The right to privacy also entails the right to have personal particulars protected and kept confidential especially if there is a risk that such information may prejudice a person. When trans or gender diverse persons elect to change their gender marker and/or first name, it is important to keep particulars of such amendments confidential as it may result in social stigma and discrimination and targeting for hate crimes. In politically repressive times, it may also expose trans and gender diverse persons to attacks from governments who may seek to clamp down on human rights. The current requirement of publishing name changes in the Government Gazette troubles this process. Legal protections for trans and gender diverse persons must include putting in place the necessary buffers to protect privacy and confidentiality.

¹⁴² Castro-Peraza ME et al. 'Gender Identity: The Human Right of Depathologization' (2019) 16 (6) *International Journal of Environmental Research and Public Health* 978–89.

¹⁴³ Supra 11 at section 33(3)(c).

¹⁴⁴ Supra 11 at sections 33(1) and (2).

¹⁴⁵ Supra 11 at section 33 and Promotion of Administrative Justice Act 3 of 2000 at preamble.

¹⁴⁶ Supra 11 at section 14.

5.6. Rights of Refugees and Asylum Seekers

The Refugees Act makes clear that South Africa offers asylum to transgender people as members of a particular “social group”.¹⁴⁷ Section 21(3) states that every asylum applicant, including his or her spouse and dependants, must have their biometrics taken in the prescribed manner at the time of application. Upon application, an asylum seeker/refugee must be furnished with written documentation that confirms that they have applied for asylum and their status in this process. These documents are the primary identification documents for asylum seekers and refugees in South Africa issued by the DHA. These are the identification documents issued from the operation of the Refugees Act:

- The initial identification document issued to an asylum applicant is now called the asylum seeker visa following the Refugees Amendment Act. This asylum visa is issued in terms of section 22(1) of the Refugees Act to a person whose application has not been adjudicated on. This document is extended from time to time until a decision is made on the application for asylum.¹⁴⁸
- Once the application for asylum is made, the Refugee Status Determination Officer must interview the applicant and make a decision. One of the decisions that can be made is to grant asylum in terms of section 24(3)(a) of the Refugees Act - at this stage, the applicant becomes what is commonly referred to as a recognised refugee. Formal written recognition is then granted to a recognised refugee.¹⁴⁹
- A recognised Refugee is entitled to an “identity card or document similar to a South African identity card or document”.¹⁵⁰

During the public Parliamentary hearings in 2003, two separate submissions were made regarding the inclusion of refugees and asylum seekers in the scope and application of Act 49.¹⁵¹ At the time, when the Bill was discussed, it was suggested that the Bill should provide a mechanism for legal gender recognition for non-South African residents. The discussion did not deal at all with the different categories of non-South African residents and how the new law could possibly apply to them. In the compromise that was reached to have the Act passed with urgency, as mentioned earlier, the rights to accurate identification documents of refugees, asylum seekers and anyone else not appearing in the population register were sacrificed.

While there is nothing in the application Act 49 which stipulates that it only applies to South African citizens and permanent residents, its focus on amending information captured in the Birth Register and the Identification Act limits its application. As the DHA would only have birth registers for South African citizens and permanent residents, Act 49 therefore only applies to these persons. In addition to this limitation, Act 49 does not make specific reference to refugees and asylum seekers. There is therefore no mechanism available for the attainment of legal gender recognition for trans and gender diverse persons who have either applied for asylum and are waiting for a decision to be made, or those who have been granted refugee status in South Africa.¹⁵²

Currently the process of applying for asylum in South Africa is lengthy, with some applicants waiting 10–19 years for status determination.¹⁵³ This is a long time for a person to be without legal gender recognition. In some instances, this has led to arrest and detention of transgender refugees and asylum seekers because their documents, indicating a different gender from the one which they present as, have been taken as an indication of fraud.¹⁵⁴ There is therefore a critical need to ensure that trans and gender diverse persons who are also refugees and asylum seekers are able to access legal gender recognition while in South Africa.

¹⁴⁷. Refugees Act 130 of 1998 at section 3(a).

¹⁴⁸. Ibid at section 22(4).

¹⁴⁹. Ibid at section 27(a).

¹⁵⁰. Ibid at section 30.

¹⁵¹. Parliamentary Monitoring Group Alteration of Sex Description and Sex Status Bill: Hearings (9 September 2003) available at <https://pmg.org.za/committee-meeting/2832/>.

¹⁵². Camminga B ‘Categories and Queues: The Structural Realities of Gender and the South African Asylum System’ (2017) 4 (1) *TSQ: Transgender Studies Quarterly* 61–77.

¹⁵³. Small MK ‘Is the Global Compact on Refugees Fit for Africa’s Purpose’ 2019 *South African Institute of International Affairs* 22.

¹⁵⁴. See Camminga B ‘Shifting in the City: Being and Longing in Cape Town’ in Matebeni Z & Camminga B (eds) *Beyond the Mountain: Queer Life in Africa’s ‘Gay Capital’* (2019) 60–70.

5.7. The Rights of the Child

The best interest of the child is of paramount importance in every matter concerning the child and this includes matters in which a trans or gender diverse child seek to affirm their gender identity and express it without fear. The Constitution defines a child as any person under the age of 18 years.¹⁵⁶ With this in mind, different pieces of South African legislation provides different ages for either partial or full consent of the child.

Most often gender affirmation is thought of from the perspective of adults. Gender affirmation matters to all trans and gender diverse identifying persons including children, whether pre-adolescent or adolescent.¹⁵⁷ It matters to varying degrees as children have different needs and expectations regarding gender affirmation, informed by their age and bodily development as well as their definition and understanding of self. From the perspective of bodily development, pre-adolescent children may only require support with social and legal affirmation, whereas adolescent teens may require support with legal gender affirmation, social gender affirmation and medical gender affirmation in the form of hormonal blockers and/or hormonal replacement care. For both children and adults, legal gender recognition should not be dependent on access to and uptake of gender affirming medical and/or surgical care, as Act 49 requires. Each person's path to gender affirmation is different.

As we stated earlier, a child is any person below the age of 18 years.¹⁵⁸ Every person under the age of 18 years is thus considered to be a legal child with limited capacity, requiring the assistance of a parent or legal guardian. There are however exceptions to this general rule, based on its recognition of the evolving capacity of children, that allow for a child to consent independently.¹⁵⁹ These considerations are important in deciding on how to define the age of consent for children in relation to obtaining legal gender recognition.

While Act 49 does not set any limitation on the age of who can apply for a gender marker change, its mandatory reliance on medical reports completely hinders children's access to legal recognition. Trans and gender diverse children will require parental consent to affect such change after accessing gender affirming medical and surgical care as required by Act 49. Age of consent in this sense thus stands in contradiction with the lowered age of consent of 12 years for medical treatment such as the choice of termination of pregnancy, HIV testing and treatment and access to contraceptives and counselling.¹⁶⁰ With limited capacity to consent, a high likelihood of not getting parental consent, limited access to gender affirming medical care and as a result of Act 49 being medicalised, trans and gender diverse children are left with little to no legal recourse to legally affirm their gender identity.

The right of the child to participate in any matter concerning the child must be respected and protected at all times and this also applies to trans and gender diverse children.¹⁶¹ Decision-making with or about the child and the right to participate is guided by what is in the best interest of the child. Section 7 of the Children's Act 30 of 2005 provides the standard to ascertain the best interest of the child in any matter concerning the child, by taking into account the following factors, amongst others:

^{156.} Supra 11 at section 28(3).

^{157.} Gender DynamiX, Iranti & Southern Africa Trans Forum 'Amplifying Trans and Gender Diverse Voices from Southern Africa: National Youth Day conversation' 7th Podcast (16 June 2020) available at: <https://youtu.be/0f3fb4gUQa8> (accessed 26 June 2020)

^{158.} Children's Act 38 of 2005 at section 17.

^{159.} Ibid at sections 129 to 133.

^{160.} Ibid at sections 129 to 134.

^{161.} Ibid at section 10.

- i. Nature of the relationship between the child and parent(s) or caregiver;
- ii. Attitude of parent(s) towards child;
- iii. Capacity of parent(s) to provide for the child, including emotional and intellectual needs;
- iv. Child's age, gender, maturity and stage of development;
- v. Emotional and physical security and intellectual, emotional, social and cultural development;
- vi. Protection of child against any form of physical or psychological harm.¹⁶²

With regard to the exceptions that exist for age of consent, the Children's Act provides that a child aged 12 years and above may consent to medical treatment if they have sufficient maturity and the mental capacity to understand the benefits, risks, social and other implications of the treatment.¹⁶³ If the child is not found to be of a sufficient age of maturity, then a child must obtain the consent of the parent, guardian or caregiver. The Choice of Termination of Pregnancy Act 92 of 1996 provides that a child, which is defined as any girl under the age of 18 years, may not be denied the right to terminate a pregnancy, even when electing not to inform her family.¹⁶⁴ Though the Choice of Termination of Pregnancy Act is used here as an example of legislation which promotes the right to bodily autonomy of children, it must be noted that the Act also overlooks the realities that sexual and reproductive rights, such as termination of pregnancy, might also apply to young transgender men who may find themselves in similar positions to young cisgender girls or women.¹⁶⁵

Lowering the age of consent for medical and surgical procedures should also allow for trans and gender diverse children to initiate gender affirming medical and surgical care in instances where consent from parents and legal guardians is denied. This would be similar to allowing children access to contraceptives without the consent of a parent or legal guardian subject to the child being provided with proper medical advice and where a medical examination finds that there is no reason it cannot be provided.¹⁶⁶ This is further reinforced by the Children's Act, which provides that in the case of HIV testing and access to Pre-Exposure Prophylaxis (PrEP), a child can consent to such testing or request for PrEP if the child is aged 12 years and above or if the child is under the age of 12 years and is proven to have sufficient maturity to understand the risks, benefit, social and other implications of the act.¹⁶⁷ The age of consent for sexual intercourse in South Africa, regardless of sexual orientation and legal sex, is 16 years. The Children's Act and Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 also set the age threshold for the presumption of consent at 12 years, where any child under 12 years is deemed "incapable in law of appreciating the nature of the sexual act"¹⁶⁸ and therefore cannot consent to any sexual act, rendering any form of consent null and void.

The age of consent for different acts varies in South Africa; however, what the different pieces of legislation hold in common is a centering of the best interest of the child. It stands to reason that if a child can and ought to be able to consent to certain medical and surgical procedures, it would seem that a less invasive process, such as a name and/or legal gender marker change, should not be limited or excluded by the requirement of parental consent. Moreover, in the same way as a child's HIV status may not be disclosed to any party other than the one who provided consent, in this case the child themselves, this principle of confidentiality would also apply to trans and gender diverse persons who embark on any process of socially, medically or surgically affirming their gender.¹⁶⁹

¹⁶². Ibid at section 7.

¹⁶³. Ibid at section 129.

¹⁶⁴. Choice of Termination of Pregnancy Act 92 of 1996 at section 5.

¹⁶⁵. See Obedin-Maliver J & Makadon HJ 'Transgender Men and Pregnancy' (2016) 9 (1) *Obstetric Medicine* 4–8.

¹⁶⁶. Supra 161 at section 134(2).

¹⁶⁷. Supra 161 at section 129.

¹⁶⁸. Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 at section 1 (3)(d).

¹⁶⁹. Supra 161 at section 133.

5.8. Rights of Detained and Sentenced Persons

The Constitution provides that every detainee or sentenced person has a right to conditions of detention that are consistent with human dignity. This includes access to adequate accommodation and medical treatment at state expense.¹⁷⁰ Obtaining legal gender recognition is a problematic issue in the criminal justice system. At present it remains unachievable. Moreover, gender affirming healthcare remains inaccessible to trans and gender diverse persons. This issue was highlighted in the case of *September v Subramoney*.

The case was brought by Jade September, a South African trans woman, serving a prison sentence in a male prison, against the Department of Correctional Services (DCS) because they had refused to allow her the ability to express her gender identity while incarcerated. She was harassed by prison officials for being transgender and prevented from expressing her gender. She was forced to cut her hair and prohibited from wearing make-up, jewellery and gender-affirming underwear. Prison staff refused to address September as a woman and use she/her pronouns. She was also placed in segregated confinement as punishment for her behaviour.¹⁷¹

As noted, the *Yogyakarta Principles* play a major role in aligning international human rights interpretations and standards to the lived realities of trans and gender diverse persons.¹⁷² In arguing the case in favour of September, counsel relied on *Principle 9 of the Yogyakarta Principles*, which requires the state to:

- i. Ensure to the extent possible, that all prisoners participate in decisions regarding the place of detention appropriate to their sexual orientation and gender identity.
- ii. Put protective measures in place for all prisoners vulnerable to violence or abuse on the basis of their sexual orientation, gender identity or gender expression and ensure, so far as is reasonably practicable, that such protective measures involve no greater restriction of their rights than is experienced by the general prison population;
- iii. Undertake programmes of training and awareness-raising for prison personnel and all other officials in the public and private sector who are engaged in detention facilities, regarding international human rights standards and principles of equality and non-discrimination, including in relation to sexual orientation and gender identity.¹⁷³

The case held that a lawfully imprisoned transgender woman has the right to express her gender identity and be recognised for who she is. As a part of the ruling,

*the Court declared the prison's operating procedures that prevent transgender inmates from expressing their gender to be unconstitutional. It ordered that September be allowed to express her gender in prison and be addressed as a woman. The judge also provided an option for September to be transferred to a prison space designated for females.*¹⁷⁴

¹⁷⁰ Supra 11 at section 35(2)(e).

¹⁷¹ Patel N 'In South Africa, a Trans Inmate Fought the State in Court And Won.' (2019) *African Arguments* (blog) available at <https://africanarguments.org/2019/10/02/in-south-africa-a-trans-inmate-fought-the-state-in-court-and-won/>.

¹⁷² Ettelbrick L & Zeran AT 'The Impact of the Yogyakarta Principles on International Human Rights Law Development: A Study of November 2007 – June 2010' (2010) available at https://www.asiapacificforum.net/media/resource_file/Yogyakarta_Principles_Impact_Human_Rights_Law.pdf

¹⁷³ Supra 6 at paragraph 98.

¹⁷⁴ Supra 174.

The Court ruled in addition that each correctional facility officer must undergo transgender sensitivity training.¹⁷⁵

Quoting Fyodor Dostoyevsky the Justice in *September v Subramoney*, Fortuin J, stated:

*“A society should be judged not by how well it treats its outstanding citizens but by how it treats its criminals.”*¹⁷⁶

Humane and dignified treatment is critical in upholding human rights for everyone. The mere fact that a person’s freedom of movement and participation in society is severely restricted as a result of being detained or sentenced for transgressing the law is no justification for denying them their human rights. To this extent, the law also allows prisoners to get married under South African law to a person that is not incarcerated.¹⁷⁷ The conclusion of a marriage is both a very personal yet also very public affair through which external parties are also involved. Therefore, marriages in prisons are allowed under strict security. Furthermore, the Identification Act also requires that a person’s marital status (personal particulars) be changed in the population register requiring that the necessary administrative processes be followed as outlined in the Act.¹⁷⁸ It is with the aforementioned logic in mind that access to legal gender marker changes need to become a reality for trans and gender diverse persons in prisons.

September, given that her gender marker has not yet been changed to female, is still legally recognised as male. The correctional services system thus also recognises her as male which is the cause for the rejection of her right to express her gender identity. The court concluded that by denying her the use of small amounts of make-up, wearing of jewellery and female underwear and the use of female pronouns the DCS acted unconstitutionally in depriving her of her right to express her gender.¹⁷⁹

The *September* case highlighted the need for the criminal justice system and administration as a whole to catch up with and serve the needs of trans and gender diverse persons in prisons.

5.9. Drawing from International Law and Instruments

In strengthening South African law, in alignment with international commitments and best practice models, section 39(2) of the South African Constitution prescribes the use of international law whilst recommending the use of foreign law when interpreting rights contained in the Bill of Rights as a means to promote its spirit, purport and objects.¹⁸⁰ Moreover, section 233 of the South African Constitution mandates courts to prefer interpretations of legislation – including the PEPUA – that are consistent with international law over those that are inconsistent.

South Africa is signatory to many international treaties and declarations. We highlight a few of these below. Of importance is the *Yogyakarta Principles*, a set of international principles guiding the application of international human rights law such as the UDHR, ICCPR, ICESCR, CEDAW, to rights relating to sexual orientation, gender identity, gender expression and sex characteristics.

¹⁷⁵. Supra 6 at paragraph 164(8).

¹⁷⁶. Supra 6.

¹⁷⁷. Stockenstrom S ‘Love behind Prison Walls’ *SowetanLIVE* 29 May 2018 available at <https://www.sowetanlive.co.za/sunday-world/lifestyle/2018-05-29-love-behind-prison-walls/>.

¹⁷⁸. Supra 6 at para 164.

¹⁷⁹. Supra 11 at section 38(2).

¹⁸⁰. Supra 118.

5.9.1. Universal Declaration of Human Rights

The UDHR was the first international document adopted by the United Nations General Assembly enshrining the rights and freedoms of all human beings. Article 1 of the UDHR emphasises the value that “*all human beings are born free and equal in dignity and rights*”.¹⁸¹ The implication of this rights assertion is that trans and gender diverse people are included in the rights protections and are able to invoke the right to safeguard them from discrimination in all ways that may seek to limit their quality of life. This also affirms that the right to equality is a core human right in international law. To exclude or place disadvantages on persons only because they are transgender or gender diverse is thus prohibited, just as it is prohibited to do so on the basis race, religion, nationality etc. We emphasise that there “is no fine print, no hidden exemption clause, in any of our human rights treaties that might allow a State to guarantee full rights to some but withhold them from others purely on the basis of sexual orientation and gender identity.”¹⁸²

5.9.2. Yogyakarta Principles

Domestically applied in the 2019 Western Cape judgement of *September v Subramoney*,¹⁸³ the *Yogyakarta Principles*¹⁸⁴ and *Yogyakarta Principles Plus 10*¹⁸⁵ are a complementary set of international principles relating to sexual orientation, gender identity, gender expression and sex characteristics. Initially crafted in 2006, the principles were prompted by documented global human rights violations targeted toward people because of their sexual orientation or gender identity.¹⁸⁶ The Principles have been described as the most authoritative statement of States obligations in international human rights law in promoting and protecting the rights of trans and gender diverse persons.¹⁸⁷ In its introduction, the document provides that a person’s sexual orientation and/or gender identity forms an integral part of their dignity, self-determination, freedom and humanity.¹⁸⁸ Central to this document is an awareness of how LGBTI+ bodies are policed by States and societies using custom, law and violence. It stresses the need for States to be proactive in integrating a pluralistic approach to policies and decision-making which recognise the interrelatedness and indivisibility of human existence including peoples’ sexual orientation and gender identity.¹⁸⁹ States thus need to adopt appropriate legislation and other measures to ensure that discrimination based on sexual orientation and gender identity is prohibited in both the public and private sphere.

Principle 2 of the Yogyakarta Principles affirms that international law prohibits discrimination on the grounds of gender identity. It accordingly obliges states to implement legislation to prevent discrimination on the grounds of gender identity and take appropriate action to eliminate such discrimination.¹⁹⁰

Principle 19 of the Yogyakarta Principles guarantees everyone the right to freedom of opinion and expression. Principle 19 clarifies that this includes “the expression of identity or personhood through speech, deportment, dress, bodily characteristics, choice of name, or any other means, as well as the freedom to seek, receive and impart information and ideas of all kinds, including with regard to human rights, sexual orientation and gender identity, through any medium and regardless of frontiers”.¹⁹¹

¹⁸¹. Article 1 of the UN General Assembly, Universal Declaration of Human Rights, 10 December 1948.

¹⁸². Free & Equal Campaign: United Nations for LGBT Equality ‘Fact Sheet International Human Rights Law and Sexual Orientation & Gender Identity’ (2017) available at <https://www.unfe.org/wp-content/uploads/2017/05/International-Human-Rights-Law.pdf>. (accessed 17 November 2020).

¹⁸³. Supra 6.

¹⁸⁴. Supra 20.

¹⁸⁵. Supra 34.

¹⁸⁶. International Commission of Jurists & ARC International ‘An Activist’s Guide to The Yogyakarta Principles’ (2010).

¹⁸⁷. O’Flaherty M ‘The Yogyakarta principles at ten’ (2015) 33 (4) *Nordic Journal of Human Rights* 281.

¹⁸⁸. Supra 20 at 6.

¹⁸⁹. Supra 20 at 10.

¹⁹⁰. Ibid.

¹⁹¹. Supra 20 at 24.

With regards to the right to legal gender recognition, the Principles state as follows:

Principle 31 of the Yogyakarta Principles Plus 10, makes clear that

Everyone has the right to legal recognition without reference to, or requiring assignment or disclosure of, sex, gender, sexual orientation, gender identity, gender expression or sex characteristics. Everyone has the right to obtain identity documents, including birth certificates, regardless of sexual orientation, gender identity, gender expression or sex characteristics. Everyone has the right to change gendered information in such documents while gendered information is included in them”.

STATES SHALL:

- A. *Ensure that official identity documents only include personal information that is relevant, reasonable and necessary as required by the law for a legitimate purpose, and thereby end the registration of the sex and gender of the person in identity documents such as birth certificates, identification cards, passports and driver licences, and as part of their legal personality;*
- B. *Ensure access to a quick, transparent and accessible mechanism to change names, including to gender-neutral names, based on the self-determination of the person;*
- C. *While sex or gender continues to be registered:*
 - i. *Ensure a quick, transparent, and accessible mechanism that legally recognises and affirms each person’s self-defined gender identity;*
 - ii. *Make available a multiplicity of gender marker options;*
 - iii. *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;*
 - iv. *Ensure that a person’s criminal record, immigration status or other status is not used to prevent a change of name, legal sex or gender.*¹⁹²

Principle 32 of the Yogyakarta Principles, in terms of self-determination, affirms that everyone has the right to bodily and mental integrity, autonomy and self-determination irrespective of sexual orientation, gender identity, gender expression or sex characteristics. Principle 32 further mandates states to “guarantee and protect the rights of everyone, including all children, to bodily and mental integrity, autonomy and self-determination”.¹⁹³

With the ever-evolving nature of international human rights law, South Africa carries a particular responsibility in developing best practice specific to the lived realities of trans and gender diverse persons in its context to contribute to shaping a world in which everyone regardless of gender identity and gender expression can live with dignity, equality and freedom. This is indeed what our own constitution and other laws like the PEPUDA requires in order to live in more substantially equal South Africa.

¹⁹². Supra 34 at 9.

¹⁹³. Supra 34 at 10.

5.9.3. Appointment of Independent Expert on Protection against Violence and Discrimination based on Sexual Orientation and Gender Identity

In 2016 the United Nations Human Rights Council (UNHRC) appointed the Independent Expert on SOGI.¹⁹⁴ According to the resolution mandating the Independent Expert, his/her role is to:

- a. *To assess the implementation of existing international human rights instruments with regard to ways to overcome violence and discrimination against persons on the basis of their sexual orientation or gender identity, while identifying both best practices and gaps;*
- b. *To raise awareness of violence and discrimination against persons on the basis of their sexual orientation or gender identity, and to identify and address the root causes of violence and discrimination;*
- c. *To engage in dialogue and to consult with States and other relevant stakeholders, including United Nations agencies, programmes and funds, regional human rights mechanisms, national human rights institutions, civil society organizations and academic institutions;*
- d. *To work in cooperation with States in order to foster the implementation of measures that contribute to the protection of all persons against violence and discrimination based on sexual orientation and gender identity;*
- e. *To address the multiple, intersecting and aggravated forms of violence and discrimination faced by persons on the basis of their sexual orientation and gender identity;*
- f. *To conduct, facilitate and support the provision of advisory services, technical assistance, capacity-building and international cooperation in support of national efforts to combat violence and discrimination against persons on the basis of their sexual orientation or gender identity.*¹⁹⁵

In a report to the United Nations General Assembly, the Independent Expert has noted the following in relation to legal gender recognition:

1. Lack of legal recognition negates the identity of trans persons to an extent that “it provokes what can be described as a fundamental rupture of State obligations”.¹⁹⁶
2. When States deny legal access to trans identities, what they are actually doing is sending a message about what and who is a proper citizen.
3. He also reiterated what has been the experience in South Africa, in that trans and gender-diverse persons whose identity is not adequately recognized suffer denial and violations of the right to health; discrimination, exclusion and bullying in accessing education contexts; discrimination in employment, housing and access to social security; violations of the rights of the child; and arbitrary restrictions on the rights to freedom of expression, peaceful assembly and association, the right to freedom of movement and residence, and the right to leave any country including one’s own.¹⁹⁷

¹⁹⁴. Human Rights Council resolution 32/2 on Protection against Violence and Discrimination Based on Sexual Orientation and Gender Identity (2016) available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/154/15/PDF/G1615415.pdf?OpenElement>.

¹⁹⁵. Ibid.

¹⁹⁶. Madrigal-Borloz V ‘Report of the Independent Expert on Protection against Violence and Discrimination Based on Sexual Orientation and Gender Identity’ (2018) available at <https://www.pgaction.org/inclusion/pdf/resources/2018-05-Report-Independent-Expert-protection-against-violence-discrimination-SOGI.pdf>.

¹⁹⁷. Ibid.

5.9.4. International and Regional Covenants

In the communication of *Toonen v Australia*,¹⁹⁸ the United Nations Human Rights Committee (UNHRC) held that States are under an obligation to protect individuals from being discriminated against based on their sexual orientation.¹⁹⁹ The judgement provided recourse to those “criminalised, pathologised or demonised... [on the basis that their]...sexual orientation or gender identity does not fit the perceived norm”.²⁰⁰ Since *Toonen*, various UN treaty bodies and international rights instruments have built upon the judgements’ foundational understanding that LGBTI+ rights are human rights.²⁰¹ This position is reflected in several international covenants and treaties that South Africa is party to, including The International Covenant on Civil and Political Rights (ICCPR)²⁰² and the International Covenant on Economic, Social and Cultural Rights (ICESCR).²⁰³

In its General Comment 18 of 1989, the United Nations Human Rights Committee (UNHRC), the treaty body that monitors the implementation of the ICCPR, emphasised that non-discrimination is a basic feature of the covenant, and that it is linked to and given effect to through the realisation of other rights. The UNHRC stated the following in respect of non-discrimination in the Covenant:

*Non-discrimination, together with equality before the law and equal protection of the law without any discrimination, constitute a basic and general principle relating to the protection of human rights. Thus, article 2, paragraph 1, of the International Covenant on Civil and Political Rights obligates each State party to respect and ensure to all persons within its territory and subject to its jurisdiction the rights recognized in the Covenant without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*²⁰⁴

In its review of South Africa during the first session of 2016, the UNHRC discussed discrimination and violence on the basis of “bodily diversity” and recommended that the “State party should redouble its efforts to prevent and combat sexual, gender-based and domestic violence and to eradicate discrimination and violence against persons based on their real or perceived sexual or gender orientation, gender identity or bodily diversity, including through implementation of the National Intervention Strategy”.²⁰⁵

The ICESCR is an international treaty that “sets out the basic economic, social and cultural rights that all persons should be able to enjoy – without discrimination. These include the right to adequate housing, health, education and employment”.²⁰⁶ Article 2(2) of the ICESCR states that:

*The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*²⁰⁷

¹⁹⁸ *Toonen v. Australia*. CCPR/C/50/D/488/1992.

¹⁹⁹ Loc Cit

²⁰⁰ Saiz I ‘Bracketing Sexuality: Human Rights and Sexual Orientation: A Decade of Development and Denial at the UN’ (2004) *Health and Human Rights* 7 (2) 49

²⁰¹ Ibid 48–80.

²⁰² *International Covenant on Civil and Political Rights* of 1966.

²⁰³ *International Covenant on Economic, Social and Cultural Rights* of 1966.

²⁰⁴ *United Nations Human Rights Committee General Comment* of 1989.

²⁰⁵ Nolan H & Chiam Z ‘Advocating on Gender Identity and Gender Expression: The Committee on Social, Economic and Cultural Rights’ (2016) 2. ILGA.

²⁰⁶ Supra 206

²⁰⁷ UN Committee on Economic, Social and Cultural Rights *General Comment No. 20: Non-Discrimination in Economic, Social and Cultural Rights* (2009) 2/2.

The Covenant is monitored by the Committee on Economic, Social and Cultural Rights (CESCR). The CESCR elaborated on the obligation non-discrimination in Article 2(2) in General Comment 20 of 2009.²⁰⁸ The CESCR explains that non-discrimination is an “immediate and cross-cutting” obligation in the Covenant. The CESCR expressly states that the words “other status” in art 2(2) includes gender identity as prohibited grounds of discrimination.²⁰⁹

The CESCR recognises sexual orientation and gender identity as prohibited grounds for discrimination in General Comment 20.²¹⁰ As such, the CESCR is a valuable tool in that it “offers opportunities to obtain concrete recommendations for States to combat violations of the rights to health, employment, education, housing, social security, family and water, amongst others, of trans persons”.²¹¹ The CESCR can be used to highlight a wide variety of human rights violations, including “lack of access to hormonal treatment, discrimination in sexual and reproductive health services, criminalisation of sex work (in particular health impacts), harassment and violence at work, school uniform requirements and dress codes, school drop-out rates and unfair evictions”.²¹²

South Africa is also a signatory to the 1951 Refugee Convention²¹³ and its accompanying 1967 Protocol²¹⁴ within which transgender and gender diverse people are able to seek asylum as a “member of a particular social group”.²¹⁵ Article 25 of the Convention states:

1. *When the exercise of a right by a refugee would normally require the assistance of authorities of a foreign country to whom he cannot have recourse, the Contracting States in whose territory he is residing shall arrange that such assistance be afforded to him by their own authorities or by an international authority.*
2. *The authority or authorities mentioned in paragraph 1 shall deliver or cause to be delivered under their supervision to refugees such documents or certifications as would normally be delivered to aliens by or through their national authorities.*
3. *Documents or certifications so delivered shall stand in the stead of the official instruments delivered to aliens by or through their national authorities, and shall be given credence in the absence of proof to the contrary.*
4. *Subject to such exceptional treatment as may be granted to indigent persons, fees may be charged for the services mentioned herein, but such fees shall be moderate and commensurate with those charged to nationals for similar services.*²¹⁶

²⁰⁸ Loc cit.

²⁰⁹ Loc cit.

²¹⁰ Supra 209 at 1.

²¹¹ Loc cit.

²¹² Loc cit.

²¹³ UN *Convention Relating to the Status of Refugees* of 1951.

²¹⁴ UN *Protocol Relating to the Status of Refugees* of 1967.

²¹⁵ See: UN High Commissioner for Refugees (UNHCR). 2012. ‘Guidelines on International Protection No. 9: Claims to Refugee Status Based on Sexual Orientation and/or Gender Identity within the Context of Article 1A(2) of the 1951 Convention and/or Its 1967 Protocol Relating to the Status of Refugees’. Guidelines. Geneva. <http://www.refworld.org/docid/50348afc2.html>.

²¹⁶ Supra 216 at article 25

Article 25 is important in refugee cases because it requires the contracting state to assist in providing services for refugees who are unable to exercise their rights in their home country. In December 2018, a Pakistani refugee living in Greece won the ability to change her name and gender on her Greek legal documents. The court granted relief, finding that the applicant, given that she had sought refuge in Greece, would not be able to request her name and gender marker change in her country of origin.²¹⁷ A similar decision was recently taken in the European Court of Human Rights regarding the documents of a trans man from Iran living in Hungary.²¹⁸ South Africa is bound by this international treaty and therefore it should be used as a valuable tool for transgender asylum seekers and refugees to exercise their rights.

South Africa is also a signatory to the Convention on the Rights of the Child (CRC),²¹⁹ which is the basis from which the South African Children's Act 30 of 2005 is formulated. Articles 1 to 3 of the Convention define the age of majority for children as 18 years whilst emphasising the protection of the child from all forms of discrimination and punishment as a necessity in advancing the best interest of the child.²²⁰ Providing easy and accessible access for children to legal gender recognition ensures their rights under the CRC to education,²²¹ health,²²² identity,²²³ protection against discrimination,²²⁴ adequate standard of living and ultimately their right to life, survival and development²²⁵ are protected. The benefit of legal gender recognition for children "will be the effect of reducing the stigmatisation felt by transgender children not only throughout their education but also throughout their mental and physical development".²²⁶

5.9.5. United Nations Charter Based Bodies

In addition to Covenants, international human rights law also relies on UN Charter-based bodies to monitor, protect and promote the realisation of rights. One of these bodies is the Human Rights Council (HRC), an inter-governmental body within the United Nations system made up of 47 States. It is responsible for the promotion and protection of all human rights around the globe. It has the ability to discuss all thematic human rights issues and situations that require its attention throughout the year. It meets at the UN Office at Geneva.²²⁷ The Human Rights Council is a space for dialogue among States, with input from various stakeholders. In its functioning, The Council may issue resolutions calling on States to take specific actions or uphold certain principles, or it may create mechanisms to investigate or monitor questions of concern. We discuss a few of the key processes and resolutions below.

²¹⁷ Karakoulaki M & Tosidis D 'Transgender Refugees in Greece Reclaim Their Dignity' available at <http://www.dw.com/en/transgender-refugees-in-greece-reclaim-their-dignity/a-44551880> (accessed July 2018).

²¹⁸ *Rana v Hungary* 2020 (17) (Application no. 40888/17), ECLI:CE:ECHR:2020:0716JUD004088817, Council of Europe: European Court of Human Rights, 16 July 2020.

²¹⁹ UN *Convention on the Rights of the Child* (1989).

²²⁰ Ibid at article 1-3.

²²¹ Ibid at 28.

²²² Ibid at 24.

²²³ Ibid at 8.

²²⁴ Ibid at 2.

²²⁵ Ibid at 6.

²²⁶ See Bucataru A 'Using the Convention on the Rights of the Child to Project the Rights of Transgender Children and Adolescents: The Context of Education and Transition' (2016) 3 (1) *The Queen Mary Human Rights Law Review* 59–81.

²²⁷ For more on the Human Rights Council see <https://www.ohchr.org/en/hrbodies/hrc/pages/home.aspx>.

5.9.5.1 Resolutions

In 2011, South Africa tabled a precedent-setting resolution on Human rights, Sexual Orientation and Gender Identity at the United Nations Human Rights Council.²²⁸ This resolution resulted in the development of a report on violence and discrimination against LGBT people worldwide.²²⁹ In September 2014, the HRC adopted a second resolution on SOGI as a follow-up to the 2011 Resolution. The 2014 resolution requested the “sharing good practices and ways to overcome violence and discrimination, in application of existing international human rights law and standards, and to present it to the Human Rights Council at its twenty-ninth session”.²³⁰ In 2016 another resolution was adopted which, as noted, established the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity for the next three years.²³¹

5.9.5.2. Special Procedures of the Human Rights Council

The special procedures of the Human Rights Council are independent human rights experts with mandates to report and advise on human rights from a thematic or country-specific perspective. In June 2016, the UNHRC, in a critical vote, adopted a resolution on the Protection against violence and discrimination based on sexual orientation, and gender identity which mandated the appointment of an Independent Expert on the subject.²³² We have already noted the critical work of the Independent Expert on SOGI as a highlight of the international human rights framework. In 2019, it was found that other Special Procedures also included SOGIESC elements in their thematic reports to the Human Rights Council and General Assembly. A total of 34 reports, almost 50% of all the thematic reports presented in 2019, made mention of or reference to one or other LGBTI+ topic. Eleven of these reports included good or strong references to LGBTI+ populations.²³³

5.9.5.3. Universal Periodic Review

The Universal Periodic Review (UPR) is a mechanism of the HRC which serves to assess the human rights situations in all United Nations Member States.²³⁴ The UPR operates in cycles, where a review cycle is a four-and-half year period, within which the human rights records of all United Nations Member states are reviewed. South Africa has been reviewed in three cycles at the UPR. In the last session that South Africa participated in 2017, it received and accepted 7 recommendations on SOGIESC. Gender DynamiX, Legal Resources Centre, Iranti-org, and AIDS and Rights Alliance for Southern Africa (ARASA) submitted an alternative report for consideration during the review of South Africa.²³⁵ An oral statement was also made by Gender DynamiX on behalf of the coalition.²³⁶ In relation to this submission, we recommended that:

²²⁸ United Nations General Assembly ‘Human Rights, Sexual Orientation and Gender Identity’ (2011) available at http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/RES/17/19.

²²⁹ United Nations High Commissioner for Human Rights Report ‘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’ (2016) GE.11-17075 Human Rights Council Nineteenth session A/HRC/19/41. https://www.ohchr.org/Documents/Issues/Discrimination/A.HRC.19.41_English.pdf

²³⁰ United Nations General Assembly resolution on *Human Rights, Sexual Orientation and Gender Identity*’ (2014) 27/32 <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/177/32/PDF/G1417732.pdf?OpenElement>.

²³¹ Human Rights Council ‘*Resolution Adopted by the Human Rights Council Protection against Violence and Discrimination Based on Sexual Orientation and Gender Identity*’ (2016). <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/154/15/PDF/G1615415.pdf?OpenElement>.

²³² Ibid.

²³³ International Service for Human Rights, and ILGA world. 2019. ‘UN Experts Push for Better Protection across a Range of Topics’. ISHR. December 11. <https://www.ishr.ch/news/lgbt-rights-un-experts-push-better-protection-across-range-topics>.

²³⁴ For more see <https://www.ohchr.org/EN/HRBodies/HRC/Pages/AboutCouncil.aspx>

²³⁵ United Nations Office of the High Commissioner for Human Rights ‘Summary of Other Stakeholders’ Submissions on South Africa (2017) available at <http://digitallibrary.un.org/record/862313>.

²³⁶ Transgender and Intersex Coalition. 2017. Universal Periodic Review- South Africa 27th UPR - Info Pre Session, Geneva April 2017. Geneva. https://ilga.org/downloads/summary_South_Africa_UPR27.pdf.

1. *Review and amend Act 49 using a self-identification model in accordance with the Yogyakarta Principles, international human rights principles and best practices – allowing all individuals to change their legal gender on demand without imposing discriminatory and invasive requirements such as reports on medical treatments, medical surgeries or adherence to a particular gender presentation.*
2. *Every individual, regardless of their gender and bodily characteristics, should have the option to self-identify as female, male or a third unspecified option (marked by a gender-neutral X) in order to ensure that the law does not impose discriminatory prerequisites on transgender, gender diverse/gender non-conforming, intersex, body diverse and other persons who seek to alter their sex descriptors in a manner consistent with how they self-identify.*
3. *The South African government must refrain from imposing its own arbitrary and uninformed thresholds on who may “qualify” for legal gender recognition. An individual’s gender identity should not be determined by a government institution or any other outside authority, and legislative reform needs to take place to ensure that self-identification is validated and recognised.*
4. *Take immediate steps to circulate national internal directives, particularly to frontline officials interacting with the public, addressing Act 49 implementation. Directives must re-emphasise that Act 49 does not require evidence of surgery as prerequisite for a sex description alteration, and that evidence of hormone/medical treatment OR of social gender characteristics (i.e. the ways in which a person expresses their social identity as a member of a particular sex by using style of dressing, wearing of prostheses or other means) is sufficient in terms of Act 49 stipulations.*
5. *Take legislative steps to address the gap in the current marriages framework which violates the rights and dignity of transgender and intersex persons.*
6. *Mandate training and education on informed consent, bodily diversity and the right to bodily integrity for all healthcare professionals in order to ensure that the medical information and healthcare services that they provide are balanced, accurate, evidence based and informed by human rights based approaches.*

Recommendations were formulated during the interactive dialogue, which were examined and accepted by South Africa. For the purposes of this report we highlight the following:

1. *Develop policies, plans and information campaigns to eradicate at all levels the stereotypes and discrimination against people based on their sexual orientation or gender identity, focused particularly on public officials and those in charge of law enforcement.*
2. *Strengthen the protection of LGBTI persons against stigmatization, harassment and discrimination by promoting tolerance for sexual diversity and different gender identities and by clearly classifying acts of violence against these persons as hate crimes.²³⁷*

Concrete and consistent actions must still be taken to fully implement these recommendations that South Africa accepted during the last session of UPR. These developments at the Council indicate that the rights of trans and gender diverse persons remain central to, and part of its objective of promoting universal respect for the protection of all human rights and fundamental freedoms for all, without distinction of any kind, and in a fair and equal manner.

²³⁷. For the full list of recommendations see: ILGA. 2017. ‘UN Programme 27TH UPR Working Group Sessions. SOGIESC Recommendations (May 1 –May 12, 2017)’. https://ilga.org/downloads/27TH_UPR_WORKING_GROUP_SESSIONS_SOGIESC_RECOMMENDATIONS.pdf.

5.9.6. *International Conventions and Instruments*

From a regional perspective, the African Commission recognises the importance of protecting LGBTI+ people as is evident from a number of developments. The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, better known as the Maputo Protocol, is an international human rights instrument adopted by the African Union that came into effect in 2005. Article 1 of the Maputo Protocol defines women as "persons of female gender, including girls".²³⁸ The use of the word the "gender" instead of "sex" in the definition of women means that the rights in the Maputo Protocol are also applicable to transgender women. Hence, all the rights and privileges in the Maputo Protocol include transgender women and states parties thereto are obligated to ensure that all women, including transgender women, benefit from the rights therein.²³⁹

The Maputo Protocol reaffirms the principle of advancing gender equality as outlined in articles 2 and 18 of the African Charter to ensure that the women of Africa can fully participate in Africa's development as equal partners.²⁴⁰ The protocol recalls the recognition women enjoy in international human rights instruments such as the UDHR, ICCPR, ICESCR and Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and its Optional Protocol, amongst others.²⁴¹ Thus, in recognising the validity and importance of international law and its application within the African regional context and the adoption of General Recommendation 28 on the Core Obligations of States Parties under Article 2 on CEDAW foregrounds the importance of recognising the intersectional nature of the identities of women and therefore conceptualising gender equality targets to include transgender women on the basis of gender identity and lesbian, bisexual and queer women regardless of sexual orientation.²⁴²

Paragraph 18 of the General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the CEDAW highlights the diverse realities of women and gives due recognition to gender identity. It provides that:

*Intersectionality is a basic concept for understanding the scope of the general obligations of States parties contained in article 2. The discrimination of women based on sex and gender is inextricably linked with other factors that affect women, such as race, ethnicity, religion or belief, health, status, age, class, caste, and sexual orientation and gender identity. Discrimination on the basis of sex or gender may affect women belonging to such groups to a different degree or in different ways than men. States parties must legally recognize and prohibit such intersecting forms of discrimination and their compounded negative impact on the women concerned. They also need to adopt and pursue policies and programmes designed to eliminate such occurrences, including, where appropriate, temporary special measures in accordance with article 4, paragraph 1, of the Convention and General Recommendation No. 25.*²⁴³

²³⁸ Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa at article 1(K).

²³⁹ Queer Space Collective 'Trans Maputo: Conversations on the African Human Rights of Persons of Female Gender'(2019) https://www.chr.up.ac.za/images/researchunits/sogie/documents/2019_transmaputo_project_1.pdf.

²⁴⁰ Supra 141 at paragraph 8.

²⁴¹ Supra 141 at paragraph 5.

²⁴² UN Committee on the Elimination of Discrimination Against Women (CEDAW) 'General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women' (2010) paragraph 18.

²⁴³ UN Committee on the Elimination of Discrimination Against Women (CEDAW). 2010. *General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*. (2010) paragraph 18.

CEDAW and the Maputo Protocol calls on State parties to put in place laws and policies aimed at preventing intersecting forms of discrimination. An example of which would be laws which not only enable the legal gender recognition of trans women but make it easy and accessible.

The African Commission has also adopted the Resolution on Protection against Violence and other Human Rights Violations against Persons on the basis of their real or imputed Sexual Orientation or Gender Identity of 2014 (also known as Resolution 275).²⁴⁴ Through the Resolution, the African Commission positions the elimination of violence against LGBTI+ identifying and perceived LGBTI+ persons at the backdrop of Article 2 (focusing on non-discrimination) and Article 3 (focusing on equal protection before the law) of the African Charter on Human and Peoples' Rights.²⁴⁵ Whilst condemning human rights violations perpetrated against LGBTI+ identifying or perceived LGBTI+ persons in Africa, it strongly urges states to enact and effectively apply appropriate laws prohibiting and punishing all forms of violence in this regard. Resolution 275 also emphasises that States must take all necessary steps to eliminate the root causes of violence against LGBTI+ persons.²⁴⁶ By passing enabling legislation for trans and gender diverse persons, countries in Africa would discharge the onus placed on them by Resolution 275 whilst addressing violence and gender inequity through the prism of the law at a fundamental level.

Following Resolution 275, the African Commission, Inter-American Commission on Human Rights, and the UN human rights mechanism adopted a report, titled Ending violence and other human rights violations based on sexual orientation and gender identity, in November 2015. The report detailed the proceedings and recommendations of a joint thematic dialogue on SOGI by these mechanisms. Within the context of legal recognition, the report states that:

- Everyone has the right to recognition everywhere as a person before the law including on their official documents.
- Self-defined gender identity is integral to an individual's personality and is one of the most basic aspects of self-determination, dignity and freedom.
- Medical procedures, including sex reassignment surgery, sterilisation or hormonal therapy, must not be forced on individuals as pre-requirements for legal recognition of their gender identity.
- No status, including marriage or parenthood, may be invoked as such to prevent the legal recognition of a person's gender identity.
- No-one should be subjected to pressure to conceal, suppress or deny their sexual orientation, gender identity or intersex status.²⁴⁷

²⁴⁴ African Commission on Human and Peoples' Rights resolution 275 on *Protection against Violence and Other Human Rights Violations against Persons on the Basis of Their Real or Imputed Sexual Orientation or Gender Identity* (2014) available at <https://www.achpr.org/sessions/resolutions?id=322>.

²⁴⁵ African Commission on Human and Peoples' Rights *African Charter on Human and Peoples' Rights* (1981) available at <https://www.achpr.org/legalinstruments/detail?id=49>.

²⁴⁶ The Centre for Human Rights, African Men for Sexual Health and Rights (AMSHer) & Faculty of Law, University of Pretoria '*275: Resolution on Protection against Violence and Other Human Rights Violations against Persons on the Basis of Their Real or Imputed Sexual Orientation or Gender Identity*' (2018) available at https://www.chr.up.ac.za/images/researchunits/sogje/documents/resolution_275/Resolution_275_booklet_ENGLISH_02_WEB.pdf

²⁴⁷ African Commission on Human and Peoples' Rights, Inter-American Commission on Human Rights, United Nations & University of Pretoria (eds) *Ending Violence and Other Human Rights Violations Based on Sexual Orientation and Gender Identity: A Joint Dialogue of the African Commission on Human and Peoples' Rights, Inter-American Commission on Human Rights and United Nations*' (2016). The Centre for Human Rights, African Men for Sexual Health and Rights (AMSHer), and Faculty of Law, University of Pretoria.

6. Redesigning Legal Gender Recognition Law in South Africa: Drawing from Foreign Law and Global Best Practice Models

Based on the experiences of transgender and gender diverse persons accessing legal recognition as well as the plethora of case studies informing the recommendations provided below, it is clear that Act 49 is outdated. The number of amendments needed would amount to a complete overhaul of Act 49. We start off by providing our recommendations relating to Act 49 and improving access to legal recognition. This is then followed by a discussion and analysis of a number of case studies that inform the recommendations made.

6.1. Repeal and Reform law on Legal Gender Recognition International Conventions and Instruments

Recommendation 1: We recommend Act 49 be replaced with a more progressive piece of legislation addressing legal gender recognition, aligned with the constitutional rights, values and ideals, international human rights standards and the global best practices on legal gender recognition for trans and gender diverse persons. The repeal should also not have the effect of leaving a legal vacuum in the law between the time of the repeal and the promulgation of new legislation.

In summary, at present, South Africa has a law in the form of Act 49 which allows people to apply to have their gender marker altered in the national population registry, and consequently to receive identity documents and passports reflecting their affirmed gender identity. As we have already mentioned, the negotiations for Act 49 took place in 2003 when the political environment was distinctly different. The Act was passed with many reservations held by trans, gender diverse, intersex people and interest groups across South Africa. It was critiqued then, as it is now, for being exclusionary, restrictive and discriminatory in both its scope and application, and that not enough time and opportunity was afforded to the community to meaningfully engage throughout the consultative processes.²⁴⁸ Since then, the world has shifted in progressive ways and trans and gender diverse persons have become more visible and active in driving their own processes for change.

Since 2003, trans activists have repeatedly informed the National Assembly Home Affairs Portfolio Committee that the Act is discriminatory, that self-identification rather than legal pathologisation (the requirement of medical reports by medical practitioners) should be the way in which the State provides for legal gender recognition. In 2003, the Home Affairs Portfolio Committee chairperson recognised the validity of these issues even then but urged compromise so as to pass Act 49 before the 2004 elections. He gave an undertaking that a thorough review and reform of the law with participation of trans and gender diverse persons would follow. To date, this has not happened.

This is the right time for the national legislature to develop a new piece of legislation on gender recognition and repeal Act 49. In doing so, the new legislation should be aligned with the constitutional rights, values and ideals, international human rights standards and global best practices on legal recognition for trans and gender diverse persons.

6.2. Remove all Medical Requirements in the Scope and Application of the Act

Recommendation 2: We recommend that all medical requirements in the application for legal gender recognition be removed. The application process must affirm and realise the rights to diverse gender identities, gender expressions and bodily diversities on the basis of the rights to self-identification, self-determination, bodily autonomy, freedom and dignity.

Based on the rights entrenched in the Constitution of South Africa and global best practices, the framing of the scope and application of Act 49 is outdated and misaligned to both human rights-based understandings and a constitutional discourse of equality, dignity and freedom in South Africa. A new Gender Recognition Law should not place any limitations on a person's ability to freely and voluntarily change their gender marker or name. The law should recognize that gender identity is fluid in relation to a person's right to self-determination.

The current application of Act 49 reads as follow:

2. (1) Any person whose sexual characteristics have been altered by surgical or medical treatment or by evolvment through natural development resulting in gender reassignment, or any person who is intersexed may apply to the Director-General of the National Department of Home Affairs for the alteration of the sex description on his or her birth register.

6.3. Biomedical model versus Human Rights-based Model

Recommendation 3: A new Gender Recognition law should not place any limitations on a person's ability to freely and voluntarily change their gender marker or name as recognition that gender identity is fluid in relation to a person's right to self-determination.

Pathologizing medical discourses heavily influenced Act 49. This is, as noted, for the most part indicative of the time in which the Act was created and the roots of the research which formed the basis of the Act. For this reason, access to legal gender recognition is at present largely confined to trans and gender diverse people that have accessed medical or surgical procedures, and intersex persons who have medical and social worker/psychologist reports confirming their intersex status and gender role. According to section 2(1) of Act 49 of 2003, the Act applies to:

...any person whose sexual characteristics have been altered by surgical or medical treatment or by evolvment through natural development resulting in gender reassignment...

Under this section the Act lists three categories of people to which it applies:

- i. Any person whose sexual characteristics have been altered by surgical treatment; OR*
- ii. Any person whose sexual characteristics have been altered by medical treatment; OR*
- iii. Any person whose sexual characteristics have been altered by evolvment through natural development.*

The first two requirements are arbitrary and very little is known regarding their initial impetus, other than their basis in a document written in the 1980s. The requirements are also punitive and inhumane given that the majority of trans and gender diverse persons in South Africa are, as noted, unable to access medical, let alone surgical care, to affirm their gender. These requirements perpetuate social inequalities particularly on the basis of class and geographical location. Not only are these requirements inaccessible, for many they are unnecessary and undesirable, forcing trans and gender diverse individuals to access medical and surgical procedures they may not have any desire for or need for. In essence, these requirements serve to maintain structural and systemic violence perpetrated against trans and gender diverse persons by forcing them to access medical or surgical care in order to fit a homogenising cisnormative perception of gender defined by the State.

²⁴⁸ Cape Town Transsexual/Transgender Support Group. 2003. *Request by the Cape Town Transsexual/Transgender Support Group to the South African Home Affairs Portfolio Committee For an Extended Submission Period for the Alteration of Sex Description and Sex Status Bill*, 2003. Cape Town: Parliamentary Monitoring Group. <http://pmg-assets.s3-website-eu-west-1.amazonaws.com/docs/2003/appendices/030909request.htm>.

Below are some examples of best practice models used by other countries, which align legal gender recognition for trans and gender diverse persons with human rights ideals:

6.3.1. Argentina

Passed in May 2012, Argentina's Gender Identity Law No. 26.743, works on a model of self-determination. It guarantees the free development of individuals according to their gender identity, whether this is the same to or different from their sex assigned at birth.²⁴⁹ Article 3 of the Law provides that "all persons can request that the recorded sex be amended, along with the changes in the first name and image, whenever they do not correspond with the self-perceived gender identity".²⁵⁰ The law facilitates both gender marker and name change. It is based on the "restitution of the full exercise of citizenship to trans people" and an application is not dependent on any medical requirements whatsoever having been met.²⁵¹ In essence Argentina recognises a person's gender identity without any preconditions.

6.3.2. Malta

In terms of article 3(1) of the Maltese Gender Identity, Gender Expression and Sex Characteristics Act:

*All persons being citizens of Malta have the right to - the recognition of their gender identity; the free development of their person according to their gender identity be treated according to their gender identity and, particularly, to be identified in that way in the documents providing their identity therein; and bodily integrity and physical autonomy.*²⁵²

The Act precludes the need for any medical or surgical reports as evidence in order to access legal gender recognition. The Act applies in both instances of changing a person's recorded gender and/or first name.

6.3.3. Denmark

In September 2014 Denmark amended the law governing the Danish National Peoples Register, allowing trans people to change their gender through a simple administrative procedure.²⁵³ The Danish law allows for the legal recognition of a transgender individual through self-determination. Despite not requiring any medical evidence, the application process does however require the provision of a written declaration, which states that the individual has a strong sense of belonging to the opposite gender. It therefore continues to be invested in a binary model of gender.

6.3.4. Iceland

In 2019 Iceland passed its Gender Autonomy Act, addressing the right to legal recognition for both trans and intersex people.²⁵⁴ The Act allows for a person's gender to be changed in the Official Registry in accordance with their own experience and without having to meet conditions for diagnosis or medical treatment. The Act is based on a model of self-determination and enshrines bodily integrity and autonomy. Iceland also allows for identity documents to indicate 'X' where a person wishes to register as neither male nor female.²⁵⁵

²⁴⁹ Fundación Huésped & Association of Transvestites, Transsexuals and Transgenders of Argentina (ATTTA) 'Gender Identity Law and Transgender Peoples Access to Healthcare in Argentina' (2014) available at <https://www.huesped.org.ar/wp-content/uploads/2018/03/Ley-de-Identidad-de-Genero-y-acceso-a-la-salud-de-personas-trans-ING.pdf>.

²⁵⁰ Supra 90 at article 3.

²⁵¹ Radi B 'Argentina: Transgender People and the Gender Identity Law' in International Gay and Lesbian Human Rights Commission Perspectives (2013) 57.

²⁵² Supra 91 at article 3(1).

²⁵³ Equal Rights Trust 'Landmark Transgender Law Enforced in Denmark' (14 September 2014) available at <https://www.equalrightstrust.org/news/landmark-transgender-law-enforced-denmark>.

²⁵⁴ Iceland's Gender Autonomy Act of 2019.

²⁵⁵ Fontaine A 'From Iceland — Iceland Passes Major Gender Identity Law: "The Fight Is Far From Over"' The Reykjavik Grapevine 19 June 2019 available at <https://grapevine.is/news/2019/06/19/iceland-passes-major-gender-identity-law-the-fight-is-far-from-over/>.

6.3.5. Norway

On 6 June 2016, the Norwegian Parliament approved the right of self-determination in Norway and eliminated the requirements of medical intervention. The change is reflected on official documents, and no medical requirements nor psychiatric diagnoses are required.²⁵⁶

6.4. Turn-around time for applications

Recommendation 4: New Gender Recognition Law should allow for a quick, transparent and accessible procedure accompanied by regulations with clear timeframes to assist in guiding officials.

At present, not all Home affairs offices are aware or knowledgeable of the existence of the current gender recognition law and how to process a gender marker change, which delays applications. Furthermore, due to a lack of clear time frames, the current process takes anywhere between 6 and 24 months to complete. Regulations with clear timeframes should be issued to assist in guiding officials.

6.4.1. Colombia

In 2015, Colombia's Interior and Justice Ministries passed Decree 1227 of 2015, which modified the law regulating the country's civil registry. This allowed for the rectification of gender markers to be made to government issued identification with a simple declaration of will.²⁵⁷ Colombia's new policy makes it easier for transgender people to change their name and gender on legal documents. All that is required is a written request, accompanied by name, national identity card number and copies of the applicant's national identity card and birth certificate. The process should be completed within five business days.²⁵⁸

6.5. Inclusion of Refugees and Asylum Seekers

Recommendation 5: A new Gender Recognition Law must make provision for refugees and asylum seekers to change their names and gender markers.

6.5.1. Malta

The Maltese model allows for a person who is granted international protection in terms of their domestic Refugees Act to change their recorded gender and first name.²⁵⁹ Accordingly, a person with refugee status will have to make a declaration under oath before the Commissioner for Refugees declaring their self-determined gender and first name, where after the Commissioner for Refugees shall record these amendments in the person's asylum application form and protection certificate within fifteen days.²⁶⁰

6.5.2. The United Kingdom

The UK's Gender Recognition Act²⁶¹ does not explicitly make provision for asylum seekers, however, section 10 states that if the applicant's birth is entered into the United Kingdom birth register, the Registrar General must be notified to alter the entry. Therefore, there is no automatic exclusion of persons not entered into the birth register. To apply for gender recognition, the applicant has to submit their original birth certificate, or if the applicant does not have their birth certificate, for example if they are an asylum seeker, they must state this in their application.²⁶²

²⁵⁶. Transgender Europe (TGEU) 'Norwegian Law Amending the Legal Gender' (2016) available at <https://tgeu.org/norwegian-law-amending-the-legal-gender/>.

²⁵⁷. Outright Action International 'Mapping Trans Rights in Columbia' (2016) available at https://outrightinternational.org/sites/default/files/TransRpt_Colombia_En.pdf.

²⁵⁸. Franco D 'Colombia, the Surprising Global Leader in Transgender Rights' TakePart (10 June 2015) available at <http://www.takepart.com/article/2015/06/10/colombia-surprising-global-leader-transgender-rights>.

²⁵⁹. Malta's Refugee Act Chapter 420 of 2000.

²⁶⁰. Supra 91 at article 4(8).

²⁶¹. United Kingdom's Gender Recognition Act of 2004.

²⁶². Her Majesty's Courts and Tribunal Service 'T451 Guidance on Completing the Standard Application Form for a Gender Recognition Certificate' (2016) available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/852924/t451-eng.pdf.

Asylum seekers in the United Kingdom are issued with Application Registration Cards, which are the equivalent of the South African asylum seeker permit. A recent policy directive issued by the UK Home Office clarifies that transgender asylum seekers can apply to change their gender markers on their cards if the claimant has obtained their Gender Recognition Certificate through the Gender Recognition Act.²⁶³ Once a claimant legally affirms their gender, a new card must be issued without delay. The case information relating to the claimant must also be updated and any old Registration Card destroyed. Therefore, although the Gender Recognition Act does not explicitly make provision for transgender asylum seekers, policy guidelines published by the Home Office makes the Gender Recognition Act accessible to asylum seekers.

6.5.3. Hungary

A recent case in the Hungarian Constitutional Court declared the omission of the law to provide for legal gender recognition for refugees and asylum seekers unconstitutional.²⁶⁴ The Hungarian Office of Immigration and Nationality rejected the applicant's request to change his gender marker on his refugee identity document stating that, as with South Africa, the change would need to be documented on the applicant's birth certificate. Since the applicant was not in the possession of a Hungarian birth certificate, his gender marker could not be changed.²⁶⁵ In their ruling, the Hungarian Constitutional Court further noted that since the legislators did not initially make provision for non-Hungarians to change their gender marker, they differentiated between persons based on citizenship in a manner that infringed on the right to human dignity.

The initial approach taken by the Hungarian authorities is similar to the approach of the DHA in South Africa.

6.6. Age of Consent

Recommendation 6: The age of consent for gender marker or name change should be brought in line with broader South African policy on the rights of children. Currently anyone under the age of 18 in South Africa cannot change their gender marker without the consent of a parent or legal guardian.

In relation to a Notice of Birth, section 9 of the Births and Deaths Registration Act 51 of 1992 does not expressly stipulate that a child's gender/sex is required at the time that the birth certificate is issued. Section 9(6) only state that "No person shall be registered unless a forename and a surname has been assigned to him".²⁶⁷ A person's forename may be changed upon application if the person is of age and in the case where the person is a child this could be affected by any parent after which such alteration will be published in the Government Gazette in terms of section 27.²⁶⁸

Below are some examples of best practice models used by other countries to align legal recognition for trans and gender diverse persons to human rights ideals with reference to age of consent:

²⁶³ UK Home Office 'Application Registration Card' (2018) UK Home Office available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/699750/application-registration-card-v4.0ext.pdf.

²⁶⁴ Quell M 'Iranian Refugee Wins Transgender Rights Case Against Hungary' Courthouse News Service 16 July 2020 available at <https://www.courthousenews.com/iranian-refugee-wins-transgender-rights-case-against-hungary/>.

²⁶⁵ Háttér Society 'Hungarian Constitutional Court Sides with Trans Refugee on Legal Gender Recognition' *Háttér Society* 21 June 2018 available at <https://en.hatter.hu/news/hungarian-constitutional-court-sides-with-trans-refugee-on-legal-gender-recognition>.

²⁶⁶ Transgender Europe (TGEU), ILGA Europe, and Transvanilla Transgender Association 'In the European Court of Human Rights *Rana v Hungary* (Application No. 40888/17)' (2017).

²⁶⁷ Supra 93 at section 9(6).

²⁶⁸ Supra 93 at section 24.

6.6.1. Canada

The province of British Columbia allows for birth certificates to be issued for children without gender specifications.²⁶⁹

6.6.2. Iceland

Legal gender recognition is only available to children with parental consent or, in the absence of which, on agreement of an expert panel.²⁷⁰ This particular provision has gotten criticism from civil society groups for being less progressive than the initial provision in the law which provided for children between the ages of 15 and 18 years to apply for a gender marker and name change without the consent of their parents²⁷¹

6.6.3. Argentina

According to article 5 of the Argentinian Gender Identity Law of 2012, a child under the age of 18 years can request for legal gender recognition through a legal representative.²⁷² Here, the evolving capacities of the child are taken into consideration in alignment with the best interest of the child, as discussed in the Convention of the Rights of the Child²⁷³ and in context of Argentina's domestic Law 26061 for the Comprehensive Protection of the Rights of Girls, Boys and Adolescents.²⁷⁴ In the case where a child's legal representative denies consent or it is impossible for them to provide consent, a judge may resort to summary proceedings through which the corresponding judge may decide on the application taking into account the factors highlighted above.²⁷⁵

6.6.4. Malta

In terms of article 7 of the Gender Identity, Gender Expression and Sex Characteristics Act of 2015, an application to change a child's gender and first name may be filed with the Voluntary Jurisdiction Section of the Civil Court by a person who has legal parental authority over a child or the tutor of such a child.²⁷⁶ The application is made on behalf of the child, whereas the Court must ensure that such application is in the best interest of the child in line with the Convention of the Rights of the Child.²⁷⁷ The Court must give due weight to the views of the child in this regard, taking into account their age and maturity. It is also deemed unlawful for a medical practitioner to conduct surgical intervention on the sex characteristics of a child. This procedure, if so elected, is to be kept in abeyance until the child can provide informed consent, either by reaching age of consent or through the person exercising parental authority over the child.²⁷⁸ Malta does not enforce a minimum age.

6.6.5. Denmark

Danish²⁷⁹ law requires an individual to be 18 years of age to amend their gender marker.

6.6.6. Norway

Children aged 6-16 need parental consent.²⁸⁰

²⁶⁹. Scripps Local Media 'Canada Issues Birth Certificate without Gender Specification' *WTLX* 6 July 2017 available at https://www.wtlx.com/syndication/canada-issues-birth-certificate-without-gender-specification/article_a65fb070-7b69-5284-a25d-0a0f-f61b851b.html.

²⁷⁰. ILGA Europe 'Annual Review of Human Rights Situation of LGBT People in Iceland Covering the Period January to December 2019' (2020) ILGA Europe available at <https://www.ilga-europe.org/sites/default/files/2020/iceland.pdf>.

²⁷¹. Ćirić J 'Iceland's Gender Autonomy Act Is a Step Forward for Trans and Intersex Rights' (2019) *Iceland Review* 19 June 2019 available at <https://www.icelandreview.com/news/icelands-gender-autonomy-act-is-a-step-forward-for-trans-and-intersex-rights/>.

²⁷². Supra 90 at article 5.

²⁷³. UN General Assembly *Convention on the Rights of the Child* (1989) 1577 *United Nations, Treaty Series* 3.

²⁷⁴. Argentina's Comprehensive Protection of the Rights of Children and Adolescent Law 26061[8] of 2005

²⁷⁵. Supra 275.

²⁷⁶. Supra 255 at 7.

²⁷⁷. Supra 276.

²⁷⁸. Supra 255 at 14.

²⁷⁹. Transgender Europe (TGEU) 'Norwegian Law Amending the Legal Gender' TGEU 1 July 2016 available at <https://tgeu.org/norwegian-law-amending-the-legal-gender/>.

²⁸⁰. Human Rights Campaign 'Gender Identity Law Takes Effect in Chile' Human Rights Campaign 10 January 2020 available at <https://www.hrc.org/blog/gender-identity-law-takes-effect-in-chile/>.

6.6.7. Chile

In December 2019, Chile passed the Ley de Identidad de Género or the Gender Identity Law. Based on self-determination, it allows those over the age of 14 to change their name and gender marker.²⁶¹

In congruence with their law, Chile's proposed bill on the Guarantees of the Rights of Children makes clear:

*Every child has the right, from birth, to have a name, a nationality and a language of origin; to know the identity of their fathers and/or mothers; to preserve their family relationships in accordance with the law; to know and exercise the culture of their place of origin and, in general, to preserve and develop their own identity and idiosyncrasy, including their gender identity.*²⁶²

6.6.8. Uruguay

Also working on a model of self-determination in Uruguay, The Comprehensive Law for Trans Persons allows those under the age of 18 to change their name and legal gender marker.²⁶³ Children who do not have the consent of legal guardians can seek judicial authorisation "if the court considers that granting the petition is in the best interests of the child".²⁶⁴

6.7. Trans and Gender Diverse Persons in Prisons

Recommendation 7: Trans and gender diverse persons must be able to legally change their gender markers whilst imprisoned with or without accessing gender affirming medical and/or surgical care.

Recommendation 8: Trans and gender diverse persons should be able to decide in which detention facility they are to be detained as a means to secure safety and dignity.

The case of *September v Subramoney* foregrounded several key issues for transgender people in prisons in South Africa. These include:

- Gender affirming healthcare remains unavailable both outside and inside the criminal justice system;
- The State does not provide for gender affirming healthcare to trans and gender diverse incarcerated persons;
- Prisoners' rights are limited, making it difficult for a trans and gender diverse persons to apply for a legal gender marker and name change; and
- In the event where this becomes possible, that inaccessibility of gender affirming healthcare would mean they would not meet the current minimum biomedical legal requirements outlined in Act 49.

Changing one's gender marker whilst incarcerated is not a right expressly listed in the Constitution. However, since the ruling in *September v Subramoney*, the DCS now carries a positive duty to respect and protect the rights of transgender prisoners. Arguably, protecting the right to gender expression on the basis of gender identity requires the state to recognise a transgender persons' gender identity regardless of whether that gender identity has been legally recognised or not. With the absence of gender affirming healthcare services, this makes it even more difficult for trans and gender diverse persons to access legal recognition. This means that either the State allows for a trans person to change their gender marker without the requirement that they access gender affirming medical and/or surgical care or, should the State retain the extraneous medical requirements, that access to gender affirming healthcare be made available to trans and gender diverse persons in prisons.

²⁶¹. Human Rights Campaign. 2020. 'Gender Identity Law Takes Effect in Chile'. Human Rights Campaign. 10 January 2020. <https://www.hrc.org/blog/gender-identity-law-takes-effect-in-chile/>.

²⁶². Guarantees of the Rights of Children Bill available at <http://www.movilh.cl/documentacion/2016/Proyecto-derechos-de-la-ninez.pdf>.

²⁶³. Comprehensive Law for Trans Persons 19684 of 2018.

²⁶⁴. Rodriguez-Ferrand G 'Uruguay: Congress Adopts New Law on Transgender Rights' Global Legal Monitor 31 October 2018 available at <https://www.loc.gov/law/foreign-news/article/uruguay-congress-adopts-new-law-on-transgender-rights/>.

Below are some examples of best practice models used by other countries to align legal recognition for trans and gender diverse persons to human rights ideals for trans and gender diverse persons in prison:

6.7.1. Malta

According to Malta's Trans, Gender Variant and Intersex Inmates Policy,²⁸⁵ inmates are assigned to a facility matching gender on legal documents. Inmates have the right to gender recognition, health services and mental health support. Critically,

A female-to-male trans inmate living as a man should be allocated to a male establishment as per gender marker. However, if he requests to be allocated to a female establishment due to high level of concern about sexual assault risk in a male establishment, then he should be kept out of association until the Director in consultation with CCF Professional Support Services responds in detail to his request.

*A male-to-female inmate living as a woman should be allocated to a female establishment as per gender marker. She should not be automatically regarded as posing a high sexual offence risk to other inmates and should not be subject to any automatic restrictions of her association with other inmates. The Director reserves the right to assign a different allocation if there is clear evidence that the inmate may pose a risk of abuse or be subjected to abuse.*²⁸⁶

6.7.2. The United Kingdom

In the UK, when a prisoner proposes to undergo, is undergoing or has undergone a process (or part of a process) for the purpose of reassigning their gender, the prisoner is considered to have the protected characteristic of gender reassignment for the purposes of the Equality Act 2010 and must not be discriminated against or harassed because of this.²⁸⁷ An establishment must permit prisoners who consider themselves trans and wish to begin to affirm their gender socially to live permanently in their acquired gender.²⁸⁸

Permitting prisoners to live permanently in their acquired gender will include allowing prisoners to dress in clothes appropriate to their acquired gender and adopting gender appropriate names and pronouns. An establishment must allow trans people access to the items they use to maintain their gender appearance at all times.²⁸⁹ Establishments must produce a management care plan outlining how the individual will be managed safely and decently within the prison environment.²⁹⁰ Establishments must put measures in place to manage the risk of transphobic harassment and transphobic hate crime. Trans prisoners should be offered as wide a regime of activities as other prisoners.²⁹¹

²⁸⁵. Malta Correctional Services 'Trans, Gender Variant and Intersex Inmates Policy' (2016) Government of Malta.

²⁸⁶. Ibid at 7.

²⁸⁷. Ministry of Justice 'The Care and Management of Individuals Who Are Transgender' (2016) *Her Majesty's Prison and Probation Service* 27.

²⁸⁸. International Bar Association LGBTI Law Committee 'Mr & Ms X: The Rights of Transgender Persons Globally' (2015) available at <https://www.ibanet.org/Document/Default.aspx?DocumentUid=17DF4B83-2209-4EF8-BBF7-9C8C163AF15E>.

²⁸⁹. Prison Reform Trust 'Information Sheet for Transgender People in Prison' (2016) available at <http://www.prisonreformtrust.org.uk/Portals/0/Documents/Prisoner%20Information%20Pages/Information%20sheet%20for%20transgender%20people%20in%20prison.pdf>.

²⁹⁰. Ministry of Justice 'The Care and Management For Individuals Who Are Transgender' (2020) *Her Majesty's Prison and Probation Service* 14.

²⁹¹. Ibid at 23.

6.8. Possibilities for Broader Legal Recognition

Recommendation 9: Adopt a no gender marker option approach and/or adopting a third category for gender identification outside of the binary model. The Department of Home Affairs must incorporate a third ‘X’ unspecified category of gender recognition alongside male and female in the National Population Register, which is to be reflected in a person’s identification number, to indicate unspecified. This third option should be available to parents upon the registration of their children at birth to indicate ‘unspecified’.

The current system of legal gender recognition in South Africa has two categories for gender: male and female. Since the Identification Act does not expressly prohibit the recognition of more than two gender designations, it would seem that the possibility exists to expand the scope of legal gender recognition to include a third category without having to amend the Act. In the majority of countries this has been facilitated in line with the stipulated rules for machine-readable passports provided by the International Civil Aviation Organisation (ICAO). The ICAO only allows for three designations on machine-readable passports: ‘M’, ‘F’ or ‘X’. The emergence of ‘X’ as a third category globally is directly tied to the possibilities of machine-readable passport systems.²⁹²

Below are some examples of best practice models used from other countries to align legal gender recognition for trans and gender diverse persons to human rights ideals:

6.8.1. India

In 2014, the Indian Supreme Court ruled in *NALSA vs India* that transgender people be recognised according to their gender identity.²⁹³ The decision included those who do not identify as either male or female.²⁹⁴ The gender marker for a third gender can be indicated on documents such as passport, driving license and ration card, and for admission in educational institutions and hospitals. Similar understandings have been reached in Nepal,²⁹⁵ Bangladesh²⁹⁶ and Pakistan.²⁹⁷

6.8.2. Iceland, Malta and Denmark

Malta, Iceland and Denmark are the sole European countries to allow ‘X’ markers not only on passports, but also IDs.²⁹⁸ While binary gender markers can be exchanged for an ‘X’ on identity cards, including passports, binary genders on birth certificates and, accordingly, in the birth registry are maintained in both Malta and Denmark.²⁹⁹ The Icelandic Act is aligned to a model of recognition that is based on self-determination and bodily autonomy and makes provision for this through the introduction of a third category of legal gender recognition that is neither male nor female. The designation is symbolised by the descriptor ‘X’. The country includes ‘X’ as an option in its National Population Register.³⁰⁰

²⁹²International Civil Aviation Organization (ICAO) ‘Part 4: Specifications for Machine Readable Passports (MRPs) and Other TD3 Size MRTDs’ (2015) Doc 9303 Machine Readable Travel Documents Seventh Edition 1 available at https://www.icao.int/publications/Documents/9303_p4_cons_en.pdf.

²⁹³. *National Legal Services Authority v Union of India and Others* (Writ Petition No. 400 of 2012 with Writ Petition No. 604 of 2013).

²⁹⁴. Ganguly M ‘South Asia’s Third Gender Court Judgments Set Example’ (2018) *Human Rights Watch* 6 June 2018 available at <https://www.hrw.org/news/2018/06/06/south-asias-third-gender-court-judgments-set-example>.

²⁹⁵. *Sunil Babu Pant and Others/ v. Nepal Government and Others*, Supreme Court of Nepal (21 December 2007).

²⁹⁶. Ahmed S ‘Recognition of “Hijra” as Third Gender in Bangladesh’ (2013) Bandhu Social Welfare Society available at <https://core.ac.uk/reader/162464218>.

²⁹⁷. *Khaki v. Rawalpindi*, Supreme Court of Pakistan (12 December 2009).

²⁹⁸. Holze L *Non-Binary Gender Registration Models in Europe: Report on Third Gender Marker or No Gender Marker Options* Brussels: ILGA Europe (2018) 16.

²⁹⁹. *Ibid* at 22.

³⁰⁰. Fontaine A ‘From Iceland — Iceland Passes Major Gender Identity Law: “The Fight Is Far From Over”’ (2019) The Reykjavik Grapevine 19 June 2019 available at <https://grapevine.is/news/2019/06/19/iceland-passes-major-gender-identity-law-the-fight-is-far-from-over/>.

Current medicalising and pathologising language used in Act 49	Human rights-orientated language that promote dignity on the basis of gender self-determination
'gender characteristics'	'gender expression'
Primary and secondary 'sexual characteristics'	Primary and secondary 'sex characteristics'
'alteration of sex description'	Question the validity of the foundation of law being built on 'sex description' visa vie 'gender recognition'
'surgical and/or medical treatment'	'social, medical and/or surgical gender affirmation'
'gender reassignment'	'gender affirmation/confirmation'
'evolvment through natural development'	It is unclear what the relevance of this section is for trans and gender diverse persons.
'medically examined' and 'medical reports'	Language which polices trans and gender diverse bodies as a means to promote binary models of gender identification and gender expression. This language suggest that a person with medical expertise knows a trans or gender diverse persons gender better than they do. Human rights-based models advance demedicalisation and depathologisation of trans and gender diverse identities and expressions in law . Legislation should be rooted in gender affirming language such as self-determination, self-identification, bodily autonomy, bodily integrity and legal gender affirmation
'sex description'	Interchangeably used with gender description. This is a misnomer as the two concepts are interrelated but not the same. The law needs to provide a clear understanding of how recognition of gender identity and sex description will be recognised in tandem without reducing trans and gender diverse persons to their 'sex assigned at birth'. Specific legal mechanisms need to be developed to this extent.

³⁰³. Gender Dynamix 'Amplifying Trans and Gender Diverse Voices' Podcast 9 YouTube 30 June 2020 available at <https://youtu.be/P2b6RIZON4Y>.

6.10. Application Process and Supporting Documents

Recommendation 11: Legal Gender Marker change and name change, if an applicant requires both, should be done simultaneously.

Section 2 of Act 49 provides that the following procedural requirements must be adhered to:

- i. That an application for a “sex marker” change be done in accordance with the prescribed form contained in section 27 of the Births and Deaths Registration Act;*
- ii. That such application form ‘be accompanied by the birth certificate of the applicant’;*
- iii. That such application be accompanied by reports from an experienced medical practitioner who provided the medical or surgical care; and*
- iv. That such medical report must be supported by another medical report confirming its correctness.*³⁰⁴

As outlined above, in order for trans and gender diverse persons to access a medical report/referral letter from a medical practitioner or surgeon to access hormone therapy or surgery, a psychologist or mental healthcare provider needs to be convinced that the person desires to align their physical body with their gender identity. If there are any uncertainties, a referral letter will not be granted. Without such a referral letter initiating medical or surgical care, trans and gender diverse persons cannot access legal gender recognition. The power entrusted to mental healthcare practitioners to play ‘god’ in the lives of trans and gender diverse persons has resulted in gross human rights violation.³⁰⁵ This is an unnecessary step in the process of legal recognition.

In addition to this, the Act works in a disjointed manner in relation to other processes which typically need to accompany gender marker change applications. These include the amendment of a person’s first name(s). To this extent, the Department of Home Affairs has adopted a practice of requiring trans and gender diverse persons to submit two separate applications, one for the gender marker change and the other for a name change. This results in the applicant having to pay for a new identification document in line with the first amendment which is the gender marker change. Then upon receiving the identity document the applicant must apply and pay again in terms of the Births and Death Registration Act to amend their first name(s).

Below are some examples of best practice models used by other countries to align legal recognition for trans and gender diverse persons to human rights ideals:

6.10.1. Argentina

In Argentina, the amendment of identity documentation is a simple process. Gender and first name can be amended simultaneously. The applicant provides the National Bureau of Vital Statistics with the details of their ‘new’ name and a photograph, to certify amendment of birth certificates, public records, and to issue a new identity card.³⁰⁶

6.10.2. India

Chapter 3 of The Transgender Persons (Protection of Rights) Act of 2019 clearly outlines the steps to be taken to change the gender marker. A transgender person can apply to the district magistrate for a certificate of transgender identity, which will give them the right to change the name on their birth certificate and have all documents updated accordingly.³⁰⁷

³⁰⁴. Supra 22 at section 2.

³⁰⁵. Supra 42.

³⁰⁶. Gender Identity Law No. 26.743 at article 4.

³⁰⁷. Ghandi D, & Ghia U ‘Transgender Rights Bill: A Stunted Understanding of Gender and Equality’ The Wire 26 November 2019 available at <https://thewire.in/lgbtqia/transgender-rights-bill-a-stunted-understanding-of-gender-and-equality>.

6.10.3. Ireland

In 2015, Ireland passed the Gender Recognition Act.³⁰⁸ The Act allows for the application to be submitted in writing or online to the Minister for consideration and amendment of the gender marker and name. The issuing of the gender recognition certificate amends the gender marker.³⁰⁹

6.11. Internal Remedies and Appeal Procedures

Recommendation 12: The internal appeals procedure can be exhausting, traumatic and costly. The Department of Home Affairs should ensure that frontline staff and the Director General capacitated to effectively grant the application. A process of self-determination which drastically reduces the number of rejections and by extension the bureaucratic case load for the Department. This would also mean the process would be overall more cost effective. The initial cost of an application for a gender marker and name change should be waived.

Section 2(3) to 2(10) of Act 49 details the appeal procedure that must be followed if an application is rejected. In South Africa, in the case that an application is refused, the Director-General must furnish the applicant with written reasons for the decision. However, no timeframe for the furnishing of reasons is given. Legally, however, section 5 of the Promotion of Administrative Justice Act 3 of 2000 applies.

In the instance of a rejection the applicant may then lodge an appeal to the Minister of Home Affairs against the decision. The appeal must be lodged within 14 days after the decision of the Director-General is made known. If an appeal is refused the applicant may apply to the District Magistrate's Court for the Court to make an order to direct the Director-General to grant the alteration of particulars. Trans and gender diverse persons have reported numerous incidents of Home Affairs 'losing' documents, resulting in an application being denied or substantially postponed.³¹⁰

Below are some examples of best practice models used by other countries to align legal recognition for trans and gender diverse persons to human rights ideals:

6.11.1. Argentina

In terms of Argentina's Gender Identity Law, which works on the basis of self-determination, an applicant needs to submit a request to the National Bureau of Vital Statistics or their district offices for the amendment of their birth certificate and new national identity card. The identity number is to remain the same after a successful application with only the gender marker and name of the person having been changed. Subsequently, the public officer will notify the amendment in the Civil Register in such jurisdiction from which the birth certificate was issued to ensure that a new birth certificate incorporating the changes can be issued to allow for the issue of the new national identity card. It should be noted that the procedure to amend a person's record is free and does not require any third party actor such as an agent or lawyer.³¹¹

6.11.2. Colombia

Since 2015, the process in Colombia takes 5 days and requires the applicant to present a written request along with their name and national identity card number and copies of their national identity card and birth certificate.³¹²

³⁰⁸. Irish Gender Recognition Act of 2015.

³⁰⁹. Citizens Information 'Changing to Your Preferred Gender' (2015) Citizensinformation.ie Ireland .available at https://www.citizensinformation.ie/en/birth_family_relationships/changing_to_your_preferred_gender.html (accessed 17 November 2020).

³¹⁰. Supra 39.

³¹¹. Supra 90 at article 6.

³¹². Chiam Z, Duffy S & Gil M Trans Legal Mapping Report Recognition before the Law (2017) 93. ILGA.

6.11.3. Uruguay

Article 8 of The Comprehensive Law for Trans Persons requires that the process must be completed within 30 days.³¹³

6.12. Accompanying Regulations and Absence Thereof

Recommendation 13: Any new Act must be accompanied by a set of regulations and guidelines clearly outlining implementation.

There are no regulations in place that provide guidelines for the implementation of Act 49 as it relates to the completion of an application form for a change in gender marker/sex descriptor, submission of supporting documents, adherence to timelines and turn-around time. Moreover, there is little to no information guiding public officials in providing a service that is dignified and respectful of trans and gender diverse persons' human rights, and that is aligned to the Constitution and national legislation pertaining non-discrimination and administrative justice. The absence of such regulations contributes to uncertainty, confusion and gross human rights violations.

This has resulted in several challenges for applicants and frontline officials. Many trans and gender diverse persons have reported receiving poor treatment at Home Affairs offices.³¹⁴ This includes receiving contradictory information,³¹⁵ applications marked as incomplete or deleted³¹⁶ from the system or denied without explanation³¹⁷ and being forced to repay application fees.³¹⁸ In some instances, trans and gender diverse persons have been sent from one official to another or one Home Affairs office to another reflecting uncertainty, active obstruction or unwillingness on the part of officials.³¹⁹ This also suggests inadequate staff training, and that there is a poor accountability structure that ensures professionalism from staff. These stressors, which applicants have to endure in an effort to have inappropriate documentation rectified, contribute to high rates of depression and anxiety amongst trans and gender diverse individuals.³²⁰

³¹³. Comprehensive Law for Trans Persons 19684 of 2018 at article 8.

³¹⁴. Mokoena N Report of the Southern Africa Transgender Advocacy and Capacity Building Summit (2014) 8. Transgender and Intersex Africa (TIA).

³¹⁵. Supra 23 at 5.

³¹⁶. Fokazi S 'What the Law Says about Gender Affirmation Surgery' (2017) IOL 26 September 2017 available at <https://www.iol.co.za/lifestyle/health/what-the-law-says-about-gender-affirmation-surgery-11357736>.

³¹⁷. May C et al. *The Experiences of Transgender and Intersex Persons in South Africa: Submission to the United Nations Universal Periodic Review* (3rd Cycle). State under Review: South Africa (2017) 6.

³¹⁸. Staff Writer 'Home Affairs Continues Abuse of Transpeople' *MambaOnline - Gay South Africa Online* 8 May 2012 available at <http://www.mambaonline.com/2012/05/08/home-affairs-continues-abuse-of-trans-people/>.

³¹⁹. Sanasie J 'Transgender SA Woman Speaks out about Prejudice and Public Humiliation' *News24* 27 June 2016 available at <https://www.news24.com/news24/video/southafrica/news/watch-a-transgender-life-in-south-africa-20160627>.

³²⁰. Bethany AO 'Travails of the Transgender' *IOL* 22 May 2016 available at <http://www.iol.co.za/news/south-africa/western-cape/travails-of-the-transgender-2024639>.

Below are some examples of best practice models used by other countries to align legal recognition for trans and gender diverse persons to human rights ideals:

6.12.1. The United Kingdom

There are several different documents providing regulations and guidelines accompanying the Gender Recognition Act. As already mentioned, the Act has accompanying guidelines for its use in relation to those incarcerated.³²¹ A more General Guide for All Users also accompanies the Act.³²²

6.12.2. Malta

Malta has perhaps the most extensive guidelines covering the Act's implementation across diverse fields including education,³²³ healthcare³²⁴ and legal gender recognition.³²⁵

The country has several different guidelines accompanying the Act in order to ensure its implementation. These include guidelines for healthcare implementation at it relates to the Act.

6.13. Change of Particulars in National Registers

Recommendation 14: The effect of Act 49 currently allows for a person's "sex marker" and name change to be recorded in the National Population Register. This should remain the legal effect of the Gender Recognition Law. This mechanism should also allow for the correction of a person's gender marker in relation to electing an alternative gender marker option entitled 'X' unspecified.

In South Africa, identity numbers are gendered. Upon successful application for a change of gender marker, a new identification number is provided, and the old number is deleted. Thereafter an applicant must apply for a new Identity Card, and will receive a confirmation letter which stipulates that the gender marker has been altered. This letter is required to alter all personal information with other institutions such as banks.



³²¹. Ministry of Justice 'The Care and Management of Individuals Who Are Transgender' (2020) *Her Majesty's Prison and Probation Service* available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/863610/transgender-pf.pdf.

³²². Her Majesty's Courts and Tribunal Service 'T455 - The General Guide for All Users - Gender Recognition Act 2004'. (2018) Gov.uk available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/786910/t455-eng.pdf.

³²³. Ministry for Education and Employment (Malta) 'Trans, Gender Variant and Intersex Students in Schools Procedures' (2015) Malta: *Ministry for Education and Employment*.

³²⁴. Office of the Deputy Prime Minister Ministry for Health Transgender Healthcare (2019) Malta: Government of Malta.

³²⁵. Ministry of Social Dialogue, Consumer Affairs and Civil Liberties 'Gender Identity, Gender Expression and Sex Characteristics Act' (2014) Malta: *Ministry of Social Dialogue, Consumer Affairs and Civil Liberties*.

Below are some examples of best practice models used by other countries to align legal recognition for trans and gender diverse persons to human rights ideals:

6.13.1. Argentina

In Argentina, the amendment of the person's gender marker and name is affected on their birth certificate and in the records with a new national identity card being issued.³²⁷ However, because identity numbers are not gendered, a person's identification number remains the same. No reference to the changes made are kept which acts as safeguard for privacy, dignity and confidentiality in the event that a someone would want to identify such person.³²⁸ Article 9, however, prescribes that only the document holder or third party with a well-founded written judicial authorisation may have access to the original birth certificate. For purposes of the Gender Identity Act, no amendments made in terms of the Act will be published. Subsequently, article 10 also places the responsibility of aligning amended particulars on the National Bureau of Vital Statistics (the body to whom application is made).³²⁹ In doing so the National Bureau of Vital Statistics will thus share the changes made with the National Registry of Criminal Records, the Electoral Registry and other bodies as provided for in the Regulations.

6.13.2. Malta

Due to Maltese legal tradition, the change of particulars in the national register is filed through a Notary Public who notifies the Director for the Public registry. Following from this, birth certificates and deeds are updated. The effect of a successful application is that a note in the act of birth is entered, whereas a full certificate of the act of birth is issued showcasing the changes of particulars based on the annotations provided. In essence, the full version of the Maltese birth certificate shows the annotation process, the shorter birth certificate does not. There is also a limit on who can request a full birth certificate shows the annotation process, the shorter birth certificate does not. There is also a limit on who can request a full birth certificate.

6.13.3. Denmark

Denmark is similar to South Africa, in that identity documents contain a social security or identity number reflecting binary gender in its last digit (even digits stand for female and odd digits for male gender). Adults in Denmark can change the gendered digit of this number from odd to even without fulfilling any requirements, except for a six-month waiting period.³³¹ The effectiveness of the X marker, available in Denmark, is however reduced due to this.

6.13.4. Iceland

When legal gender recognition and name change are registered in the population register, a new identity number is issued to the applicant by Registers Iceland. The previous identity number remains accessible to those government authorities and other bodies which, due to the nature of their work, need to be aware of the link between the old and new number. Iceland is the only country, which also facilitates the X as a possibility in its National Register.³³²

³²⁷. Supra 90 at article 4.

³²⁸. Supra 90 at article 6.

³²⁹. Supra 90 at article 10.

³³⁰. Supra 91 at article 5.

³³¹. Holzer L 'Non-Binary Gender Registration Models in Europe: Report on Third Gender Marker or No Gender Marker Options (2018) 20.

³³². Fontaine A 'From Iceland — Iceland Passes Major Gender Identity Law: "The Fight Is Far From Over"' 2019 The Reykjavik Grapevine. 19 June 2019 available at <https://grapevine.is/news/2019/06/19/iceland-passes-major-gender-identity-law-the-fight-is-far-from-over/>.

6.14. New Identification Number versus Old Identification Number

Recommendation 15: In the event where a new ID number is issued, the old ID number must be completely deleted and not linked to the applicant in any way. The new law must put the onus on the State to ensure that safeguards in the form of constitutionally sound procedures and systems are put in place to ensure that a person's rights are not infringed and benefits do not get forfeited on account of a change in ID number.

Recommendation 16: Legal gender marker change must not result in forced divorce or the duplication of a person's identity by retaining both the old and new identification numbers to ensure compliance with discriminatory administrative systems and practices.

The Alteration of Sex Description and Sex Status Act 49 of 2003 is the piece of legislation in South Africa that allows for trans, gender diverse and intersex people to affirm their gender identity. Due to the fact the identification numbers in South Africa are gendered (females are assigned numbers in the range 0000-4999 and males from 5000-9999), upon successful application the DHA issues the applicant with a new identification number, cancelling the old identification number in the process.

Despite the creation of a new gendered identification number, the Act expressly stipulates that no right which has been acquired or accrued to a person before the legal alteration will be negatively affected by the alteration.³³³ Thus trans, gender diverse and intersex people to retain all their rights and entitlements after the legal alteration is affected. In practice this has been difficult. The issuing of a new identification number to a trans person has however resulted in the complete erasure of a person's historic existence, placing the applicant in a difficult position of having to manage all the negative legal consequences that may flow from this. A good example of such consequences is to be found in the case of *KOS v Minister of Home Affairs*. The case brought to light several issues with regards to Act 49:

- i. The absence of a uniform approach by government departments, in this case the Department of Home Affairs, on issues concerning transgender persons is striking.³³⁴
- ii. Act 49 is unsatisfactorily administered, and this is evident from the experiences of the applicants in the case.³³⁵

Consequently, the current practice appears to be that the DHA are using both identification numbers of the transgender spouses in KOS to ensure that the marriages may continue uninterrupted, whereas the new identity documents with changed particulars can be issued. The Department of Home Affairs is therefore acting unlawfully and contradictory to the court order which sought the have the matter remedied in a lawful and constitutional manner.

6.14.1. Argentina

Article 7 provides that amendment in the records of gender and name will not affect rights and legal obligations.³³⁶ The applicant's identity number remains the same. Article 9 notes further that only those authorized by the document holder or provided with a written and well-founded judicial authorization can have access to the original birth certificate".³³⁷

³³³ Supra 38 at section 3(3).

³³⁴ *Supra 5 at 30*.

³³⁵ Ibid at 32.

³³⁶ Supra 90 at article 7.

³³⁷ Supra 90 at article 9.

6.15. Removing Gender Markers on Identity Cards and Associated State Issued Identity Documents

Recommendation 17: The omission of gender markers from Identity Documents including the Smart Card ID. The Identification Act is not prescriptive regarding the need for a person's gender to be reflected on their Identity Card. In light of the old Identity Books (the Green ID Book) not having indicated a person's gender at all, there is precedent for this. This practice is supported by the Identification Act as it stands.

A person's identity card, obtained at the age of 16 in accordance with section 15 of the Identification Act, may contain all particulars as detailed in section 8(a), (b), (c) and (f) which includes a person's gender. The Act provides that a person's gender 'may' be stated on their ID card and is therefore not framed as a legal requirement.³³⁸ Sally Gross, founder of Intersex South Africa (ISSA), suggested that it would be possible given the shift to the smart card ID and South Africa's investment in biometric data to eliminate gender from identity documents and cards.³³⁹ Moreover, although the smart card states either 'M' or 'F', the previous green ID book in South Africa did not indicate gender. It is only with the advent of the Smart Card ID system that this has changed. No reason can be established as to why.

Below are some examples of best practice models used by other countries to align legal recognition for trans and gender diverse persons to human rights ideals:

6.15.1. The Netherlands

While implementing a model of self-identification, the Netherlands has opted to limit public gender registration. Information regarding gender is omitted from public transportation cards, student cards, and on government forms where it has been found to be without purpose or use.³⁴⁰ A number of Dutch educational institutions have eliminated gender markers from their student cards and implemented gender-neutral communication with students. Some cities, such as Amsterdam, the Hague and Utrecht, have further announced their intention to eliminate unnecessary questions related to one's gender from all government forms and/or render any official communication with its citizens gender-neutral.³⁴¹

6.16. Privacy and Confidentiality: Protecting Details Concerning Legal Amendments

Recommendation 18: Act 49 does not require the publication of changes in particulars made in terms of the Act. This should continue as a sound legal mechanism to protect trans, gender diverse and intersex people from social stigma, discrimination and violence. To this extent, the new Gender Recognition Law should incorporate such protective provision and extend this name change.

Recommendation 19: As a general rule, no record of any amendment made in terms of the Gender Recognition Law should be retained to ensure that such particulars are never used against applicants. In the event where records are kept, such particulars should only be available to the document holder.

The Regulations on Registration of Births and Deaths of 2014, accompanying the Births and Deaths Registration Act, requires that amendments to forenames and surnames be published in the Government Gazette.

The Act does not require the publication of changes in other particulars.

³³⁸. Identification Act 68 of 1997 at section 14(a).

³³⁹. Supra 129.

³⁴⁰. Holzer L *Non-Binary Gender Registration Models in Europe: Report on Third Gender Marker or No Gender Marker Options* (2018) 7.

³⁴¹. Wareham J 'Dutch ID Cards To Become Gender Free – Could More Of Europe Follow?' Forbes 7 July 2020 available at <https://www.forbes.com/sites/jamiewareham/2020/07/07/dutch-id-cards-to-become-gender-free--could-more-of-europe-follow/>.

Below are some examples of best practice models used by other countries to align legal recognition for trans and gender diverse persons to human rights ideals:

6.16.1. The United Kingdom

It is an offence in the UK to disclose any information regarding gender affirmation if a person has applied to have their gender marker adjusted. The Act stipulates that it is a criminal offence for “representatives of public bodies, services, businesses or employers to share your previous name, gender history or trans identity without your consent”.³⁴² Given that it is criminal in law, a trans person who has had this right breached is not required to hire a lawyer. Rather it is the police’s responsibility to deal with the matter. Should the courts find someone guilty of this breach, not only will they have a criminal record but may well be liable for a fine of up to £5000.³⁴³

6.16.2. Malta

Deliberately breaching a person’s privacy in relation to Malta’s Gender Identity Act is an offence, as stipulated in the Act,³⁴⁴ which can incur a fine of 1,000€ – 5,000€.³⁴⁵

6.16.3. Argentina

Article 9 states that only those with the authorization of the holder of the same or with a written and founded judicial order will have access to the original birth certificate. In no case will publicity be given to the registration rectification of sex and change of name, except with the authorization of the owner of the data.

6.17. Community-led law reform and policy development processes

Recommendation 20: Ensure that the processing of reforming Act 49 to align it with constitutional and other protections and to align it with global trends is done in a manner that centres on the public participation of transgender, gender diverse and intersex persons.

Since 2003, when South Africa’s Act 49 was first tabled, trans activists have repeatedly informed the National Assembly Home Affairs Portfolio Committee that the Act is discriminatory,³⁴⁶ that self-identification rather than legal pathologisation (the requirement of medical reports by medical practitioners) should be the way in which the state provides for legal gender recognition,³⁴⁷ and that the lack of any consultation and participation of trans and gender diverse persons in the writing of the initial bill rendered the process invalid and undemocratic. In 2003, the Home Affairs Portfolio Committee chairperson recognised the validity of these issues but urged compromise so as to pass the Alteration of Sex Description and Sex Status Act 49 of 2003 before the 2004 elections. He gave an undertaking that a thorough review and reform of the law with participation of trans and gender divers persons would follow.³⁴⁸ To date, this has not happened.

Drawing from the process in 2003, as civil society we demand meaningful inclusion and meaningful participation at a strategic level in the review and repeal process of Act 49 and the development of new legislation to address gender recognition in South Africa.

³⁴². Galop ‘Trans Privacy Law’ *Galop* (blog) 7 August 2017 <http://www.galop.org.uk/trans-privacy-law-2/>.

³⁴³. Loc cit.

³⁴⁴. Supra 91 at article 11(1).

³⁴⁵. Supra 329.

³⁴⁶. Supra 129.

³⁴⁷. Kheswa S ‘Portfolio Committee for Home Affairs: Request for a Meeting to Discuss Implementation of Act 49 of 2003’ (2012).

³⁴⁸. Cape Town Transsexual/Transgender Support Group *Alteration of Sex Description and Sex Status Bill Oral Presentation for the South African Home Affairs Portfolio Committee Hearings* on 9 September 2003 (2003) Cape Town: Parliamentary Monitoring Group 10 September 2003 available at <https://pmg.org.za/committee-meeting/2849/>.

7. Conclusion

In addressing respect for difference and the advancement of the right to equality, the Court held in *National Coalition for Gay and Lesbian Equality v Minister of Justice* that:

*What the Constitution requires is that the law and public institutions acknowledge the variability of human beings and affirm the equal respect and concern that should be shown to all as they are. At the very least, what is statistically normal ceases to be the basis for establishing what is legally normative. More broadly speaking, the scope of what is constitutionally normal is expanded to include the widest range of perspectives and to acknowledge, accommodate and accept the largest spread of differences what becomes normal in an open society, then, is not an imposed and standardised form of behaviour that refuses to acknowledge difference, but the acceptance of the principle of difference itself, which accepts the variability of human behaviour.*³⁴⁹

In drawing from the constitutional obligations that all actors in South Africa carry, this Position Paper highlights the need for law reform and policy development to fairly and justly reflect and protect gender diversity so that trans and gender diverse persons can fully live the constitutional promise of dignity, equality and freedom. In this instance, dignity, equality and freedom mean the right to have gender recognised on the basis of self-identification, self-determination and bodily autonomy and to act with full personal autonomy and agency. This means an investment in a model of gender identification that is cognisant of the diversity of gender in a way that does not require any medical evidence as proof.

From inequality to a place of substantive equality, from being positioned as ‘abnormal’ and ‘deviant’ to asserting difference without being subjected to second-class citizenship, to dismantling sex and gender binaries, the law has an opportunity now to further address social injustice and gendered inequalities and in so doing break South Africa’s ties with its oppressive past. We need to recognize that new possibilities exist to unlearn and relearn ways of building a nation that continues to protect and respect diverse genders and sexualities. As opposed to viewing transgender and gender diverse people as disruptive and unsettling of a status quo, we can view them as people who embody difference as a positive feature of human existence in its diversity, with the ability to contribute their talents and skills towards nation-building.

Belonging and recognition are fundamental concepts that determine the experiences of people to participate in the life of a nation and society and be valued for whom they regardless of their bodies, their sexuality, their gender identity and gender expression, amongst others. Should South Africa continue to overlook appropriate and accurate legal redress for trans and gender diverse persons in refusing to redesign and implement new law addressing legal gender recognition on the basis of the principles highlighted above, it will reveal government’s gender repressive power in relation to difference and diversity and a flagrant disregard of its obligation in advancing transformative constitutionalism.

Aluta Continua!

³⁴⁹. *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC) at 134.

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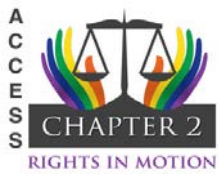
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AUTHOR BIOGRAPHIES

Liberty Matthyse

Liberty Matthyse is the former Legal, Policy and Education Advocacy Officer of Gender DynamiX, joining the team as Executive Director on 1 February 2018. Identifying as a trans non-binary person, she/they hold a Master's Degree in Law (cum laude). Liberty also holds qualifications in Project Management, Leadership, Financial Management and Strategic Business Management. She/They can be defined as a community-centred, critical-thought, human rights and social justice activist whose passion in fighting for dignity, equality and freedom for trans and gender diverse persons drives their/her dedication to achieving positive change. Author to a self-published book "A Darling's Journey to Liberty", in her/their spare time she/they enjoy spending time with loved ones, particularly in their/her hometown of Darling.

Amy-Leigh Payne

Amy-Leigh completed her LLB in 2017 at the University of the Western Cape. Amy-Leigh is currently an Attorney at the Legal Resources Centre in Cape Town and a Bertha Justice Fellow Alumni. Her work has a specific focus on Education and ensuring Equality and Non-Discrimination of women, children and LGBTQI+ persons.

Mandivavarira Mudarikwa

Mandi Mudarikwa is an attorney at the Women's Legal Centre working primarily in the Equality in Relationships and Sexual and Reproductive Health Rights focus areas. Her work over the last 11 years has sought to use law, specially strategic litigation and advocacy, to advance and promote the realisation of the right to equality and non-discrimination for people who are marginalised, excluded and made invisible because of by the operation of law, policies and practice.

Estian Smit

Estian Smit is Research, Advocacy and Policy Manager at Triangle Project, an LGBTQI+ human rights organisation in Cape Town, South Africa, and former National Advocacy Coordinator and Researcher at Gender DynamiX. As a trans activist, Estian has two decades of experience in trans and gender diverse law and policy reform advocacy, research, capacity-strengthening and community consultation. Legal gender recognition and non-pathologising healthcare access for trans and gender diverse people have been a strong focus of their work. Estian holds a Master's degree in Philosophy from Stellenbosch University.

B Camminga

B Camminga (they/them) is a Postdoctoral Fellow at the African Centre for Migration & Society, Wits University, South Africa. They are the co-convenor of the African LGBTQI+ Migration Research Network (ALMN). Their work focuses on the physical and digital journeying of transgender refugees from the African continent. Their first book, *Transgender Refugees & the Imagined South Africa* (Palgrave, 2019), was awarded the 2019 Sylvia Rivera Award in Transgender Studies.

Ricardo Rossouw

Ricardo J. Rossouw is a social worker with an interest in the mental health of marginalised communities, in particular the LGBT community, street children and refugees. His particular interest in the mental wellbeing of transgender and bisexual individuals stems from their increasing experience of linear oppression within the LGBT community. His masters research utilised a photo-voice participatory action research methodology to explore the mental health care challenges experienced by older transgender people in the Cape metro-pole in Cape Town, South Africa.

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Legal Resources Centre

Gender Dynamix
Unit 21, Collingwood Building
10 Anson Street
Observatory
Cape Town, South Africa
Tel: +27 (0) 21 447 4797
Email: info@genderdynamix.org.za
Website: <https://www.genderdynamix.org.za/>

Legal Resources Centre
Ground Floor, Block D,
Aintree Business Park
c/o Doncaster & Loch Road
Kenilworth
Email: info@lrc.org.za
Website: <https://www.lrc.org.za>