



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

February 2016

Human Rights Committee Additional Information Report: South Africa, 2016

Contents

Contents.....	2
Introductions to the Organisations making the Submissions.....	3
Understanding key terminology relating to the submission	4
Alteration of sex description – denial of citizenship	6
Non-discrimination and violence against transgender and intersex persons.....	10
Security of the Person and Freedom from Arbitrary Arrest and Detention:	13
Equality in Accessing Education for Transgender Children.....	14
Bodily integrity, freedom and security of the person relating to non-consensual, medically unnecessary treatment/surgery on intersex infants, children and adolescents	18
Unequal Access to Health	23
Unequal access to socio-economic opportunities	26

We hereby submit additional input to the Human Rights Committee (Committee) in advance of the 116th Session of the Committee to be held in March 2016 and in response to the invitations to civil society organisations to provide additional information during the preparation of the 116th session. We welcome this opportunity to contribute to the Committee's evaluation of the implementation of the International Convention on Civil and Political Rights in South Africa. The submissions contained within this report focus exclusively on the plight of transgender and intersex persons in South Africa seeking to have their civil and political rights respected, protected and fulfilled. We believe that the challenges faced by transgender and intersex persons in South Africa are currently not dealt with sufficiently in the state report, list of issues and the replies to the list of issues. This submission therefore aims to provide further information in order to ensure that the dialogue between the Committee and the government of South Africa (GOSA) is inclusive and cognisant of the rights and challenges of transgender and intersex persons.

Introductions to the Organisations making the Submissions

Gender DynamiX (hereinafter GDX)

GDX, established in 2005, is the first organisation based in Africa to deal specifically with transgender issues. The organisation is currently based in Cape Town, South Africa. The organisation uses various advocacy methods to raise awareness about the structural human rights violations experienced by transgender persons as a result of a lack of access to the right to health, citizenship, education, safety and security and freedom of expression. GDX provides resources, information and support for transgender persons, their partners, family, employers and the general public. Central to its advocacy strategy is the education of medical service providers, teachers, government officials and the community.

Iranti-Org

Iranti-org is an African transgender and lesbian focused media advocacy organisation based in Johannesburg, South Africa. Founded in 2012, Iranti-org works within a human rights framework, which it uses for raising issues on gender identities and sexual orientation. It was formed with the clear intention of building local partnerships and movements that use media as a tool and platform for gathering evidence, lobbying, advocacy and educational interventions across Africa. Through the use of various media tools such as video, photography, audio recording, among others, Iranti-org seeks to establish an archive of African Queer memory that affirms and challenges the traditional notions of gender identities and sexual orientation.

Legal Resources Centre (hereinafter LRC)

The LRC is a public interest, non-profit law clinic in South Africa that was founded in 1979. Since its inception, the LRC has shown a commitment to working 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.

Through its Equality and Non-Discrimination project (“the project”), the LRC utilises creative and effective solutions to support its clients. These include using a range of strategies such as impact litigation, law reform initiatives, participation in development processes, education and networking within and outside of South Africa. Within the arena of equality and non-discrimination, the LRC has viewed the rights of vulnerable and marginalised persons, including sexual and gender non-conforming minorities, women, children, refugees and sex workers, as being integral to the pursuit of social justice. It is within this context that the LRC seeks to ensure that the existing, and developing, legal apparatus available are appropriately cognisant of the rights and realities of vulnerable and marginalised groups. The LRC believes that this will ensure that experiences of discrimination, violence and prejudice are reduced and eventually diminished.

Understanding key terminology relating to the submission

Sexual orientation v gender identity and gender expression v intersex status/bodily diversity:

It is extremely disheartening to see the South African government confusing and conflating sexual orientation, gender identity and expression, and intersex status/bodily diversity/sex characteristics with one another. We are also very concerned with the State Report definition of, and use of, the term “corrective rape”.

The Report and government policies and intervention programmes continue to confuse and conflate three different concepts which have different implications for a person or group’s identity and bodily integrity. The Report fails to distinguish between sexual orientation; which pertains to sexuality and a person’s ‘capacity for profound emotional, affectional and sexual attraction to, and intimate relations with, individuals of a different gender or the same gender

or more than one gender'¹; and gender identity, which refers to a 'person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth.'² Similar to the Report, South African government departments and human rights institutions often perpetuate misconceptions that transgender and intersex issues are a matter of sexual orientation,^{3 4} or that intersex rights are a matter of gender identity and expression rather than bodily diversity and sex characteristics,⁵ or the misconception that intersex persons may have two full sets of genitals.⁶

The conflation of sexual orientation, gender identity and intersex status/sex characteristics has resulted in a frustration of the attempts by gender diverse and body diverse minorities to obtain access to various rights, and in some instances has meant that transgender and intersex people are unable to access their rights to citizenship and the additional rights that accrue with such recognition. The continued, uncritical use of the umbrella term lesbian, gay, bisexual and intersex (LGBTI) is therefore inaccurate and frustrating as it pools together three different groups, which although they might have similar needs in some respects, also have divergent needs as a result of different vulnerabilities, concerns and rights which the State needs to uphold.

This brings us to the term and definition ascribed to "corrective rape" in the Report, which seeks to create an impression that sexual violence is used against only lesbian women for the purpose of forcing them to change their sexual orientation. We would submit that the crime is much more than merely seeking to 'correct' lesbian women's behaviour. It is rather perpetrated against all diverse and non-normative persons who express difference across the sexuality, gender identity/expression and sex characteristics spectrum. The Report diminishes the fact that transwomen and transmen, intersex individuals, as well as other gender diverse and body diverse persons, and those who are perceived as gender non-

¹ICJ Yogyakarta Principles – Principles on the Application of International Human Rights Law in relation to Sexual orientation and Gender Identity available at <http://www.yogyakartaprinciples.org/>

²Ibid.

³ Department of Social Development (DSD). 2015. National adolescent sexual and reproductive health and rights framework strategy 2014–2019, p.25 available at http://www.dsd.gov.za/index2.php?option=com_docman&task=doc_view&gid=578&Itemid=39

⁴ South African Human Rights Commission (SAHRC). 2015. Equality roundtable dialogue report, pp.15-16.

⁵ South African Human Rights Commission (SAHRC). 2012. Equality report. Commentaries on equality: Race, gender, disability and LGBTI issues, p.49.

⁶ Department of Justice and Constitutional Development (DOJ & CD). 2012. *Lesbian, gay, bisexual, transgender, intersex (LGBTI): Situational analysis*. Report prepared by Create Africa Trading (CAT) with Social Law Project (SLP), University of the Western Cape, p.6.

conforming, are at serious risk of sexual violence and even death, as well as non-consensual psychological and/or medical/surgical interventions in the case of some individuals. We submit that as long as government conflates gender identity and gender expression, bodily diversity and sex characteristics, and sexual orientation with each other, they will be unable to secure the safety, security, bodily integrity and equality of the different vulnerable groups within South African society.

Recommendations:

We recommend that:

- The government of South Africa (GOSA) be specifically asked about the States understanding of gender identity, bodily diversity (specifically intersex variations), and sexual orientation and how this understanding is translated in the laws of South Africa.
- The GOSA be requested in future, to undertake to ensure that the roll out of training to government employees guarantees an understanding of the varying terms and the different associated human rights.
- The GOSA be requested to provide clear information and an undertaking on when the proposed Hate Crimes Legislation will be published for public comment and will be introduced into Parliament for adoption.
- The GOSA must undertake to, in consultation with civil society organisations (CSOs), introduce costed and budgeted programs at basic education level to address a wider understanding of gender identity and gender expression, bodily diversity (specifically intersex variations) as well as sexual orientation, in order to begin addressing the transphobic, intersexphobic, cisnormative, heteronormative and patriarchal attitudes and behaviours within South African communities.
- The GOSA be encouraged to promote debate and engagement within South Africa in order to address violence against those who are perceived as being gender diverse, gender non-conforming and/or body diverse/intersex. To enable such engagement, the State must set aside the necessary funding in order to support CSOs who engage in such work at community level.

Alteration of sex description – denial of citizenship

The Alteration of Sex Description and Sex Status Act⁷ (Act 49) was enacted to fill the void left by the repeal of section 28 of the Births, Marriages and Deaths Registration Act⁸. Act 49 allows a person whose; (1) sexual characteristics have been altered by, (2) medical or surgical treatment or (3) a person who is intersexed, to make an application to the Director-General of the National Department of Home Affairs for the alteration of the sex descriptor on their birth register.⁹

This piece of legislation, by world standards is relatively progressive in relation to allowing transgender persons to alter the sex descriptor on their South African identity documents. However, the manner in which the Department of Home Affairs administers Act 49 has rendered a lot of transgender and intersex persons vulnerable and has effectively denied them access to their rights to education, health, housing and employment among others.¹⁰

The lack of effective and efficient administration of Act 49 is the result of various factors, all of which the state does not address in their reports to the Committee.

1. Firstly, there is a lack of accurate application and understanding of the Act by officials charged with administering the Act at the Department of Home Affairs. This has resulted in some branch offices insisting on proof of genital surgery from applicants. This is a misinterpretation of the Act as section 2(2)(b) of Act 49 which requires that a gender reassignment application must be accompanied by (1) the applicant's birth certificate¹¹ and (2) two medical letters from two separate and independent health providers testifying as to the nature of the **“surgical or medical treatments”** administered as well as the results from either treatments.¹² Home Affairs officials have often turned gender reassignment and intersex applicants away as a result of their insistence that the applications must be accompanied by proof of surgical treatment.¹³ However, the Act merely makes surgical treatment optional for gender reassignment applicants and does not require any medical or surgical treatment for

⁷ Alteration of Sex Description and Sex Status Act 49 of 2003.

⁸ Births, Marriages and Deaths Registration Act 81 of 1963.

⁹ Act 49 (note 7), section 2(1).

¹⁰ Nadia Swanepoel reported that she had been forced into escorting because she could not get jobs after employers questioned why her identity document said she was a man available at <http://mg.co.za/article/2014-10-09-transgender-goes-on-hunger-strike-over-id-application>

¹¹ Section 2(2)(a)

¹² Act 49 (note 7), section 2(b) – (c).

¹³ Gender Dynamix and Legal Resource Centre Briefing Paper ‘ Alteration of Sex Description and Sex Status Act 43 of 2003’ 2014 available at <http://genderdynamix.org.za/wp-content/uploads/LRC-act49-2015-web.pdf>

intersex persons. By making surgical treatment mandatory, the Department of Home Affairs officials impeded access by transgender and intersex people to various rights.

2. Secondly, the result of a lack of national directives from the Department of Home Affairs has meant that transgender - and intersex people often have to wait unacceptably long periods of time should their applications be accepted by the Department.¹⁴ From empirical experience of Gender DynamiX, Iranti-org and Legal Resources Centre and other partner organisations, there have been complaints from persons who have waited, and are still waiting, for their identity documents to be altered by the Department. From the cases on file, the waiting periods range from 2 years up to 7 years. This waiting period forced on applicants is clearly egregious when one takes into consideration the fact that the average waiting period for most alterations to identity documents is three months.
3. Third, when an application is denied, no reasons are provided by the various branch offices of Home Affairs. This makes it difficult and unduly burdensome on the applicants seeking alternative legal redress to lodge appeal applications in terms of the Act.¹⁵ This effectively denies transgender persons their rights to equal protection and benefit of the law. At times, the applicants conduct follow ups and are told that their applications got “lost” without the Department providing any form of adequate relief or an expedited process.¹⁶
4. Lastly, as a result of the lack of directives, there are currently no existing measures to ensure the protection of marriages where a transgender or intersex person changes their sex descriptor after getting married. South African marriages are currently governed in terms of two separate Acts; the Marriage Act,¹⁷ which governs heterosexual unions, and the Civil Unions Act¹⁸, which governs heterosexual and same-sex unions. However, there is no bridging regulation or process through which a heterosexual union, which has become same-sex as a result of one partner’s change in sex descriptor, can be registered under the Civil Union Act. This loophole in legislation often means that transgender and intersex persons are forced to divorce their spouses in order to have their sex descriptors changed in their identity documents, and to access their rights. Often they are not told by the Department that they have to divorce their spouses; they are rather forcibly divorced, without their

¹⁴ Ibid.

¹⁵ Act 49 (note 7), section 2(3)-(4).

¹⁶ Ibid.

¹⁷ Marriage Act 25 of 1962.

¹⁸ Civil Union Act 17 of 2006.

knowledge, by the Department. In some instances the Department simply refuses to alter the identification sex descriptor without a divorce order.

The problems created by the lack of regulatory directives from the Department are not only isolated to interactions between transgender and intersex persons and the Department of Home Affairs. The lack of an efficient and effective processing system has resulted in transgender and intersex persons being exposed to extreme human rights violations by both state and non-state actors. These human rights violations have been completely overlooked by the State in their reports to the Committee.

Recommendations

- We urge the Committee to mandate the GOSA to review and immediately process any pending Act 49 applications and provide the applicants with written decisions on all successful and unsuccessful applications as is required by Act 49.
- We urge the GOSA to provide for legal recognition using a self-identification model in accordance with the Yogyakarta Principles, allowing all individuals to change their legal gender on demand without imposing discriminatory requirements such as reports on medical treatments, medical surgeries or living in a particular gender role. 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. The GOSA must be encouraged to refrain from imposing what is considered as a threshold on how to “qualify” as a transgender person. An individual’s gender identity should not be determined by a government institution, or anyone other than oneself and legislative reform needs to take place to ensure self-identification.
- The GOSA must take immediate steps to develop and circulate national internal directives, particularly to frontline officials interacting with the public, addressing the implementation of Act 49 and how such applications can be processed in an effective and time efficient manner. Significantly, the directives need to re-emphasise that Act 49 does *not* require evidence of surgery as a 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, the wearing of prostheses or

other means) is sufficient in terms of the stipulations of Act 49. Department of Home Affairs staff members must be provided with ongoing training in order to ensure that they are up to date on the State's obligations in Act 49, and regarding transgender and intersex rights generally, through partnership with various local CSOs working on these issues.

- The Department of Home Affairs must be advised to address the gap in the current marriages framework which as stated, violates and impugns on the dignity of transgender persons.

Non-discrimination and violence against transgender and intersex persons

Violence against transgender and intersex persons is underpinned by societal stigma, transphobia, intersexphobia and overshadowed by misunderstandings about their presumed sexual orientation. Gender identity and body diversity (particularly intersex variations) in South Africa are still misunderstood. As a result of cisnormative and heteronormative conceptions of gender, a lot of transgender women are still classified as “gay men” and transgender men as “lesbian women”. Violence against transgender men is often unreported and unpunished, or conflated and misreported in “corrective rape” statistics which are often framed as an issue solely in the lesbian community, particularly in townships. Violence against transgender persons is reinforced by a culture that views masculinity as dominant and femininity as subservient. Such violence is still misunderstood and often characterised as violence motivated by the victim's sexual orientation rather than their gender identity and gender expression. South African society still understands gender along cisnormative lines and follows a biological-determinist model of gender identity and gender expression. This makes it extremely hard to obtain statistical data on transgender persons in South Africa.

By expressing greater bodily and gender diversity than socially constructed stereotypes and constructions of men and women, transgender persons are exposed to stigma, harassment, sexual and physical violence at the hands of family members, their communities and State actors. Transgender persons have expressed experiencing twice as much bullying from teachers and students alike, which contributes to high levels of truancy, absenteeism, decreased educational aspirations and lower academic performance, ultimately leading to lower economic and social standards of living in later life for transgender persons. Transgender people also find

it difficult to access legal protection through law enforcement. One transgender woman reported that;

'I was raped and I went to the police station. They would not take my case and I could not access rape services as a result of them not wanting to take my case. The police thought I was male'

Not only does this deprive them of their basic human rights, but it increases their risk of poverty, HIV infection and other health related problems, and access to rights such as legal citizenship and education. Further to this, many transgender persons continue to express difficulty in accessing the necessary health services, particularly friendly and affirming health care even in times of experiencing sexual and physical violence.

Intersex persons in South Africa are subjected to widespread intersexphobia, verbal and physical violence, and subjected to gross human rights violations in the medical sector, including non-consensual, medically unnecessary treatments and surgeries, and being put on medical display and their bodies and genitals treated as a curiosity.¹⁹ They face even greater obstacles of invisibility, isolation, misunderstanding, stigma, secrecy, shame and pathologisation than transgender persons.²⁰ It has been reported in the South African media that in some areas there may be a practice of murdering intersex infants shortly after birth:

"We interviewed 90 midwives ... 88 of them said when a child with ambiguous genitalia is born they will twist the child's neck, killing it, because it is a product of a bewitched or cursed family," Griqua said.

The mother would be told that her child was stillborn.

[...]

¹⁹ Iranti-Org. 2015b. ICD intersex workshop. Video made during a regional African intersex workshop on the *International Classification of Diseases (ICD)*, hosted by Iranti-Org, Gender Dynamix and GATE, 27 September 2015. Accessed 23 October at <https://www.youtube.com/watch?v=4med0vTOzU0>. See also Soldaat, N. 2006. The story of my life. In T. Shefer, F. Boonzaier & P. Kiguwa (Eds.), *The gender of psychology*. Cape Town: Juta Academic/UCT Press, 267–269. See also Van Rooyen, J. 2015. Understanding social inclusion or exclusion of intersex people living in South Africa. MSc thesis, Trinity College Dublin.

²⁰ Mokoena, N. 2015. Remembering Sally, and the intersex movement in South Africa. Intersex Awareness Day. Accessed 28 October 2015 at <http://intersexday.org/en/remembering-sally-south-africa/>. See also Husakouskaya, N. 2013. Rethinking gender and human rights through transgender and intersex experiences in South Africa. *Agenda* 27(4): 10–24.

*In 2010 a principal at a school in Ga-Ntatelang village near Kuruman undressed a six-year-old child, who had ambiguous genitalia but preferred to use the girls' toilets, and forced the child to use the boys' toilets instead*²¹.

Recommendations:

As noted by one author, “*confronting the issue of GBV against transgender communities will not only promote the rights and safety of transgender people but will also advance broader goals of gender equality and elimination of all forms of gender-based violence. Reducing the stigma and taboos surrounding transgender persons and issues is a critical step to ensuring human rights and combating gender-based violence in general.*”²² Some key actions that can be implemented include the following:

- The GOSA must publicly condemn all forms of transphobic and intersexphobic violence and take steps to ensure that such violence is addressed through enacting protective legislation, regulations and policies in the spheres of crime prevention, education, access to healthcare and other auxiliary services needed by victims of abuse, including hate crime legislation and associated implementation mechanisms. Further, the GOSA must include transgender and intersex persons within policies, laws, and action plans which seek to address gender inequality and violence. The government must ensure that current criminal legislation is amended to ensure the inclusion of tougher sentences for crimes motivated by transphobia, intersexphobia and prejudice towards transgender and intersex persons.
- GOSA should enact legislation and policies that mandate sensitivity training on issues of gender diversity and body diversity (including intersex variations) and capacity-building on violence against transgender and intersex persons for healthcare providers, police services, social workers and other public officials who interact with transgender and intersex persons. It is crucial that those mandated to implement legislation regarding violence against transgender and intersex persons, including police, prosecutors and judges have an in-depth

²¹ John, Victoria. 2012. Gentle man's brutal murder turns spotlight on intolerance. Mail & Guardian Online, 28 June 2012. <http://mg.co.za/article/2012-06-28-gentle-mans-brutal-murder-turns-spotlight-on-intolerance>

²²Kate Giles, 'Gender-Based Violence Against the Transgender Community Is Underreported' available at <http://www.prb.org/Publications/Articles/2011/gender-based-violence-transgender.aspx>

understanding of such legislation and are able to implement it in a manner sensitive to gender diversity and body diversity.

- GOSA must make safe spaces such as homeless shelters and support mechanisms available to ensure that transgender and intersex victims of violence are encouraged to report violence. The government should therefore ensure that transgender and intersex persons have access to the criminal justice system by ensuring prompt, thorough, impartial and serious investigation of violence against transgender and intersex people, securing prosecutions and avoiding secondary victimisation. The government must also ensure criminal justice mechanisms are implemented which ensure that the right to privacy and identity is protected where necessary.
- The government should ensure the collection of information including statistical and research data on violence against transgender and intersex persons so as to enable policy formulation and implementation. In collecting data, the police should ensure that it is disaggregated in order to track the incidence of transphobic and intersexphobic violence.
- GOSA must ensure the provision of protective services specific to transgender and intersex survivors of crimes or ensure transgender inclusive and intersex inclusive policies are implemented in institutions which provide support services to survivors of violent crimes.
- The GOSA must be requested to provide details of protective measures that have been put in place to reduce the risk of violence against transgender and intersex persons at the community level.

Security of the Person and Freedom from Arbitrary Arrest and Detention:

The South African Report makes reference to the legislation that has been enacted to provide for the safety and security of persons within the country. Reference in the State Report is made to the Criminal Law (Sexual Offences and Related Matters) Amendment Act. We hereby submit that this legislation lies at the heart of discrimination faced by sex workers in South Africa as it criminalizes consensual commercial sexual intercourse between consenting adults. The continued criminalization of sex work in South Africa is a leading cause for violence encountered by sex workers at the hand of the police who are meant to implement the legislation. Transgender sex workers, and in this context particularly transgender women, are especially at risk as reported incidents of physical as well as verbal abuse are experienced. These sex workers are at the intersectionality of working in a

profession which is criminalized within a society where transphobia often leads to violence and are therefore a particularly vulnerable category of persons in need of protection.

The effect of policing sex work has led to the harassment of sex workers by members of the South African Police. The fact that few arrests of sex workers result in prosecutions speaks to the arbitrary nature of arrests and their legality. When they are detained, sex workers are kept in cells that are unhygienic; they are deprived of food, access to the telephone as well as their antiretroviral medication. There have also been instances where transgender sex workers were put in cells with male suspects without regard for their safety. In 2009 there was successful litigation against the Minister of Police because sex workers were being arrested and detained arbitrarily and without the intention of bringing them before a Court for prosecution. The harassment, arrests and arbitrary detentions however, continue in contravention of the Court Order.

Recommendations:

We recommend that:

- The GOSA be requested to provide information on when they intend on publishing the South African Law Reform Commission's findings on its investigation into Adult Prostitution and when legislation will be introduced into the public space for debate.
- The GOSA adopt the position of full decriminalization as recommended by the Commission for Gender Equality and the World Health Organisation in order to ensure the safety and security of sex workers in the industry.
- The GOSA highlights to the Committee what measures they have put in place to generate evidence and information on the vulnerability of sex workers including transgender sex workers to gender-based violence in South Africa.

Equality in Accessing Education for Transgender Children

There is a lack of education about gender, bodily diversity, specifically intersex variations, and sexual identities in primary and high schools in South Africa – where it is provided, the educators are either not well informed, as they are not trained in the subject, or they allow their prejudices to impact on the subject and thus stigmatise student's understanding of sexual orientation, bodily diversity and gender identity. The education community is also largely unaware of the issues experienced by transgender, intersex and gender diverse/gender non-confirming youth. The lack of education around, and awareness of,

gender, bodily and sexual diversity creates a hostile and discriminatory environment for transgender, intersex and gender non-conforming youth in schools. There are several issues impacting transgender, intersex and gender non-conforming/gender diverse children and youth in South African schools. Some of these include²³:

1. Transgender and intersex youth are bullied and discriminated against by other learners.

Transgender, intersex and gender diverse/gender non-conforming learners are subjected to bullying primarily by other learners, but also by teachers and staff. The bullying can be verbal or physical. The severity of the bullying is dependent on several factors including the type of school and the way the transgender and intersex youth expresses their gender identity. Bullying of transgender and intersex youth is often more common in high school than primary school.

2. Schools lack support systems able to adequately address the specific needs of transgender and intersex learners.

Teachers and administrative staff often try to prevent bullying against transgender and intersex youth in schools. However, support for, and protection of, transgender, intersex and gender diverse/gender non-conforming youths generally comes from *individual* teachers and staff members. There are no systems and structures in place to ensure consistent and sustainable interventions of teachers on behalf of transgender and intersex youth. In many cases, the lack of an organized support system capable of meeting the needs of transgender and intersex youth forces transgender, intersex and gender diverse/gender non-conforming learners to enter into a hostile school environment.

3. There is no mention of gender, sexual, or bodily diversity in the school curriculum.

Gender identity, intersex variations and sexual orientation are rarely discussed in a manner which ensures inclusivity and a balanced informed understanding in schools. This has serious consequences for transgender and intersex individuals who are not educated about gender variance in their school curriculum. Transgender and intersex youth may feel pressured into conforming to the existing gender binaries and stereotypes, and for intersex youth, undergoing invasive and medically unnecessary procedures to do so. The lack of gender identity, bodily diversity and sexual orientation education may also cause

²³Submissions here are based on the research conducted by The Gender Dynamix report, *Young and Transgender: Understanding the Experiences of Young Transgender Persons in Educational Institutions and the Health Sector in South Africa*.

transgender persons to misidentify themselves as “gay,” instead of “trans”, and for intersex youth to feel isolated and pathologised. This has a detrimental effect on the mental and sexual health of transgender and intersex youth as they go through puberty and may result in depression, self-harming and other life-risking behaviour.

4. The lack of education on gender identity, intersex variations and sexual orientation causes many transgender people to misidentify themselves for a period of their lives. Many transgender youth misidentify as gay because they have never been exposed to the notion of transgender identities. Other transgender people identify as gay because the community more easily understands the term “gay” than “transgender.” Exposure to “trans” language is crucial to an individual’s understanding of gender identity, healthy mental and sexual development, and navigation of puberty and appropriate options available to them at that time.

5. Transgender and intersex learners often choose not to use the toilets at school for fear of harassment and discrimination. Some transgender and intersex learners do not use the bathrooms at school out of fear of discrimination by other learners. They contain urinating, defecating and changing menstrual items until they are at home in order to avoid the discrimination and sexual assault and harassment by other learners and, at times, educators. Individual teachers have allowed transgender youth access to staff toilets; however, this only further isolates transgender learners from other learners at school and enables discrimination to continue.

6. Use of pronouns and forms of address that do not respect the learner’s gender identity. Due to limited understanding of transgender persons, intersex, gender identity and other reasons, both learners and teachers have been reported as refusing to refer to transgender and intersex persons using the right pronoun. This has a detrimental effect on the ability of transgender and intersex children to learn and to socially relate with their peers and can instigate and sustain bullying.

7. Sex segregation through use of school uniforms according to a gender binary that is enforced for boys and girls robs gender non-conforming/gender diverse students of their equality and dignity. Dress and pronouns are important ways in which persons express their gender identity. Forcing incorrect pronouns and inappropriate sex-specific uniforms on transgender, intersex

and gender non-conforming/gender diverse pupils in the educational environment is harmful to their dignity, sense of self and educational experience. The discomfort expressed by some gender non-conforming/gender diverse pupils is exacerbated by their being targets of bullying and intimidation on school grounds, which various school policies do not take into account or adequately address.

8. Sexual harassment at school.

There have been reports of transgender and intersex children being sexually harassed at school. It was reported for example that a learner was singled out by his fellow learners (and their older friends who are not learners at the school) who tried to disrobe him, threatened him and posed uncomfortable questions which implied that his gender expression existed because he is afraid to sleep with men. Such targeted incidences of abuse against transgender, intersex and gender diverse/gender non-conforming learners forced them to stop attending school in order to remain safe, free of abuse and harassment, inadvertently impacting on their rights.

9. Alteration of gender specific information on matriculation certificates.

Currently, the matriculation certificate for the final high school certificate requires the identification number of the applicant as well as personal details such as forenames to be captured. In the event that a person transitions from one sex to another, or changes their legal gender, this gendered information on the certificate makes it impossible for a person to use this certificate especially when they have altered their forenames (and surname) and the identification number on the identification card. This often leads to transgender and intersex persons being unable to rely on their qualification in seeking employment and other financial opportunities. There is currently a policy in place that allows for such alterations to be made. The responsible unit, Umalusi, understands this policy to mean that certificates are only re-issued where administrative errors occur and not for transitioning reasons. They believe that transgender and intersex persons bear the responsibility of proving that the certificate is theirs and not fraudulent. This violates the rights of transgender and intersex persons to privacy and equality by requiring them to divulge private details about their gender identity and bodily characteristics when seeking jobs and other opportunities.

All of the above circumstances are compounded by the fact that currently, there is no guideline for schools to assist learners, teachers, school governing bodies and the rest of the school communities on how to socially include transgender and intersex children in their school community. The inclusion and realisation of transgender and intersex children's rights

is dependent upon the school community in question and their willingness to include and cater for transgender and intersex children in their school.

Recommendations

- We urge the GOSA to draft and implement national and provincial policies regarding the inclusion and protective measures (among others) of transgender and intersex children in all levels of schools.
- We urge the GOSA to meet with school governing bodies to implement structures within the schools to enable them to address and prevent discrimination against transgender and intersex youth. We further urge the GOSA to require schools to engage in a dialogue on how to effectively educate learners on gender, sexual, and bodily diversity within the curriculum. The GOSA must take steps towards ensuring that gender identities and bodily diversity are discussed more openly in the school environment.
- We urge the GOSA to mandate the implementation of community education programs about gender identity, bodily diversity, intersex variation and sexual orientation. The greater community must have access to awareness regarding trans and intersex youth and their needs. Trans and intersex youth must also have safe spaces to turn to for support.
- We urge the GOSA to develop protective school and education policies that safeguard a smooth transition for gender non-conforming/gender diverse pupils to choose their school attire or uniforms to protect their dignity on school grounds.
- We urge the GOSA to establish new governing and decision-making bodies in the Education sector for the purpose of addressing the concerns related to transgender, intersex and gender diverse/gender non-confirming youth.
- We urge the GOSA to ensure that transgender and intersex persons seeking to alter their details on the matriculation certificate do so without delay and discrimination.

Bodily integrity, freedom and security of the person relating to non-consensual, medically unnecessary treatment/surgery on intersex infants, children and adolescents

It should be noted from the outset that the reference to children here includes infants and adolescents who are characterised as minors by the law. Intersex persons in South Africa are often subjected to non-consensual, medically unnecessary and physically and

psychologically harmful sex assignment surgeries during infancy or childhood.²⁴ This takes the form of so-called ‘normalising’ feminising or ‘normalising’ masculinising treatments that aim to make all human bodies conform to stereotypical sex standards based on highly problematic and discriminatory notions of normality.²⁵ Similar to female genital mutilation, such treatments constitute gross human rights violations. As has been pointed out in a recent document by an international group of intersex activists and experts (including South African intersex activist, Nthabiseng Mokoena):

10

“Normalizing’ procedures violate the right to physical and mental integrity, the right to freedom from torture and medical abuses, the right to not being subjected to experimentation, the right to take informed choices and give informed consent, the right to privacy and, in general, sexual and reproductive rights.”²⁶

These human rights violations largely take place because the language used in medical and public discourse to describe and understand intersex bodies is generally stigmatising and pathologises intersex persons, for instance in the World Health Organisation’s International Classification of Diseases (ICD)²⁷ and in South African medical publications.²⁸ Consent given without positive, affirming language and information cannot be characterised as free and informed consent.²⁹ Training and education on informed consent, bodily diversity and the right to bodily integrity is therefore necessary to ensure that healthcare professionals are able to provide medical information and healthcare services that are balanced, accurate,

²⁴Estian Smit (2015), *Extracts from Unpublished Review and Analysis of South African Transgender and Intersex Research, Legislation and Policy*.

²⁵ Carpenter, M. & Cabral, M. (Eds.). (2015) *Intersex Issues in the International Classification of Diseases – a revision*. <https://globaltransaction.files.wordpress.com/2015/10/intersex-issues-in-the-icd.pdf>

²⁶ Ibid, pg 10.

²⁷ Ibid, pg 2.

²⁸ Rebelo, E., Szabo, C.P. & Pitcher, G. (2008). Gender assignment surgery on children with disorders of sex development: A case report and discussion from South Africa. *Journal of Child Health Care* 12(1): 49–59.

See also Wiersma, R. (2011a). The clinical spectrum and treatment of ovotesticular disorder of sexual development. In New, M.I. & Simpson, J.L. (Eds.), *Hormonal and genetic basis of sexual differentiation disorders and hot topics in endocrinology: Proceedings of the 2nd World Conference*. New York: Springer, 101-103.

See also Wiersma, R., & Ramdial, P.K. (2009). The gonads of 111 South African patients with ovotesticular disorder of sex differentiation. *Journal of Pediatric Surgery* 44(3): 556–560.

²⁹ Nthabiseng Mokoena (2015) *Intersex youth: Can we say that consent is truly free, full and informed?*, Page 3

evidence based and informed by human rights approaches when interacting with intersex infants, youth and their parents and/or guardians.³⁰

In South Africa, when the principle of informed consent is invoked in relation to medical treatments and surgeries on intersex infants and children, the emphasis is on informed consent of the parents of the intersex child, who are consulted in order to reach a decision regarding surgery for their child.³¹ This approach focuses primarily on the parents, informing them of the potential risks and complications of surgery, instead of focusing on the child's bodily integrity, privacy and his/her right to freedom, security and sexual and reproductive health rights.³² Notwithstanding an acknowledgement that all decisions by the team and parents should take into account the rights and/or best interests of the child, the power to decide over the child's body remains almost exclusively in the hands of clinicians and parents, and what they consider to be the child's best interests.³³

Information about the number of surgeries performed on intersex infants, children and adolescents in South Africa is not easily accessible. However, judging from the life stories of intersex persons in South Africa,³⁴ as well as local medical publications³⁵ (Wiersma 2001, 2004, 2011a, 2011b: 102–103; Wiersma & Ramdial 2009), such surgeries remain common despite the severe physical and mental health risks involved. This is in contravention of the call by the United Nations *Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* that all States “repeal any law allowing intrusive and irreversible treatments, including forced genital-normalizing surgery, involuntary sterilization,

³⁰ Ibid pg 3.

³¹ Smit, 2015.

³² Ibid.

³³ Maharaj, N.R., Dhai, A., Wiersma, R. & Moodley, J. 2005. Intersex conditions in children and adolescents: Surgical, ethical, and legal considerations. *Journal of Pediatric and Adolescent Gynecology* 18(6): 399–402. See also Rebelo et al, 2008. See also Wiersma, R. 2011b. Ovotesticular disorder of sex development in Southern Africa. Doctoral thesis, Erasmus University Rotterdam.

³⁴ Van Rooyen, J. 2015. Understanding social inclusion or exclusion of intersex people living in South Africa. MSc thesis, Trinity College Dublin. See also Soldaat, N. 2006. The story of my life. In T. Shefer, F. Boonzaier & P. Kiguwa (Eds.), *The gender of psychology*. Cape Town: Juta Academic/UCT Press, 267–269.

³⁵ Wiersma, R. 2001. Management of the African child with true hermaphroditism. *Journal of Pediatric Surgery* 36(2): 397–399. See also Rebelo et al, 2008. See also Wiersma, R. 2004. True hermaphroditism in Southern Africa: The clinical picture. *Paediatric Surgery International* 20(5): 363–368. See also Wiersma, R. (2011a). The clinical spectrum and treatment of ovotesticular disorder of sexual development. In New, M.I. & Simpson, J.L. (Eds.), *Hormonal and genetic basis of sexual differentiation disorders and hot topics in endocrinology: Proceedings of the 2nd World Conference*. New York: Springer, 101-103. See also Wiersma, R. 2011b. Ovotesticular disorder of sex development in Southern Africa. Doctoral thesis, Erasmus University Rotterdam.

unethical experimentation, medical display, ‘reparative therapies’ or ‘conversion therapies’, when enforced or administered without the free and informed consent of the person concerned. He also calls upon them to outlaw forced or coerced sterilization in all circumstances and provide special protection to individuals belonging to marginalized groups”.³⁶

For adolescents who are at the age where their consent must be obtained for surgical proceedings, their interaction with medical practitioners is often dictated by the power imbalances that often leaves very little choice.³⁷ It has been reported that because of this power imbalance, intersex youth are often at the mercy of their practitioners who exude authority over any decision that an intersex adolescent could make. Consequently, this power imbalance leaves the medical practitioner’s decision on surgery unchallenged even when there is not enough evidence to support the suggested procedure.³⁸

Concerns with the current treatment of intersex children in medical institutions therefore include the following:

1. An informed consent approach that focuses on getting consent from parents and ignores the child’s right to bodily integrity.

The current medical practice of an informed consent approach that focuses on informing parents of the potential risks and complications of medical treatment and surgery for their child, leaves the decision over the child’s body exclusively to clinicians and parents, often pre-empting the possibility of informed consent for the intersex person later in life.

2. Sex assignment surgery is frequently harmful to children and poses serious risks to their mental and physical health.

Sex variations rarely constitute life-threatening conditions and in most cases sex assignment surgery is not medically necessary.³⁹ When an intersex child is forced to undergo surgery, the child frequently suffers physical and emotional harm for the rest of their life.⁴⁰

³⁶ Méndez, Juan E. (2013). *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Juan E. Méndez. Human Rights Council, 22nd Session, 1 February 2013. United Nations General Assembly, Document A/HRC/22/53, p.23. See also pp.18-19.

³⁷ Nthabiseng Mokoena (note 20),Page 3

³⁸ Ibid, pg 3

³⁹ Diamond, M. & Garland, J. 2014. Evidence regarding cosmetic and medically unnecessary surgery on infants. *Journal of Pediatric Urology* 10(1): 2–6.

⁴⁰ Carpenter, M. & Cabral, M. (Eds.). (2015) *Intersex Issues in the International Classification of Diseases – a revision*. <https://globaltransaction.files.wordpress.com/2015/10/intersex-issues-in-the-icd.pdf>

3. The parents' decision to subject their intersex child to sex assignment surgery often revolves around socio-cultural and psychological fears as opposed to medical necessity.⁴¹

Intersex variations are generally framed as a condition or disorder to be managed, thereby further reinforcing stereotypical sex standards and discriminatory notions of normality.

Typically, it is assumed that some form of treatment is necessary for the child to be accepted as "normal."

4. Non-surgery is a marginal option.

Despite the fact that sex reassignment surgery is usually unnecessary to preserve the health of the child, professionals continue to offer parents the option of non-consensual surgery in conformance with societal prejudices.

Recommendations:

- We urge the government of South Africa (GOSA) to promote the understanding that intersex bodies are healthy manifestations of human bodily diversity and that such diversity must be promoted as it is in line with the tenets of the Constitution of South Africa.
- We urge the GOSA to 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 they provide to intersex persons are balanced, accurate, evidence based and informed by human rights approaches.
- We urge the GOSA to require psychological professionals to encourage parents to "look for alternatives to surgical intervention in the case of intersex infants, unless for pertinent physical health reasons"⁴² and to prohibit medically unnecessary surgeries on intersex children.
- We urge the GOSA to establish and preserve intersex advocacy and awareness organisations to ensure that doctors and the public are aware of intersex children's right to self-determination and the physical and mental harms of medically unnecessary treatments and surgeries.

⁴¹ Rebelo, E., Szabo, C.P. & Pitcher, G. (2008). Gender assignment surgery on children with disorders of sex development: A case report and discussion from South Africa. *Journal of Child Health Care* 12(1): 49–59.

⁴²The Psychological Society of South Africa (PsySSA) (2013: 10), *Sexual and Gender Diversity Statement*

- We urge the GOSA to conduct an investigation into the prevalence of non-consensual, medically unnecessary surgeries on intersex infants, children and adolescents in the South African public and private health sectors,⁴³ and take steps to ensure that such human rights violations are ceased,⁴⁴ and that gender-related surgeries and hormonal treatments take place only where desired by the individual in question and under conditions of full, free and informed consent,⁴⁵ and that redress mechanisms and reparations are provided where individuals have been subjected to forced, coercive or involuntary procedures as infants or children.⁴⁶
- We recommend that the GOSA investigate, draft and enact health legislative and policy measures which take into consideration the best interests of the child when surgery on intersex infants and adolescents is contemplated.

Unequal Access to Health

In addition to facing the same socio-economic and socio-political barriers to quality health care faced by South Africans generally, intersex and transgender persons also have to navigate a healthcare system which is unresponsive to their specific healthcare needs. For transgender persons, such interventions are primarily required to bring their bodies into alignment with their gender identities. This process could involve psychological support, hormonal replacement treatment and various surgical procedures.

In the government subsidised public sector, transgender people continue to face several obstacles. There is a dearth of transgender-specific healthcare services. For example, there are only two hospitals in the entire country providing the full range of trans specific healthcare, and only one of these follows the latest guidelines of the World Professional Association for Transgender Health (WPATH) and actively works together with transgender organisations to provide trans-friendly healthcare. In a few provinces, transgender organisations are actively engaged in training nurses and healthcare providers at clinics and hospitals, since government neglects to take responsibility for this. Moreover, the country's

⁴³ World Health Organization (WHO). (2014). Eliminating forced, coercive and otherwise involuntary sterilization: An interagency statement, OHCHR, UN Women, UNAIDS, UNDP, UNFPA, UNICEF and WHO. Geneva, Switzerland: WHO, p.16.

⁴⁴ Méndez, Juan E. (2013). *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Juan E. Méndez*. Human Rights Council, 22nd Session, 1 February 2013. United Nations General Assembly, Document A/HRC/22/53, p. 23.

⁴⁵ WHO, 2014, pp. 7-8, 14-15.

⁴⁶ WHO, 2014, pp.15-16.

response to HIV/Aids and psycho-social treatment are yet to turn their focus on the transgender and intersex communities, even though the transgender community is cited as facing higher risks of requiring both.⁴⁷

There remains a lack of focused policy guidelines which could assist transgender people in navigating the healthcare system and health professionals in opening up the healthcare system for transgender people, particularly for those who wish to access gender affirming healthcare services in order to transition or alter their bodies. The medical profession is also unable to keep up by training medical officers with the clinical skills to provide adequate gender affirming and trans-specific healthcare. Additionally, health professionals and officials barricade access to healthcare for transgender persons by overt discrimination and antagonism. As part of the broader community, doctors and nurses tend to share the attitudes and values of the general population.⁴⁸

In the private healthcare sector, where one is expected to settle the medical bill themselves, the thin cohort of trans people who have the means face exorbitant prices, poorly regulated insurance and service provider industries as well as the classification of trans specific healthcare as wholly cosmetic and therefore outside of the scope of medical aid funding.⁴⁹

Section 27 of the Constitution enjoins the state to ensure the progressive realisation of everyone's right to health care services. The National Health Act⁵⁰ supplements this constitutional directive by issuing best practice rules aimed at providing the best possible healthcare services to citizens. The National Health Act expressly protects and promotes the rights of vulnerable groups, including women, children, older persons and the disabled. However, transgender and intersex people are not specified as a vulnerable group. As a result of the National Health Act, the national Department of Health has initiated and implemented various strategies in order to improve the health status of the South Africans that do not speak directly to transgender and intersex specific healthcare. One such initiative is the National Health Insurance (NHI). The main objectives for the implementation of the NHI in South Africa are to bring reform, improve service and to promote equity and efficiency

⁴⁷ Müller, A. 2013c. Teaching lesbian, gay, bisexual and transgender health in a South African health sciences faculty: Addressing the gap. *BMC medical education* 13(174), 7pp.

⁴⁸ Ibid.

⁴⁹ Sanger, N. 2014. Young and transgender: Understanding the experiences of young transgender persons in educational institutions and the health sector in South Africa. Cape Town: Gender Dynamix.

⁵⁰ Act 61 of 2004.

in the healthcare system.⁵¹ Throughout this document, the issue of equity is discussed in detail, yet transgender and intersex people seem to have been left out of the policy altogether.

Transgender and intersex people are further alienated from accessing health care as the whole system operates under the assumption that everyone is either male or female. This leaves a large consistency of gender non-conforming, gender diverse and body diverse persons completely erased from healthcare services. This prevailing institutional psyche leads to an exclusive healthcare system which denies a subset of the population access to quality appropriate healthcare. This frame of classification also impacts on the treatment of intersex persons in the healthcare system. For intersex persons, healthcare services and interventions are ordinarily utilised for psychological support and various sexual realignment surgical procedures. In these procedures, intersex infants and adolescents are subjected to harmful, medically unnecessary surgical procedures with adverse consequences without their full, free and informed consent. Additionally, although the promulgation of the Alteration of Sex Description and Sex Status Act allows intersex persons to change their sex on their identity documents without having to undergo surgical or medical treatment, the road to accessing this right is not a friendly one. Intersex persons are subjected to providing proof of having lived in their gender role for an unbroken period of 2 years, severely delaying how soon they can apply for a change in their sex descriptor.⁵²

Recommendations:

- ✚ The GOSA should to put in place policy directives for healthcare practitioners to aid in ensuring non-violent and non-discriminatory treatment of trans and intersex persons.
- ✚ The GOSA ought to ensure that health professionals acquire the requisite skills through trans and intersex sensitive training and curricula.
- ✚ The GOSA must ensure that trans and intersex specific healthcare services that are trans and intersex friendly, affirming and informed by human rights approaches, are included as part of the general healthcare regime found at all levels of healthcare provision.
- ✚ The GOSA must ensure that policy and legal reform that seeks to respect, protect and fulfil the rights of transgender and intersex persons to equal access to health are

⁵¹ Department of Health, National Health Insurance [published in GG in December 2015].

⁵² Ibid.

led by transgender and intersex individuals with the assistance of the civil society organisations which work with them.

Unequal access to socio-economic opportunities

Section 7[2] of the Constitution determines that '*the state must respect, protect, promote and fulfil the rights in the bill of rights*'.⁵³ Furthermore, the South African Constitutional Court has interpreted the rights in the Bill of Rights of the Constitution as interconnected and interdependent. This means that the violation of one right necessarily infringes or at the very least implicates other rights. When the state fails to protect, promote and respect the constitutionally enshrined rights of transgender and intersex people to equality [s9], security [s12], bodily integrity [s12], citizenship [s20] and human dignity [s10], it simultaneously falls short of ensuring that transgender and intersex people have access to various rights including socio-economic rights such as the s26 right to housing, s27 right to healthcare, food, water and social security. This failure infringes on their rights to life, equality and dignity, among others.

The burdensome red tape and ineffective implementation of the Alteration of Sex Description and Sex Status Act⁵⁴ impedes transgender and intersex people exercising their citizenship rights which are guaranteed in s20 of the Constitution and in Article 25 of the ICCPR. Without identity documents that reflect their gender identity, trans and intersex people are unable to access various socio-economic rights and the institutions which administer such rights which require one to "prove" their identity before receiving service.

A recurring example of how the lack of trans and intersex specific legislation and policy in South Africa negatively impacts access to socio-economic rights is in the area of housing where transgender and intersex persons' ability to benefit from government subsidy programs is very limited.⁵⁵ Although s26 of the Constitution affords **everyone** the right to equal access housing in South Africa and burdens the state with an obligation to respect, promote and fulfil this right, transgender and intersex persons continue to face substantive

⁵³ The Constitution of the Republic of South Africa, 1996.

⁵⁴ Act 49 of 2003.

⁵⁵ Ouspenski 'We fight more than we sleep - shelter access by transgender individuals in Cape Town' available at <http://genderdynamix.org.za/wp-content/uploads/2013/08/GDX-Shelter-Report.pdf>, accessed on 08 February 2016.

discrimination based on their gender identity and sex characteristics, consequently limiting their access to public service and benefits compared to their fellow citizens.

Where there is a mismatch between a transgender or intersex person's gender identity and the gender descriptor on their identity document, it acts as a barrier to accessing state housing as administrative officials are distrustful and not yet sensitised about transgender and intersex peoples and their plight. Analogous patterns are observed when transgender and intersex people attempt to access other socio-economic rights such as access to running water and sanitation, and social services such as welfare grants. We submit that this is contrary to Article 25 of the ICCPR which provides that "every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions to have access, on general terms of equality, to public service in his country."⁵⁶

Moreover, transgender and intersex persons are at a high risk of being homeless because of the abuse they are prone to facing within their homes and the discrimination that excludes them from employment opportunities and economic advancement. This limits their ability to equally enjoy the rights entrenched in both the Constitution of South Africa and the ICCPR. Currently South Africa does not administer government run shelters to mitigate against transgender and intersex homelessness. Instead faith-based and non-governmental organisations administer homeless shelters, most of whom enforce rigid criteria regarding gender identity, sex, sexual orientation and religion which directly discriminate against transgender and intersex persons and violate their rights equality, to freedom and security and privacy.⁵⁷

Additionally, homeless shelters usually have strict separations between 'male' and 'female' housing units. As a result, if a transgender or intersex person does not have a legal gender descriptor that matches their gender identity and gender expression, they are often subjected to the humiliation of being allocated shelter space which does not accord with their gender identity and gender expression.⁵⁸ This lack of access to protective shelters exposes transgender and intersex persons to continued physical and emotional violence as they are in some cases forced to remain in the same house with their abusers which perpetually

⁵⁶ 1966 International Covenant on Civil and Political Rights (ICCPR)

⁵⁷ Ouspenski (note 55) 35.

⁵⁸ Ibid.

places their lives in danger contrary to Article 6 of the ICCPR⁵⁹. Should they be lucky enough to find a protective shelter which allows them to stay, transgender persons have reported that they often experience verbal and physical attacks from both the staff and the other occupants.⁶⁰

Recommendations:

- GOSA must be requested to provide information on what steps they have been taken to ensure that all government subsidies and other measures in place to combat poverty are equally accessible to all citizens especially in promoting access for transgender persons to such benefits.
- GOSA must ensure that all their public service employees that interface with transgender and intersex persons are trained in sensitivity, sexual, body and gender diversity, equality and rights generally.
- The State legal and policy machinery ought to reform its gender identification laws and replace them with more nuanced understandings of citizen identities that allow transgender and intersex people to fully access all their rights and all relevant equity measures.

Should the Committee have any questions about the information in the report or communicate any related information to the organisations submitting this report, please do not hesitate to contact Ms M Mudarikwa at mandy@lrc.org.za

Jointly Prepared and Submitted by:
Busisiwe Deyi (Legal Resources Centre),
Charlene May (Legal Resources Centre),
Estian Smith (Gender DynamiX),
Jackie Pilcowitz (Legal Resources Centre),
Joshua Sehoole (IRANTI-Org),
Mandivavarira Mudarikwa (Legal Resources Centre);
Sandile Ndelu (Gender DynamiX) and
Tshepo Kgositau (Gender DynamiX).

⁵⁹ 1966 International Covenant on Civil and Political Rights (ICCPR)

⁶⁰ Ouspenski (note 55) 35.