Recognition of Economic, Social and Cultural Rights: A continued struggle for transgender, gender diverse and intersex persons in South Africa

List of issues submitted to the Working Group on South Africa Committee on Economic, Social and Cultural Rights

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1. The organisations and individuals listed above are honoured to assist the Committee on Economic, Social and Cultural Rights (**Committee**) in preparing the List of Issues to review the implementation of the International Covenant on Economic, Social and Cultural Rights by South Africa.
2. The challenges faced by transgender and intersex persons in South Africa are currently not sufficiently dealt with in the report filed the Government of South Africa (**GOSA)**. At best, the report mentions the Alteration of Sex Description and Sex Status Act, No. 49 of 2003 once in footnotes 92 and 93. It is important to note that transgender (a matter concerning gender identity) and intersex (a matter concerning body diversity) matters have historically been conflated with issues of sexual orientation, with the latter receiving much more due consideration.
3. This submission therefore aims to provide pertinent information in order to ensure that the development of the List of Issues by the Committee in preparation of the review is inclusive and cognisant of the rights and challenges of persons with diverse gender identities, gender expressions and sex characteristics, who generally remain marginalised, rendered invisible and oppressed in South Africa due to the continued, overt and covert, dominance of essentialist cisnormative and heteronormative conceptions of sex and gender, and binary conceptions of biological sex.

I. NON-DISCRIMINATION IN THE ICESCR

(Article 2)

4. We premise this report on the emphasis on equality and non-discrimination entrenched in both Section 9 of the Constitution of South Africa and Article 2(2) of ICESCR. We firmly agree with paragraphs 1-3 of General Comment 20[1] on Non-discrimination in Economic, Social and Cultural Rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights) which state that:

   Discrimination undermines the fulfilment of economic, social and cultural rights for a significant proportion of the world's population. Economic growth has not, in itself, led to sustainable development, and individuals and groups of individuals continue to face socio-economic inequality, often because of entrenched historical and contemporary forms of discrimination.

   Non-discrimination and equality are fundamental components of international human rights law and essential to the exercise and enjoyment of economic, social and cultural rights. Article 2, paragraph 2, of the International Covenant on Economic, Social and Cultural Rights (the Covenant) obliges each

[1] 42nd session of the Committee on Economic, Social and Cultural Rights on 2 July 2009 'General Comment 20: Non-discrimination in economic, social and cultural rights (art.2, para.2, of the International Covenant on Economic, Social and Cultural Rights' Agenda Item 3 of 10. In General Comment 20, the Committee on Economic, Social and Cultural Rights observed that 'sexual orientation' is included under 'other status.' In addition, 'gender identity' has also been recognised as a ground upon which a person may not be discriminated against. In coming to this conclusion, the Committee relied upon the nonbinding international instrument, the *Yogyakarta Principles: Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity* (as compiled in Indonesia, March 2007) as a source of guidance on the understanding of 'sexual orientation' and 'gender identity' in international human rights law.

State party "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.

The principles of non-discrimination and equality are recognized throughout the Covenant. The preamble stresses the "equal and inalienable rights of all" and the Covenant expressly recognizes the rights of "everyone" to the various Covenant rights such as, inter alia, the right to work, just and favourable conditions of work, trade union freedoms, social security, an adequate standard of living, health and education and participation in cultural life.

5. The fact that someone is lesbian, gay, bisexual, transgender or intersex (LGBTI) may not be used as a ground to limit their entitlement to enjoy all the human rights which accrue to them equally with their heterosexual, cisgender and biologically binary (non-intersex) counterparts.[2] The lack of protection of trans, gender diverse and intersex persons against discrimination and violence is apparent in the continued failure to adequately distinguish, recognise and protect human rights related to (1) gender identity and gender expression, and (2) bodily diversity (particularly intersex variations and other non-binary bodies) in the laws, policies and state reporting by the South African government. It is also apparent in the continued criminalisation of sex work, which subjects transgender persons (particularly trans women), who often have no other work opportunities apart from sex work, to extreme stigmatisation, discrimination, victimisation and violence at the hands of police, clients and the public, in the process denying them their rights to work, an adequate standard of living, access to health, equality, non-discrimination and frequently their very right to life.
6. In essence, this document positions the rights of transgender, gender diverse and intersex people's access to social, economic and cultural rights, which are interrelated and interconnected with civil-political rights, in the context of their right to self-determination, bodily autonomy and full agency.

Suggested Questions

7. **What steps has the GOSA taken to ensure that Article 2(2) of the Convention is implemented in ensuring that transgender, gender diverse and intersex persons access and enjoy economic, social and cultural rights as envisaged in the Convention without discrimination?**
8. **What steps is the GOSA taking to ensure that sex work is urgently decriminalised in South Africa, and that the rights of all sex workers, and particularly transwomen sex workers, are protected?**

a) Alteration of sex description – denial of citizenship

9. As a concept, 'citizenship' can be defined as collection of rights and duties that determines whether or not a person or group of people are able to access socio-political membership, resources and benefits as well as membership to the politico-legal community.[3] In South Africa, citizenship is conceptualised in heteronormative, cisnormative and sex binary terms, which forms the basis for the political system

[2] International Conference on Human Rights, Sexual Orientation and Gender Identity (2013), 48.
[3] Staeheli, L. 'Reconstructing citizenship in Pueblo, Colorado' (1994), *Environment and Planning*, 850; see generally Turner, B. & Hamilton, P. (eds.), *Citizenship: Critical Concepts* (1994).

and associated discourses.[4] Consequently, there has been a strong push by activists that a model of citizenship be constructed that consisted of fairness and justice and that guarantees the protection of all minorities based on various grounds including sex, sex characteristics, gender identity and sexual orientation.[5] The Alteration of Sex Description and Sex Status Act[6] (Act 49 of 2003, as mentioned in footnote 93 of the GOSA's report) is South Africa's legal gender recognition law for transgender and intersex persons. It allows transgender and intersex persons to alter their legal gender in the National Birth Register and in their South African identity documents. This law was enacted to fill the void left by the repeal of section 28 of the Births, Marriages and Deaths Registration Act.[7]

10. Act 49 allows the following categories of persons to make an application to the Director-General of the National Department of Home Affairs for the alteration of their legal sex descriptor, provided they submit certain medical and/or psychosocial reports:[8]

    (1) A person whose sexual characteristics have been altered by:

        (1a) medical or surgical treatment resulting in gender reassignment; or by

        (1b) evolvement through natural development resulting in gender reassignment.

    (2) A person who is intersex.

11. When promulgated in 2003, this piece of legislation was progressive by world standards, but over the past few years several other countries (e.g. Argentina[9] and Malta[10]) have enacted much more progressive gender recognition laws based on a self-identification principle. Although South Africa is a signatory to the *Yogyakarta Principles* (2007),[11] the South African government has yet to reform its laws and policies to comply with self-identification, bodily integrity and other human rights standards for gender identity and bodily diversity articulated in this instrument. Act 49 also needs to be reformed to make provision for trans, gender diverse and intersex minors, asylum-seekers and refugees to have their gender identity recognised, all of whom are extremely vulnerable and marginalised groups currently being excluded from accessing their right to gender recognition, thereby barring their access to other human rights and services. Furthermore, the manner in which the Department of Home Affairs administrates Act 49 renders many transgender and intersex persons vulnerable and effectively denies them access to their rights to education, health, housing and employment, among others.[12]

12. The lack of effective and efficient administration of Act 49 is the result of various factors, none of which the State addresses in their reports to the Committee.

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[4] Johnson, C. 'Heteronormative citizenship and the politics of passing' (2002), *Sexualities* 317.
[5] McEwan, C. 'Engendering citizenship: Gendered spaces of democracy in South Africa' (2000) 19, *Political Geology* 631-2.
[6] Alteration of Sex Description and Sex Status Act No. 49 of 2003. Available at http://www.gov.za/sites/www.gov.za/files/a49-03.pdf.
[7] Births, Marriages and Deaths Registration Act 81 of 1963.
[8] Act 49 of 2003, section 2(1).
[9] For Argentina's Gender Identity Law, see https://globaltransaction.files.wordpress.com/2012/05/argentina-gender-identity-law.pdf.
[10] For Malta's Gender Identity, Gender Expression and Sex Characteristics Act No. XI of 2015, see http://justiceservices.gov.mt/DownloadDocument.aspx?app=lp&itemid=26805&l=1.
[11] *Yogyakarta Principles: Principles on the application of international human rights law in relation to sexual orientation and gender identity*. (2007). Available at http://www.yogyakartaprinciples.org/.
[12] 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.

12.1 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, which is a misinterpretation of the Act. Section 2(2)(b) of Act 49 requires that a **gender reassignment application** must be accompanied by (1) the applicant's birth certificate[13] 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.[14] In the case of **intersex applicants**, Act 49 requires (1) the applicant's birth certificate, (2) a medical report testifying that the applicant is intersex, and (3) a report by a social worker/psychologist that the applicant has lived in their gender role for an unbroken period of two years. However, Home Affairs officials have often turned gender reassignment and intersex applicants away by insisting that their applications must be accompanied by proof of surgical treatment.[15] But as indicated above, the Act merely makes surgical treatment optional for gender reassignment applicants and does not require any medical or surgical treatment for intersex persons. By making surgical treatment mandatory, Department of Home Affairs officials impede access by transgender and intersex people to various rights, and commit gross human rights violations, including forced sterilisation and intersex genital mutilation (IGM).

12.2 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 for their applications to be accepted and processed by the Department.[16] From empirical experience of Gender DynamiX, Iranti-org, 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.

12.3 Third, when an application is denied, no reasons are provided by the various branch offices of Home Affairs. This makes it difficult for, and unduly burdensome on, applicants seeking alternative legal redress to lodge appeal applications in terms of the Act.[17] This effectively denies transgender and intersex persons their rights to equal protection and benefit of the law. At times, when applicants conduct follow-ups, they are told that their applications got "lost" without the Department providing any form of adequate relief or an expedited process.[18]

[13] Act 49 of 2003, Section 2(2)(a).
[14] Act 49 of 2003, section 2(b) – (c).
[15] Gender DynamiX & Legal Resource Centre. 2015. *Briefing Paper: Alteration of Sex Description and Sex Status Act, No. 49 of 2003*. Cape Town: Gender DynamiX & Legal Resources Centre. Available at http://genderdynamix.org.za/wp-content/uploads/LRC-act49-2015-web.pdf
[16] Ibid.
[17] Act 49 of 2003, section 2(3)-(4).
[18] Gender DynamiX & Legal Resource Centre, 2015, pp.23, 29.

12.4 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 three separate Acts: the Marriage Act,[19] which governs heterosexual unions, the Civil Unions Act[20] which governs heterosexual and same-sex unions, and the Recognition of Customary Marriages Act that regulates customary marriages. 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 knowledge, by the Department. In some instances the Department simply refuses to alter the identification sex descriptor without a divorce order.

13. The majority of transgender and intersex people do not even have access to affirming and inclusive general healthcare, let alone to medical and mental healthcare practitioners who would have the necessary knowledge to write the reports required in terms of Act 49. The Act therefore excludes the majority of people it seeks to benefit. Moreover, for both transgender and intersex applicants, the submission of reports about their bodies and identities involves a violation of their privacy, dignity and the confidential nature of their relationships with medical and mental health practitioners. It enlists these professionals in assisting with the enforcement of discriminatory sex and gender stereotypes and reporting on peoples' bodies, gender identities and gender expressions. This constitutes an untenable situation, as it compromises healthcare relationships that should primarily be concerned with the health, wellbeing and support of transgender and intersex clients, who already belong to the most marginalised groups in society.
14. The problems created by the lack of progressive gender recognition legislation that respects trans and intersex persons' self-identification, the lack of regulatory directives from the Department and the lack an efficient and effective processing system, are not only isolated to interactions between transgender and intersex persons and the Department of Home Affairs. It 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 report to the Committee.

<u>Suggested Questions</u>:

15. **The government states in footnote 93 of the State Report that they have prioritised the processing of sex description alterations. Given that access to a number of economic, social and cultural rights is constantly based on the ability to produce valid and positive identification documentation:**

[19] Marriage Act 25 of 1962.
[20] Civil Union Act 17 of 2006.

15.1 **The GOSA should be asked to provide more details on the steps and procedures that have been implemented in prioritising applications for alteration of sex descriptions as well as when these steps will be implemented? What steps have been taken to increase public knowledge of these steps?**

15.2 **How will the government ensure that applications for alterations of sex description that have been pending will be decided on in light of the prioritisation above?**

15.3 **What steps have been taken to develop and implement national internal directives, particularly to frontline officials interacting with the public, addressing the implementation of Act 49 in order to ensure that lack of identification documents is not a hindrance for transgender, gender diverse and intersex persons seeking to access and enjoy socio-economic rights?**

15.4 **What steps have been taken to amend relevant marriage legislation to provide a bridge between the Marriage Act and the Civil Unions Act and which will prevent the need for people seeking amended identity documents to seek a divorce before their identification documents can be altered?**

15.5 **What steps have been taken to reform the gender recognition law (Act 49 of 2003) in accordance with the Yogyakarta Principles and the rights to gender and bodily self-determination, gender self-identification (including non-binary genders), and bodily integrity and autonomy?**

15.6 **What steps have been taken to reform the gender recognition law (Act 49 of 2003) to make provision for the recognition of the gender identities of minors, asylum-seekers and refugees?**

b) Unequal access to socio-economic opportunities

16. Section 7[2] of the Constitution determines that '*the state must respect, protect, promote and fulfil the rights in the bill of rights*'.[21] 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.
17. The burdensome red tape and ineffective implementation of the Alteration of Sex Description and Sex Status Act[22] impedes transgender and intersex people exercising their citizenship rights, which are guaranteed in the Constitution. Without identity documents that reflect their gender identity, trans

[21] The Constitution of the Republic of South Africa, 1996.
[22] Act 49 of 2003.

and intersex people are unable to access various socio-economic rights and the institutions administering such rights, which require individuals to "prove" their identity before receiving service.

18. 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.[23] 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 discrimination based on their gender identity and sex characteristics, consequently limiting their access to public service and benefits compared to their fellow citizens.
19. 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.
20. Transgender, gender diverse and intersex persons face pervasive discrimination and structural violence in all spheres of society, and often experience rejection by their families and communities, homelessness, forced medical or psychiatric treatments, incarceration, violence, rape and murder. Gender identity, gender expression, sex characteristics, lack of education, unemployment, homelessness, HIV and health status, sex work, drug use and other factors often intersect to render transgender and intersex persons extremely vulnerable in a very prejudiced society. This severely limits their ability to equally enjoy the rights entrenched in both the Constitution of South Africa and the ICESCR.
21. Transgender and intersex persons are at a high risk of being homeless and forced into sex work at a young age because of the abuse they are prone to facing within their homes, schools and communities, and the discrimination that excludes them from other employment opportunities and economic advancement. For transgender women in particular, sex work is often the only option left for earning a livelihood, yet they are further marginalised and oppressed by the state who criminalises them for sex work and drug use, and the police who victimise them rather than offer protection against perpetrators. Sex work is criminalised in South Africa in the Sexual Offences Act and trans sex workers are also targeted through municipal bylaws against loitering. This criminalisation and stigmatisation lead to gross human rights violations against transwomen at the hands of law enforcement, clients and the public, with no recourse to justice.
22. 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, gender expression, sex, sexual orientation and/or religion that directly discriminate against transgender and intersex persons and violate their rights to equality, freedom and security and privacy.[24] Strict criteria around

[23] Ouspenski, A. 2013. *'We fight more than we sleep': Shelter access by transgender individuals in Cape Town, South Africa*. Cape Town: Gender DynamiX. http://genderdynamix.org.za/wp-content/uploads/2013/08/GDX-Shelter-Report.pdf.
[24] Ibid.

sex work and drug use also function to exclude many trans and intersex persons who survive by sex work and/or use drugs, often having no recourse to other forms of employment or psychosocial support, and facing multiple, intersectional forms of marginalisation and stigma.

23. 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.[25] Trans sex workers' needs regarding their working hours are also often not accommodated, as curfews prevent them from earning a living at night, thereby closing off what is for many their only work opportunity. This lack of access to protective and inclusive 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, or to remain homeless and live on the streets, which perpetually places their lives in danger. 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.[26]

Suggested questions:

24. **What steps is the GOSA taking to ensure that the socio-economic welfare of transgender, gender diverse and intersex persons are being met in a non-discriminatory manner, including equal access to state services such as social grants and subsidized housing?**
25. **What steps is the GOSA taking to ensure that sex work is urgently decriminalised in South Africa and to protect trans sex workers' right to work in just, safe, non-discriminatory and non-stigmatising working conditions?**
26. **What steps is the GOSA taking to ensure that shelters are providing services in an affirming and non-discriminatory way and are competent to assist transgender and intersex victims of violence, as well as inclusive of sex workers and people who use drugs (PWUD)?**
27. **What steps is the GOSA taking to ensure that drug use is decriminalised in South Africa and to protect trans and intersex people who use drugs (PWUD) against further human rights violations and additional forms of stigmatisation and discrimination due to drug use?**

II. RIGHT TO BASIC EDUCATION AND CULTURE: EQUALITY IN ACCESSING EDUCATION FOR TRANSGENDER AND INTERSEX CHILDREN

(Article 13 and 15)

28. There is a lack of education about gender diversity, bodily diversity (specifically intersex variations), and sexual identities in primary and high schools in South Africa – where it is provided, 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 students' understanding of sexual orientation, bodily diversity, and gender identity and expression. The education community is also largely unaware of the

[25] Ibid.
[26] Ibid.

issues experienced by transgender, intersex and gender diverse/gender non-conforming youths. The lack of education around, and awareness of, gender, bodily and sexual diversity creates a hostile and discriminatory environment for transgender, intersex and gender diverse/non-conforming youth in schools. There are several issues impacting transgender, intersex and gender diverse/non-conforming children and youth in South African schools. Some of these include[27]:

28.1 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, and 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, and whether or not their gender identity and sex characteristics are known to others. Bullying tends to be more common in high school than primary school. Intersex children may be particularly vulnerable to abuse and privacy violations in primary school if teachers and other learners notice that their bodies (sex characteristics) are more diverse than stereotypical binary social constructions of femaleness or maleness.

28.2 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.

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

Gender identity, gender expression, 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 and bodily diversity in their school curriculum. Transgender and intersex youth may feel pressured into conforming to the existing gender and sex binaries and stereotypes, and for intersex youth, forced into undergoing invasive and medically unnecessary procedures to do so. The lack education on gender identity, gender expression, bodily diversity and sexual orientation may also cause 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 behaviours.

[27]Submissions here are largely based on the following Gender DynamiX research report: Sanger, N. 2014. *Young and Transgender: Understanding the Experiences of Young Transgender Persons in Educational Institutions and the Health Sector in South Africa*. http://genderdynamix.org.za/wp-content/uploads/GDXtransyouth2015-web.pdf

28.4 The lack of education on gender identity and expression, intersex variations and sexual orientation causes many transgender and intersex people to misidentify themselves for a period of their lives.

Many transgender youth at first misinterpret their gender identities in terms of sexual orientation categories (e.g. gay or lesbian) because they have never been exposed to the notion of transgender identities. Other transgender people identify as gay or lesbian because the community more easily understands these terms than "transgender." Exposure to "trans" language is crucial to a transgender individual's understanding of gender identity, healthy mental and sexual development, and navigation of puberty and appropriate options available to them at that time.

Intersex persons whose bodies (sex characteristics) do not appear stereotypically female or male are also generally only exposed to sexual orientation terminology or to stigmatising terms that conflate incorrect assumptions about biology and sexual orientation (e.g. *stabane*).[28] Additionally, they may be exposed in medical settings to highly technical and pathologising medical language (e.g. "disorder", "disease", "malformation", "pathologic", "defect" and "abnormality") about their bodies.[29] This undermines a positive sense of self and causes depression, anxiety and confusion about one's body, identity and belonging. Early social affirmation of bodily diversity as a healthy manifestation of human diversity, and access to intersex-positive language are crucial for the self-understanding, self-affirmation and healthy mental and sexual development of intersex children and youth.

28.5 Sex-segregated toilets constitute major sites of abuse and discrimination, and 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. It has been reported in 2010 that a school principal in Ga-Ntatelang village near Kuruman undressed a six-year-old intersex child, who "preferred to use the girls' toilets, and forced the child to use the boys' toilets instead".[30] Individual teachers have allowed youth access to staff toilets; however, this often only further isolates transgender and intersex learners from other learners at school and enables discrimination to continue.

28.6 Use of pronouns and forms of address that do not respect the learner's gender identity.

Due to prejudice and limited understanding of gender identity, gender expression and bodily diversity, both learners and teachers have been reported as refusing to refer to transgender and intersex persons using the right pronouns. 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.

[28] Swarr, A.L. (2009). 'Stabane', intersexuality, and same-sex relationships in South Africa. *Feminist Studies* 35(3): 524–548.
[29] Carpenter, M. & Cabral, M. (Eds.). (2015). Intersex Issues in the International Classification of Diseases – a revision. Available at https://globaltransaction.files.wordpress.com/2015/10/intersex-issues-in-the-icd.pdf.
[30] 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

28.7 Sex segregation through use of school uniforms according to a gender binary that is enforced for boys and girls robs gender diverse/gender nonconforming 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 experienced by some gender diverse/gender nonconforming 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.

28.8 Sexual harassment at school.

There have been reports of transgender and intersex children being sexually harassed at school. It was for instance reported that a transgender 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 of sleeping with men. Such targeted incidences of abuse against transgender, intersex and gender diverse/gender non-conforming learners force them to stop attending school in order to remain safe, free of abuse and harassment, severely impacting on their rights.

28.9 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 changes their social and legal gender (which changes their identity number), the gendered information on the certificate makes it impossible for a person to use this certificate, especially if they have altered both their forenames (and sometimes surname) and identification number on their identification card. This often leads to transgender and intersex persons being unable to rely on their qualification when seeking employment and other financial opportunities. There is currently a policy in place that allows for alterations to be made. However, the responsible unit, Umalusi, understands this policy to mean that certificates are only re-issued where administrative errors occur and not for reasons of legal gender change. They believe that transgender and intersex persons bear the responsibility for 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/sex characteristics when seeking jobs and other opportunities.

29. All of the above circumstances are compounded by the fact that there are currently no guidelines for schools to assist learners, parents, teachers, school-governing bodies and other members of 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 are dependent upon the school community in question and their willingness to include and make provision for transgender and intersex children in their school.

Suggested questions

30. **What steps has the GOSA taken to draft and implement national and provincial policies regarding the inclusion and protective measures (among others) of transgender, gender diverse and intersex children in all levels of schools as a measure to ensure that this class of children are able to access their right to education without discrimination and foster tolerance in schools?**
31. **What steps has the GOSA taken to towards ensuring that gender identities and bodily diversity are discussed more openly in the school environment as a measure to encourage equality, tolerance inclusion in accessing education?**
32. **What steps have been taken by 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?**
33. **What steps has the GOSA taken to engage with school governing bodies to implement structures within schools to enable them to address and prevent discrimination against transgender, gender diverse and intersex youth?**
34. **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.**
35. **What steps have been taken by the GOSA to ensure that transgender and intersex persons seeking to alter their details on the matriculation certificate do so without delay and discrimination?**

III. BODILY INTEGRITY AND AUTONOMY, AND FREEDOM AND SECURITY OF THE PERSON RELATING TO NON-CONSENSUAL, MEDICALLY UNNECESSARY TREATMENT/SURGERY ON INTERSEX INFANTS, CHILDREN AND ADOLESCENTS

(Article 12(1))

36. In its report, the GOSA states that it does not allow any discriminatory practice or *any form of degrading and harmful treatment of transgender people* [Para 88 of the State Report]. The experiences of transgender, gender diverse and intersex persons prove otherwise, as will be explained below.
37. 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.[31] This takes the form of so-called 'normalising' feminising or 'normalising' masculinising treatments that aim to make all human bodies conform to stereotypical binary sex standards for femaleness and maleness that are based on highly problematic and discriminatory notions of normality.[32] Similar to female genital mutilation, such treatments constitute gross human rights violations. As has been pointed out

[31] Smit, E. 2015. Extracts from Unpublished Review and Analysis of South African Transgender and Intersex Research, Legislation and Policy.
[32] 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

in a recent document by an international group of intersex activists and experts (including South African intersex activist, Nthabiseng Mokoena):

> '*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*.[33]

38. These human rights violations largely take place because the language used in medical and public discourses 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)[34] and in South African medical publications.[35] Consent given without positive, affirming language and information cannot be characterised as free and informed consent.[36] 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, evidence based and informed by human rights approaches when interacting with intersex infants, youth and their parents and/or guardians.[37]
39. In South Africa, conventional medical discourses and practices are complicit in enforcing dominant societal norms about sex and gender, actively pre-empting the possibility of informed consent for intersex children and undermining the protection of their bodily integrity. Where the principle of informed consent is invoked in relation to medical treatments and surgeries on intersex infants and children, the emphasis is not on informed consent given by the intersex child (who mostly is not yet in a position to effectively question and challenge medical decisions), but consent by the parents of the child, who have often internalised society's intersexphobic values, which then become further entrenched through exposure to pathologising medical discourses employed by clinicians. Clinicians inform parents of the potential risks and complications of surgery, rather than focusing on the child's rights to bodily integrity, privacy, freedom, security and sexual and reproductive health. Notwithstanding an acknowledgement that all decisions by the clinical team and parents should take into account the rights and/or best interests of the child – a right also included within the South African Constitution – the power to decide over the child's body currently remains almost exclusively in the hands of clinicians and parents, and what they consider to be the child's best interests in terms of hegemonic and discriminatory binary sex and gender norms.[38]

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[33] Ibid, p. 10.
[34] Ibid, p. 2.
[35] 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 dis order 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.
[36] Mokoena, N. 2015. Intersex youth: Can we say that consent is truly free, full and informed?, p. 3.
[37] Ibid p. 3.
[38] 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

40. 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,[39] as well as local medical publications[40], such surgeries remain common despite the severe physical and mental health risks involved. For example, on 7 July 2016, the SABC aired[41] a segment on intersex traits (specifically, hypospadias) on the show, "Morning Live", featuring Dr Kabo Ijane from the Urology Hospital in Pretoria who strongly advocated for 'normalising', cosmetic surgery during infancy or early childhood even when there is no medical need. Dr Ijane appreciated the high complexity and expertise required for these surgeries and low levels of competency among surgeons, while simultaneously advocating for early intervention. This can only increase the rate of revision, and Dr Ijane acknowledged that 50% of cases were for revisions as a result of complications. Children therefore end up spending inordinate amounts of time in surgery, for medically unnecessary procedures taking place without full, free and informed consent, within a pathologising framework affecting not only their sexual and reproductive health but psycho-social wellbeing. This approach 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, 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".[42]
41. For adolescents at the age where their consent is required for surgical procedures, their interaction with medical practitioners is often dictated by power imbalances that leave very little choice.[43] It has been reported that because of this power imbalance, intersex youth are often at the mercy of medical 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.[44]

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al, 2008. See also Wiersma, R. 2011b. Ovotesticular disorder of sex development in Southern Africa. Doctoral thesis, Erasmus University Rotterdam.

[39] 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.

[40] 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.

[41] For the interview with Dr Kabo Ijane on the MorningLive show, SABC 2, see https://www.youtube.com/watch?v=gig4QqurdTo. See also the press release by Iranti-org at http://www.iranti-org.co.za/content/Press_Releases/2016/Urology-Hospital-Pretoria-Intersex.pdf.

[42] 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.

[43] Nthabiseng Mokoena (note 20), p. 3.

[44] Ibid, p. 3

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

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

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.

42.2 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.[45] When an intersex child is forced to undergo surgery (often requiring repeated follow-up medical interventions throughout childhood and adolescence), the child frequently suffers physical and emotional harm for the rest of their life.[46]

42.3 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.[47]

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."

42.4 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.

Suggested Questions

43. **At the 73rd Session of the UN Committee on the Rights of the Child, the Committee expressed its concern "*at the high prevalence of harmful practices in the State party, including … intersex genital mutilation*" and in the light of its general comment No. 18 on harmful practices (2014), adopted jointly with the Committee on the Elimination of Discrimination against Women, the Committee urged the State party to:**

…

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

[46] 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

[47] 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.

(d) Guarantee bodily integrity, autonomy and self-determination of all children, including intersex children, by avoiding unnecessary medical or surgical treatment during infancy or childhood;

(e) Build capacity of all professional groups working for and with children to prevent, identify and respond to incidents of harmful practices and to eliminate customary practices and rituals which are harmful to children;

(f) Ensure sanctions on perpetrators of harmful practices (…) and provide effective remedies to the victims of harmful practices.

43.1 **How is the state working to end intersex genital mutilation and guarantee the bodily autonomy and self-determination of intersex children?**

43.2 **What steps is the GOSA taking 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" and to prohibit medically unnecessary surgeries on intersex children and adults in order to ensure that their bodily autonomy is protected and promoted in accessing their right to health?.**

43.3 **What steps is the GOSA taking 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?**

43.4 **What steps is the GOSA taking 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?**

IV. UNEQUAL ACCESS TO HEALTH

(Article 12)

44. 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. Apart from general healthcare that is transgender inclusive, many transgender persons also require access to gender affirming healthcare services to enable them to alter their bodies in ways that affirm their gender identities. Depending on the individual in question, they may require access to hormone therapies and/or various surgical procedures, and/or other medical procedures and forms of healing, including traditional/indigenous healing. Some transgender persons may require access to psychosocial and mental health services.
45. In the government-subsidised public sector, transgender people continue to face several obstacles. There is a dearth of transgender-specific healthcare services that provide gender affirming care. Although a handful of hospitals located in urban centres provide some gender affirming procedures, only one hospital in the entire country provides the full range of trans-specific healthcare in accordance with the latest guidelines of the World Professional Association for Transgender Health

(WPATH)[48] and actively works together with transgender organisations to provide gender affirming healthcare (Groote Schuur Hospital, Cape Town). They have a surgery waiting list of up to 25 years. 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 responses to HIV/Aids and psycho-social treatment are only beginning to focus on the transgender and intersex communities, even though the transgender community is cited as facing higher risks of requiring both.[49]

46. 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 sector is not training medical professionals with the clinical skills necessary to provide adequate gender affirming and trans-specific general 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.[50]
47. In the private healthcare sector, where individuals are 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.[51]
48. Section 27 of the Constitution enjoins the state to ensure the progressive realisation of everyone's right to health care services. The National Health Act[52] 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 vulnerable groups. 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 South Africans, however these 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 in the healthcare system.[53] 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.
49. Transgender and intersex people are further alienated from accessing health care as the whole system operates under the binary assumption that every person's body is either stereotypically male or stereotypically female (sex binarism), and the assumption that being born with a male body implies a

[48] World Professional Association for Transgender Health. 2011. *Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People, Version 7*. Available at http://www.wpath.org/site_page.cfm?pk_association_webpage_menu=1351&pk_association_webpage=4655.
[49] 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.
[50] Ibid.
[51] 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.
[52] Act 61 of 2004.
[53] Department of Health, National Health Insurance [published in GG in December 2015].

stereotypical gender identity and gender expression as a man, and being born with a female body implies a stereotypical gender identity and gender expression as a woman (cisnormativity). This leaves a large number of transgender, gender diverse, gender non-conforming, nonbinary, intersex and body diverse persons completely erased from healthcare services. This prevailing institutional psyche leads to an exclusive healthcare system which denies whole subsets of the population access to quality, appropriate healthcare. The binary framework of sex classification also severely impacts on the treatment of intersex persons in the healthcare system. For intersex persons, contact with healthcare services often entails traumatising encounters with healthcare professionals and non-consensual sex assignment procedures that constitute gross human rights violations. In these procedures, intersex infants and adolescents are subjected to harmful, medically unnecessary treatments and surgical procedures with long-term adverse consequences without their full, free and informed consent.

Suggested Questions

50. **What steps has the GOSA taken to ensure that their policies and implementation thereof does not continue to be discriminatory to transgender, gender diverse and intersex persons? What steps are being taken to ensure that legislation and polices are inclusive of the specific needs of this group of persons?**
51. **What plans does GOSA have in place to ensure that new systems of health provision such as the NHI, which will rely on information from birth certificates and Identification documents, will not continue to discriminate against transgender and intersex patients?**
52. **What steps is GOSA taking to ensure that its health care staff receives ongoing training and sensitisation in order to provide affirming and accurate healthcare to transgender and intersex patients.**
53. **In its role as regulator and accreditor of education and training in RSA, what role is GOSA playing to ensure that medical staff receive adequate and diverse instruction on sexual orientation and gender identification topics.**

****ENDS****