**Recognition of Economic, Social and Cultural Rights: A continued struggle for persons with diverse gender identities, gender expressions and sex characteristics in South Africa**

**Recommendations submitted to the Working Group on South Africa   
Committee on Economic, Social and Cultural Rights**

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7. The organisations and individuals listed above are honoured to assist the Committee on Economic, Social and Cultural Rights (**Committee**) in preparing for the review of the implementation of the International Covenant on Economic, Social and Cultural Rights (ICESCR) by South Africa.
8. As we stated in our report for the List of Issues, the challenges faced by transgender, gender diverse and intersex persons in South Africa are currently not sufficiently dealt with in the report filed by the Government of South Africa (**GOSA)**.
9. We note further that the List of Issues as developed by the Committee does not adequately address these issues. The only question that is aimed at addressing issues concerning transgender, gender diverse and intersex persons in the List of Issues is Question 7, which does not adequately recognise, among others, the urgent need for law reform to address human rights violations committed by the GOSA in terms of (a) severely discriminatory requirements enforced through the very stipulations of South Africa’s gender recognition law (Act 49 of 2003) over and above the lack of effective implementation of the Act by the Department of Home Affairs; and (b) practices of Intersex Genital Mutilation (IGM) or non-consensual sex-assignment surgeries and medical treatments on intersex infants and children that require urgent prohibition and prevention rather than merely addressing risks and problems.
10. It is important to note that transgender and gender diverse matters (which concern gender identity and gender expression) and intersex matters (which concern sex characteristics and bodily diversity) have historically been conflated with issues of sexual orientation, with the latter receiving much more due consideration. This submission therefore aims to provide pertinent information in order to ensure that the review of South Africa by the Committee is inclusive and cognisant of the rights and challenges of persons with diverse gender identities and expressions, as well as persons with diverse sex characteristics. . These classes of persons 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. We drafted and submitted a report to the Committee in preparation for the development of List of Issues – this report is already before the Committee.
11. This submission will be divided into two parts:
    1. **Part A: Key issues that were included in the List of Issues**
    2. **Part B: Key issues that were not included in the List of Issues**

**A. KEY ISSUES INCLUDED IN THE LIST OF ISSUES**

**QUESTION 7**

1. Out of the 30 questions in the List of Issues, only one question, Question 7, concerns the rights of transgender, gender diverse and intersex persons in South Africa. The question essentially deals with two different issues, namely, (a) the implementation of South Africa’s gender recognition law, and (b) non-consensual sex assignment surgeries performed on intersex infants and children. The question reads as follows:

**‘Please provide information on the measures taken to effectively implement the Alteration of Sex Description and Sex Status Act. Please also provide information on the number of surgeries performed on intersex infants and children; on the measures taken to address the severe physical and mental risks facing intersex infants and children undergoing such surgery without free and informed consent; and whether the State party intends to address the problems caused by the performance of such surgery’**.

1. In addressing, Question 7, we have subdivided it into four parts, namely:
   1. The measures taken to effectively implement the Alteration of Sex Description and Sex Status Act No. 49 of 2003;
   2. Information on the number of surgeries performed on intersex infants and children;
   3. Measure taken to address the severe physical and mental risks facing intersex infants and children undergoing surgery without free and informed consent and;
   4. Whether the State party intends to address the problems caused by the performance of such surgery.
2. We will provide input as to whether the GOSA has sufficiently addressed the above four issues raised in Question 7 and recommendations relating to the issues raised herein.
3. **Measures taken to effectively implement the Alteration of Sex Description and Sex Status Act[[1]](#footnote-1) (‘Act 49’):**
4. The GOSA’s reply to the List of Issues provides a brief overview of the application of Act 49 and the procedure to apply for a change of gender marker in paragraph 7.1. However, the response neglects to distinguish between the two main categories of applicants mentioned in the Act, namely, (a) Gender Reassignment Applicants and (b) Intersex Applicants, and also conflates the different sets of requirements for these different categories of applicants. Importantly, contrary to the GOSA’s response, Act 49 does not require intersex applicants to undergo an alteration of sex characteristics by surgical or medical treatment.
5. The GOSA’s response also erroneously assumes that all trans and gender diverse persons are able to access and/or want to undergo an alteration of sex characteristics by surgical or medical treatment. These misconceptions are at the heart of many of the human rights violations committed by the Department of Home Affairs’ in terms of Act 49, and reflect the GOSA’s lack of understanding of gender diversity and bodily diversity (variations of sex characteristics), and also of the measures required to ensure the protection and realisation of the rights to gender identity, gender expression and bodily integrity/autonomy of trans, gender diverse and intersex persons. Moreover, the response does not address the question regarding the measures taken by GOSA.
6. The answer further states that to date two children have changed their gender markers as per their parents’ requests and 18 people have applied in 2018. The GOSA did not clarify which measures were taken to effectively implement Act 49, nor did it provide clarification on whether any of the 18 applications were successful – pertinent information in relation to barriers of GOSA’s implementation of Act 49.
7. In our report for the development of List of Issues, we primarily mentioned four barriers to effective implementation of Act 49. None of these factors were addressed by the GOSA in the reply to List of Issues.
   1. The first factor is the lack of accurate application and understanding of Act 49 by officials charged with administering Act 49 at the Department of Home Affairs. Applicants have in various instances been turned away by officials at the Department of Home Affairs as they insist that the applicants must furnish proof of surgical intervention.[[2]](#footnote-2) Act 49 is however misinterpreted by the officials as it does not require surgical intervention as a requirement, it is merely optional. In some cases, Home Affairs branches are even completely unaware of the fact that Act 49 exists and turn applicants away, erroneously informing them that it is not at all possible for transgender and intersex persons to change their gender marker in South Africa.
   2. The second barrier is the lack of national directives from the Department of Home Affairs which have resulted in transgender and intersex applicants having to wait unreasonably long for their applications to be processed by the Department. Gender DynamiX, Iranti-org, Legal Resources Centre and other organisations have received complaints from persons waiting for up to 7 years for their application to be processed. The average waiting period for most alterations to identity documents is three months, therefore this waiting period ranging from 2 years to 7 years is unacceptable.
   3. The third factor discussed is the lack of reasons for the rejection of an application made in terms of Act 49. Without reasons given by the Department of Home Affairs, legal redress and lodgement of appeals in terms of Act 49[[3]](#footnote-3) are unduly burdensome on applicants. In terms of section 33 of the Constitution of the Republic of South Africa, 1996 (“the Constitution”), administrative action which adversely affects the rights of any person must be accompanied with reasons. The decision taken by the Director-General to reject an application is administrative action. Therefore, the Department of Home Affairs is infringing on applicants’ rights to just administrative action by not providing reasons for rejections. Furthermore, certain applicants were told that their applications got “lost” when they request an update on their application.[[4]](#footnote-4)
   4. Fourthly, the marriage status of applicants seeking to alter their sex description. In the case of *Kos v Minister of Home Affairs*[[5]](#footnote-5) the court addressed the issue of the dissolution of the applicants’ marriages in terms of the Marriage Act[[6]](#footnote-6) when they apply for an alteration of their sex descriptions. The Department of Home Affairs took the position that as the Marriage Act states that a marriage is between a male and a female, when one of the parties’ wishes to change their legal gender, their respective marriage must be dissolved. The High Court ruled that an application from a transgender or intersex person to change their legal gender in terms of Act 49 must be considered irrespective of their marriage status. The judgment remains largely unenforced as some of the applicants are yet to receive identification documents that reflect their gender identity and sex description as indicated in their Act 49 applications, and all the applicants still do not have marriage certificates that reflect their altered sex description and names. The judgment therefore needs to be implemented immediately to avoid unnecessarily violating the rights of those involved.
8. Our report for the development of List of Issues also pointed out that it is not just the lack of effective implementation of Act 49 that results in the denial of the right to legal gender recognition and citizenship for trans and intersex persons in South Africa. The very requirements that applicants have to meet in terms of Act 49 in order to qualify for changing the gender marker in their identity documents, constitute human rights violations and do not comply with the Bill of Rights of the South African Constitution or international human rights standards for legal gender recognition:
   1. For gender reassignment applicants, Act 49 requires an alteration of sex characteristics through surgical or medical treatment or evolvement through natural development. This demand violates the person’s Constitutional right to bodily and psychological integrity, including the right (a) to make decisions concerning reproduction, and (b) to security in and control over their body,[[7]](#footnote-7) as well as their Constitutional right to equality before the law and not to be discriminated against on the basis of sex and gender,[[8]](#footnote-8) among others. The demand for an alteration of sex characteristics inevitably means a demand for sterilisation. In South Africa, the Sterilisation Act No. 44 of 1998 states that a person may not be sterilised without their consent.[[9]](#footnote-9) Requiring a person to alter their sex characteristics before allowing them to access legal gender recognition forces them to give up their right to bodily integrity and autonomy in order to access their right to legal recognition and citizenship. Such a forced choice does not constitute free consent, but rather a gross human rights violation – this has been recognised repeatedly by international human rights bodies: In 2013, the United Nations *Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* for instance called on all States “to outlaw forced or coerced sterilization in all circumstances and provide special protection to individuals belonging to marginalized groups”.[[10]](#footnote-10) In 2017, the European Court of Human Rights (ECHR) declared that a sterilisation requirement for legal gender recognition is a human rights violation, compelling European countries to remove any such requirement from their legislation, and noting that “a very clear position in favour of abolishing the sterility criterion, which they regard as an infringement of fundamental rights [have been adopted by] the Commissioner for Human Rights of the Council of Europe, the Parliamentary Assembly of the Council of Europe, the United Nations Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, the World Health Organisation, the United Nations Children’s Fund, the United Nations High Commissioner for Human Rights and the OHCHR, UN Women, UNAIDS, the United Nations Development Programme and the United Nations Population Fund”.[[11]](#footnote-11)
   2. For intersex applicants, Act 49 requires medical corroboration of intersex status combined with living for an unbroken period in a particular gender role. These demands similarly violates intersex persons’ Constitutional rights to psychological and bodily integrity and autonomy, human dignity,[[12]](#footnote-12) privacy[[13]](#footnote-13) and freedom of expression,[[14]](#footnote-14) and the right not to be discriminated against on the basis of sex and gender.
   3. The majority of transgender, gender diverse 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.
   4. There is no provision in Act 49 for prepubertal trans and gender diverse children to change their gender marker. In the case of prepubertal trans and gender diverse children, an alteration of sex characteristics does not apply and cannot be made a requirement. It is only at puberty that some children may access medical or surgical procedures to alter sex characteristics. In the case of children, demanding an alteration of sex characteristics/sterilisation before recognising their gender identity would be an extreme human rights violation. Prepubertal trans and gender diverse children are therefore effectively excluded from accessing legal gender recognition through Act 49.
   5. Currently, the only options on identity documents are female and male. However, some persons do not want to have any gender recorded, or want to have a different gender identity recorded – whether for reasons of safety, gender fluidity or their gender identities not being confined to the two binary options, or for other reasons. Currently Act 49 does not make provision for completely leaving out gender or for recording other gender identities where this may be required by individuals.
   6. Act 49 requirements for legal gender recognition constitute forms of systemic, state-sanctioned exclusion and violence against trans, gender diverse and intersex persons. Despite repeatedly bringing this to the attention of the GOSA, it continues to fail to reform this piece of legislation in accordance with human rights standards and best practices. Starting with Argentina in 2012, a clear trend has been emerging of countries adopting gender self-determination/self-identification models in their gender recognition legislation whereby persons self-declare their gender identity, which is then recorded by the State without any requirements for medical interventions or reports. We again bring to the attention of the GOSA that South Africa is a signatory to the *Yogyakarta Principles* (2007), which states that “No one shall be forced to undergo medical procedures, including sex reassignment surgery, sterilisation or hormonal therapy, as a requirement for legal recognition of their gender identity. No status, such as marriage or parenthood, may be invoked as such to prevent the legal recognition of a person’s gender identity”.[[15]](#footnote-15) We again urge the GOSA to reform Act 49 to comply with international human rights standards by implementing a gender self-determination/self-identification model as outlined in the *Yogyakarta Principles* (2007), Principle 3, and the *Yogyakarta Principles Plus 10* (2017), Principle 31. These human rights instruments explain how universal human rights, such as those contained in the South African Constitution, apply to gender identity, gender expression and sex characteristics.

**Recommendations:**

1. **We recommend that the Department of Home Affairs immediately take steps to prioritise applications for alteration of sex descriptions that have been outstanding for more than 3 months.**
2. **We urge the Committee to recommend that the GOSA take steps 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. The Directives could address the following issues:** 
   1. **Clarifying that surgical intervention is not a requirement in terms of Act 49 before an application for alteration of sex description can be made. Gender affirming surgery is merely one of the options available to transgender persons.**
   2. **Applications in terms of Act 49 must be dealt with in a timely manner and all applications received by the Department of Home Affairs must be processed as envisaged by Act 49.**
   3. **If a transgender, gender diverse or intersex person’s application is rejected, the rejection must be accompanied with written reasons in order for the decision to be complying with the requirements for just administrative action as set out in the Constitution.**
   4. **Additionally, GOSA must provide regular and adequate training to frontline officials on the above-mentioned directives.**
   5. **Lastly, the marriage status of the applicants has no impact on their application to alter their gender marker on their identity documents.**
3. **The GOSA must be encouraged to promote public knowledge on Act 49 and how to apply to alter one’s sex description (gender marker) in South Africa.**
4. **We urge the Committee to recommend that the GOSA reform the gender recognition law (Act 49 of 2003) in accordance with a gender self-determination/self-identification model as outlined in** **the *Yogyakarta Principles* (2007), Principle 3,[[16]](#footnote-16) and the *Yogyakarta Principles Plus 10* (2017), Principle 31,[[17]](#footnote-17)** **in order to ensure that the Act realises every person’s rights to gender identity, gender expression and sex characteristics, equality, dignity and privacy. (bodily integrity and autonomy). For trans and gender diverse persons, this entails removing all requirements for submission of reports on the alteration of sex characteristics resulting in gender reassignment. For intersex persons, this requires removing all requirements for submission of medical reports on their bodies and psychologist/social worker reports on their gender roles. Instead, a simple procedure is needed whereby every person can submit a form in which they freely indicate/self-declare the gender marker they require on their identity documents. Not having any gender marker should also be an option. Provision also needs to be made for minors to use this procedure to change their gender marker.**
5. **We encourage the Committee to recommend the GOSA to reform Act 49 to explicitly make provision for the recognition of the gender identities and alteration of gender markers of asylum seekers and refugees. Currently, GOSA holds that asylum seekers and refugees are excluded under the ambit of Act 49 as their names are not entered into the Population Register and therefore the Population Register cannot be altered.**
6. **Information on the number of surgeries performed on intersex infants and children:**
7. Paragraph 7.2 of the Reply to the List of Issues states that the GOSA does not keep statistics on the number of surgeries performed on intersex infants and children in South Africa. The reply merely states that it has taken note of the challenges presented.
8. As discussed in our report on the development of the List of Issues, intersex persons in South Africa are often subjected to non-consensual, medically unnecessary and physically and psychologically harmful sex assignment surgeries and treatments during infancy or childhood. Detailed documentation of human rights violations against intersex children and adults in South Africa have been submitted in a report on intersex genital mutilation in South Africa by StopIGM to the United Nations Committee on the Rights of the Child under the Convention on the Rights of the Child.[[18]](#footnote-18) These human rights abuses include infanticide and mutilations. In medical settings, it includes sterilising procedures and arbitrary imposition of hormones, ‘feminising’ genital surgeries and ‘masculinising’ genital surgeries. Other human rights violations include repeated forced genital exams and photography. These practices are taught and perpetrated with impunity at South African academic hospitals funded by the South African state. So-called ‘normalising’ feminising or ‘normalising’ masculinising treatments 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.[[19]](#footnote-19) Similar to female genital mutilation, such treatments constitute gross human rights violations that must be urgently prohibited. 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):

‘*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*.[[20]](#footnote-20)

1. We emphasise that Consent given without positive, affirming language and information cannot be characterised as free and informed consent.[[21]](#footnote-21) 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.[[22]](#footnote-22)
2. We commend the Committee for requesting the GOSA to provide information on the number of surgeries performed on intersex infants and children; and on the measures taken by the GOSA. However, the focus of the question should have been measures regarding prohibition and prevention of these surgeries and medical treatments, as well as reparation and redress, not merely on measures addressing risks and problems caused by surgeries performed in the absence of informed consent.
3. In its *Concluding Observations on the Second Periodic Report of South Africa*[[23]](#footnote-23) (September 2016), the United Nations Committee on the Rights of the Child (CRC) expressed its concern about “the high prevalence of harmful practices in the State party, including intersex genital mutilation”. The CRC urged the GOSA to ensure that its “legislation prohibits all forms of harmful practices used on children”, “Develop and adopt a national action plan to effectively eliminate such practices”, “Ensure meaningful participation of all stakeholders, including children affected or at risk of harmful practices and their communities in developing, adopting, implementing and monitoring of relevant laws and policies”, “Guarantee bodily integrity, autonomy and self-determination of all children, including intersex children, by avoiding unnecessary medical or surgical treatment during infancy or childhood”, “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”, and “Ensure sanctions on perpetrators of harmful practices, […] and provide effective remedies to the victims of harmful practices”. Nearly two years have passed since the recommendations made by the CRC in September 2016, and the GOSA has not been able to mention any measures taken in this regard, apart from hosting a national engagement on the rights of intersex persons in December 2017.

**Recommendations:**

1. **We recommend that the Committee urge the GOSA to guarantee the bodily integrity, autonomy and self-determination of all intersex children through working with intersex persons to draft and enact legislative and policy measures that prohibit practices of intersex genital mutilation (IGM) in socio-cultural and medical settings.**
2. **The GOSA must be urged to implement monitoring mechanisms to obtain and keep statistical records on sex-related surgeries, hormonal interventions and other medical treatments performed on intersex infants and children in South Africa.**
3. **The GOSA must be urged to establish a special monitoring unit on human rights violations against intersex children in medical and socio-cultural settings, and provide mechanisms and reparations where individuals have been subjected to forced, coercive or involuntary procedures as infants, children or adults.[[24]](#footnote-24) [[25]](#footnote-25)**
4. **The GOSA must be urged to enact measures to ensure that doctors and the public are aware of intersex children’s rights to bodily integrity, bodily autonomy and self-determination, and of the physical and mental harms of medically unnecessary and non-consensual treatments and surgeries, and the need to eliminate harmful socio-cultural practices constituting human rights abuses against intersex children.**
5. **The GOSA must be urged to publicly promote the understanding that intersex bodies are healthy manifestations of human bodily diversity and that such diversity must be promoted in accordance with the tenets of the Constitution of South Africa.**
6. **Measures taken to address the severe physical and mental risks facing intersex infants and children undergoing surgery without free and informed consent:**
7. The GOSA replied to this question by stating that the Ministry of Justice and Correctional Services hosted a National Engagement on the Promotion of the Human Rights of Intersex Persons Workshop hosted in December 2017.[[26]](#footnote-26) The Keynote Address by Honourable JH Jeffery, Deputy Minister for Justice and Constitutional Development and Member of Parliament, recognised the harmful practices on intersex infants and children. The Address further refers to the Promotion of Equality and Prevention of Unfair Discrimination Act,[[27]](#footnote-27) the Alteration of Sex Description and Sex Status Act and the new Prevention of Combatting of Hate Speech and Hate Crime Bill,[[28]](#footnote-28) which all mentions intersex persons. Legislation that prohibits surgery on intersex children is something that the government and relevant stakeholder will have to engage on further, according to the Address. Furthermore, the Address concludes by stating that consideration should be given to one of the Chapter 9 institutions, perhaps the South African Human Rights Commission or the Commission for Gender Equality, to conduct hearings and/or investigations.
8. We submit that the Address does not at all sufficiently deal with any measures taken by the GOSA to address the severe physical and mental risks facing intersex infants, children and adults undergoing non-consensual surgery. At best, the GOSA merely acknowledges that South Africa is facing this issue. However, the report of the National Engagement contains a range of recommendations made by participants in December 2017 on legal interventions, medical and health interventions, research, community health, and awareness and education.[[29]](#footnote-29) In its response to the List of Issues, the GOSA merely mentions that the report contains recommendations to government and that this matter is receiving the attention of Government, but nothing concrete is mentioned in terms of following up on the recommendations.

**Recommendation:**

1. **We recommend that the GOSA urgently take active steps in collaboration with intersex persons to implement the recommendations contained in the *National Dialogue on the Protection and Promotion of the Human Rights of Intersex People* report (2018).**
2. **We recommend that active steps are taken by the GOSA to implement legislative and other measures that are specifically aimed at the protection of intersex infants, children and adults’ bodily integrity, autonomy and self-determination when interacting with health professionals.**
3. **We urge the Committee to recommend that the GOSA 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.**
4. **The GOSA should take further steps to ensure that medical, mental health and social services professions effectively communicate to parents of intersex children that surgical and medical intervention on their children’s sex characteristics is not necessary, unless for pertinent physical health reasons.**
5. **Whether the State party intends to address the problems caused by the performance of such surgery:**
6. Together with question three, the GOSA refers to National Engagement on the Promotion of the Human Rights of Intersex Persons Workshop hosted in December 2017, as summarised above. The GOSA said that legislation that prohibits such surgery on infants and children should be further explored by stakeholders. No further indication of active measures taken to address the problems caused by such surgery was put forth.
7. As submitted in our report, 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,[[30]](#footnote-30) as well as local medical publications[[31]](#footnote-31), such surgeries remain common despite the severe physical and mental health risks involved. For example, on 7 July 2016, the SABC aired[[32]](#footnote-32) 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”.[[33]](#footnote-33)
8. 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.[[34]](#footnote-34) 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.[[35]](#footnote-35)

**Recommendations:**

1. **We ask as a matter of utmost urgency that the GOSA enacts legislation and policy to prohibit practices of non-consensual, medically unnecessary surgeries and treatments (i.e. intersex genital mutilation) on intersex infants and children in medical and other settings.**
2. **The GOSA must be urged to establish a special monitoring unit on human rights violations against intersex children in medical and socio-cultural settings, and provide mechanisms and reparations where individuals have been subjected to forced, coercive or involuntary procedures as infants, children or adults.[[36]](#footnote-36) [[37]](#footnote-37)**
3. **We recommend that the GOSA take steps 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.**

**B. KEY ISSUES NOT INCLUDED IN THE LIST OF ISSUES**

1. We urge the Committee to consider the following issues that were not addressed in the List of Issues or the reply to the List of Issues. These issues are repeated from our report on the development of List of Issues which is already before the Committee and for a more detailed discussion of the issues. In this report, we provide some recommendations that the Committee should make to the GOSA which we believe will go a long way in realising the economic, social and cultural rights of persons with diverse gender identities, gender expressions and sex characteristics.
2. **RIGHT TO WORK**

(Article 6)

1. As mentioned in our report on the development of List of Issues, for transgender women in particular, sex work is often the only option left for earning a livelihood. They are still 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. 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.

**Recommendations:**

1. **We recommend the Committee to request the GOSA to fully decriminalise sex work in South Africa and to protect transgender sex workers’ right to work in just, safe, non-discriminatory and non-stigmatising working conditions.**
2. **We encourage the Committee to recommend the GOSA ensure that drug use is decriminalised in South Africa and to protect trans and intersex people who use drugs against further human rights violations and additional forms of stigmatisation and discrimination due to drug use.**
3. **PROTECTION OF THE FAMILY AND CHILDREN**

(Article 10)

1. As discussed in our report on the development of List of Issues, 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,[[38]](#footnote-38) which governs heterosexual unions, the Civil Union Act[[39]](#footnote-39) 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.
2. We note that the Committee, in their List of Issues, asked the GOSA about amending the Marriages Act to remove the difference in treatment between women and men, however, the Committee has not addressed the need to bridge the gap between the Marriage Act (heterosexual marriages) and the Civil Union Act (same-sex civil unions and heterosexual civil unions).

**Recommendations:**

1. **In addition, the GOSA must amend relevant marriage legislation to provide a bridge between the Marriage Act and the Civil Union Act to solve the current problem where people seeking amended identity documents are forced by Home Affairs to seek a divorce before their identification documents can be altered.**
2. **Consequently, we urge the Committee to request an update from the GOSA on the enforcement of the *Kos v Minister of Home Affairs*[[40]](#footnote-40)judgment, specifically on the measures it has put in place to avoid forcing people to divorce, as well as the systems in place to alter sex descriptions of those married in terms of the Marriage Act without impacting on the status of their marriages.**
3. **We also request the Committee to urge the GOSA to implement this judgment.**
4. **Additionally, the Civil Union Act needs to be amended to use inclusive language, as it currently employs the phrases “same sex” and “opposite sex”, which are based on binary conceptions of biological sex and gender, and therefore excludes intersex persons, as well as other persons with diverse sex characteristics and/or nonbinary gender identities.**
5. **RIGHT TO AN ADEQUATE STANDARD OF LIVING**

(Article 11)

1. As discussed in our report on the development of List of Issues, the lack of trans and intersex-specific legislation and policy in South Africa negatively impacts access to socio-economic rights in the area of housing where transgender and intersex persons’ ability to benefit from government subsidy programs is very limited. 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 and discrimination they are prone to facing. Because of the restrictive and under inclusive policies that most homeless shelters have, transgender and intersex persons are exposed to continuing 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. Further exacerbating the problem is that South Africa does not administer government-run shelters to militate against transgender and intersex homelessness.

**Recommendations**

1. **The GOSA must 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 subsidised housing.**
2. **The GOSA must be encouraged 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.**
3. **RIGHT TO PHYSICAL AND MENTAL HEALTH**

(Article 12)

1. As described in our report on the development of List of Issues, in addition to facing the same socio-economic and socio-political barriers to quality health care faced by South Africans generally, transgender and gender diverse 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.
2. 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)[[41]](#footnote-41) 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 transgender communities, even though the transgender community is cited as facing higher risks of requiring both.[[42]](#footnote-42)
3. 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.[[43]](#footnote-43)

**Recommendations**

1. **The GOSA must be requested to ensure that their policies and implementation thereof do not continue to be discriminatory to transgender and gender diverse persons, and asked about the steps that are being taken to ensure that legislation and polices are inclusive of the specific needs of this group of persons.**
2. **The GOSA must ensure that new systems of health provision such as the National Health Insurance (“NHI”), which will rely on information from birth certificates and identification documents, will not continue to discriminate against transgender patients when they require access to gender affirming healthcare.**
3. **That GOSA ensures that Health Care Benefits of the NHI include coverage for gender affirming procedures as well as psycho-social services.**
4. **We recommend the Committee encourage the GOSA to develop internal policies to ensure that its health-care staff receives ongoing training and sensitisation in order to provide affirming and accurate healthcare to transgender patients.**
5. **We recommend that the Committee request that the GOSA enact clear standard operating procedures in its capacity as regulator and accreditor of education and training in South Africa to ensure that medical staff receive adequate and diverse instruction on topics of sexual orientation, gender identity, gender expression and sex characteristics (SOGIESC).**
6. **RIGHT TO BASIC EDUCATION: EQUALITY IN ACCESSING EDUCATION FOR TRANSGENDER AND INTERSEX CHILDREN**

(Articles 13-14)

1. As described in our report on the development of List of Issues, 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. The lack of education around and awareness of, gender diversity and bodily diversity (variations of sex characteristics) creates a hostile and discriminatory environment for transgender, gender diverse and intersex youth in schools. There are several issues impacting transgender, gender diverse and intersex children and youth in South African schools. These issues include verbal and physical bullying, the lack of a support system able to address the needs of intersex and transgender learners, learners own misinterpretation of gender identity caused by lack of exposure to transgender identities in school curriculum, the inability of intersex and transgender learners to use toilets because of a fear of discrimination, the lack of respect for pronouns and chosen forms of address and targeted abuse and sexual harassment.
2. Additionally, dress is an important way for persons to express their gender identity. Forcing incorrect, inappropriate sex-specific uniforms on transgender, gender diverse and intersex pupils in the educational environment is harmful to their dignity, sense of self and educational experience.
3. Further, the gendered information on matriculation certificates makes it impossible for a person to use this certificate if a person changed their social and legal gender. The current policy for alterations requires transgender, gender diverse and intersex persons to divulge private details about their gender identity and bodily/sex characteristics when seeking jobs and other opportunities, which violates their rights to privacy, dignity and equality.

**Recommendations**

1. **We urge the Committee to recommend the GOSA 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 to ensure that these groups of children are able to access their right to education without discrimination and foster tolerance in schools.**
2. **We recommend the Committee to encourage the GOSA to ensure that gender identities, gender expressions and bodily diversity (sex characteristics) are discussed more openly in the school environment as a measure to encourage equality, tolerance, and inclusion in accessing education.**
3. **The GOSA must be encouraged 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.**
4. **The GOSA must undertake 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-conforming youth.**
5. **The GOSA must be requested to develop protective school and education policies that safeguard a smooth transition for transgender and gender diverse pupils to choose their school attire or uniforms to protect their dignity on school grounds.**
6. **We urge the Committee to request the GOSA to develop procedures and policies to ensure that transgender, gender diverse and intersex persons seeking to alter their details on the matriculation certificate do so without delay and discrimination.**

**Conclusion**

1. We trust that these submissions will be helpful in the evaluation of the implementation of the International Covenant on Economic, Social and Cultural Rights in South Africa. We thank you again for the opportunity to make submissions on this issue. Should you have any queries and/or questions, do not hesitate to contact Ms. Mandivavarira Mudarikwa (mandy@lrc.org.za).

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1. Act 49 of 2003. Available at <https://www.gov.za/sites/default/files/a49-03.pdf> [↑](#footnote-ref-1)
2. 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 https://drive.google.com/file/d/1xvXcmoa5OZ1gsrzMk-z7JbCvd\_T0zz5W/view. [↑](#footnote-ref-2)
3. Section 2(3)-(4). [↑](#footnote-ref-3)
4. Gender DynamiX & Legal Resource Centre, 2015, pp.23, 29. [↑](#footnote-ref-4)
5. 2017 (6) SA 588 (WCC) (6 September 2017). [↑](#footnote-ref-5)
6. Act 25 of 1961. [↑](#footnote-ref-6)
7. Constitution of the Republic of South Africa, 1996, Section 12(2)(a)-(b). [↑](#footnote-ref-7)
8. Constitution of the Republic of South Africa, 1996, Section 9. [↑](#footnote-ref-8)
9. Sterilisation Act No. 44 of 1998, Section 2(2). [↑](#footnote-ref-9)
10. 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. [↑](#footnote-ref-10)
11. Case of A.P., Garçon and Nicot v. France. <http://hudoc.echr.coe.int/eng?i=001-172913> [↑](#footnote-ref-11)
12. Constitution of the Republic of South Africa, 1996, Section 10. [↑](#footnote-ref-12)
13. Constitution of the Republic of South Africa, 1996, Section 14. [↑](#footnote-ref-13)
14. Constitution of the Republic of South Africa, 1996, Section 16. [↑](#footnote-ref-14)
15. *Yogyakarta Principles: Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity*, Principle 3. (2007). http://www.yogyakartaprinciples.org/ [↑](#footnote-ref-15)
16. *Yogykarta Principles* (2007), Principle 3, <http://yogyakartaprinciples.org/principle-3/> [↑](#footnote-ref-16)
17. *Yogykarta Principles* (2017), Principle 31, <http://yogyakartaprinciples.org/principle-31-yp10/>. [↑](#footnote-ref-17)
18. Bauer, M. & Truffer, D. 2016. Intersex genital mutilations: Human rights violations of children with variations of sex anatomy. NGO Report to the 2nd Periodic Report of South Africa on the Convention on the Rights of the Child (CRC). Zurich: *Zwischengeschlecht.org.* <http://intersex.shadowreport.org/public/2016-CRC-ZA-NGO-Zwischengeschlecht-Intersex-IGM.pdf> [↑](#footnote-ref-18)
19. 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> [↑](#footnote-ref-19)
20. Ibid, p. 10. [↑](#footnote-ref-20)
21. Mokoena, N. 2015. Intersex youth: Can we say that consent is truly free, full and informed?, p. 3. [↑](#footnote-ref-21)
22. Ibid p. 3. [↑](#footnote-ref-22)
23. United Nations Committee on the Rights of the Child (CRC). 2016. *Concluding Observations on the Second Periodic Report of South Africa*. https://tbinternet.ohchr.org/Treaties/CRC/Shared%20Documents/ZAF/CRC\_C\_ZAF\_CO\_2\_25463\_E.pdf [↑](#footnote-ref-23)
24. World Health Organisation (WHO). (2014). Eliminating forced, coercive and otherwise involuntary sterilization: An interagency statement, OHCHR, UN Women, UNAIDS, UNDP, UNFPA, UNICEF and WHO. Geneva, Switzerland: WHO, pp.15-16. [↑](#footnote-ref-24)
25. UN Committee against Torture (CAT), UN Committee on the Rights of the Child (CRC), UN Committee on the Rights of People with Disabilities (CRPD), UN Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (SPT), African Commission on Human and Peoples' Rights (ACHPR), Inter-American Commission on Human Rights (IACHR), Council of Europe (COE) et al. 2016. End violence and harmful medical practices on intersex children and adults. Geneva: Office of the United Nations High Commissioner for Human Rights (OHCHR). http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20739&LangID=E [↑](#footnote-ref-25)
26. Department of Justice & Constitutional Development (DOJ&CD), Intersex South Africa (ISSA), Iranti-org et al. 2018. *National Dialogue on the Protection and Promotion of the Human Rights of Intersex People*. http://www.justice.gov.za/vg/lgbti/2018-NationalIntersexMeetingReport.pdf [↑](#footnote-ref-26)
27. Act 4 of 2000. [↑](#footnote-ref-27)
28. B9-2018. [↑](#footnote-ref-28)
29. Department of Justice & Constitutional Development (DOJ&CD), Intersex South Africa (ISSA), Iranti-org et al. 2018. *National Dialogue on the Protection and Promotion of the Human Rights of Intersex People*, p.32. http://www.justice.gov.za/vg/lgbti/2018-NationalIntersexMeetingReport.pdf [↑](#footnote-ref-29)
30. 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. [↑](#footnote-ref-30)
31. 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. [↑](#footnote-ref-31)
32. For the interview with Dr Kabo Ijane on the MorningLive show, SABC2, 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>. [↑](#footnote-ref-32)
33. 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. [↑](#footnote-ref-33)
34. Nthabiseng Mokoena (note 20), p. 3. [↑](#footnote-ref-34)
35. Ibid, p. 3 [↑](#footnote-ref-35)
36. World Health Organisation (WHO). (2014). Eliminating forced, coercive and otherwise involuntary sterilization: An interagency statement, OHCHR, UN Women, UNAIDS, UNDP, UNFPA, UNICEF and WHO. Geneva, Switzerland: WHO, pp.15-16. [↑](#footnote-ref-36)
37. UN Committee against Torture (CAT), UN Committee on the Rights of the Child (CRC), UN Committee on the Rights of People with Disabilities (CRPD), UN Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (SPT), African Commission on Human and Peoples' Rights (ACHPR), Inter-American Commission on Human Rights (IACHR), Council of Europe (COE) et al. 2016. End violence and harmful medical practices on intersex children and adults. Geneva: Office of the United Nations High Commissioner for Human Rights (OHCHR). http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20739&LangID=E [↑](#footnote-ref-37)
38. Marriage Act 25 of 1962. [↑](#footnote-ref-38)
39. Civil Union Act 17 of 2006. [↑](#footnote-ref-39)
40. 2017 (6) SA 588 (WCC) (6 September 2017). [↑](#footnote-ref-40)
41. 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>. [↑](#footnote-ref-41)
42. 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. [↑](#footnote-ref-42)
43. Ibid. [↑](#footnote-ref-43)