BRIEFING PAPER

Alteration of Sex Description and Sex Status Act, No. 49 of 2003

LRC
Legal Resources Centre

GENDER DYNAMIX

This briefing paper provides an overview and analysis of the Alteration of Sex Description and Sex Status Act No. 49 of 2003 (Act 49) from inception to implementation. The paper concludes that Act 49 has not been implemented in accordance with its own provisions, and consequently undermines its progressive potential and other national and international rights. The briefing paper concludes with recommendations about how to improve the implementation of Act 49.

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Alteration of Sex Description and Sex Status Act, No. 49 of 2003

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Introduction to the Organisations Involved

This paper is produced jointly by Gender DynamiX (GDX) and the Legal Resources Centre (LRC). GDX and LRC have both identified transgender persons as a marginalized group within the South African and broader societies that is in need of specialised protection. Both organisations agree that like any other persons in South Africa transgender persons' rights must be protected and implemented in a manner that is tailored to their specific needs. We verily believe that in the context of the constitutional democracy in South Africa limiting access to rights and services to only those who have gender identity that is "acceptable" undermines the spirit and purport of the Constitution, which requires that the State must take steps to protect, promote and fulfil everyone's rights, which includes transgender persons.

Gender DynamiX

GDX, established in 2005, is the first organisation based in Africa to deal specifically with transgender issues. The organisation is currently based in Cape Town, South Africa. The organisation uses various advocacy methods to raise awareness about the structural human rights violations experienced by transgender persons as a result of a lack of access to the right to health, citizenship, education, safety and security and freedom of expression.

GDX provides resources, information and support for transgender persons, their partners, family, employers and the general public. Central to its advocacy strategy is the education of medical service providers, teachers, government officials and the community.

Legal Resources Centre

The LRC, established in 1979, is a South African-based human rights organisation with regional offices in Johannesburg, Durban, Grahamstown and Cape Town. The organisation uses the law as an instrument of justice for the vulnerable and marginalised, including poor, homeless, and landless people and communities who suffer discrimination by reason of race, class, gender, and disability or by reason of social, economic, and historical circumstances. The strategies employed to secure the protection and promotion of human rights include impact litigation, law reform, participation in partnerships and development processes, education, and networking within South Africa, the African continent and at the international level.

The LRC, through its Equality and Non-Discrimination project ("the project"), focuses on empowering marginalised and vulnerable groups, such as the transgender community, by providing: legal advice; legal representation; and by participating in advocacy and law reform. In relation to the Alteration of Sex Description and Sex Status Act, the LRC has worked alongside GDX with transgender individuals who have applied for the recognition of their appropriate gender identity. Additionally, we have represented transgender clients who are seeking medical aid coverage for their gender reassignment surgery and we are therefore keenly aware of the institutional and structural discrimination that our clients have had to face on a daily basis. It is in this context that we seek to ensure that the existing legal apparatus availed to the transgender community is appropriately implemented in order to ensure that their experiences of discrimination and prejudice are lessened, and that the law of democratic South Africa is an instrumental tool in securing their equality. ◦

Cape Times, Wednesday, September 10, 2003, p4.

Transgender group calls for more time to consider 'inhumane' bill on sex status

CHARLES PHAHLANE
Political Bureau

SEX organs are not the only basis to determine the sex of a person.

This was the heartfelt plea from the Cape Town Transsexual/Transgender Support Group in parliament yesterday who said the Alteration of Sex Description and Sex Status Bill forced them to undergo painful sexual mutilation to assume the gender they identified with.

"It is positively inhumane to require us to undergo surgical alteration of sex organs given the immense risks involved, the number of hospital stays, the immense amount of physical pain, and the frequently unsatisfactory results and debilitating consequences," said Estian Smit of the support group.

"There is no medical rationale for linking legal recognition of a transperson's new sex to genital reconstructive surgery or any other specific treatment that is not medically appropriate or possible for all transsexual people."

Smit said the 1995 Law Commission study was based on outdated study material of the early 1970s. Being transsexual/transgender was not a mental illness.

Chairman of the national assembly's home affairs committee Patrick Chauke said he was concerned that the home affairs department had failed to send drafters of the bill to listen to the presentation.

The bill requires that, in order for a person to be given an identity document confirming their sex status, they should first undergo a sex-change operation.

HEARTFELT PLEA: Estian Smit, left, and Simone Heradien, of the Transsexual Support Group, told parliament yesterday a one-step sex change was a myth. *Picture: ENVER ESSOP*

But Smit said the idea of a one-step sex-change was a myth. The full effects of hormone treatment were only completed after several years and it was like undergoing puberty.

There were, however, many non-medical ways of changing one's gender, said Smit, who has undergone hormone treatment to become a man but has not transformed his genitalia.

Simone Heradien, also with the support group, said she changed her gender when she was 19, and by 25 she was living fully as a female. Smit estimated there were at least 2 500 transpeople in South Africa but, due to under-reporting, it was possible that that figure could apply to Cape Town alone.

He said a person should be allowed to change their birth register entry on the basis of living as a member of the sex corresponding to their chosen sex description.

They should only be required to show that they had lived as a member of that sex for a period of a year, backed up by reports from a social worker, a psychologist or a medical practitioner.

Executive Summary

The Alteration of Sex Description and Sex Status Act, No. 49 of 2003 (Act 49) is an important piece of legislation. It seeks to legally enable transgender and intersex people to amend their identification documentation from the gender recorded at their birth to reflect their true gender identity. Transgender individuals do not identify with the gender that was assigned to them at birth. Transgender persons feel a complete mismatch between their gender identity and their biological/physical sex. Act 49 was developed to enable transgender individuals to change the sex description that was captured on their birth certificate and other identity documentation in order to accurately capture their gender identity.

Section 2 of Act 49 provides that: *"[a]ny person whose sexual characteristics have been altered by surgical or medical treatment or by evolvement through natural development resulting in gender reassignment, or any person who is intersexed may apply to the Director-General of the National Department of Home Affairs for the alteration of the sex description on his or her birth register."*

The Department of Home Affairs (DHA) is the designated custodian of Act 49. It is responsible for considering applications made in terms of Act 49, and issuing successful applicants with new identity documentation that reflects their appropriate gender. However, it has become apparent that the implementation of Act 49 has been problematic for a number of reasons. These reasons are discussed in depth, and recommendations for how to address them are proposed.

The main concerns that this briefing paper discusses relate to:

1. The rejection of applications for sex description alterations with the justification that the applicant did not provide proof of gender reassignment surgery.
   a. This has been classified as a misinterpretation of the requirements set out in Act 49, which explicitly allows transgender applicants that have undergone medical (i.e. hormonal) treatment to qualify for sex description alteration.
2. The waiting period for applications to be processed has been reported to have been anywhere between 1 year to 7 years.
   a. This inefficiency is inexcusable and has profoundly negative consequences for the applicants, since their appearance and officially recorded gender on their identity documentation do not match.
3. The successful sex description alteration causes problems for married applicants.
   a. The Marriages Act and Recognition of Customary Marriages Act do not recognise same-sex marriage, thus married couples are required to remarry in terms of the Civil Union Act. However, the Divorce Act does not accommodate these grounds for divorce, and effectively causes applicants to lie before court in order to end their marriage in terms of the Marriages Act and the Recognition of Customary Marriages Act only to remarry in terms of the Civil Union Act.
   b. Couples married in terms of the Civil Union Act also face problems since there are no measures in place that enable spouses to change the gender that has been recorded on their marriage certificate to reflect their newly recognised gender.

In order to try address these issues, the LRC and GDX have made the following recommendations:

1. Directives for Act 49 need to be developed in order to ensure that there is absolute clarity about what the application requirements and processes are for both applicants and DHA officials alike.
2. The Marriage Act, Recognition of Customary Marriages Act, and Civil Union Act ought to be amended in order to enable the automatic 'conversion' of marriages in terms of the former two Acts into a marriage in terms of the latter Act upon the granting of a sex description alteration.
3. DHA staff need to receive appropriate training, both in terms of Act 49 but also sensitivity training with respect to how to address and treat Act 49 applicants. ◦

Transgender persons do not identify with the gender assigned to them at birth. Transgender persons feel that there is a mismatch between their gender identity and their biological/physical sex.

Overview: Transgender in South Africa

The Alteration of Sex Description and Sex Status Act, No. 49 of 2003 (henceforth "Act 49") is an important piece of legislation. It seeks to legally enable transgender and intersex people to amend their identification documentation from the gender recorded at their birth to reflect their appropriate gender identity. "Gender identity" as a term has been subjected to much academic debate. However, there appears to be increasing consensus that at essence "gender identity" refers to the way that people self-identify and define their gender.[11] This identification is influenced by socially constructed viewpoints about gender roles – what biologically and behaviourally constitutes a "man" or "woman".[2]

Transgender[3] persons do not identify with the gender assigned to them at birth.[4] Transgender persons feel that there is a mismatch between their gender identity and their biological/physical sex.[5] This consequently means that a transgender person's legal identification documents (including identity document books, passports, drivers licences, and birth certificates) misrepresent the gender identity of the individual since they reflect the gender assigned to them at birth – regardless of whether or not this is the felt experience of the individual. This is a result of the incorrect assumption that gender and/or sex are necessarily derived from and determined by physical sexual organs, and cannot change.

Transgender should not be conflated with intersex. Intersex[6] is the situation when an individual is born with ambiguous genitalia, chromosomes, or internal reproductive systems. Often intersex individuals are assigned a sex description at birth despite the ambiguous sexual organs because birth registration adheres to a binate definition of people as either a "female" or "male".[7] Act 49 has provisions for transgender and intersex applicants respectively. This briefing paper focuses primarily upon the experiences of transgender persons applying for sex description alterations in terms of Act 49 since this has been the main constituency that has approached GDX and LRC for assistance.

There are three main procedures that a transgender person may follow to realign their physical appearance with their gender identity. They may live in accordance with their gender identity. This is called "Social Transitioning" and includes measures to alter one's appearance by, for example, dressing in the relevant gender's clothing, one's hairstyle, and purchasing cosmetics and toiletries of the appropriate gender. The challenge with basing an external assessment on these factors alone is that it may rely on gender essentialist stereotypes about how a woman or man ought to live or dress.

In addition to this, one may decide to undergo Hormone Replacement Treatment/Therapy (HRT) to assist with altering one's body to be more closely in line with their gender identity. This can be through minimising the physical attributes of their birth gender, as well as introducing the physical attributes of the experienced gender.[8] This treatment is a lifelong commitment if one wishes for the effects to remain. Lastly, and the most extensive of the options, a transitioning transgender person may undergo Gender Reassignment Surgery. This surgically alters the sex organs of the transgender patient – for example the removal of breasts (mastectomy); removal of penis (phallectomy); removal of vagina (vaginectomy); breast implants; surgically constructed penis (phalloplasty); and surgically constructed vagina (vaginoplasty). While the result of surgery – full realignment – may be the most desirable, many settle for hormone treatment and/or living as the desired gender because of the expense and life-threatening danger of the surgical options.[9]

There have been high recordings of depression among transgender individuals in the United States. This is correlated with transgender people who lack appropriate social support and suffer from ostracism.[10] The same study found that

drug abuse and high rates of suicide have also been a consequence of this isolating social environment.[11] At a stakeholder inaugural conference held in Hout Bay in Cape Town with the Department of Health, GDX pushed for the revision of the title of the official diagnostic name for transgender related conditions in the Diagnostic and Statistical Manual of Mental Disorders (DSM V) from "Gender Identity Disorder" to "Gender Incongruence" on the grounds that the title "Gender Identity Disorder" stigmatises and pathologises transgender people.[12]

In South Africa there are two public sector specialist clinics available to transgender people: the Steve Biko Academic Hospital in Pretoria, and the Groote Schuur Hospital in Cape Town. Groote Schuur Hospital offers the most comprehensive care, with a specialist team consisting of a dedicated psychologist (Dr. Adele Marais), a psychiatrist (Dr. Don Wilson), a clinical social worker (Mr. Ronald Addinall), an endocrinologist, a gynaecologist, and a plastic surgeon (Dr. Kevin Adams).[13] Dr. Adams is allocated with four gender reassignment surgery slots per annum by his hospital chiefs.[14] It is therefore unsurprising that there is an extremely long waitlist for receiving this surgery.[15] Dr. Adams states that he has 30 patients on his waitlist for gender reassignment surgery.[16] There are 130 plastic surgeons in South Africa, which would make one inclined to think that the shortage of appropriately skilled surgeons is the main reason for the long waiting list.[17] In fact, one of the key challenges for reducing this waiting period is that medical professionals themselves are influenced by the pathologisation of transgender persons and refuse to provide the medical and surgical treatment needed.[18] This suggests the need for improved sensitivity training in medical academic training, as well as better modules that delineate between sexual orientation and gender, and explain transgender and intersex more comprehensively.[19]

"Transphobia" is a term used to refer to the discrimination and prejudice against transgender people. Transphobia is a pervasive issue that plagues the international community.[20] The prevailing negative attitude toward transgender people has influenced many to live in secret, and sometimes to never disclose their identity. This makes attaining accurate figures for the transgender community difficult since it is likely that transphobic incidents are underreported. Nonetheless, some quantitative studies have been conducted; however, the figures that follow should be considered conservative estimates. Between 1970 and 2014 the Trans* Tracker Portal recorded the following trans*-related occurrences: 1'935 murders, 97 violent incidents, 4 suspicious deaths, 8 silicone-injection-related deaths, 6 missing persons, and 18 suicides have been recorded on the Trans* Violence Tracker Portal. Research in the United Kingdom indicates the extent that transphobia is experienced at tertiary education institutions – with a 'dropout' rate of 28.5 percent among transgender students as result of discrimination, harassment and bullying, and 41 percent of transgender staff members stating that they had experienced discrimination and abuse from their colleagues.[21]

Transphobia in South Africa has assumed an extremely vicious form of violence. A study conducted by Human Rights Watch details the prevalence of violent discrimination against black lesbian women and transgender men in the townships and rural areas of South Africa.[22] The progressive constitutional rights that ought to protect transgender and lesbian people are juxtaposed in the Report with the negative social attitudes towards these groups.[23] 121 individuals were interviewed for the Report from marginalised and underprivileged regions in the country (townships, semi-urban, and rural areas) because individuals in this social demographic tended to be the most vulnerable.[24] The discrimination faced by these groups are not only within their communities, but also from the State. For example, the police were reported to be inactive and unwilling to assist the victimised lesbian women and transgender men.[25] This causes and sustains a sense of impunity for the verbal, sexual, and physical threats and abuse these two groups suffer from. Similarly, the insulting comments that have been made about South African Olympic sprinter Caster Semenya is indicative of the types of prejudice, misinformation, and discrimination that her gender evoked.[26] The pervasiveness of transphobia is indicative of the need for directed efforts on the part of government to try to instil a social attitude of tolerance, rather than impunity. While South Africa's efforts to ensure a progressive legal framework guides the country's legislation are commendable, they remain insufficient if the formal rights are not translated into substantive rights.

Moving Towards Act 49

I. Former South African Legislation

Section 7b of the repealed Births, Marriages and Deaths Registration Act, No. 81 of 1963[27] enabled post-operative transgender and intersex individuals to change the sex description on their birth certificate. The Births, Marriages and Deaths Registration Act was amended on 16 October 1974 by section 1(1) of the Births, Marriages and Deaths Registration Amendment Act, No. 51 of 1974,[28] and the following was inserted into Act 81 of 1963:

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

The Act of 1963 was repealed in its entirety under section 33 of the Births and Deaths Registration Act, No. 51 of 1992. However, section 33(3) provided that anyone in the midst of a gender change process before the Act of 1992 was adopted was still allowed to apply for a sex description alteration in terms of section 7b of the 1963 Act. The decision to withdraw section 7b was based on the judgment delivered on 27 January 1976 for the South African case *W v W* in 1976.[29] The case was a divorce hearing between the defendant, who had committed adultery, and the plaintiff, who was a post-operative transgender woman. Nestadt J in his judgement stated that the question of gender was highly relevant in determining whether there was adultery and the necessity for divorce, since marriage is, by definition, the union of two people of the opposite sex.[30] The plaintiff had had gender reassignment surgery on 31 July 1970. This was before her marriage to the defendant, which took place on 12 July 1972.[31] The plaintiff noted that the defendant knew about her gender alteration procedures, and that they had consummated their marriage and had heterosexual sexual relations.[32] Judge Nestadt ruled in favour of the defendant on the grounds that the plaintiff cannot be considered to have been female at the time of their marriage because *"[i]mitation cannot be equated with actual transformation."*[33] Judge Nestadt also held that section 7b of the Birth, Marriages and Deaths Registration Act, 81 o 1963 as amended did not assist the plaintiff with proving that she had her sex changed.

Judge Nestadt references the English case *Corbett v Corbett*[34] in his judgment.[35] The petitioner in that case, Mr. Arthur Cameron Corbett, sought to divorce his post-operative transgender wife on the grounds that their marriage was void because she was a male at the time of marriage. [36] The respondent, his wife Ms. April Ashley, stated that she had undergone gender reassignment surgery on 11 May 1960, which was before their marriage took place on 20 September 1963. Therefore Ms. Ashley argues that she was female at the time of marriage. The presiding judge, Lord Justice Ormrod ruled that gender cannot be medically altered since it is biologically determined at birth. He devised a four-pronged test, which became known as the "Ormrod Test", to be used to determine gender: "*(a)* chromosomal factors; *(b)* gonadal factors (i.e. the presence or absence of testes or ovaries); *(c)* genital factors (including internal sex organs); and *(d)* psychological factors."[37] The "Ormrod Test" has had a profound impact on the general understanding of transgender directly, and intersexuality indirectly. It asserts that gender is stagnant and *de facto* that transgender people's experience that their bodies do not match their gender identity is baseless. It indirectly impacts intersexuality because it denies an intersex person the grounds to claim that their gender assignment at birth was incorrect, and denies that there is anything other than a male-female gender binary.

The influence of the Ormrod decision in *Corbett v Corbett* on Judge Nestadt's decision in *W v W* consequently meant that transgender and intersex South Africans had no course of legal action to revise their identity documentation to reflect what the gender identity that they felt was appropriate and practised. The repeal of Act 81 of 1963 by Act 51 of 1992 effectively meant that there was no avenue for self-realisation of gender, but that it was something predetermined at birth for an individual, regardless of how they felt. It popularised the belief that gender is determined by biology, and added to the stigma and pathology felt by transgender and intersex people. It seems problematic that the law should be used to retrospectively nullify what at the time was considered a legal marriage in both the *Corbett v Corbett* and the *W v W* cases. In these two cases, both the defendants who had entered into their marriages knowing that their intended wives had had gender reassignment surgery. The divorce proceedings allowed the assets of the defendants to be protected despite the willingness of their entry into the marriages – and this is despite the fact that the defendant in *W v W* had committed adultery. The significance of the introduction of Act 49 in 2003 is therefore apparent. It challenges the parochial gender viewpoints espoused by the *W v W* judgment that remained in legislation until Act 49's introduction in 2003. An Act of this nature has the potential to provide protection to transgender individuals – a minority group that is dependent upon legislation ensuring and safeguarding their constitutional and human rights.

II. The Drafting of Act 49

The Alteration of Sex Description and Sex Status Bill[38] was approved for submission to Parliament in late May 2003.[39] Litigation against the Department of Home Affairs largely prompted the drafting of the Bill.[40]

The Parliamentary Monitoring Group, an independent NGO, has made the Minutes from two consecutive Committee Hearings on the Alteration of Sex Description and Sex Status Bill available online.[41] These Minutes shed light on the various interests at play in the drafting of Act 49. The Minutes have the further value of enabling insight into how Act 49's drafters responded to the public hearing process on the Bill. The Minutes capture the various concerns with the Bill that were highlighted by the public hearing participants. Reading these together with the final version of Act 49 show where these concerns were heeded or ignored, and whether or not any of the issues previously highlighted remain relevant.

The Portfolio Committee for Home Affairs received written submissions from four interest groups and four individuals. The South African Human Rights Commission (SAHRC), the Commission on Gender Equality, the Lesbian and Gay Equality Project ("the Equality Project"), and the Cape Town Transsexual/Transgender Support Group (TTSG) constitute the former category. Clinton Howard, (the late) Sally Gross, Erik Rood, and Simone Heradien constitute the latter category.[42] On the 9th of September 2003 the Portfolio Committee for Home Affairs considered oral submissions from the SAHRC, TTSG, Lesbian and Gay Equality Project, and Simone Heradien. On the second day of the Alteration of Sex Description and Sex Status Bill public hearings, 10 September 2003, only (the late) Sally Gross gave an oral submission.

The following key substantial concerns regarding the Bill emerged from both the written and verbal submissions.

i. Proposed Title of Act 49

Three objections were lodged against the title of the Bill. Instead of the "Alteration of Sex Description and Sex Status". TTSG proposed the "Sex Recognition Act" and Simone Heradien proposed the "Gender Recognition Act" – each influenced by the title of the sister legislation in the United Kingdom.[43] TTSG argued that the proposed title of the Bill is inappropriate since the Bill could do more than alter ones gender – it potentially has more far-reaching effects that could be enabled in the future through amendments. Heradien argued that the title of the Bill is misleading since it suggests that transgender people are changing their gender by choice, rather than to make it appropriately reflect their identity. Eric Rood also suggested a revised title to the "Alteration of Sex Designation". His rationale was that "designation" is a more accurate term to denote the process.[44]

ii. Requirements for Alteration

TTSG, Simone Heradien, and the Equality Project all objected to the Bill's emphasis on the sexual organs of the potential applicants. It was seen to unduly privilege surgically treated applicants, and misunderstood the realities of living as a transgender individual. As explained earlier, transgender individuals are less likely to have surgery due to the limited number of gender reassignment surgery slots per annum available for the procedure, the expense of the surgeries, and the risk involved with undergoing the surgeries. The emphasis on sexual organs – which are only measurable if one has had surgery – is therefore an inappropriate proxy for determining whether a person is transgender. TTSG offered a few alternate proposals to make the Bill more in line with the actual transsexual/transgender experience. TTSG's first proposal

An Act of this nature has the potential to provide protection to transgender individuals – a minority group that is dependent upon legislation ensuring and safeguarding their constitutional and human rights.

was that there should be no conditions at all required for a person to alter their sex description. Next, TTSG proposed that status could be altered based on *"social or lived identity of the applicant"*.[45] This entailed various examples that someone was living as their desired gender – such as pronoun and name changes, written support from a health professional, purchase patterns, and so on. Finally, TTSG suggested Parliament could have sex status contingent on "sexual characteristics" instead of "sexual organs".[46] The third proposal was ultimately adopted by Parliament. However, it should be highlighted that while this proposal rejected the necessity of surgically altering one's sexual characteristics, it did not explicitly reject the requirement that sexual characteristics are medically altered. In other words, transgender individuals who lived as their desired gender but without undergoing hormone and/or surgical treatment were not included in the potential applicants under the revised wording of the Bill in the third proposal by TTSG. The Equality Project recommended that a minimum age of eighteen-years-old should be a qualification requirement in order to apply for gender alteration.[47]

Simone Heradien's concerns regarding the emphasis on sexual organs was related to intersex applicants. She argued that pre-operative and non-operative intersex people should all be equally provided for in Act 49, alongside post-operative transgender individuals.

The SAHRC took issue with section 1*(2) (b)'s* requirement that applications include a report written by the medical practitioner that performed the surgery and/or administers the medical treatment.[48] They argued that this was an inflexible and problematic provision since there are many reasons why the same medical practitioner may not be available (for example, emigration or death). They suggested that it should be altered to allow any medical practitioner in the field to provide supporting documents for the application.[49]

iii. Intersexuality

Concern was raised by Sally Gross, Simone Heradien and the Equality Project over the wording: *"whose sex organs have been altered…by evolvement through natural development resulting in a sex change"*.[50] It was assumed that this referred to intersex people. Similar uncertainty about this phrase was expressed during a Home Affairs Portfolio Committee session, where Mr Mogotsi (Director of DHA Legal Services) stated that the phrase had been introduced by Cabinet.[51] The trouble with this phrasing was that it disqualified most forms of intersexuality, and in fact referred to an extremely rare form of intersexuality called 5-alpha reductase deficiency syndrome.[52] Furthermore, the same emphasis on surgery applied to intersex individuals, which caused alarm since it included similar issues as highlighted in the transgender case – where individuals may not undergo surgery but live the lifestyle of their gender identity. Furthermore, the emphasis on surgery reinforced the problematic practice of performing such surgeries on infants and children.[53] The Equality Project proposed, instead, that evidence of two undisrupted consecutive years of living as the gender role applied for should serve as the criteria for intersex individuals applying for a gender description alteration.[54]

iv. Privacy

Considerable discontent was raised about the phrasing of section 1(3): *"If the Director-General refuses the application contemplated in subsection (1), he or she must furnish the applicant with written reasons for the decision unless such reasons have been made public"* (emphasis added).

The SAHRC, TTSG, Simone Heradien and Eric Rood argued that the section highlighted in the extract ought to be removed since it impinges on people's right to privacy by allowing for public disclosure. In fact, it was suggested that there ought to be a non-disclosure of information clause added to the Bill.[55]

v. Terminology

TTSG and Eric Rood both motivated for the removal of the phrase "sex change" from the Bill, since it was a misnomer. It is not realistically possible to have a complete alteration of gender – only alterations that tend towards the desired gender. It therefore was proposed that "sex change" should be replaced with "sex or gender reassignment procedures" to more accurately reflect the treatment options.[56]

vi. Other

TTSG suggested that the Bill should provide for the legal recognition of gender alteration for foreign nationals as well – following the UK precedent.[57] Contrary to this sentiment, Eric Rood suggested that the Bill should explicitly apply to South African citizens only.[58]

Eric Rood also suggested that a clear cut procedure should be provided for in the Bill, or in related regulations. These procedural provisions should require that the necessary accompanying medical documentation come from South African registered and practicing health professionals in order to ensure best practice, consistency, and legal certainty. Furthermore, time allocations should also be stated. For example, it should be added that the Director General of the Department of Home Affairs must respond in writing to applicants after thirty days of receipt of the application. Similarly, applicants should be allocated a time period in which to respond to the Director General.[59]

III. Passage of the Bill

Sally Gross and the TTSG were invited to appear before the Home Affairs Portfolio Committee meeting on 30 September 2003. Each party provided an oral testimony of their concerns, as discussed in the Bill hearings earlier that month.[60] On 2 October 2003 the Social Services Select Committee debated the proposed amendments for the Bill. The substitution of "sexual organs" with "sexual characteristics" and "sex change" with "gender reassignment" was approved without debate.[61] Additionally, it was agreed that intersex people should be explicitly provided for in Act 49.[62] A period of fourteen days was provided for the appeal of a rejected application.[63] The Bill was unanimously passed.[64]

The amended Bill was then presented to the Home Affairs Portfolio Committee on 11 November 2003. It was suggested that the fourteen day appeal period should be extended to twenty-one days in order to allow applicants to seek legal advice to support their appeal process.[65] Chairperson of the Portfolio Committee, Mr Chauke stated that if there was consensus for twenty-one days then this should be taken into account into a redrafting of the Bill. The amended Bill was passed unanimously by the Home Affairs Portfolio Committee on 21 November 2003.[66]

IV. The Alteration of Sex Description and Sex Status Act, No. 49 of 2003

The South African Parliament passed the Alteration of Sex Description and Sex Status Act No. 49 of 2003. Act 49 amended the Births and Deaths Registration Act No. 51 of 1992 so as to allow certain groups of people to apply to the National Department of Home Affairs (hereinafter referred to as "DHA") to legally alter their sex description on their birth register and obtain a new birth certificate.[67] Act 49 allows three groups of people to apply for alteration of sex description: 1) people whose sexual characteristics have been altered through medical or surgical treatment, 2) people whose sexual characteristics have been altered through natural evolvement, and 3) people who are intersex.[68]

i. Preamble

The preamble of Act 49 details that the legislation aims to allow for people with particular circumstances to alter their sex description. It also notes

that Act 49 consequently amends the Births and Deaths Registration Act, and that Act 49 provides for any matters related to these two provisions.

ii. Section 1: Definitions

This section details the definitions used in Act 49. It is worthwhile highlighting key concepts:

- *"gender characteristics"* means the ways in which a person expresses his or her social identity as a member of a particular sex by using style of dressing, the wearing of prostheses or other means;
- *"gender reassignment"* means a process which is undertaken for the purpose of reassigning a person's sex by changing physiological or other sexual characteristics, and includes any part of such a process;
- *"intersexed"*,[69] with reference to a person, means a person whose congenital sexual differentiation is atypical, to whatever degree;
- *"sexual characteristics"* means primary or secondary sexual characteristics or gender characteristics.

The contrast drawn between "gender" and "sexual" characteristics is important to note. The former refers to what has been referred to earlier as "gender identity". The latter refers to genitalia at birth (primary sexual characteristics) and bodily organs that develop as a result of the hormonal base of an individual (secondary sexual characteristics). It should be noted that there was no definition provided for the term *"transgender"* as this word is entirely absent from Act 49.

iii. Section 2: Application for alteration of sex description

Section 2 details the different applicant categories and relevant requirements when submitting an application to have ones "sex description" changed. "Sex description" refers to whether one is recorded as either a male or female, and it has not been defined in section 1. Act 49 implies the understanding that gender is not predetermined at birth and is subject to how an individual identifies themselves. This is progress from the Judge Nestadt decision, which had hitherto informed the legislative understanding that gender was determined at birth based on primary sexual characteristics. Act 49's understanding clearly departs from this, however it remains limited to some degree as it still relies on physical criteria to define gender.

Section 2(1):

Section 2(1) sets out who is able to apply for the official change of the recorded gender alteration on their birth register. Applications must be made to the Director General of the National Department of Home Affairs. As outlined above, these three categories were: Any person whose sexual characteristics have been altered

1. by surgical or medical treatment – "Category 1";[70]
2. by evolvement through natural development resulting in gender reassignment – "Category 2"; or
3. any person who is intersex – "Category 3".

Category 1 implies that at the very least the applicant has to have engaged in hormone treatment to qualify to align their official gender with their felt gender. The DHA has in practice interpreted this to mean that anyone has not undergone at least hormone treatment cannot apply to change their sex description to reflect their gender identity. As was discussed earlier, there may be medical, as well as financial, reasons why someone cannot undergo hormone treatment. It is possible to read Category 2's wording "…evolvement through natural development…" broadly, and therefore allow applicants who have not had medical or surgical treatment but live as their felt gender, to apply for their sex description alteration. However, this has not been the case, which signifies the DHA's apparent commitment to a narrow interpretation of Act 49.

Category 2 was retained despite the sentiments expressed by Sally Gross, Simone Heradien and the Equality Project in the Committee hearings that this wording implied a form of intersexuality – 5-alpha reductase deficiency syndrome – that is extremely rare and probably irrelevant.[71] The Committee did, however, respond to their concerns that most intersex individuals had been excluded from Act 49 due to the phrasing of Category 2. This is seen by the introduction of Category 3 in Act 49, which had been absent from the Bill. However, "any person who is intersexed" rendered Category 2 redundant since gender reassignment due to natural development is a subtype of intersexuality, and therefore necessarily provided for by "any person who is intersexed".

Section 2(2):

This subsection establishes the application requirements for Act 49. All applicants are required to submit their original birth certificate, and a report from a medical practitioner who has examined the applicant to verify the applicant's sexual characteristics.[72]

Category 1 applicants (i.e. those who have undergone gender reassignment due to their sexual characteristics having been altered medically or surgically) must include medical reports that detail the procedures and results of the treatments administered to the applicant by the medical practitioner that carried out these procedures, *or* a medical practitioner with experience in the field.[73] The allowance for a medical practitioner that did not necessarily administer the treatments is a response to the concern raised by SAHRC that there are many reasons why the medical practitioner that carried out the procedures may be inaccessible.[74] This medical report should be provided by a different medical practitioner to the one that submitted the report after examining the applicant.

Intersex applicants are required to submit a medical report from a medical practitioner that confirms that the applicant is intersex. Act 49 does not note whether or not this medical practitioner should be in addition to the report that verifies the applicant's sexual characteristics. It seems safe to assume that these are the same reports since they provide the same information. In addition to the report confirming the applicant's intersexuality, the applicant must submit a report written by a qualified social worker or psychologist that they applicant has lived stably as their desired gender for two consecutive years.[75]

There are no existing regulations at present that could specifically provide templates or guidelines for the required accompanying letters from the various medical practitioners. The absence of such regulations contributes to uncertainty about which letters are required for whom, and the required information that the letters ought to contain. Accompanying regulations would assist with streamlining the application process by making it clearer what is expected of the medical practitioners' reports, and thereby reducing the confusion incurred by applicants as well as those processing the applications.

Section 2(3)-(10):
Subsections (3) to (10) of Section 2 of Act 49 detail the procedure that must be followed if an application is refused, as well as how to appeal this decision. The Director General of the Department of Home Affairs can either grant the application or deny it and furnish the applicant with stated reasons for its denial. If the application is granted, the Director-General must proceed in terms of section 27A of the Births and Deaths Registration Act, and the applicant's sex description is thereafter deemed to be officially altered from that point forward.[76] If the application has been refused, the Director General must provide written reasons for why the application has been rejected.[77] It is important to note that no timeframe has been provided in which the Director General must issue this written explanation to the applicant, despite Eric Rood suggesting that this be provided during the Committee hearings.[78] Such timeframes could be regulated and provided for in accompanying directives. Reports received by GDX further indicate that applicants have not been advised in writing that their applications have been rejected. Rather officials at the Department either refuse to accept their applications where they are found to be "incomplete" or they are told verbally that they do not meet the requirements and so their applications are rejected.

If the applicant is refused, then the applicant may appeal to the Minister of Home Affairs within 14 days of receiving the Director-General's refusal and reasoning.[79] No timeframes and details of what should be provided to the Minister in the appeal are provided for in Act 49. Again, this could easily be provided for in accompanying directives. If the appeal is refused, then the applicant may apply to their residential Magistrates' Court of the district for an order directing the change in sex description.[80] No timeframe within which the applicant should approach the Magistrates' Court has been provided for in the Act. The appeal to the magistrate must include the necessary documentation required by section 2, as well as the reasons provided by the Minister of Home Affairs for his/her refusal of the applicant's appeal.[81] The applicant may have legal representation at his/her appearance before the Magistrates' Court.[82] If the Magistrate overrules the Minister's decision, the Magistrate must issue an order to the Director General to alter the sex description on the applicant's birth register.[83] There is nothing further in Act 49 about the procedure to be followed should the Magistrate refuse the applicant's appeal. In this absence, it seems reasonable to assume that one can rely on the Constitution's section 34 right to access to courts, which allows one to approach a court for appropriate remedies.[84] It also would require that the decisions of the court are complied with by all parties.

iv. Section 3: Order for alteration of sex description

Section 3 instructs that the Director General must act in terms of section 27A of the Births and Deaths Registration Act, 1997 (Act No. 51 of 1992) should s/he accept an application, or should s/he be instructed to do so by a Magistrate.[85] Section 27A of the Births and Deaths Registration Act, entitled "[a]lteration of sex description", provides for the birth register of a successful Act 49 applicant to be amended: "*(1) If the Director-General grants an application, made in the prescribed manner, or a magistrate issues an order in terms of section 2 of the Alteration of Sex Description and Sex Status Act, 2003 (Act No. 49 of 2003), the Director-General shall alter the sex description on the birth register of the person concerned. (2) An alteration so recorded shall be dated and after the recording of the said alteration the person concerned shall be entitled to be issued with an amended birth certificate.*" Section 3 of Act 49 also states that the applicant's gender should officially be considered altered from the date that the sex description alteration has been recorded, and that the alteration does not compromise the rights and obligations responsible to the applicant, as well as those the applicant is responsible for.[86]

v. Section 4: Insertion of Section 27A in Act 51 of 1992

Section 4 contain the amendment (the insertion of section 27A) that must be made to the Births and Deaths Registration Act, 51 of 1992.

vi. Section 5: Short Title

Section 5 states that short title of Act 49.

Shortfalls in Implementing Act 49

I. Narrow (Mis)Interpretation of Act 49

Though Act 49 was a move forward for transgender persons in South Africa, the DHA has implemented Act 49 narrowly. Act 49 offers the possibility of including a wide group of people in the pool of applicants eligible for a gender status alteration, in practice the DHA has generally granted status alterations to applicants who have undergone gender reassignment surgery.[87] The then Minister of Home Affairs, Naledi Pandor, stated that since enactment, ninety-five people have officially changed their gender on their birth certificates.[88] To keep the number in perspective, it is important to note the circumstances in which Pandor released this information. MP Manny de Freitas pointedly asked the Minister of Home Affairs about implementation details after de Freitas received complaints from individuals that the DHA was delaying and ignoring applications by transgender and intersex people.[89]

On 26 November 2012 Gender DynamiX highlighted the various ways that Act 49 had been incorrectly implemented to the Home Affairs Portfolio Committee.[90] It was noted that there were reports of serious delays with the processing of applications, with some applications taking up to five years.[91] The consequences of these delays are profound, and include the inability of applicants to access medical services, receive their education results, apply for jobs, vote, or perform any activity that requires identification because of the mismatch between their appearance and their recorded gender.[92] Furthermore, some applicants had been rejected on the grounds that they had not had surgery (in violation of section 2(1) of Act 49), while some were not given an explanation for the refusal of their application (in violation of the section 2(3) of Act 49).[93] As a result of the frequency of the unfounded rejections on the basis that the applicant has not had surgery, some medical practitioners have begun to refuse to issue letters of support for their patients that have not had surgery, but nonetheless qualify to apply for a gender marker alteration since they have received other forms of medical treatment (such as hormone regimens). The Committee was not particularly proactive in trying to remedy the situation. Mr Gaum (ANC Portfolio Committee Member) had committed to informing the Department that they needed to inform their officials about the legislation so that it would be carried out appropriately, and that this would be a sufficient measure negating the need for regulations.[94] It was noted by Mr McIntosh (COPE Portfolio Committee Member) that biometric fingerprints would be a way to verify the individual's identity without gender being an issue.[95] However, the practical relevance of this observation is unclear since biometric technology is not used at every instance where an identity document is needed.

Leigh Ann van der Merwe, the Coordinator of Social, Health and Empowerment Feminist Collective of Transgender and Intersex Women of Africa ("SHE"), contends that the biggest problem is that Home Affairs is misinterpreting Act 49 to be narrower than it actually is.[96] Act 49 does not require surgery, but Home Affairs has effectively made surgery a prerequisite for a successful application.[97]

According to Thamar Klein, a scholar on transgender rights, the DHA is violating both Act 49 itself and the Equality clause in how they interpret Act 49 and carry out its requirements.[98] The text of Act 49 states that a medical practitioner must show proof of gender reassignment. Klein argues that "medical practitioner" includes surgical doctors and biomedical therapists. Therefore, an applicant who underwent a biomedical rather than surgical transformation should qualify for a gender status alteration. However, in practice, the DHA had been demanding proof of surgical transformation before granting a sex description change.[99]

Additionally, Klein argues that Act 49 contemplates an alteration of sexual characteristics, which according to its own definition means "primary or secondary sexual characteristics or gender characteristics." Gender characteristics include the way a person expresses his or her social identification as a member of a particular gender such as the way he or she dresses, the pronoun they use, and so on.[100] Thus, according to Klein, under Act 49, DHA has no legal right to be requiring surgical alteration before altering a person's gender status or description.[101] Klein suggests that administrative organizations like the DHA form a sort of countermovement against South Africa's progressive constitution.[102]

By only recognizing gender reassignment surgeries as a basis for a status change, the DHA is violating Act 49 in a significant way.

The media has covered a number of individual cases demonstrating how the DHA goes astray of Act 49's actual language in order to prevent applicants from having their documentation changed. One transgender woman, who had undergone two years of hormone treatment, was told that without gender reassignment surgery, she was not eligible under Act 49.[103] However, Act 49 clearly states that surgery *or* medical treatment resulting in gender reassignment is sufficient. Robert Hamblin of Gender DynamiX asserted that Home Affairs' flagrant betrayal of Act 49's language has devastating effects for the trans* community as gender reassignment surgeries are not commonly available in South Africa. By only recognizing gender reassignment surgeries as a basis for a status change, the DHA is violating Act 49 in a significant way, and rendering it applicable to about four people a year.

II. Bureaucratic Blunders

Act 49 notably fails to make any provision for people who wish to be identified as neither male nor female. Act 49 presupposes that gender is not ambiguous and that there is a definitive sex-binary. However, from medical and social perspectives, neither presupposition is clearly valid.[104] Klein contends that gender is flexible and even goes so far as using the term trans*, with the asterisk, meant to highlight and accommodate the many people who identify somewhere on a spectrum of sex/gender identities and sexual orientation.[105] Despite social and medical communities evolving their thinking about gender and sex beyond the male-female/man-woman binary, the law has not.

GDX conducted an implementation study, for which GDX documented the response of DHA to applications for gender amendment between 2009 and 2011. GDX recorded 49 cases of trans* people that highlighted DHA's failure to comply with Act 49.[106] Of the 49 cases that GDX followed, only 14 percent of these were resolved procedurally.[107] Significantly 40 percent of applicants were instructed to get surgery for their application to receive consideration.[108] Additionally, applicants in this group had their applications pending for 18-24 months.[109] Only nine percent of the cases were resolved where the applicant had been medically, but not surgically, treated. Twenty-eight percent of the rejections due to a lack of surgery (despite proof of medical treatment) were resolved only once legal pressure had been placed on the Department.[110] The likelihood that DHA staff are using dated guidelines for Act 49, or simply are ignorant of its contents, is suggested by the fact that 40 percent of the applicants' cases highlighted in the GDX report are awaiting proof of gender reassignment surgery.[111] This suggests a communication and training failure within the DHA. The continued use of dated guidelines or the uninformed implementation of Act 49 by officers at the DHA means that clients who lack the economic means to access health services will continue to be foreclosed from altering their gender description. As GDX reports, there was no supervision of the implementation of Act 49 or "the regulations thereof by the DHA," which very well explains existing issues with the implementation of Act 49.

As these figures demonstrate, transgender people continue to encounter difficulties in their pursuit of equality. While Act 49 allows transgender persons to amend his or her sex description through either surgical or medical

Demanding gender alteration surgery is not only illegal under current South African law, but also poses severe socio-economic consequences for the transgender citizen.

treatment, the DHA has not provided equal access to these services to a large proportion of the applicants.

Current access to services is an issue that has also been reported in journals. Liminalis, an online journal published by the Scientific Advisory Board of the Transgender Network in Berlin, published an article entitled, "Intersex and Transgender Activism in South Africa" in its 2009 edition.[112] According to the article, while genital surgery is no longer required for the alteration of one's gender description, this is not the legal practice of the DHA.[113] The DHA continues to only process applications where the applicant has completed genital surgery and *"demands letters from the surgeon who carried it out."*[114] The article calls for court action to be taken in order for the DHA to discontinue applying old guidelines.

Demanding gender alteration surgery is not only illegal under current South African law, but also poses severe socio-economic consequences for the transgender citizen. According to an article published in the South African Medical Journal, the transgender population continues facing prejudice notwithstanding the enactment of Act 49.[115] Furthermore, given the serious limitations with public health provisions for transgenderism and intersexuality, given that only four gender reassignment surgeries are allocated per year, this request condemns applicants to and reemphasises the long wait to be given a surgery slot. Using the public sector for gender alteration surgery can result in up to a six year wait on surgical waitlists, and sometimes being referred to the private sector, resulting in expensive medical bills.[116] Going the private route would cost the transgender person about R250 000, beginning from the *"stipulated 3 months of psychological/psychiatric assessment through to hormone therapy and fully completed gender transition some 6 years later."*[117] This is one of the reasons why many transgender individuals do not choose the surgical route and instead opt for hormonal therapy. Many also choose to opt out of Gender Reassignment Surgery because of the various health risks that come with such an operation including issues with healing of incisions.[118] Additionally, many surgeons do not wish to operate on transgender individuals because of internalized stigma and prejudice towards transgender persons.[119] Patients also report that many surgeons will only agree to do 'one operation and "*try to get it passed through the system as quietly as possible, without arousing suspicion.*"[120] This speaks to the need of educating doctors about transgender issues in order to provide transgender patients with holistic care.

In addition to the concerns highlighted above, anecdotal evidence demonstrates the profound real-life effects of the inappropriate implementation of Act 49, and the consequences of the delayed issuance of the amended identity documentation.

A further bureaucratic issue that has emerged with regards to Act 49 is the refusal to process applications for a simultaneous name alteration as well as gender marker alteration. Often a transgender applicant seeks to amend their identity documentation so that it reflects their appropriate identity – this frequently includes not only a sex description change, but also a name change so that the applicant's official name corresponds with their gender identity. It has been reported that when applicants have tried to submit the appropriate forms for both these alterations, they have been informed that the DHA does not process simultaneous amendment applications. This claim seems unfounded since this is not cautioned against by the DHA on any official platforms. Rather, it seems that this is an impromptu decision made by some front-line staff. Those applicants that have managed to submit both applications have experienced delays with both applications, and at times have been informed by the DHA upon following up on their applications that one or both applications were lost or have not yet submitted. As highlighted earlier, these bureaucratic inefficiencies have severe consequences for how transgender persons are able to conduct normal day-to-day activities, and creates an unnecessary burden for applicants to bear.

III. Denial of Access to Health Care

A transgender woman was gang-raped and beaten by five men because of her trans* identity.[121] Upon arriving with the assistance of a friend at hospital in order to receive treatment and preventive HIV care, the nurse seeing to her refused to assist her after looking at her identity document book, and *"…told me to go home and take off my dress."*[122] Consequently, the victimised transgender woman is HIV positive.

This is an example of discrimination and prejudice. Not only was this woman targeted and brutally harmed because of her identity, but she was also refused critical treatment due to the prejudice held by the nurse. This reinforces the earlier noted need to train healthcare professionals to be sensitive to transgender clients. Furthermore, it is reasonable to suppose that the nurse would have offered treatment to the patient should she have had an identity document that reflected her female gender identity.

IV. Forced Divorce

A hitherto unaddressed issue with the effects of the implementation of Act 49 is with regards to marriage. There are three sets of separate legislation that govern marriage in South African law: the Marriages Act, No. 25 of 1961; the Recognition of Customary Marriages Act, No. 120 of 1998; and the Civil Union Act, No. 17 of 2006. The Marriages Act provides for the solemnisation of civil or religious marriages between a man and a woman (i.e. opposite-sex marriages). The Recognition of Customary Marriages Act enables the registration and regulation of customary law marriages. The Civil Union Act provides for the civil or religious marriage or civil partnership between two individuals regardless of their gender (i.e. it allows for same-sex marriages). Marriages in terms of the Civil Union Act and Marriage Act bear the same legal consequences, which consequently means that they have similar propriety consequences.[123]

There are no regulations in Act 49 or any of the three marriage Acts pertaining to altering the sex description of spouses on marriage certificates. If Act 49 applicant is married under the Marriage Act or the Registration of Customary Marriages Act and has now been legally recognised as the same sex as their spouse, and thus wishes to change the sex description on their marriage certificate, they must:

1. Apply for a divorce. Same-sex marriages are not valid under the Marriage Act or the Recognition of Customary Marriages Act, and one can only be legally registered under one marriage Act at any given time; and then
2. Apply for a marriage or civil partnership under the Civil Union Act, which permits same-sex marriages.

The dissolution of all marriages on grounds of divorce is regulated by the Divorce Act, No. 70 of 1979. Read together, sections 3, 4 and 5 of the Divorce Act determine the only grounds upon which a married couple may be granted divorce. Section 3 of the Divorce Act establishes the grounds for divorce:

> *"A marriage may be dissolved by a court by a decree of divorce and the only grounds on which such a decree may be granted are—*
> *(a) the irretrievable breakdown of the marriage as contemplated in section 4;*
> *(b) the mental illness or the continuous unconsciousness, as contemplated in section 5, of a party to the marriage."*

Section 4 of the Divorce Act establishes what constitutes an "irretrievable break-down of marriage as grounds for divorce":

1. *"A court may grant a decree of divorce on the ground of the irretrievable break-down of a marriage if it is satisfied that the marriage relationship between the parties to the marriage has reached such a state of disintegration that there is no reasonable prospect of the restoration of a normal marriage relationship between them.*
2. *Subject to the provisions of subsection (1), and without excluding any facts or circumstances which may be indicative of the irretrievable breakdown of a marriage, the court may accept evidence –*
   a. *that the parties have not lived together as husband and wife for a continuous period of at least one year immediately prior to the date of the institution of the divorce action;*
   b. *that the defendant has committed adultery and that the plaintiff finds it irreconcilable with a continued marriage relationship; or*
   c. *that the defendant has in terms of a sentence of a court been declared an habitual criminal and is undergoing imprisonment as a result of such sentence, as proof of the irretrievable break-down of a marriage."*

Section 5 of the Divorce Act provides for cases of mental illness and continuous unconsciousness and are thus irrelevant to the issue at stake for Act 49 applicants that are married in terms of the Marriage Act.

The only provision that could be used for a couple in these circumstances is Section 4 (2), which allows for "…*any facts or circumstances which may be indicative of the irretrievable break-down of a marriage…*" to be used as evidence for the irretrievable break-down of the marriage, and thus grounds for divorce. However, this provision is inappropriate for couples that wish to remain married but due to the gender reassignment of one of the partners has to divorce in order to void their marriage in terms of the Marriage Act so that they may remarry in terms of the Civil Union Act. Couples in this situation clearly do not conform to the requirements for an "irretrievable break-down of marriage" since they do not meet the proof-tests set out under subsection 2 of section 4 of the Divorce Act.

1. If the couple still live together they do not meet the provisions of subsection 2(a), which requires that the partners have not lived together for a continuous period of at least one year preceding the divorce application;
2. If the couple do not wish to separate due to adultery they do not meet the provisions of subsection 2(b), which provides for instances where one partner is unwilling to maintain their marriage following adulterous action committed by the other partner;
3. If neither partner has been sentenced to imprisonment they do not meet the provisions of subsection 2(c), which allows for the imprisonment of one partner to be cause for irretrievable break-down of a marriage.

Thus the couple is faced with a dilemma: they either need to lie in order to meet the requirements for the irretrievable break-down of marriage in order for their marriage in terms of the Marriage Act or the Recognition of Customary Marriages Act to be dissolved so that they can be remarried in terms of the Civil Union Act; or they can refuse to file for divorce and remain married in terms of the Marriage Act or the Recognition of Customary Marriages Act, but have the legal validity of their marriage cast in doubt, if not definitely invalid, since the sex description of one of the partners recorded on their marriage certificate does not match their reassigned sex description of in terms of Act 49. The fact that marriage would technically become invalid because the sex description on the marriage certificate no longer matches the person's actual sex is in contradiction with section 3(3) of Act 49, which provides that the *"[r]ights and obligations that have been acquired by or accrued to such a person before the alteration of his or her sex description are not adversely affected by the alteration"*,[124] is untenable. This includes the right to undergo a gender reorientation, to have that reorientation reflected in their identity documents, and their right to family.

Furthermore, the circumstances under which a marriage may be deemed null, void or invalid in the three marriage Acts relate only to the retrospective realisation that the marriage was originally conceived in a manner that did not conform to the requirements of the relevant marriage Act. These circumstances include fraudulent or incorrect marriage procedures, and any other irregularities in the conclusion of the marriage, such as an unauthorised solemniser. These factors are inapplicable to the case at hand since the marriage between the couple was valid up until the gender reassignment of one of the spouses under Act 49. The couples in the circumstances that we are considering, as a result of this legal vacuum and ambiguity, are forced to get a divorce they neither want nor need. In effect they are also being forced to lie to the court in order to gain a divorce that they do not want, but need, in order to remarry as a same-sex couple in terms of the Civil Union Act. They have to tell the court that their marriage has irretrievably broken down when in fact they are getting divorced because there is no other way to have their sex description changed on their marriage certificate.

"This is shattering news for us. How can we go before the court and lie in order to get a divorce[?] It seems then that I will not really be able to ever change my gender, because we do not have the resources to fight this."

Upon receipt of the information that Client A would need to divorce her partner in order to alter her sex description on her marriage certificate, Client A responded: *"[t]his is shattering news for us. How can we go before the court and lie in order to get a divorce[?] It seems then that I will not really be able to ever change my gender, because we do not have the resources to fight this."* Forcing a happily married couple to divorce simply in order to have the sex description of one of the spouses altered on their marriage certificate constitutes an overly complicated, costly and unnecessary burden on the individuals concerned, and undermines the intent of section 3(3) of Act 49, which deliberately seeks to safeguard the rights of applicants that are granted a sex description alteration.

We recommend that a much more efficient procedure would be to allow the couple married under the Marriage Act or Customary Marriages Act to 'convert' their marriage into a Civil Union marriage or partnership, upon which amended marriage certificates could be lawfully issued that correctly describe the altered sex of the gender reoriented spouse and the new form of marriage.

1. This would require an amendment to the Marriage Act that would allow couples married under the Marriage Act, of whom one spouse has undergone gender reassignment, to convert their marriage into a civil union marriage or partnership so that their correct gender descriptions can be recorded on their marriage certificate, thereby bringing it into line with their other identity documents.
2. Section 8 (3) of the Civil Union Act would also have to be amended in order to allow for this conversion to take place, as this section expressly states that any *"…person who is married under the Marriage Act or Customary Marriages Act may not register a civil union."*
3. Additionally, section 8 (4) of the Civil Union Act would have to be amended since it provides that *"[a] prospective civil union partner who has previously been married under the Marriage Act or Customary Marriages Act or registered as a spouse in a marriage or a partner in a civil partnership under this Act, must present a certified copy of the divorce order, or death certificate of the former spouse or partner, as the case may be, to the marriage officer as proof that the previous marriage or civil union has been terminated."*

Fortunately, providing for a conversion from a marriage concluded under the Marriage Act or the Recognition of Customary Marriages Act to a civil marriage or partnership in terms of the Civil Union Act would not affect the matrimonial property regime in place under the marriage. This is because all South African marriages are by default in community of property unless specifically excluded by the spouses in an ante-nuptial contract which regulates the matrimonial property system of their marriage. All ante-nuptial contracts are governed by the Matrimonial Property Act, No. 88 of 1984. Neither the Civil Union Act nor the Marriage Act have regulations concerning matrimonial property regimes, so a conversion from one to the other would not affect the regime adopted by the spouses at marriage. Customary marriages concluded before 15 November 2000 are not governed by the Recognition of Customary Marriages Act, and therefore were not automatically in community of property. However, as a result of the *Gumede v The President of South Africa and Others* 2009 (3) SA 152 (CC) judgement all customary marriages are now in community of property unless excluded by an ante-nuptial contract. A forced divorce, on the other hand, would cause couples married under a community of property to temporarily separate all of their property before reconstituting it under a new marriage.

Even if the couple has been married or entered a civil partnership in terms of the Civil Union Act, there are no regulations or procedures at present that would allow them to alter their sex description on their Civil Union marriage certificate. Thus the challenge of altering the sex description recorded on their marriage certificate remains. Regulations or instructions by the Minister allowing for such couples to alter the sex description on their Civil Union marriage certificate are therefore also necessary, either through Act 49 or the Civil Union Act.

These recommendations are not unprecedented.

1. In *Bundesverfassungsgericht* (I BvL 10/05) the Federal Constitutional Court of Germany struck down the Transsexual Law, which required transsexual individuals to undergo a divorce in order to marry. The Court held that the Transsexual Law was unconstitutional

"I am broken. I'm sad and thought we have human rights in this country. I am so close [to] giving up. How much abuse do I need to take?"

because it required gender reoriented individuals seeking legal recognition to undergo a divorce. The Law therefore made individuals choose between two constitutionally protected rights: the right to integrity and the right to marriage.

2. *In M.T. v J.T., 140 N.J. 77, 355 A.2d 204, 204* (NJ Super Ct. 1976) the Superior Court of New Jersey upheld the principle of divorce as exclusively determined by the parties involved (rather than 'forced' as a result of legal incongruence). The Court held that a marriage in which one individual transitioned genders does not necessarily require parties to undergo a divorce.
3. In *Varnum v Brein* 763 N.W2d 862 (Iowa 2009) ("Varnum"), the Supreme Court of Iowa in the United States extended marriage rights to same-sex couples by defining sexual orientation as "quasi-suspect" group under its equality protection framework. As a result of this legislative reframing (the case defined "sexual minorities" as a protected category), laws distinguishing on the basis of sexual orientation triggered the application of an intermediate level of scrutiny. The Court found that sexual minorities (gay and lesbian people) were entitled to strict scrutiny as a result of their historical experience of discrimination and subjection to legislative burdens on the basis of stereotype.[125] This principle could be extended to gender reoriented peoples. If one can prove that gender reoriented peoples have historically been targeted in practice and legislation, then one might make the argument for creating a newly protected class, individuals marginalized by their gender non-conformance. Considering gender reoriented persons as a protected category would enable one to undertake impact litigation: if gender reoriented peoples are a protected category, then the marriage Acts' effects would be discriminatory under relevant equality legislation and thereby should be amended to adequately protect gender non-conforming persons.

In *Dawood and Another v Minister of Home Affairs and Others* (CCT35/99) the Constitutional Court found that the right to family outweighed the provisions in section 25(9) of the Aliens Control Act. This section requires that immigration permit applicants must be outside of South African territory while they await the outcome of their immigration permit application. The spouses, permanent same-sex life partners, child dependants, and destitute, aged or infirm family members of South African citizens and permanent residents are excluded from this requirement, and they may await the application outcome while residing in South Africa so long as they have a valid temporary residence permit. Judge O'Regan ruled that the lack of clear legislative guidelines that determined when it is justifiable to refuse to grant or extend a temporary residence permit infringed upon individuals' rights to dignity wherein lies their right to family, marriage, and cohabitation.[126] This demonstrates the importance that the Constitutional Court places upon these rights, and is suggestive of the severity of forced divorce.

Therefore, the LRC and GDX recommend that legislative measures be taken in order to enable the 'conversion' of marriages in terms of the Marriages Act and Recognition of Customary Marriages Act into marriages or civil partnerships in terms of the Civil Union Act given:

1. The international precedence outlined above;
2. The matrimonial property system of the marriages are the same in terms of all three marriage Acts since marriages in each of these Acts is by default a marriage in community of property unless an ante-nuptial stating otherwise is signed;
3. The human and civil rights of the married couple are infringed upon with the current status quo, which effectively requires a forced divorce in order for the gender reassigned partner to register their appropriate sex description on their marriage certificate. This is incongruent with section 3 (3) of Act 49, which serves to protect Act 49 applicants from any adverse effects on their rights.

IV. Depression, Discrimination and Financial Constraints

There have been a number of reports from gender alteration applicants that they have received poor treatment at various Home Affair offices. There were instances reported of Home Affairs officials and Call Centre operators providing applicants with contradictory instructions regarding their application process. Additionally, applications have been inappropriately reported as "incomplete" or deleted from the system. This forces applicants to reapply and/or endure unnecessary expenses and stress trying to resolve these issues. This suggests that there has been inadequate staff training, and that there is a poor accountability structure that ensures professionalism from staff. The fact that people have been forced to reapply after Home Affairs has lost applications, and repay applications fees, suggests that there may be a more sinister money-making scheme afoot. Ultimately, there needs to be an improved system to ensure accountability, transparency and professionalism in the Home Affairs offices.

The following quote from an email from Client B demonstrates the negative effects that this experience can have on the applicants: *"I am broken. I'm sad and thought we have human rights in this country. I [am] so close in [sic] giving up. How much abuse do [I] need to take?"* Client B has waited three years for her application to be approved, and has had to submit three separate applications. She has been responsible for following up on each application without any progress being reported to her from the DHA.

The mismatch between the physical appearance of transgender individuals and their identity documentation has numerous consequences on their ability to conduct day-to-day life. It was noted earlier that the gender mismatch between the identity documentation and the appearance of the individuals has resulted in accusations of fraud and refusals of, for example, bank services. It was also noted that there are high rates of depression among transgender individuals who are unsupported. The interaction of general discrimination against transgender people and the anxiety and stresses that are induced by inappropriate documentation may act as a stimulant for depression among these individuals. Client C says that "*[t]here is so much I want to do but I can't because of Department of Home Affairs.*" Client C is unable to access her academic results, or apply for a drivers licence because she is still awaiting her amended identification documents – more than a year after submitting her application. Bureaucratic inefficiency is an unacceptable reason for the far-reaching and severely negative impacts that are felt on a daily basis by applicants awaiting their appropriate identification.

The mismatch between the physical appearance of transgender individuals and their identity documentation has numerous consequences on their ability to conduct day-to-day life

V. Application of Act 49 to Asylum Seekers

It is unclear whether or not Act 49 applies only to South African citizens or to everyone that is resident in the country, including refugees and asylum seekers, despite this issue being submitted by two separate parties during the public Parliamentary hearings in 2003.[127]

Client D, a post-operative transgender asylum seeker from a SADC member state, wished to alter the sex description recorded on her permit from "male" to "female". She has fully transitioned to a female, and no longer resembles a male in appearance, thus the sex description mismatch on the permit. Client D holds a permit that has been issued in terms of section 22 of the Refugee Act, which provides for asylum seekers.[128] In pursuing Client D's case, the DHA advised that Act 49 did not extend to asylum seekers since asylum seekers are not recorded on the South Africa National Population Register (NPR), and Act 49 only applies to those that are on the NPR.[129] Only if Client D was to become a permanent resident, refugee or naturalised citizen would she qualify in terms of Act 49. According to the DHA, the provisions in the Refugee Act for asylum seekers does not allow for birth status alterations, and attempts to do so would be beyond the legal authority of the DHA.

The consequences of the exclusion of asylum seekers from Act 49 is problematic since they are subject to many of the same experiences of prejudice and discrimination as have already been discussed. Due to the mismatch between Client D's asylum seeker permit and her appearance, Client D has been accused of fraudulent activity, denied work opportunities, denied medical treatment, and forced to publically disclose her private affairs. Client D has no means at her disposal to alter her identity documentation to reflect her appropriate gender and therefore correspond with her appearance. This is a cause of serious concern since it unnecessarily deprives Client D and others in her situation of many of the basic human rights that have been highlighted through this paper, which as an asylum seeker they are still entitled to. Furthermore, it means that asylum seekers that have fled to South Africa due to discrimination and persecution based on their transgenderism are forced to endure continued discrimination and persecution because Act 49 does not extend to them.

It is our submission that the procedures and applicability of Act 49 to asylum seekers, refugees, and permanent residents should be clarified in directives that accompany Act 49. The same documents as established in section 2(2) of Act 49 could be required of all applicants, regardless of their citizenship status. The directives could provide that, upon issuing a refugee or asylum seeker with a successful application, the Director-General must send instructions to Refugee Affairs to issue the refugee or asylum seeker applicant with amended permits reflecting their appropriate sex description. The proposed directives should include example forms for an Act 49 application, which includes a criterion question that establishes whether an applicant is a citizen, permanent resident, refugee, or an asylum seeker. It should also detail the precise nature of the procedure as applies to each of these categories of persons.

The consequences of the exclusion of asylum seekers from Act 49 is problematic since they are subject to many of the same experiences of prejudice and discrimination as have already been discussed.

Guiding Legal Framework

It is important to consider the guiding legal framework that ought to inform Act 49 in order to promote and protect the rights of transgender and intersex individuals. The legislation that is developed to this end needs to not only help combat stigma and discrimination, but also protect transgender and intersex – as well as the broader lesbian, gay, bisexual, and gender non-conforming communities – against violent persecution and hate crimes.[130] This section considers the relevant national and international laws and treaties in relation to transgender rights to which South Africa has obliged itself to uphold. South Africa has an important role to play at a continental level when it comes to promoting basic human rights for LGBTI (lesbian, gay, bisexual, transgender, and intersex) persons.

The need for more active efforts to combat the prevalent persecution, violence and discrimination of these groups is apparent given that thirty-eight of the fifty-five African States have criminalised homosexuality, making South Africa more advanced when it comes to the formal legal rights provided to LGBTI individuals.[131] It is dissatisfactory for South African foreign policy to be incongruent with domestic policy, and this requires the concerted effort on the part of official South African representatives to spearhead progressive continental and international legislation to promote LGBTI rights.[132] It is therefore essential that South Africa ensures that its internal politico-legal framework is one that is exemplary of progressive measures that promote and protect rights. In order to assess Act 49 and propose recommendations, it is important to take stock of the existing legal frameworks that ought to be guiding Act 49. Act 49 was drafted in accordance with international standards.

I. The Applicable National, Regional, and International Rights

This section analyses the national rights that are affected by Act 49. Furthermore, the relevant regional and international rights and principles are also analysed in terms of section 39 (1) (b) of the Constitution, which obliges courts, tribunals and forums to consider international law when they interpret the Bill of Rights.[133] This section has organised the relevant rights by theme based on those rights captured in the South African Constitution,[134] and makes reference to the regional and international regimes to which South Africa has acceded where applicable within these themes.

i. The Right to Equality

1. Section 9 of the South African Constitution provides for the right to equality. Subsection 3 of this clause specifically protects people from unfair discrimination based on their sex and their sexual orientation:
   a. *"(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth."*[135]
   b. *One could take issue with the term "sex" rather than "gender" due to the definitional association of "sex" relating to biological sexual characteristics and the male-female binary. This language could be seen to be exclusive of gender ambiguous and gender non-conforming individuals. However, in practice "sex" has been treated as "gender", and serves to protect the rights of transgender and intersex individuals.*

2. The Promotion of Equality and Prevention of Unfair Discrimination Act, No. 4 of 2000 ("PEPUDA") was created, in part, to help promote the Section 9 right to equality, and subsection 3 prevention of unfair discrimination.
   a. Section 8 ("Prohibition of unfair discrimination on ground of gender")[136] is of particular relevance for transgender and intersex individuals since it specifically caters for gender discrimination. Furthermore, PEPUDA's definition of the "prohibited grounds" for dismissal, which constitute automatically unfair dismissal unless proven otherwise,[137] includes "gender".
   b. ""[P]rohibited grounds" are - *(a)* race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth; or *(b)* any other ground where discrimination based on that other ground-causes or perpetuates systemic disadvantage;undermines human dignity; oradversely affects the equal enjoyment of a person's rights and freedoms in a serious manner that is comparable to discrimination on a ground in paragraph (a)"[138]
   c. It should be noted that "gender" has been distinguished from "sex" in subsection (a) of the prohibited grounds. PEPUDA's definition of "sex" includes "intersex".[139]

3. Similarly, article 1 of the Universal Declaration of Human Rights provides: *"All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood."*

4. Article 2 of the Universal Declaration of Human Rights ensures non-discrimination: *"Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status…"*

5. Article 7 of the Universal Declaration of Human Rights provides further for equality and non-discrimination: *"All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination."*

6. Article 3 of the International Covenant on Civil and Political [Ratified by South Africa on 10 December 1998] obliges State Parties to *"… ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant."*

7. Article 26 of the International Covenant on Civil and Political Rights provides for equality and non-discrimination: *"[a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."*

8. Article 2(2) of the International Covenant on Economic, Social and Cultural Rights [Signed by South Africa on 3 October 1994] provides for non-discrimination: *"The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."*

9. Article 3 of the International Covenant on Economic, Social and Cultural Rights ensures equality: *"[t]he States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant."*

10. Article 2 of the African Charter on Human and Peoples' Rights [Ratified by South Africa on 9 July 1996] iterates the importance of non-discrimination: *"Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, color, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status."*

11. Article 28 of the African Charter on Human and Peoples' Rights reasserts the importance of non-discrimination: *"[e]very individual shall have the duty to respect and consider his fellow beings without discrimination, and to maintain relations aimed at promoting, safeguarding and reinforcing mutual respect and tolerance."*

12. Article 3 of the African Charter on Human and Peoples' Rights provides for equality: *"(1) Every individual shall be equal before the law. (2) Every individual shall be entitled to equal protection of the law."*

13. In respect of equality, article 3 of the African Charter on Human and Peoples' Rights further adds that: *"[a]ll peoples shall be equal; they shall enjoy the same respect and shall have the same rights. Nothing shall justify the domination of a people by another."*

14. Principle 1 of the Yogyakarta Principles[140] promotes equality and non-discrimination: *"Everyone is entitled to enjoy all human rights without discrimination on the basis of sexual orientation or gender identity. Everyone is entitled to equality before the law and the equal protection of the law without any such discrimination whether or not the enjoyment of another human right is also affected. The law shall prohibit any such discrimination and guarantee to all persons equal and effective protection against any such discrimination. Discrimination on the basis of sexual orientation or gender identity includes any distinction, exclusion, restriction or preference based on sexual orientation or gender identity which has the purpose or effect of nullifying or impairing equality before the law or the equal protection of the law, or the recognition, enjoyment or exercise, on an equal basis, of all human rights and fundamental freedoms. Discrimination based on sexual orientation or gender identity may be, and commonly is, compounded by discrimination on other grounds including gender, race, age, religion, disability, health and economic status."*

15. The ineffective implementation of Act 49 has meant that transgender persons that have applied for the recognition of their reassigned gender are subjected to unequal and discriminatory treatment – as was demonstrated by our clients' various anecdotal excerpts in the previous chapter. The right to equality and non-discrimination on the grounds of gender is jeopardised by transgender persons having to publically disclose their personal affairs in relation to their gender identity, which is often met with prejudice and unequal treatment. The effect that this has on the following rights is also a tribute to the compromised right to equal realisation of those rights.

ii. Right to Dignity

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

2. Article 1 of the Universal Declaration of Human Rights provides for dignity in addition to equality.[141]

3. While the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights each do not directly provide the right to dignity, both do suggest that human rights are integral to upholding human dignity in their respective Preambles: *"Recognizing that these rights derive from the inherent dignity of the human person…"*

4. Article 5 of the African Charter on Human and Peoples' Rights ensures the dignity of all individuals: *"[e]very individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status…"*

5. The ability to ensure that one's official identity documents reflect one's gender identity is instrumental in promoting the right to dignity. It has been discussed already that transgender women and men have encountered a number of practical issues with conducting otherwise simple tasks in their daily lives, such as bank transactions, since their identity documents do not match their appearance. This infringes on their dignity since they been referred to in accordance with their identity document gender (i.e. "Mr. X" instead of "Ms. X"), which can add to feelings of alienation and self-hatred. Furthermore, they have been accused as being criminals and forced to divulge their private information in public settings in order to explain the alleged "fraudulent" behaviour.

iii. Right to Freedom and Security of the Person

1. Section 12 of the Constitution ensures the right to freedom and security. Subsection 2(b) of section 12 is particularly relevant for transgender and intersex rights in relation to Act 49 since it ensure the right to bodily and psychological integrity:
   "(2) Everyone has the right to bodily and psychological integrity, which includes the right-
   (a) to make decisions concerning reproduction;
   (b) to security in and control over their body; and
   (c) not to be subjected to medical or scientific experiments without their informed consent."[142]

2. Article 3 of the Universal Declaration of Human Rights declares that *"[e]veryone has the right to life, liberty and security of person."*

3. Article 1 of the International Covenant on Civil and Political Rights seems to capture the same sentiment as the right to freedom and security of person as enshrined in the South African Constitution: *"[a]ll peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."*

4. Similarly, Article 1 of the International Covenant on Economic, Social and Cultural Rights echoes this sentiment: *"[a]ll peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."*

5. Article 6 of the African Charter on Human and Peoples' Rights ensures the freedom and security of persons: *"[e]very individual shall have the right to liberty and to the security of his person."*

6. Principle 5 of the Yogyakarta Principles promotes the right to security: *"[e]veryone, regardless of sexual orientation or gender identity, has the right to security of the person and to protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual or group."*

7. Being able to realign the official recording of one's gender to reflect their gender identity is crucial to ensuring that individuals can directly realise their right to psychological integrity, due to the negative consequences of inappropriate identity documents on their psychology. It also affects their right to bodily integrity and their section 12 right to security in and control over their body because of transphobic persecution and violence that can be spurred by inaccurate identity documentation.

iv. Right to Privacy

1. Section 14 of the Constitution provides everyone with the right to privacy. It was discussed in section (2) above how privacy can be infringed upon due to misrepresentative official gender recordings.

2. Article 12 of the Universal Declaration of Human Rights states: *"[n]o one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks."*

3. Article 17 of the International Covenant on Civil and Political Rights ensures the privacy of the individual: *"(1) No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation. (2) Everyone has the right to the protection of the law against such interference or attacks."*

4. Principle 6 of the Yogyakarta Principles promotes the right to privacy: *"[e]veryone, regardless of sexual orientation or gender identity, is entitled to the enjoyment of privacy without arbitrary or unlawful interference, including with regard to their family, home or correspondence as well as to protection from unlawful attacks on their honour and reputation. The right to privacy ordinarily includes the choice to disclose or not to disclose information relating to one's sexual orientation or gender identity, as well as decisions and choices regarding both one's own body and consensual sexual and other relations with others."*

"[e]veryone, regardless of sexual orientation or gender identity, is entitled to the enjoyment of privacy without arbitrary or unlawful interference, including with regard to their family, home or correspondence as well as to protection from unlawful attacks on their honour and reputation..."

The ability to ensure that one's official identity documents reflect one's gender identity is instrumental in promoting the right to dignity

5. The mismatch between the gender appearance of transgender persons and their identity documents has frequently resulted in demands that these individuals disclose private information about their gender identity. This clearly infringes of their right to privacy.

v. Freedom of Trade, Occupation and Profession

1. Section 22 of the Constitution ensures that: *"[e]very citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law."*

2. Article 6 of the International Covenant on Economic, Social and Cultural Rights establishes the right to work: *"(1) The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right. (2) The steps to be taken by a State Party to the present Covenant to achieve the full realization of this right shall include technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual."*

3. Article 15 of the African Charter on Human and Peoples' Rights protects the right to work: *"Every individual shall have the right to work under equitable and satisfactory conditions, and shall receive equal pay for equal work."*

4. Principle 12 of the Yogyakarta Principles promotes the right to work: *"[e]veryone has the right to decent and productive work, to just and favourable conditions of work and to protection against unemployment, without discrimination on the basis of sexual orientation or gender identity."*

5. The failure to efficiently provide applicants with their amended identity documents within a reasonable period of time after receipt of the application prohibits transgender persons from being able to pursue employment since their identity document does not reflect who they are (both in appearance and in experience). It also forces them to disclose why their current identity document is inaccurate, which may make them vulnerable to discrimination and prejudice.

vi. Right to Just Administrative Action

1. Section 33 of the Constitution ensures that everyone should be provided with appropriate and just administrative services:
   "(1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.
   (2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.
   (3) National legislation must be enacted to give effect to these rights, and must –
   (a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;
   (b) impose a duty on the state to give effect to the rights in subsections (1) and (2); and
   (c) promote an efficient administration."[143]

2. The misinterpretation of Act 49 and refusal to grant amended birth registers in contradiction of the provisions of Act 49 means that section 33(1) is being breached since the administrative action in these instances are not procedurally fair.

vii. Right to Legal Recognition

1. The South African Constitution does not explicitly provide for this right, however it is well catered for in various international and regional legislation to which South Africa has acceded. It is submitted that they apply di-

rectly because of the provisions of section 233 of the Constitution, which provides that: "[w] hen interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law."

2. Article 6 of the Universal Declaration of Human Rights provides for the "…right to recognition everywhere as a person before the law."

3. Article 16 of the International Covenant on Civil and Political Right provides: "*[e]veryone shall have the right to recognition everywhere as a person before the law.*"

4. Article 5 of the African Charter on Human and Peoples' Rights provides for the recognition of individual's legal status.[144]

5. Principle 3 of the Yogyakarta Principles entitled "the Right to Recognition before the Law" is of exceptional relevance for Act 49, since it specifically addresses the right to recognition and gender self-identification, as well as how States can help to promote and enable these rights.
"Everyone has the right to recognition everywhere as a person before the law. Persons of diverse sexual orientations and gender identities shall enjoy legal capacity in all aspects of life. Each person's self-defined sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom. No one shall be forced to undergo medical procedures, including sex reassignment surgery, 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. No one shall be subjected to pressure to conceal, suppress or deny their sexual orientation or gender identity."
Accordingly, states shall:
   a. *"Ensure that all persons are accorded legal capacity in civil matters, without discrimination on the basis of sexual orientation or gender identity, and the opportunity to exercise that capacity, including equal rights to conclude contracts, and to administer, own, acquire (including through inheritance), manage, enjoy and dispose of property*;
   b. *Take all necessary legislative, administrative and other measures to fully respect and legally recognise each person's self-defined gender identity;*
   c. *Take all necessary legislative, administrative and other measures to ensure that procedures exist whereby all State-issued identity papers which indicate a person's gender/sex — including birth certificates, passports, electoral records and other documents — reflect the person's profound self-defined gender identity;*
   d. E*nsure that such procedures are efficient, fair and non-discriminatory, and respect the dignity and privacy of the person concerned;*
   e. *Ensure that changes to identity documents will be recognised in all contexts where the identification or disaggregation of persons by gender is required by law or policy;*
   f. *Undertake targeted programmes to provide social support for all persons experiencing gender transitioning or reassignment."*[145]

6. The right to be recognised as a legal person is compromised when transgender persons are not issued their amended identity documents that accurately reflect their appropriate gender. This, as already explained, has a negative impact on their health and well-being, consequently making it difficult in some circumstances to access basic services.

The above extracts of the various national, regional, and international treaties and laws that serve to protect the various human rights of all individuals equally demonstrate that the necessary legal framework is already in place that support the recognition of the rights of transgender persons. It is therefore a matter of putting these legal measures into effect to make these rights and entrenchments a reality for transgender persons.

Recommendations for the Department of Home Affairs

Based on the identified shortfalls in the implementation of Act 49, the following recommendations are directed to the Department of Home Affairs:

I. Provide Directives for Act 49

One of the key issues that has emerged in relation to Act 49 has been its implementation. Under section 2(1) of Act 49 *"any person whose sexual characteristics have been altered by surgical or medical treatment; by evolvement through natural development resulting in gender reassignment; or any person who is intersexed"* **may apply for their birth register to be changed. As already stated, Act 49 expressly states any person who has altered their sexual characteristics by surgical** *or* **medical treatment may apply for an alteration of their gender description thus denoting that surgery is an** *option* **rather than a** *requirement* **for the applicant. In spite of this, the DHA has given Act 49 a narrow and restrictive interpretation. In practice, the DHA has rejected application due to a lack of evidence of gender alteration surgery. Furthermore, they have demanded that applicants divorce before accepting and often granting a valid identity document that reflects their true identity.**[146]

The cause of Act 49's misinterpretation is unclear. A cynic may conclude that civil servants may hold personal discrimination against transgender and intersex applicants, and therefore deliberately sabotage their application process. A less negative reason for this misinterpretation may be because the DHA has not made any guidelines publically available to assist in the interpretation of Act 49. In other words, Act 49 lacks accompanying regulations that would ensure a uniform approach to processing gender alteration applications, as well as accountability for this process. An online search on the DHA's website demonstrates the lack of any available regulations or directives on Act 49.[147]

There is precedent of providing accompanying public regulations for comparable gender recognition laws in countries that have robust legislation protecting the transgender rights, such as Argentina. Argentina's Cabinet of Administrative Coordination has a website that breaks down the identity document altering process in a few simple steps.[148] The applicant can obtain information on where to submit alteration forms and what documentation to bring. While this website primarily aims at instructing the public, it also assists in ensuring that the Civil Registrar, the administrative body that handles such applications, understand what they can and cannot require from applicants.

The DHA website provides incomplete information about what is required when applying for a sex description alteration.[149] The website states that applicants seeking to change their gender must submit form BI-526 or a written request, pay 70 rand, and submit two medical reports from two independent medical practitioners.[150] It also provides separate information for intersex applicants, noting that they are expected to supply a medical report from a medical practitioner confirming that the applicant is intersex, and another medical report from a qualified psychologist confirming that the applicant has lived *"stably and satisfactorily, for an unbroken period of at least two years in the gender role corresponding to the sex description under which he or she seeks to be registered"*.[151] However, the website does not mention that it is necessary for the applicant to bring a copy of their original birth certificate, as required by section 2(2) of Act 49. The required form for the application is not available online and can only be obtained from a DHA office.

It is recommended that the DHA develop directives for Act 49 that are widely circulated throughout their offices. The directives ought to include timeframes, for example, the time by which an applicant can expect to receive notification of their application status (accepted and ready for collection, or rejected and a letter detailing the reasons for the refusal) and the forms that must be completed. The directives will also serve as a monitoring tool to evaluate the implementation of the legislation going forward, and would assist in identifying areas that the DHA would need to address where gaps exist that frustrate service delivery. In the interim and in addition, a public procedure should be published on the DHA website, similar to that of Cabinet of Administrative Coordination in Argentina,[152] which clearly sets out the process that needs to be followed by applicants. This means that the section explaining what an applicant needs to submit in order to achieve a sex description alteration should note *all* the required documents to supplement form BI-526, as well as give an indication of how long applicants should expect to wait until their application has been processed. In addition, information should be added that details the procedure and timeframes for appealing rejected applications.

II. Recommended Amendments to the Marriage Acts

Section 3(3) of Act 49 protects all other rights of applicants, and states that Act 49 should not negatively affect these rights. Article 12 of the Universal Declaration of Human Rights serves to protect people from the arbitrary interference by States into their private lives.[153] **Article 18 of the African Charter also makes provisions to safeguard the family unit.**[154] **The failure to amend the Marriage Act, Recognition of Customary Marriages Act, and the Civil Union Act in light of Act 49's enforcement is an oversight that infringes on these familial rights. As discussed earlier, a divorce is made necessary after gender reassignment since marriage in terms of the Marriage Act and the Recognition of Customary Marriages Act in South African law can only be between members of the opposite gender. In order to remain married, the applicant and their partner must divorce and then enter into a marriage or civil partnership in terms of the Civil Union Act, which allows for same-sex marriage. However, the Divorce Act prescribes three main grounds for divorce: irretrievable breakdown of marriage, or mental illness, or continuous unconsciousness. None are appropriate for divorces that are necessitated in order to amend marriage certificates to reflect the gender reassignment of one of the spouses. Consequently, couples are forced into the position of lying about the reasons why they want a divorce (usually irretrievable breakdown of marriage) and have to undergo the cumbersome process that accompanies divorces: matrimonial propriety division and legal costs. This is incurred purely so that they are able to remarry in terms of the Civil Union Act.**

The issue of forced divorce is not limited to South Africa. Only Lithuania and the Netherlands allow a pre-operative transgender person who is married to remain married. The United Kingdom and Poland require divorce in order to recognise the new gender. In Bulgaria and Hungary the approval of the gender alteration automatically dissolves a marriage.[155] As already explained, it is our submission that forcing people who are married to divorce in order to recognise and realise the accurate reflection of their gender identity on their marriage certificate violates international law as well as the Constitution of South Africa. Furthermore, divorce should be the choice of the two people in a marriage and cannot be forced upon people given that this may violate their religious and/or cultural views.

> …forcing people who are married to divorce in order to recognise and realise the accurate reflection of their gender identity on their marriage certificate violates international law as well as the Constitution of South Africa.

Act 49 expressly states any person who has altered their sexual characteristics by surgical ***or*** medical treatment may apply for an alteration of their gender description thus denoting that surgery is an *option* rather than a *requirement* for the applicant.

It is recommended that a marriage registered in terms of the Marriage Act and the Recognition of Customary Marriages Act should automatically be converted into a marriage or civil partnership in terms of the Civil Union Act with the granting of a gender alteration in terms of Act 49. Act 49 already states that even though the gender has been reassigned the duties and obligations all remain the same. There would therefore appear to be no reason why a conversion whilst maintaining the communal property regime of the parties' initial marriage cannot be automatically carried out at the time of the granting of sex description alteration.

III. Train DHA Staff

The misunderstanding and apparent lack of knowledge about the requirements of Act 49 suggest that it is necessary to ensure that the staff of the DHA are properly trained in order to ensure that they implement Act 49 accurately. Furthermore, it may be necessary to provide sensitivity training to staff members about how to interact with transgender and intersex applicants so that applicants are not made to feel insulted, discriminated against or judged. Sensitivity training is important to ensure that Act 49 is professionally implemented.

Australia ensures that its offices administrating identification documents from transgender are properly trained on the legislation.[156] In a set of guidelines published in 2013, the government made it a goal to develop a consistent sex and gender classification system for Australian record-keeping, develop a consistent standard of evidence for people to establish their sex and/or gender on personal records, and maintain consistent data collection.[157] The guidelines also require all Australian Government departments and agencies to implement the directives of these guidelines by July of 2016.[158]

This comprehensive guide outlines which documents are valid for evidencing the sex/gender of an applicant and expressly states that gender reassignment surgery and or hormone therapy should not be a prerequisite for recognition of change of gender in Australian Government records.[159] The guidelines also call for the collection of data to monitor the equality between men and women and to monitor the quality of services to transgender citizens. The guidelines impose a duty on the Australian government to provide transgender sensitivity training to their frontline staff who deal with the public on the daily basis.[160] For example, the guidelines instruct staff to receive training on appropriate terminology, definitions, and on the sensitivities that affect the intersex, transgender and gender diverse communities.[161] The fact that the guidelines impose a duty to adequately train their staff is indicative of the commitment the Australian government has in ensuring equal treatment to their gender diverse citizens.

It is recommended that the Department of Health publish a similar set of guidelines that ensure consistency with the implementation of Act 49. These guidelines ought to provide clarity to health professionals on the requirements of Act 49 and the role of health professionals in assisting transgender persons with their sex description alterations. Additionally, the directives should include among other things instructions that it is unlawful for health professionals to deny issuing letters of support to Act 49 applicants that have not had surgery, but otherwise qualify to apply for a sex description alteration. Furthermore, frontline staff and other relevant officials that have to preside over issues related to Act 49 ought to be given sensitivity training so that they are fully aware of transgender and intersex issues, and the appropriate manner in which to address the applicants (i.e. in the pronoun of the desired gender). Additionally, the directives issued by the DHA ought to clearly emphasise to officials that name alteration applications can be simultaneously applied for with sex description alteration applications in terms of Act 49. These directives should clearly stipulate how this process works and the required documentation and forms which must be attached to the directives for ease of reference for officials.

IV. Enable Gender Self-Identification

At present, Act 49 still imposes significant criteria on transgender applicants for qualifying for gender alteration since it requires that either medical treatment and/or surgery. This is somewhat comparatively progressive, since many European Union (EU) States required forced sterilisation in addition to this, and many EU States lack any form of gender recognition legislation. Sixteen EU Members do not have any gender recognition law and twenty-four Member States require sterilisation before recognition is possible.[162]

However, there are a number of EU States that have more progressive gender recognition legislation than Act 49. In 2010, Spain, Hungary, Finland, and United Kingdom did not require surgery or hormonal treatment in order for a gender alteration application to be considered.[163] They did, however, require evidence of gender dysphoria from a medical practitioner.[164] As of 11 June 2014 Denmark altered its gender recognition law to not require any evidence from a medical practitioner to support a gender alteration application, rather gender is entirely self-determined by the applicant.[165] Additionally, this makes the Danish law the most progressive gender recognition law in the European Union. This puts the Danish legislation in line with the hitherto "best practice" country case for gender recognition law: Argentina.[166]

Argentina's Gender Identity and Health Comprehensive Care for Transgender People Act, which entered into force July 2012, comprehensively protects the rights of transgender citizens.[167] The Argentinean Act recognizes the individual's right to express their gender in a way that corresponds with their true gender identity.[168] Under the Argentinean Act, the individual is not required to undergo *"a surgical procedure for total or partial genital reassignment, hormonal therapies or any other psychological or medical treatment has taken place."*[169] Rather, the individual can change the official recording of their gender when it does not reflect their self-perceived gender identity.[170] This is comparable with the earlier discussed first proposal by TTSG in the Bill hearings that set no criteria for "proving" one's gender identity. Article 4 of the Argentinean Act merely requires that the applicant prove that they are at least eighteen-years-old and provide their desired new name to the district office. After the receipt thereof, the district office will notify the corresponding Civil Registrar of the amendment of the applicant's gender and name.[171] Furthermore, Article 7 of the Argentinean Act specifies that the person's alteration of their gender and the recording of a new name does not change the person's entitlement to *"rights and legal obligations that could have corresponded to the persons before the recording of the amendments."* As such, Argentina does not require the dissolution of marriage as a prerequisite to legal gender recognition.

It is clear from the Argentinean and Danish precedent that South Africa still has significant steps to make to ensure that its gender recognition legislation, Act 49, is in line with international best practice. This primarily requires that the requirement that medical and psychological proof of gender be removed, and that the negative effects of Act 49 on marriage be addressed. Of the utmost urgency, it requires that Act 49 be properly implemented.

At present, Act 49 still imposes significant criteria on transgender applicants for qualifying for gender alteration since it requires that either medical treatment and/or surgery.

Conclusion

"A state that recognises difference does not mean a state without morality or one without a point of view. It does not banish concepts of right and wrong, nor envisage a world without good and evil. It is impartial in its dealings with people and groups, but is not neutral in its value system. The Constitution certainly does not debar the state from enforcing morality. Indeed, the Bill of Rights is nothing if not a document founded on deep political morality. What is central to the character and functioning of the state, however, is that the dictates of the morality which it enforces, and the limits to which it may go, are to be found in the text and spirit of the Constitution itself."

Justice Albie Sachs

The LRC and GDX emphasise that the need to address the concerns that have been highlighted and analysed in the course of this briefing paper are paramount. The gravity of South Africa's transition to a constitutional democracy is undermined if the rights to dignity and equality, as well as the other human rights that have been identified, are nothing more than words on paper in laws, and do not positively impact on the lives of transgender people. These values are cornerstones of the new South Africa.

Justice Albie Sachs aptly captures the moral obligation expected of the democratic South African State in order to ensure that its citizens are protected from discrimination:

> *"A state that recognises difference does not mean a state without morality or one without a point of view. It does not banish concepts of right and wrong, nor envisage a world without good and evil. It is impartial in its dealings with people and groups, but is not neutral in its value system. The Constitution certainly does not debar the state from enforcing morality. Indeed, the Bill of Rights is nothing if not a document founded on deep political morality. What is central to the character and functioning of the state, however, is that the dictates of the morality which it enforces, and the limits to which it may go, are to be found in the text and spirit of the Constitution itself."*

In a media statement explaining South Africa's support of the Resolution on Human Rights, Sexual Orientation and Gender Identity, the Permanent Representative of South Africa to the United Nations and other International Organisations at Geneva, Ambassador Abdul Samad Minty said:

> *"Our support for the resolution is in sync with our national values shaped on our own history and experience of discrimination. This history and the struggle against all forms of discrimination has therefore made us, as a people and a country, committed to the principle that no person should be subjected to discrimination or violence based on race, class, sex, religion, gender and as is the case with this resolution, on the basis of sexual orientation or gender identity. It is the same value base that guides our stance on fighting for equality between countries and why we shall always make our voices heard about exploitation and oppression of people in any form."*[173]

Legislation itself is clearly not enough if the other legs that are required to transform society are not in place or are weak. Statements of commitment to the values of dignity and equality ring hollow without concerted efforts to eradicate apparent discrimination. It is insufficient to make declarations of such commitments at the international arena whilst domestic organs of government are not performing in a manner that is consistent with these commitments. In order to realize the right to dignity and equality DHA must act in a substantive manner to give effect to their obligations. Until then, transgender persons are condemned to being treated as second-rate citizens. This is an injustice that cannot continue.

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52. See para 5.5. Sally Gross 'Submission' Submission to Portfolio Committee on Home Affairs, 9 September 2003.
53. See para 3.2. Lesbian and Gay Equality Project (South Africa) 'The Alteration of Sex Description and Sex Status Bill' Submission to Portfolio Committee on Home Affairs, 9 September 2003
54. See para 4. Ibid.
55. See page 10. Cape Town Transsexual/Transgender Support Group 'Alteration of Sex Description and Sex Status Bill, 2003' Oral Presentation to Portfolio Committee on Home Affairs, 9 September 2003.
56. See page 1. Eric Rood 'Alteration of Sex Description and Sex Status Bill [37 – 2003]' Submission to Portfolio Committee on Home Affairs, 9 September 2003.
57. See page 10. Cape Town Transsexual/Transgender Support Group 'Alteration of Sex Description and Sex Status Bill, 2003' Oral Presentation to Portfolio Committee on Home Affairs, 9 September 2003.
58. See page 3. Eric Rood 'Alteration of Sex Description and Sex Status Bill [37 – 2003]' Submission to Portfolio Committee on Home Affairs, 9 September 2003.
59. See page 4. Eric Rood 'Alteration of Sex Description and Sex Status Bill [37 – 2003]' Submission to Portfolio Committee on Home Affairs, 9 September 2003.
60. Parliamentary Monitoring Group 'National Health Bill: final mandates; Electoral Laws Amd Bill; Alteration of Sex Description & Sex Status Bill: briefing' 30 September 2003, available at http://www.pmg.org.za/minutes/20030929-national-health-bill-final-mandates-electoral-laws-amd-bill-alteration-sex-descript, accessed on 12 October 2014.
61. See page 3. Parliamentary Monitoring Group 'Electoral Laws Amendment Bill, Alteration of Sex Description and Sex Status Bill: voting' 2 October 2003, available at http://www.pmg.org.za/minutes/20031001-electoral-laws-amendment-bill-alteration-sex-description-and-sex-status-bill-voting, accessed on 12 October 2014.
62. Ibid.
63. See page 4. Ibid.
64. See page 1. Ibid.
65. See page 4. Parliamentary Monitoring Group 'ID Campaign and Legislation; Sita on IT Support: briefing' available at http://www.pmg.org.za/minutes/20031110-id-campaign-and-legislation-sita-it-support-briefing, accessed on 12 October 2014.
66. Parliamentary Monitoring Group 'Alteration of Sex Description & Sex Status Bill, Electoral Laws Second Amendment Bill: voting; Study Tour to North-West Province' available at http://www.pmg.org.za/minutes/20031120-alteration-sex-description-sex-status-bill-electoral-laws-second-amendment-bill-vot, accessed on 12 October 2014.
67. No. 49 of 2003: Alteration of Sex Description and Sex Status Act, 2003.
68. 49.2.(1).
69. Please note that "intersexed" is only used when quoting text. We recognise that "intersex" and "transgender" should be written in continuous form. Divergences are due to quotes or referenced materials using a different form, i.e. "intersexed" instead of "intersex" or "transgendered" instead of "transgender".
70. These category names (i.e. "Category 1") have been added for the ease of reference only.
71. See supra notes 46 and 47.
72. 49.2.(1) and 49.2.(2)(c).
73. 49.2.(2).(b).
74. See pages 9 and 10. South African Human Rights Council 'Alteration of Sex Description and Sex Status Bill [37 – 2003]' Submission to Portfolio Committee on Home Affairs, 9 September 2003

75. 49.2.(2).(d).
76. 49.3(1)-(2).
77. 49.2.(3).
78. See page 4. Eric Rood 'Alteration of Sex Description and Sex Status Bill [37 – 2003]' Submission to Portfolio Committee on Home Affairs, 9 September 2003.
79. 49.2.(4)-(5)
80. 49.2.(6)
81. 49.2.(7).
82. 49.2.(10).
83. 49.2.(9).
84. Section 34 of the Constitution provides: "[e] veryone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."
85. 49.3.(1).
86. 49.3.(2)-(3).
87. Ryan Thoreson. Beyond Equality: The Post-Apartheid Counternarrative of Trans and Intersex Movements in South Africa.
88. MambaOnline. 95 People in SA have Changed Gender Since 2004. Available at: http://mambaonline.com/article.asp?artid=8224
89. Ibid.
90. Parliamentary Monitoring Group 'Gender DynamiX on Alteration of Sex Description & Sex Status Act implementation; Lawyers for Human Rights on Statelessness; CoRMSA on Closure of Refugee Reception Offices in metro areas' 26 November 2012, available at http://www.pmg.org.za/report/20121126-gender-dynamix-alteration-sex-description-sex-status-act-implementati, accessed on 12 October 2014.
91. See page 1. Ibid.
92. Ibid.
93. Ibid.
94. See ibid. at page 3.
95. Ibid.
96. Ibid.
97. Ibid.
98. Thamar Klein. Who Decides Whose Gender? Medico-legal classifications of sex and gender and their impact on transgendered South Africans' family rights. Ethnoscripts. Page 23. Available at: http://www.ethnologie.uni-hamburg.de/de/forschung/publikationen/ethnoscripts/es-14-2/es-14-2-klein.pdf
99. Ibid at 24.
100. Ibid. at 23
101. Ibid.
102. Ibid. at 24
103. Wendy Jason da Costa. Transgender woman wins Battle over ID- KwaZulu-Natal. Iol News. 10 Oct 2011. Available at: http://www.iol.co.za/news/south-africa/kwazulu-natal/transgender-woman-wins-battle-over-id-1.1153626#.U0VP3NySaPc
104. Ibid. at 12.
105. Ibid. at 13-14.
106. Ibid. at 54 and 55
107. Ibid. at 55
108. Ibid.
109. Ibid. at 56
110. Robert Hamblin and Mzikazi Nduna 'Alteration of Sex Description and Sex Status Act and Access to Services for Transgender People in South Africa' (2013) 9, 1&2 New Voices in Psychology 50, available at: https://sites.google.com/site/newvoicesinpsychology/home/issues/2013-volume-9-no-1-2.
111. Ibid.
112. Liminalis report.
113. Ibid. at 30-31.
114. Ibid. at 31.
115. Transgender Patients Sidelined by Attitudes and Labelling, available at: http://www.samj.org.za/index.php/samj/article/view/4735.
116. Ibid. at 91. See also, http://www.timeslive.co.za/thetimes/2014/06/10/sex-change-ops-25-year-wait discussing applicants on the wait list at one of the country's public hospitals that performs sex change operations may wait for a period of 15 to 25 years.
117. Ibid. at 93.
118. See http://www.scielo.br/pdf/ibju/v38n1/a14v38n1.pdf
119. Bateman at 93.
120. Ibid.
121. Hamblin and Nduna, at 58.
122. Ibid.
123. s 13 of the Civil Union Act:
"Legal consequences of civil union. — (1) The legal consequences of a marriage contemplated in the Marriage Act apply, with such changes as may be required by the context, to a civil union. (2) With the exception of the Marriage Act and the Customary Marriages Act, any reference to—(a) marriage in any other law, including the common law, includes, with such changes as may be required by the context, a civil union; and (b) husband, wife or spouse in any other law, including the common law, includes a civil union partner."
124. 49.3.(3).
125. Comparative Law Casebook, 343.
126. Para 61 of Dawood and Another v Minister of Home Affairs and Others (CCT35/99).
127. See supra notes 54 and 55 of this document.
128. Section 22(1) of the Refugee Act, No. 130 of 1998: "The Refugee Reception Officer must, pending the outcome of an application in terms of section 21 (1), issue to the applicant an asylum seeker permit in the prescribed form allowing the applicant to sojourn in the Republic temporarily, subject to any conditions, determined by the Standing Committee, which are not in conflict with the Constitution or international law and are endorsed by the Refugee Reception Officer on the permit."
129. Email correspondence between the LRC and DHA, dated 10 December 2013.
130. Psychological Society of South Africa (PsySSA) 'Sexual and Gender Diversity Position Statement: Introduction, Rationale and Context' (2013), available at http://www.psyssa.com/documents/psyssa_sexuality_gender_position_statement_2013.pdf, accessed on 16 October 2014.
131. Peter Fabricius 'Just how serious is South Africa about gay rights?' ISS Today 27 February 2014, available at http://www.issafrica.org/iss-today/just-how-serious-is-south-africa-about-gay-rights, accessed on 16 October 2014.
132. Ibid.
133. The full provision for the interpretation of the Bill of Rights under section 39(1) is:
"When interpreting the Bill of Rights, a court, tribunal or forum –
must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
must consider international law; and
may consider foreign law."
134. Constitution references refer to the Constitution of South Africa, as amended, available at http://www.saflii.org/za/legis/consol_act/cotrosa1996423/, accessed 16 October 2014.
135. ss 3 s 9 of the Constitution of the Republic of South Africa.
136. Section 8 of the Promotion of Equality and Prevention of Discrimination Act, No. 4 of 2000 as amended.
137. Chapter 3 of PEPUDA provides the conditions for fair or unfair discrimination.
138. s 1 ch 1of PEPUDA.
139. Ibid.
140. The Yogyakarta Principles was developed following a meeting of 29 experts from 25 countries at Gadjah Mada University in Yogyakarta, Indonesia held in November of 2006. These principles aim to address a range of human rights standards and their application to issues of sexual orientation and gender identity. While the Yogyakarta Principles are guidelines and not binding law, South Africa is a signatory and therefore has obliged itself to uphold these Principles. Edward Cameron signed the Yogyakarta Principles on behalf of the Republic in his capacity as a Justice of the Supreme Court of Appeal. See: http://www.yogyakartaprinciples.org/principles_en_principles.htm#_Toc161634723, accessed on 30 October 2014.
141. See quoted text in para (1) in preceding "Right to Equality" section.
142. ss 2 of s 12 of the Constitution.
143. s 33 of the Constitution.
144. Full text of Article 5: "Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited." (Emphasis added).
145. Principle 3 of the Yogyakarta Principles.
146. Hamblin and Nduna, at 56.
147. Search as of August 7, 2014.
148. http://www.tramites.gob.ar/tramites/rectificacion-datos-cambio-genero-documento-nacional-identidad-dni-argentino-naturalizado-opcion-res-rnp-n-4932013_t2253
149. See 'Amendments' under the 'Civic Services' page available at http://www.dha.gov.za/index.php/civic-services/amendments, accessed on 19 November 2014.
150. Ibid.
151. Ibid.
152. See supra note 148.
153. Article 12 of the UDHR reads as follows: "No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks."
154. Article 18 of the African Charter:
"1. The family shall be the natural unit and basis of society. It shall be protected by the State which shall take care of its physical health and moral.
2. The State shall have the duty to assist the family which is the custodian or morals and traditional values recognized by the community."
155. Cristina Castagnoli 'Transgender Persons' Rights in the EU Member States' (2010) Report prepared for the European Parliament's Committee on Civil Liberties, Justice and Home Affairs, available at http://www.lgbt-ep.eu/wp-content/uploads/2010/07/NOTE-20100601-PE425.621-Transgender-Persons-Rights-in-the-EU-Member-States.pdf, accessed on 16 October 2014.
156. See http://www.ag.gov.au/Publications/Docu ments/AustralianGovernmentGuideline-sontheRecogni tionofSexandGender/AustralianG-overnmentGuideline sontheRecognitionofSexan-dGender.PDF
157. Ibid. at 2.
158. Ibid. at 8.
159. Ibid. at 4.
160. Ibid. at 8.
161. Ibid. at 8.
162. Richard Köhler, Alecs Recher, and Julia Ehrt 'Legal Gender Recognition in Europe' (2013) Transgender Europe, available at http://www.tgeu.org/sites/default/files/Toolkit_web.pdf, accessed on 16 October 2014.
163. Cristina Castagnoli 'Transgender Persons' Rights in the EU Member States' at 7.
164. Ibid.
165. Emine Saner 'Europe's Terrible Trans Rights Record: Will Denmark's New Law Spark Change?' The Guardian 1 September 2014, available at http://www.theguardian.com/society/shortcuts/2014/sep/01/europe-terrible-trans-rights-record-

denmark-new-law, accessed on 16 October 2014.

166. Richard Köhler, Alecs Recher, and Julia Ehrt 'Legal Gender Recognition in Europe' at 49.

167. See The Argentinean Gender Identity and Health Comprehensive Care for Transgender People Act (Decree No. 773/12 , of Gender Identity Act No. 26,743), English translation available at http://www.opensocietyfoundations.org/reports/license-be-yourself beginning at page 43; original Spanish version available at http://www.infojus.gob.ar/legislacion/ley-nacional-26743-ley_identidad_genero.htm?3 .

168. See generally Id. Art.2

169. Ibid. Art. 4.

170. Ibid. Art. 3.

171. Ibid. Art. 6.

172. Para 136 of National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others (CCT11/98) [1998] ZACC 15.

173. Department of Social Development "Media Statement: Explanation of Vote: Resolution A/Hrc/27/L.27 Rev.1 on Human Rights, Sexual Orientation and Gender Identity" available at http://www.dsd.gov.za/index.php?option=com_content&task=view&id=630&Itemid=106 accessed on 30 October 2014.