

SUMMARY

ASSIGNED SEX
SOCIAL NORMS
FEMALE
GENDER DYSPHORIA
GENDERQUEER
COMING OUT
TOP SURGERY
PANGENDER
FEMALE
GENDER DYSPHORIA
INTERNAL SENSE
GENITAL REASSIGNMENT
PANGENDER
FEMALE
GENDER DYSPHORIA
INTERNAL SENSE
GENITAL REASSIGNMENT



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South Africa is one of the very few countries in Africa that offers protection to trans and gender diverse persons. However, the current model of legal gender recognition, through the Alteration of Sex Description and Sex Status Act 49 of 2003, is highly pathologizing and incompatible with the country's priority of achieving social equity for all who live in it. The pathologisation model is outdated and unethical, as all State law and policy should be in line with the Constitutional human rights framework.

On 18 June 2018, the World Health Organisation (WHO) confirmed the depathologisation of trans identities in the International Classification of Diseases, Eleventh Revision (ICD- 11). Trans and gender diverse identities are no longer classified as psychological disorders, and access to gender affirming health care is provided for in terms of the ICD-11 Chapter on conditions related to sexual health.

Globally, several countries including Malta, Spain, Iceland, Norway, Argentina, Portugal, Belgium, Luxembourg, Pakistan, India, Nepal, Colombia, Uruguay and parts of Canada, Spain and the USA have shown a commitment to human rights, dignity, freedom, and equality for trans and gender diverse persons by adopting models based on self-determination.

The above international best practices are compatible with South Africa's commitment to transformative constitutionalism.

Act 49, which is South Africa's current option for legal gender recognition, is highly problematic.

1. The Act lacks directives, time frames and adequate standard operating procedures. This has subsequently led to human rights violations by the Department of Home Affairs (DHA).
2. The Act pathologizes trans and gender diverse identities, by making medical treatment, confirmed by two different health care providers, a requirement. This means that people who do not wish receive or cannot access medical treatment are excluded from legal gender recognition.
3. A lack of knowledge and sensitisation on gender identity, sexual orientation, and gender expression for government officials implementing the Act results in stigma and prejudice.
4. A lack of informed and adequate standard operating procedures.
5. There is no standard time frame for processing applications.
6. Non-existent guidelines for Act 49.
7. The Act reflects the current binary model used by the National Registry of RSA, where all people are classified as either male or female – this excludes non-binary and intersex people.
8. The high financial costs involved in gender marker and name changes, which impact heavily on the poorest community members.
9. Refugees and asylum seekers are currently excluded.

Legal gender recognition law and policy reform is essential to ensure that all people in South Africa are able to exercise their rights to equality, human dignity, freedom of movement and residence, gender identity, gender expression, access to social security, and the many other Constitutional rights.

The Position Paper calls for:

A fast, efficient, accessible, cost-effective, and non-discriminatory administrative procedure that respects the human rights of trans and gender diverse persons in South Africa. It rejects all medical, psychosocial, marital, or other requirements as preconditions to legal gender recognition. It recognises the right to self-determination, bodily autonomy, and self-declaration for all South African citizens, as well as refugees, asylum seekers, and other foreign nationals living permanently in SA.

Recommendations:

1. Develop legislation addressing legal gender recognition, aligned with constitutional requirements, international human rights values, and global best practices. Repeal and replace the Alteration of Sex Description and Sex Status Act 49 of 2003.
2. Develop new application provisions based on self-determination, bodily autonomy, freedom, and dignity, not on medical requirements.
3. The new law should not place limitations on a person's ability to change their gender marker or name freely and voluntarily.
4. Provide a swift, transparent, and accessible procedure, accompanied by regulations with clear time frames, to assist DHA officials in implementing the new Act.
5. Legal gender recognition must speak to a wide variety of identities and expression. These include:
 - People who may medically affirm their gender through hormone therapy or surgery.
 - People who may seek to legally affirm gender without undergoing any medical procedures.
 - Intersex, transgender and gender diverse persons who do not identify within the gender binary of male and female.
6. Legal gender recognition must make provision for refugees and asylum seekers to change their names and gender markers.

7. The age of consent for gender marker or name changes should be congruent with broader South African law on Children's Rights.
8. Trans and gender diverse persons must be able to legally change their gender markers whilst imprisoned with or without accessing gender-affirming medical and/or surgical care.
9. Trans and gender diverse persons should be able to decide in which detention facility they are to be detained in, to secure ensure their safety, dignity, and self-affirmation.
10. A third category for gender identification outside of the binary model must be adopted. Incorporate a third 'X' category of gender recognition on the National Population Register. This third option should be available to parents upon the registration of their children at birth. The third X option should refer to "Gender Unspecified", and not be regarded as creating a catch-all third gender category.
11. The omission of gender markers from Identity Documents (the Smart Card ID). The Identification Act is not prescriptive regarding the need for a person's gender to be reflected on their Identity Card. Gender should not be indicated in ID documents or be coded into ID numbers. The coding of gender into ID numbers is a relic of the Apartheid era, and should be abandoned in the same way that coding of race into ID numbers has been stopped.
12. If an applicant requires both gender marker and name change, these must be done simultaneously.
13. The internal appeals procedure can be exhausting, traumatic and costly. The Department of Home Affairs should ensure that frontline staff and the Director-General are capacitated to effectively grant the application. A process of self-determination would drastically reduce the number of rejections and, by extension, the bureaucratic caseload for the Department. This would also mean the process would be more cost-effective overall. The initial cost of an application for a gender marker and name change should be waived.
14. Any new Act must be accompanied by a set of regulations and guidelines clearly outlining implementation.
15. In the event where a new ID number is issued, the old ID number must be deleted entirely and not linked to the applicant in any way. The new law must put the onus on the State to ensure that safeguards in the form of constitutionally sound procedures and systems are put in place. These should ensure that a person's rights are not infringed upon, and benefits are not forfeited, on account of a change in ID number.
16. Legal gender marker change must not result in forced divorce or the duplication of a person's identity by retaining both the old and new identification numbers in the population register, and the systems for recording marriages must be adapted to allow for gender marker changes.

17. Act 49 does not require the publication of changes in particulars made in terms of the Act. This should continue as a sound legal mechanism to protect trans, gender diverse and intersex people from social stigma, discrimination, and violence.
18. No record of any amendment made in terms of the Gender Recognition Law should be retained to ensure that such particulars are never used against applicants. In the event where records are kept, such particulars should only be available to the document holder.

We look forward to engaging with government, civil society and other stakeholders as we move forward towards the realisation of freedom, dignity and equality for all.

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

metoidioplasty
cultural constructs
preferred pronouns
body shape
AFAB
surgery
physical
hairstyle
butch
AMAB
trans
assigned sex
FTM
agender
intersex
name change
trans man
female
genderqueer
gender expression
gender presentation
legal documents
genderfluid
they/them
gender nonconforming
gender nonconforming
male
top surgery
gender dysphoria
trans woman
internal sense
he/him
voice
gender identity
bottom surgery
other genders
other
presentation
transphobia
other
assigned male at birth
bigender
assigned female at birth
gender affirming surgery
phalloplasty
genital reassignment
surgical alteration
social norms
transition
clothing
gender dysphoria
misgender
MTF
she/her
coming out
voice

Legal Resources Centre



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