



Submission to the Department of Home Affairs on the DRAFT OFFICIAL IDENTITY MANAGEMENT POLICY

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I. INTRODUCTION

1. The Women's Legal Centre, Triangle Project and Intersex South Africa hereby welcome the opportunity to submit written comments on the Draft Official Identity Management Policy (OIDM Policy, the Policy)¹ to the Department of Home Affairs (DHA, the Department).
2. Our submission focuses on aspects of the Policy that impact on transgender, nonbinary and intersex people and their human rights to gender identity, gender expression and sex characteristics (GIESC).
3. Before providing our written submission, we wish to bring to the attention of DHA that Gender DynamiX and Legal Resources Centre have developed a Position Paper on legal gender recognition in South Africa that is based on a gender self-determination model, human rights principles and best practices internationally. This Position Paper has been endorsed by a further 22 organisations active in the South African LGBTQI+ sector, including our three organisations. Consulting this Position Paper would be valuable to the Department in your adjudication and finalisation of the OIDM Policy. The publication, titled, *Keeping the Promise of Dignity and Freedom for All: A Position Paper on Legal Gender Recognition in South Africa*, is available here:

<https://drive.google.com/file/d/1Wx7d9o06qec0ka2aJ32G47JsT1BR2DI0/view>

4. The rest of this submission is structured as follows:
 - 4.1 **Part II** will introduce the organisations making the submission.
 - 4.2 **Part III** will provide a brief note on the language used in the submission.
 - 4.3 **Part IV** will highlight some of the principles guiding the submission.
 - 4.4 **Part V** will provide the context and experience informing this submission; and
 - 4.5 **Part VI** will provide comments on the Draft Official Identity Management Policy.

II. INTRODUCTION TO THE ORGANISATIONS MAKING THE SUBMISSION

WOMEN'S LEGAL CENTRE (WLC)

¹ Available at: http://www.dha.gov.za/images/PDFs/Draft_Official_Identity_Management_Policy_-_Gazette_Version_of_22122020.pdf

5. The WLC is an African feminist legal centre that advances womxn's rights and equality through strategic litigation, advocacy, education and training. The Centre has a vision of womxn in South Africa who enjoy equal and substantive access to their rights, being free from violence, empowered to ensure their own sexual health and reproductive rights, free to own their own share of property and resources, having a safe place to stay, and access to work in a safe and equal work environment. The WLC was founded in 1998 and remains uniquely placed as the only dedicated womxn's rights legal centre of its kind in South Africa. Our programmatic work and focus areas are shaped by the womxn who seek assistance from us. This submission falls into our programmatic work on sexual and reproductive health and rights which is focused in ensuring that womxn's rights to make decisions about their bodies are respected, protected and realised.

TRIANGLE PROJECT

6. Triangle Project is a non-profit human rights organisation offering professional services to ensure the full realisation of constitutional and human rights for lesbian, gay, bisexual, transgender, queer, intersex, plus (LGBTQI+) persons, their partners and families. Our three-core services centre around Health and Support, Community Engagement and Empowerment, and Research and Advocacy. We offer a wide range of services to LGBTQI+ communities. These include sexual health clinical care, a needle and syringe programme, nutrition support, counselling, support groups, a helpline, public education and training services, solidarity spaces, community outreach, and court support to survivors of hate crimes. This submission falls within our Research, Advocacy and Policy Programme that works to advance the inclusion and protection of the human rights to sexual orientation, gender identity, gender expression and sex characteristics (SOGIESC) within South African legislation, policy and practices.

INTERSEX SOUTH AFRICA

7. Intersex South Africa (ISSA) is an organization founded in 2010 by late intersex activist Sally Gross. ISSA seeks to raise awareness of intersex issues in South Africa and promotes the rights to bodily autonomy and integrity of all intersex persons. ISSA collaboratively works at national and regional levels to advance the human rights of intersex persons through the strategic use of human rights mechanisms. The organisation also provides intersex-related technical assistance, education, training and advice to key stakeholders and engages in legal and policy review, reform and drafting

for the development of an enabling environment for the human rights of all intersex persons.

III. A NOTE ON LANGUAGE IN THE SUBMISSION

8. We wish to clarify and draw attention to several key concepts that need to inform the Department's understanding of the human rights, needs and concerns of transgender, nonbinary and intersex persons in relation to the OIDM Policy.
9. Currently, the Policy includes a Glossary that defines the terms 'Assigned sex', 'Gender', 'Gender identity', 'Intersex', 'Non-binary person', 'Transgender' and 'Transition', among others. This language will no doubt make its way into future legislation and it is therefore critically important for the Department to ensure that the language is accurate and encompasses the rights of the persons that the policy and laws speak to.
10. The definitions in the Glossary section therefore need improvement and additional terms need to be included. We deal with this in more detail below.
11. In other sections of the Policy, some of the above Glossary terms are used, as well as additional terms and expressions such as 'Gender and sexual identity minorities', 'third gender', 'biological males with feminine gender identity or expression or biological females with masculine gender identity or expression' and 'sexual orientation'. Unfortunately, the ways in which these terms are used and interpreted in the Policy, show considerable confusion and conflation, combined with erroneous assumptions about the needs and concerns of trans, nonbinary and intersex persons. This unfortunately led to the inclusion of several recommendations in the OIDM Policy that would put transgender, nonbinary and intersex persons at greater risk and violate our Constitutional rights, which runs counter to the express intention of the Department and the Policy to "Recognise equality, non-discrimination and human dignity values in managing the official identity and status of all citizens and non-citizens who interface with the DHA" (OIDM Policy, Section 3.1).
12. We believe that a clear understanding of key concepts will go a long way in assisting the Department with ensuring that the policy and all steps taken to put the policy into practice do not hinder, harm, violate or undermine the very people it is seeking to protect and affirm. We believe, too, that this will assist the Department in understanding our submission.
13. Key concepts include **sexual orientation (SO), gender identity (GI), gender expression (E), and sex characteristics (SC)**, in short **SOGIESC**. It is important to realise that every individual has a sexual orientation, gender identity, gender expression and sex characteristics. Our understanding of these

concepts is informed by the *Yogyakarta Principles* (2007)² and *Yogyakarta Principles Plus 10* (2017).³

14. **Sexual orientation** refers to each person's capacity for profound emotional, affectional and sexual attraction to individuals of the same gender (gay or lesbian), a different gender (heterosexual) or more than one gender (bisexual or pansexual). Sometimes the terms '**sexuality**' or '**sexual identity**' are also used to refer to sexual orientation. A sexual minority or '**sexual identity minority**' (the term used in the OIDM Policy) would therefore refer to persons who represent a minority in terms of their sexual orientation, for example, lesbian women, gay men, and bisexual and pansexual persons. It was an error to introduce the terms 'sexual orientation' and 'sexual identity minorities' into the OIDM Policy, as the capturing of sexual orientation or sexual identity has not been and must never be a function of the government's official management or regulation of identities.
15. **Gender identity** refers to each person's self-identified, deeply felt, internal and individual experience of gender as female, male, nonbinary, another gender or a combination of genders, which may or may not correspond with the gender assigned at birth. If and where gender continues to be captured as part of the official management of identity, it should reflect a person's gender identity.
16. **Gender expression** refers to each person's presentation of gender through their external appearance (including dress, hairstyles, accessories, cosmetics), mannerisms, speech, behavioural patterns, names and pronouns. Gender expression may or may not reflect a person's gender identity. It was therefore an error to introduce the terms 'feminine gender expression' and 'masculine gender expression' into the OIDM Policy, as the capturing of gender expression has not been and must never be a function of the government's official management of identities.
17. **Sex characteristics** refer to each person's physical features relating to sex (female, male, intersex), including genitals and other features of sexual and reproductive anatomy, chromosomes, hormones and secondary physical features emerging from puberty. It was an error to describe intersex persons as a 'third gender' in the OIDM Policy, as 'intersex' refers to a person's sex characteristics, not to their gender or gender identity. As with other persons, an intersex person's

² *Yogyakarta Principles: Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity*. 2007. <http://www.yogyakartaprinciples.org/>

³ *Yogyakarta Principles Plus 10: Additional Principles and State Obligations on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Identity, Gender Expression and Sex Characteristics to Complement the Yogyakarta Principles*. 2017. <http://www.yogyakartaprinciples.org/>

gender identity can be woman/girl/female, man/boy/male or nonbinary, and cannot be inferred from their sex characteristics.

18. It is important to note that **the terms 'female' and 'male'** are sometimes used by people to refer to biological sex, but also often used by people to indicate their gender identity and the particular gender they belong to socially and legally. The latter meaning, i.e., gender identity and a person's social and legal gender, is how the terms 'female' and 'male' should be understood in relation to the official capturing and management of identity.
19. Commonly, in South Africa and beyond, lesbian women, gay men, bisexual persons, transgender persons, non-binary persons, gender diverse persons, queer persons, intersex persons and other individuals whose sexual orientation, gender identity, gender expression and/or sex characteristics differ from the cultural expectations of their society are referred together as LGBTQI+. This acronym has several variations (e.g., LGBTI+, LGBTQIAP, etc.), with additional letters indicating additional groups or categories (e.g., 'A' for asexual, 'P' for pansexual, etc.) in ever expanding attempts to be more inclusive of all persons of diverse and marginalised sexual orientations, gender identities, gender expressions and/or sex characteristics. Adding the plus symbol (+) at the end of any of these acronyms is an acknowledgement that there are additional categorisations and self-claimed descriptors of sexual, gender and bodily diversity that may not be explicitly represented in the acronym. No acronym can fully capture all the emerging and evolving categories.
20. The explicit naming of only some classes of persons in an acronym such as LGBTQI+ may unintentionally send a message that only those specifically mentioned are recognised and protected. This invisibilises other diverse sexual orientations, gender identities, gender expressions and sex characteristics, limiting the ability of those who are excluded to self-identify and control their bodies.
21. Furthermore, an umbrella term like LGBTQI+ often leads people unfamiliar with the various groups indicated by the different letters, to conflate the groups with each other, and overlook the distinct human rights concerns applicable to each group.
22. **SOGIESC** is often used in human rights discourse to recognize that rights belong to all people, which include LGBTQI+ people as well as those not listed explicitly but implied under the + (plus). For this reason, in our papers we refer to all these classes of persons as those of diverse sexual orientations, gender identities, gender expressions and sex characteristics (SOGIESC) to ensure that we do not continue to prejudice and exclude certain marginalised identities, bodies and individuals.

Important international human rights bodies are also using SOGIESC concepts to be inclusive and bring more visibility to sexual, gender and bodily diversity.

23. Our organisations are aware that the terminology used by and for persons who transcend cultural expectations related to gender, sexuality and biological sex often differ across societies, communities and languages.

23.1 The key concepts of SOGIESC help us to refer in a more general way to these different forms of diversity without having to attempt to enumerate all existing and emerging terms that individuals and groups may use.

23.2 However, where we cite case law, academic writing or reports, we follow the way in which the applicable work describes people with diverse SOGIESC to ensure that we do not misrepresent the work.

IV. INFORMING PRINCIPLES

24. This submission departs from the firm principle that a person's sexual orientation, gender identity, gender expression and sex characteristics (SOGIESC) must never be used as grounds to limit their entitlement to enjoy all the human rights which accrue to them. This is a critical starting point in line with the Constitution when developing any law and policy, or undertaking any actions or practices aimed at realising, promoting and developing SOGIESC-based rights of LGBTQI+ people and related marginalised groups and individuals.

25. Equality is both a right and value in the Constitution of South Africa. The right to equality and non-discrimination is entrenched in both Section 9 of the Constitution of South Africa and the Promotion of Equality and Prevention of Unfair Discrimination Act, 4 of 2000.

26. We note that in the case of *Fourie*, the Constitutional Court held that our Constitution represents a radical rupture with a past based on intolerance and exclusion, and the movement forward to the acceptance of the need to develop a society based on equality and respect by all for all.⁴

27. The Constitutional Court, in the same judgment, also emphasised that a democratic, universalistic, caring and *aspirationally* equal society embraces everyone and accepts people for who they are. To treat people differently because of who they are, is profoundly disrespectful of the human personality and violates the right to equality.⁵ The Court explained that the *respect for human rights*

⁴ Minister of Home Affairs and another v Fourie and Bonthuys CCT60/04, Para 59.
<http://www.saflii.org.za/za/cases/ZACC/2005/19.pdf>

⁵ Ibid at para 60.

*requires the affirmation of self, not the denial of self. Equality therefore does not imply a levelling or homogenisation of behaviour or extolling one form as supreme, and another as inferior, but an acknowledgement and acceptance of difference. **At the very least, it affirms that difference should not be the basis for exclusion, marginalisation and stigma.*** (own emphasis).

28. We also wish to highlight the *Yogyakarta Principles* (2007)⁶ and its recent supplement, the *Yogyakarta Principles Plus 10* (2017),⁷ which are binding on South Africa. The Yogyakarta Principles aim to provide guidance to states on the application and implementation of international human rights law in relation to Sexual Orientation, Gender Identity, Gender Expression and Sex Characteristics (SOGIESC) in national laws, policies and practices. The Yogyakarta Principles have been applied in our domestic Courts in the *September vs Subramoney* judgement.⁸

29. Principle 31 of the Yogyakarta Principles Plus 10 deals with “**The Right to Legal Recognition**”⁹ and states that:

Everyone has the right to legal recognition without reference to, or requiring assignment or disclosure of, sex, gender, sexual orientation, gender identity, gender expression or sex characteristics. Everyone has the right to obtain identity documents, including birth certificates, regardless of sexual orientation, gender identity, gender expression or sex characteristics. Everyone has the right to change gendered information in such documents while gendered information is included in them.

STATES SHALL:

A) Ensure that official identity documents only include personal information that is relevant, reasonable and necessary as required by the law for a legitimate purpose, and thereby end the registration of the sex and gender of the person in identity documents such as birth certificates, identification cards, passports and driver licences, and as part of their legal personality;

B) Ensure access to a quick, transparent and accessible mechanism to change names, including to gender-neutral names, based on the self-determination of the person;

⁶ *Yogyakarta Principles: Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity*. 2007. <http://www.yogyakartaprinciples.org/>

⁷ *Yogyakarta Principles Plus 10: Additional Principles and State Obligations on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Identity, Gender Expression and Sex Characteristics to Complement the Yogyakarta Principles*. 2017. <http://www.yogyakartaprinciples.org/>

⁸ *September v Subramoney NO and Others* (EC10/2016) [2019] ZAEQC 4; [2019] 4 All SA 927 (WCC) (23 September 2019). Available at: <http://www.saflii.org/za/cases/ZAEQC/2019/4.html>

⁹ Available at: <https://yogyakartaprinciples.org/principle-31-yp10/>

C) While sex or gender continues to be registered:

- i. Ensure a quick, transparent, and accessible mechanism that legally recognises and affirms each person's self-defined gender identity;*
- ii. Make available a multiplicity of gender marker options;*
- iii. Ensure that no eligibility criteria, such as medical or psychological interventions, a psycho-medical diagnosis, minimum or maximum age, economic status, health, marital or parental status, or any other third party opinion, shall be a prerequisite to change one's name, legal sex or gender;*
- iv. Ensure that a person's criminal record, immigration status or other status is not used to prevent a change of name, legal sex or gender.*

V. LIVED EXPERIENCES OF LEGAL GENDER RECOGNITION IN SOUTH AFRICA

30. In South Africa, transgender, nonbinary and intersex persons experience widespread systemic violence and discrimination based on their gender identity, gender expression and/or sex characteristics (GIESC).
31. These forms of systemic violence and discrimination also pervades the official management of identity by the Department of Home Affairs and the South African government, more broadly.
32. This systemic violence and discrimination stem from a fundamental lack of recognition of every individual's right to their self-identified and self-determined gender identity regardless of their sex characteristics or gender assigned at birth. It also stems from a very restrictive, discriminatory and transphobic understanding of gender and gender identity in heteronormative, cisnormative¹⁰ and exclusively binary terms. Additionally, it stems from a very restrictive binary, discriminatory, and intersexphobic understanding of biological sex as ideally typically female or typically male. Moreover, it stems from the erroneous assumption that the official management of identity requires the capturing of a person's biological sex or physical sex characteristics, rather than their gender identity.

¹⁰ Cisnormativity is the discriminatory assumption that everyone is or should be cisgender. In other words, it is the discriminatory assumption that everyone identifies/should identify with the gender they were assigned at birth.

33. When official identity is conceptualised in heteronormative, cisnormative and sex binary terms, this forms the basis for the political system and associated discourses,¹¹ giving rise to many forms of human rights violations throughout all spheres of society and government.
34. The Alteration of Sex Description and Sex Status Act 49 of 2003 (Act 49)¹² allows transgender, gender diverse and intersex persons to alter their legal gender in the National Birth Register and in their South African identity documents. This law was enacted to fill the void left by the repeal of section 28 of the Births, Marriages and Deaths Registration Act.¹³
35. Act 49 allows two main categories of persons to make an application to the Director-General of the National Department of Home Affairs for the alteration of their legal gender, which is erroneously called a “sex description” in the Act. These two categories of applicants are (1) gender reassignment applicants (i.e., transgender applicants, although this term is not used in the Act), of which two subcategories are provided (see below), and (2) intersex applicants:¹⁴.
- (1) A person whose sex characteristics have been altered resulting in gender reassignment, either by:
- (1a) medical or surgical treatment; or by
 - (1b) evolvment through natural development.
- (2) A person who is intersex.
36. Two different sets of requirements apply to gender reassignment applicants and intersex applicants respectively: Whereas gender reassignment applicants need to submit medical proof of an alteration of sex characteristics resulting in gender reassignment, intersex applicants need to submit medical proof of being intersex and psychosocial proof of having lived “stably” in their gender role for a period of at least two years.
37. When promulgated in 2003, this piece of legislation was considered progressive by world standards even though it was still extremely discriminatory and oppressive, transgender and intersex persons were not consulted in its initial drafting, and their calls for gender self-identification and protection of bodily integrity during the public hearings in 2003 were not heeded by parliament.

¹¹ Johnson, C. ‘Heteronormative citizenship and the politics of passing’ (2002), *Sexualities* 317.

¹² Available at: https://www.gov.za/sites/default/files/gcis_document/201409/a49-03.pdf

¹³ Births, Marriages and Deaths Registration Act 81 of 1963.

¹⁴ Act 49 of 2003, section 2(1).

38. However, as discussed at length in the Legal Gender Recognition Position Paper¹⁵ referred to earlier, many other countries have in recent years enacted much more progressive (human rights-based) gender recognition laws based on principles of gender self-determination, self-identification, bodily autonomy and bodily integrity. These include Argentina, Malta, Colombia, Ireland, Uruguay, Iceland, Norway, Pakistan, India, Nepal, Portugal, Belgium, Luxembourg, and parts of Canada, Mexico, Spain and the USA. Among the first countries to pass comprehensive gender recognition laws based on a gender self-determination model complying with the *Yogyakarta Principles* were Argentina¹⁶ and Malta¹⁷.
39. Although South Africa has domestically applied the *Yogyakarta Principles* (2007, 2017) in its Courts, the South African government has yet to reform its laws and policies to comply with gender self-determination, self-identification, bodily autonomy, bodily integrity and other human rights standards for gender identity and sex characteristics articulated in this instrument. South Africa's gender recognition legislation also needs to move away from an exclusively binary model of gender identity that only provides for female and male categories, to a model of gender diversity that includes nonbinary and other diverse gender identities. To the extent that the Draft Official Identity Management Policy seeks to achieve these objectives, we welcome this effort by the Department of Home Affairs, and it is the aim of this submission to assist the Department in revising the Draft OI DM Policy so that it would comply with these human rights principles.
40. Act 49 is fundamentally flawed and needs to be repealed and at the same time replaced with legislation that immediately makes provision for legal recognition based on a gender self-determination and self-identification model. The new gender recognition law must ensure that all transgender, nonbinary, gender diverse and intersex persons, including minors, asylum-seekers and refugees can also have their gender identity recognised, all of whom are extremely vulnerable and marginalised groups currently being excluded from accessing their right to gender recognition. This will ensure their access to their human rights and services. Currently, the way the Department of Home Affairs implements Act 49 renders many transgender, nonbinary, gender diverse, and

¹⁵ *Keeping the Promise of Dignity and Freedom for All: A Position Paper on Legal Gender Recognition in South Africa*. Available at: <https://drive.google.com/file/d/1Wx7d9o06qec0ka2aJ32G47JsT1BR2DI0/view>

¹⁶ Gender Identity Law No. 26.743 of 2012 (Argentina). Available at: <https://globaltransaction.files.wordpress.com/2012/05/argentina-gender-identity-law.pdf>.

¹⁷ Gender Identity, Gender Expression and Sex Characteristics Act No. XI of 2015 (Malta). Available at: <https://legislation.mt/eli/cap/540/eng/pdf>.

intersex persons vulnerable and effectively denies them access to their rights to education, health, housing and employment, among others.¹⁸

41. The lack of effective and efficient administration of Act 49 is the result of various factors, and these need to be considered in the current policy development to avoid the same factors once again frustrating the intentions of the Department.

41.1 First, there is a lack of accurate application and understanding of Act 49 by officials charged with administering the Act at the Department of Home Affairs. This has resulted in some branch offices insisting on proof of genital surgery from applicants, which is a misinterpretation of the Act.

41.1.1 Section 2(2)(b) of Act 49 requires that a **gender reassignment application** must be accompanied by (1) the applicant's birth certificate¹⁹ and (2) two medical letters from two separate and independent health providers testifying as to the nature of the "**surgical or medical treatments**" administered as well as the results from either treatment.²⁰

41.1.2 In the case of **intersex applicants**, Act 49 requires (1) the applicant's birth certificate, (2) a medical report testifying that the applicant is intersex, and (3) a report by a social worker/psychologist that the applicant has lived in their gender role for an unbroken period of two years.

41.1.3 However, Home Affairs officials have often turned gender reassignment applicants and intersex applicants away by insisting that their applications must be accompanied by proof of surgical treatment.²¹ But as indicated above, the Act merely makes surgical treatment optional for gender reassignment applicants and does not require any medical or surgical treatment for intersex persons.

41.1.4 By making surgical treatment mandatory, Department of Home Affairs officials impede access by transgender and intersex people to various rights,

¹⁸ Nadia Swanepoel reported that she had been forced into escorting because she could not get jobs after employers questioned why her identity document said she was a man. Available at <http://mg.co.za/article/2014-10-09-transgender-goes-on-hunger-strike-over-id-application>.

¹⁹ Act 49 of 2003, Section 2(2)(a).

²⁰ Act 49 of 2003, section 2(b) – (c).

²¹ Gender Dynamix & Legal Resource Centre. 2015. *Briefing Paper: Alteration of Sex Description and Sex Status Act, No. 49 of 2003*. Cape Town: Gender Dynamix & Legal Resources Centre. Available at: https://drive.google.com/file/d/1xvXcmoa5OZ1gsrzMk-z7JbCvd_T0zz5W/view

and commit gross human rights violations, including forced sterilisation and intersex genital mutilation (IGM).

- 41.2 Second, the result of a lack of national directives from the Department of Home Affairs has meant that transgender and intersex people often have to wait unacceptably long periods of time for their applications to be accepted and processed by the Department.²² From empirical experience of Triangle Project, Women's Legal Centre, Gender Dynamix, Iranti-org, Legal Resources Centre and other partner organisations, there have been complaints from persons who have waited, and are still waiting, for their identity documents to be altered by the Department. From the cases on file, the waiting periods range from 2 years up to 10 years. This waiting period forced on applicants is clearly egregious when one takes into consideration the fact that the average waiting period for most alterations to identity documents is three months. Moreover, in a meeting between trans coalition organisations and the Minister of Home Affairs on 21 September 2020, the Minister stated that the standard waiting time for applications are 6-8 weeks, and we could inform the Department when any application has been taking more than 8 weeks. However, there continues to be many cases submitted by organisations since the meeting with the Minister, which have not been resolved yet, despite applicants having waited for a year or longer.
- 41.3 Third, when an application is denied, no reasons are provided by the various branch offices of Home Affairs. This makes it difficult for, and unduly burdensome on, applicants seeking alternative legal redress to lodge appeal applications in terms of the Act.²³ This effectively denies transgender and intersex persons their rights to equal protection and benefit of the law. At times, when applicants conduct follow-ups, they are told that their applications got "lost" without the Department providing any form of adequate relief or an expedited process.²⁴
- 41.4 Fourth, because of the lack of directives, there are currently no existing measures to ensure the protection of marriages where a transgender or intersex person changes their legal gender after getting married. South African marriages are currently governed in terms of three separate Acts: The Marriage Act 25 of 1960, which governs

²² Ibid.

²³ Act 49 of 2003, section 2(3)-(4).

²⁴ Gender Dynamix & Legal Resource Centre, 2015, pp.23, 29.

heterosexual unions, the Civil Unions Act 17 of 2006 which governs heterosexual and same-sex unions, and the Recognition of Customary Marriages Act that regulates customary marriages. However, there is no bridging regulation or process through which a heterosexual union, which has become a same-gender union because of one partner's change in legal gender, can be registered under the Civil Union Act. This loophole in legislation often means that transgender and intersex persons are forced to divorce their spouses to have their legal gender changed in their identity documents, and to access their rights. Often, they are not told by the Department that they must divorce their spouses; they are rather forcibly divorced, without their knowledge, by the Department. In some instances, the Department simply refuses to alter their legal gender without a divorce order.

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

VI. COMMENTS ON THE DRAFT OIDM POLICY

Glossary

44. We have already provided some definitions above on SOGIESC – we refer the department to our section on language to further guide the glossary section.

45. We however recommend that the following definitions be revised as follows:

45.1 Assigned sex

Recommendation: Remove this term and its definition, since the only other places in the Policy where it occurs is in the definitions of 'gender identity' and 'transgender', and we submit that 'gender identity' and 'transgender' also need to be amended to remove this term, instead using gender assigned at birth (see below).

45.2 Consent is one of the critical aspects in protecting self-determination, self-identification and bodily autonomy of a person. It is an important aspect of a person's ability to make decisions about their body, gender and identity. We are concerned that the definition provided here does not adequately explain the parameters of consent.

Recommendation: Consent: Full, free and informed consent: 'Full' refers to information that should be in a form that is accessible and understandable, presenting all available options – including unpopular ones – with accuracy and without prejudice. 'Free' implies no coercion, intimidation or manipulation. 'Informed' means that information is provided that covers (at least) the following aspects: the nature, reversibility, duration and consequences of any proposed procedure or process, the reason(s) for or purpose(s) of it, and the personnel likely to be involved in its execution – including distinguishing between required and non-essential personnel.

45.3 Gender: We are concerned that this definition frames gender within a binary context of personhood which continues to make a lot of people invisible, marginalised and prejudiced.

Recommendation: Gender: Socially constructed roles, behaviours, activities and attributes that a particular society or community ascribes to individuals based on their sex characteristics.

45.4 Gender Identity: This definition needs to be improved as suggested below. No need to specifically mention the term 'trans' in defining the term. The focus needs to be on a diversity of gender identities, and the fact that a person's gender identity may or may not correspond to the gender assigned to them at birth:

Recommendation: Gender Identity: Each person's self-identified, deeply felt, internal and individual experience of gender as female, male, nonbinary, another gender or a combination of genders, which may or may not correspond with the gender assigned at birth.

45.5 Intersex: We again are of the view a broader definition that captures the key elements of intersex and sex characteristics is necessary in the content of the submission.

Recommendation: Intersex: An umbrella term used to describe a wide range of natural bodily variations in sex characteristics. Intersex people are born with sex characteristics (including genitals, gonads and chromosome patterns) that do not fit normative binary notions of male or female bodies – such variations may involve atypical genitalia, hormonal differences, or combinations of chromosomal genotype and sexual phenotype other than XY and XX. Some intersex traits are visible at birth while others are not apparent until puberty. Some chromosomal intersex variations may not be physically apparent at all.²⁵

45.6 Transgender:

- a. Do not refer to 'expression' in the definition; the focus here is on gender identity.
- b. Also, do not refer to 'assigned sex' in the definition, but rather to 'gender assigned at birth'.
- c. Keep the focus on how the person was assigned a social and legal gender at birth regardless of what their sex characteristics may have been. The Department should not concern itself with the particulars about a transgender person's sex or sex characteristics, but rather whether the person wants to change the social and legal gender that was assigned to them at birth.
- d. This is because social and legal gender is often assigned based on an interpretation of sex characteristics (whatever these may be), but it is not a person's sex or sex characteristics that should be captured. Section 7.1.1 of the OIDM Policy correctly

²⁵ Office of the High Commission of Human Rights, Intersex Fact Sheet (2015) <https://www.unfe.org/wp-content/uploads/2017/05/UNFE-Intersex.pdf>

points out that “the Identification Act refers to gender and not sex” when it lists particulars to be included in population register.

Recommendation: Transgender: an adjective referring to a person whose gender identity differs from the gender assigned to them at birth.

45.7 Sex: Remove the reference to ‘indeterminate sex’, as this is discriminatory.

Recommendation: Sex: A person’s particular combination of sex characteristics, based on which they are classified as female, male or intersex.

Recommended definitions and abbreviations to be added:

45.8 **SOGIESC: Sexual orientation, gender identity, gender expression and sex characteristics**

45.9 **Sexual orientation:** Each person’s capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of the same gender, a different gender or more than one gender.

45.10 **Gender expression:** Each person’s presentation of gender through their external appearance (including dress, hairstyles, accessories, cosmetics), mannerisms, speech, behavioural patterns, names and pronouns. Gender expression may or may not reflect a person’s gender identity.

45.11 **Sex characteristics: Each person’s physical features relating to sex, including genitals and other features of sexual and reproductive anatomy, chromosomes, hormones and secondary physical features emerging from puberty.**

SECTION A: BACKGROUND, ANALYSIS AND CONTEXT

Chapter 1: Understanding Identity and the role of the DHA

46. Before getting into the role of DHA, it is important to focus on the subject matter of the policy - **identity**. Given the history of our country and the years of oppression and discrimination based on identity, both the Policy and what it seeks to achieve are critically important if we are to achieve social cohesion.

47. **What is identity?** The Oxford English Dictionary defines identity as *the fact of being who or what a person or thing is and the characteristics determining who or what a person or thing is*. Many other writings and contexts give varying definitions of the word and what it denotes. The common and main aspect of identity is a sense of recognition, so that none seems obviously wrong, despite the diversity.²⁶
48. **Key characteristics of a person's identity** would include race, ethnicity, gender, age, sexual orientation, gender identity, physical attributes, personality, political affiliations, religious beliefs, professional identities, and so on.²⁷
49. **Identity is intersectional.** This is because the characteristics of identity are overlapping and interconnected as individuals 'belong to multiple groups at the same time. We may hold some traits more central to our identity than others, but not everyone holds that same value system.'²⁸ The term intersectionality was coined by Kimberle Crenshaw in the 1980s and recognises that where inequality persists, it is often because multiple forms of discrimination are at play and impacting on the individual in varying ways.²⁹ For example, a person who is black, transgender and living with a disability will experience society and access differently from other black people because multiple and specific forms of discrimination are impacting the individual in varying ways.
50. **Identity is fluid**, with some characteristics remaining the same over time. Although a person's identity is multifaceted, as they grow, adapt and find enabling environments, aspects of their identity can also shift. For example, a poor black person that identifies as gay at one point might experience economic upward mobility and then identify as middle class at a later stage; they can also explore some aspects of their identity and find clearer words to describe their gender identity, thus moving from describing themselves as gay to describing themselves as transgender.

²⁶ James D. Fearon, (1999), WHAT IS IDENTITY (AS WE NOW USE THE WORD)? Available at <https://web.stanford.edu/group/fearon-research/cgi-bin/wordpress/wp-content/uploads/2013/10/What-is-Identity-as-we-now-use-the-word-.pdf>

²⁷ Jason M. Satterfield, The Iceberg—Visible and Hidden Identity, from the Lecture Series: Mind-body Medicine: The New Science Of Optimal Health available at <https://www.thegreatcoursesdaily.com/visible-and-hidden-identity/#:~:text=Identity%20is%20simply%20defined%20as,professional%20identities%2C%20and%20so%20on> [Accessed on 12 March 2021]

²⁸ Ibid.

²⁹ <https://www.unwomen.org/en/news/stories/2020/6/explainer-intersectional-feminism-what-it-means-and-why-it-matters>

51. For the purposes of this submission, the relevant identity characteristics that we are focusing on are gender, gender identity, gender expression and sex characteristics. Many human rights instruments have explained in detail how universal human rights including the rights to equality, dignity, bodily autonomy and determination, health and others apply to protect and affirm gender, gender identity, gender expression and sex characteristics
52. As explained above, starting with Argentina in 2012, a clear trend has been emerging of countries adopting gender self-determination/self-identification models in their gender recognition legislation whereby persons self-declare their gender identity in a simple, quick administrative procedure, which is then recorded by the State without any requirements for medical interventions, or medical or psychosocial reports.
53. We highlight Principle 3 of the *Yogyakarta Principles* (2007), which states that “No one shall be forced to undergo medical procedures, including sex reassignment surgery, sterilisation or hormonal therapy, as a requirement for legal recognition of their gender identity. No status, such as marriage or parenthood, may be invoked as such to prevent the legal recognition of a person’s gender identity”.³⁰ We also again highlight Principle 31 of the *Yogyakarta Principles Plus 10* (2017), which states that “Everyone has the right to legal recognition without reference to, or requiring assignment or disclosure of, sex, gender, sexual orientation, gender identity, gender expression or sex characteristics. Everyone has the right to obtain identity documents, including birth certificates, regardless of sexual orientation, gender identity, gender expression or sex characteristics. Everyone has the right to change gendered information in such documents while gendered information is included in them”.³¹
54. Within the context of Act 49 and ensuring that people express and affirm their own identity, Act 49 needs to be repealed and simultaneously replaced to ensure that our legislative framework complies with the Constitution of South Africa and its international human rights obligations and standards by implementing a gender self-determination and self-identification model as outlined in the *Yogyakarta Principles* (2007), Principle 3, and the *Yogyakarta Principles Plus 10* (2017), Principle 31. The repeal of Act 49 must not leave a temporary hiatus during which legal gender

³⁰ *Yogyakarta Principles: Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity*, Principle 3. (2007). Available at: <https://yogyakartaprinciples.org/principle-3/>

³¹ Available at: <https://yogyakartaprinciples.org/principle-31-yp10/>

recognition ceases to be accessible. Its repeal must go hand in hand with the immediate implementation of a new legal, policy and administrative framework that enables access to recognition of every person's gender identity.

Role of DHA in capturing identity:

55. For the purposes of management of identity by the Department of Home Affairs, gender identity is what the Department should be concerned with, NOT sexual orientation. This is because identity management in South Africa does not record a person's sexual orientation – put simply, the DHA does not record that a person is heterosexual/straight, gay, lesbian, bisexual and so forth in the population register. The Department does have the obligation to realize the rights in the Constitution in respect of dignity and equality as it intersects with the individual's right to an identity.
56. It is further critical for there to be an understanding that the state (the Department) does not determine a person's identity. The Department's obligation is to ensure that the identity of the person is recognised through recording a person's identity on the National Population Register and uses this unique information to enable a person to identify themselves and for the state to identify them at different times and for different purposes.
57. Referring to the Department as determining a person's identity (as is currently implied in the Policy) will unintentionally hamper the ability of people to self-determine their identity which is linked to the right to equality, bodily autonomy and dignity. It would also amount to a gross violation of an individual's human right to make that determination for themselves.

Recommendation:

58. **We urge the department to promote a self-determination and self-identification model of identity and legal gender recognition as an affirmation and realisation of constitutional rights.**
59. **We urge the Department in this section to clearly articulate that their role is simply to record the identity of a person in a unique manner and not to determine a person's identity. Suggesting otherwise undermines the right to bodily autonomy and self-determination.**

Chapter 2: Problem Analysis and Rationale

60. We refer to the section above that detailed the lived experiences of legal gender recognition in South Africa. This submission should be read as if that section has been inserted here.

Chapter 7, Principle 1: Policy Analysis and Options

61. We do not purport to address all issues in the principles informing the policy. We have only identified those relevant to the issues of gender identity, gender expression and sex characteristics.

62. We welcome the need to provide services that cater to ALL persons in their diversity in South Africa as this is consistent with equality and dignity as entrenched in both the Constitution of South Africa.

Section 7.1.1

Registration of Birth of Intersex Children

63. It is indeed correct that the Identification Act and the Births and Deaths Registration Act do not at all cater for the registration of intersex babies. In fact, the insistence by these two pieces of legislation to operate and regulate identity within a heteronormative binary has contributed to genital mutilation of intersex children.

64. Intersex babies in South Africa are often subjected to non-consensual, medically unnecessary and physically and psychologically harmful sex assignment surgeries and treatments during infancy or childhood.

65. These gross violations of human rights which violate constitutional rights include infanticide and mutilations. In medical settings, it includes sterilising procedures and arbitrary imposition of hormones, 'feminising' genital surgeries and 'masculinising' genital surgeries. Other human rights violations include repeated forced genital exams and photography. These practices are taught and perpetrated with impunity at South African academic hospitals funded by the South African state. So-called 'normalising' feminising or 'normalising' masculinising treatments aim to make all human

bodies conform to stereotypical binary sex standards for femaleness and maleness that are based on highly problematic and discriminatory notions of normality.³²

66. In its *Concluding Observations on the Second Periodic Report of South Africa*³³ (September 2016), the United Nations Committee on the Rights of the Child (CRC) expressed its concern about “*the high prevalence of harmful practices in the State party, including intersex genital mutilation*”. Accordingly, the CRC urged the government of South Africa to:

- 66.1 *Ensure that its “legislation prohibits all forms of harmful practices used on children”,*
- 66.2 *“Develop and adopt a national action plan to effectively eliminate such practices”,*
- 66.3 *“Ensure meaningful participation of all stakeholders, including children affected or at risk of harmful practices and their communities in developing, adopting, implementing and monitoring of relevant laws and policies”,*
- 66.4 *“Guarantee bodily integrity, autonomy and self-determination of all children, including intersex children, by avoiding unnecessary medical or surgical treatment during infancy or childhood”,*
- 66.5 *“Build capacity of all professional groups working for and with children to prevent, identify and respond to incidents of harmful practices and to eliminate customary practices and rituals which are harmful to children”, and “Ensure sanctions on perpetrators of harmful practices, [...] and provide effective remedies to the victims of harmful practices”.*

67. We hope that Department of Home Affairs will take the current process of developing identity management policy in South Africa as an opportunity to clearly articulate that intersex genital mutilation has no place in South Africa and take the opportunity to implement the recommendations by the Committee on the Rights of Children in realising rights of intersex children and persons generally.

³² Carpenter, M. & Cabral, M. (Eds.). 2015. *Intersex Issues in the International Classification of Diseases – a Revision*. <https://globaltransaction.files.wordpress.com/2015/10/intersex-issues-in-the-icd.pdf>

³³ United Nations Committee on the Rights of the Child (CRC). 2016. *Concluding Observations on the Second Periodic Report of South Africa*. https://tbinternet.ohchr.org/Treaties/CRC/Shared%20Documents/ZAF/CRC_C_ZAF_CO_2_25463_E.pdf

Recommendations:

68. In ensuring that the important need to capture identity details and maintain the population register does not create an environment where intersex babies are genitally mutilated, we suggest that the Policy explain and affirm that:

- 68.1 **All children have the right to have their bodily autonomy and bodily integrity protected with respect to their sex characteristics. Denying any child their bodily autonomy and integrity is a violation of their right to equality and non-discrimination.**
- 68.2 **Every child has the right to be identified as being of one gender in their proof of birth as long as specifying gender is a requirement for birth registration.**
- 68.3 **In case of doubt about the legal gender to assign to the child, the best expectations based on previous intersex experiences of sex assignment and parental opinion will be considered.**
- 68.4 **Under no circumstances will the recording of a child's gender be dependent on the realisation of a medical or surgical procedure to alter the sex characteristics of the child.**
- 68.5 **If through clinical studies or any other source, supervising data arose after registration of the birth of a child, then procedures of Section 7 of the Births and Deaths Registration Act must be made available to enable such a child or their parents to apply to modify the original gender assignment in the birth certificate.**
- 68.6 **To protect the rights of the child, the proof of birth and subsequently the birth certificate, will only record the assigned gender and no specification whatsoever about a person's sex characteristics.**

Inference to the classification of all transgender, nonbinary and intersex persons as a 'Third Gender' category

69. The draft policy intends to create a legal framework where the options available at registration of birth for gender are more than just male and female. This is an important departure from the binary

options available currently, which exclude and invisibilise nonbinary persons whose gender identities go beyond the two binary categories.

70. The submitting organisations have all either provided advice, support or legal representation to individuals who have suffered prejudice because of the enforced binary and/or the pathologising, medicalising requirements of Act 49. These relate to individuals being excluded from attending schools and finding employment, not being able to access medication or health services, and in some instances being compelled to divorce their spouses for them to give effect to the realisation of their identity recognition. Our organisations have also experienced the emotional and psychological harm that accompanies not being able to self- identify and the stigma of doing so within a transphobic, cisnormative, intersexphobic, and binary society.
71. We therefore welcome this departure from the binary options as we think it is a step closer to the ideals of equality and dignity that our constitution encapsulates.
72. We are however concerned by several factors in this regard:

- a. Creation of a third gender**

73. In this section of the draft policy (and similarly, in Section 7.3), the creation of this option has been framed as a 'third gender' category, rather than a third open and inclusive option for registering gender in South Africa.
 74. The Department makes the erroneous assumption that all transgender, nonbinary and intersex persons would want to be accommodated as a kind of 'third gender'. This is completely inaccurate. Many transgender and intersex persons identify as either female or male and would want their gender identities officially recognised as such. But it needs to take place through a quick and easily accessible administrative procedure of gender self-declaration without other discriminatory barriers and external requirements, such as medical or psychosocial interventions or reports.
 75. Furthermore, although many nonbinary persons would prefer a third option, not all may feel safe to do so.
 76. Presenting a new gender marker option as a 'third gender' and allocating it to all transgender, nonbinary and intersex persons, would create an easily identifiable group of persons and put them at extreme risk of discrimination, stigmatisation and violence.

b. Conflation of gender identity and expression

77. The draft policy specifically states that “The new legislation and population register must make a provision that enables the establishment of a category that is neither male nor female. That is, a sex category that caters for biological males with feminine gender identity or expression or biological females with masculine gender identity or expression in the identity system”.
78. Unfortunately, this framing in the policy conflates gender identity and gender expression as outlined in the section on the language and glossary above. It feeds harmful stereotypical ideas on how people present themselves or give expression to themselves. This conflation therefore compounds prejudice by introducing stereotypes into our policy and legislative framework.
79. A consequence of the language and framing will lead to cisgender women who are perceived as more ‘masculine’ in their physical appearance to be classified as transgender, and similarly cisgender men who are perceived as more ‘feminine’.
80. It must be reiterated that it is not gender expression that should be captured in the official management of identity, but rather gender identity.

c. Suggests identity to be what is captured at birth

81. The phrasing is also offensive in suggesting that a person’s biological sex characteristics or sex/gender assigned at birth are the most salient fact about their identity regardless of a person’s lived and self-identified gender.
82. This is one of the historical ways in which people have misgendered, dismissed, harmed and violated transgender persons.
83. It implies that a rectification that is required later so as to correct the error made in the birth classification, is not a rectification that a transgender person should be entitled to, but somehow a choice that the Department is allowing them to make through some form of state generosity.

Recommendations

84. **Introduce a third open and inclusive option (‘X’) for registering gender that means ‘not stated/unspecified’, and that is available to any person regardless of their gender identity or sex characteristics (including cisgender persons). This will help to avoid creating a category that is othering and stigmatising. It will also ensure that persons who have fluid and changing gender identities, or who need to change their gender expression in different contexts for reasons of**

safety, will be able to do so within an open and inclusive category that would not put them at risk.

85. Clearly articulate that where gender continues to be captured, it aims to capture a person's gender identity, not their biological sex.

86. Remove offensive and problematic language as explained above

87. Refer to the *Yogyakarta Principles*, Principle 3, and *Yogyakarta Principles Plus 10*, Principle 31, as the legal gender recognition principles that inform the OIDM Policy in line with the Constitution.

Section 7.2: Principle 2: Removal of barriers

Cost Barriers

88. Currently, to access alteration of forenames and/or gender markers as captured in the National Population Register at birth, and obtaining all the accompanying documents, there are several costs that must be incurred.

89. Currently, the following are costs that would be incurred by a person who wishes to amend their personal details in the National Population Register and on their birth certificate, identification document and passport:

- 89.1. Money to pay for 2 ID photos.
- 89.2. R70 for an application in terms of Act 49.
- 89.3. R140 for forename change.
- 89.4. R140 for your ID to be re-issued.
- 89.5. R70 for confirmation of change of details forenames letter.
- 89.6. R70 for confirmation of gender marker letter.

Passport costs are as follows:

- 89.7. Passport pictures costs, and
- 89.8. R400 for to apply for a passport with the amended details if you have your old passport, R800 if you do not.
- 89.9. Travel costs to and from DHA offices for the multiple trips that will be made to make all these applications as they are not all processed in one application, and because persons may not be given the right process to follow the first time that they attend to the offices.

90. Many transgender, nonbinary and intersex persons are unable to afford these costs due to severe forms of discrimination, hate crime, exclusion and marginalisation experienced in their communities and society at large, resulting in unemployment, poverty and lack of support systems. Not being able to access identity documents that reflect their gender identity, put them at greater risk, pushes them further out to the margins of society, and perpetuates a vicious cycle.

91. **We therefore welcome the provision by the Policy in 7.2.1 that:**

91.1 **Fees should only be charged for non-mandatory identity documents like passports.**

91.2 **Fees should be charged on a sliding scale based on several replacements.**

91.3 **Certain classes of persons are exempt from paying fees.**

91.4 **An indigent policy for DHA must be developed.**

Cisnormative, pathologising and binary conceptualisation of identity as barrier to legal gender recognition

92. We have already explained how the current cisnormative, pathologising and binary conceptualisation of identity in South African law blocks the access of many transgender, gender diverse, non-binary and intersex persons to identity documents that they desperately need to integrate into society.

93. **Recommendation: We urge the Department to keep this in mind when developing processes on removing barriers for vulnerable classes of persons. We motivate for the exemption of transgender, nonbinary and intersex persons from paying fees.**

Mandatory Medical Treatment as a barrier to legal gender recognition

94. We have also explained how Act 49 currently undermines transgender, non-binary, gender diverse and intersex persons' ability to self-determine and self-identify by making medical and psychosocial treatments, assessments and/or reports mandatory. The requirements of Act 49, as well as the way in which it is being misinterpreted and unlawfully applied, constitute gross human rights violations, including promotion of forced sterilisation and in some instances intersex genital mutilation (IGM).

95. **Recommendation: We urge the Department to take steps to address this by repealing and replacing Act 49 with a Constitutionally sound legal gender recognition framework that protects the rights to gender identity, gender expression and sex characteristics, and that complies with the Yogyakarta Principles and Yogyakarta Principles Plus 10.**

Section 7.3: Principle 3

Duplicate identity numbers in altering gender markers

96. We agree about the need for accurate, up-to-date information in the identification database.
97. We emphasise again that the DHA does not provide identities to individuals, but simply capture certain characteristics to enable the creation of **a unique identity profile** that is verifiable over the course of a person's life.
98. Act 49 only applies to individuals whose details are captured on the National Population Register. This means that when a person successfully applies to alter the recording of their forenames or gender markers, the DHA must do so on this existing record. Our experience with the implementation of Act 49 indicates that the Department is not altering the existing population register entry. Rather, the Department is creating new entries for successful applicants who are then instructed to bring their parents so that the initial birth entry is done, because generally, no person can report their own birth.
99. This creates duplicate identity profiles that apply to one person, with some aspects like marriage, children, fingerprints, etc. not connected. This has been the experience of people applying to alter their gender markers who are also married in terms of the Marriage Act.
100. **Recommendation: Regardless of which legal gender recognition model is adopted, it must clearly explain that an application to amend details of a person's entry in the National Population Register must only amend the details already captured and not create a new identity entry.**

Structure of ID number

101. We strongly support the option of a random number generated using mathematical algorithms and that does not contain any information about the person. We also support the option of the serial number if it also does not contain any information about the person. This will remove the need for changing your identity number if you change your legal gender. A single genderless ID number would relieve the tremendous administrative burden currently experienced by transgender, nonbinary and intersex persons who change their legal gender and then must change their ID number everywhere.

102. The option of not including personal information in the identification number must be coupled with the removal of 'all gender markers ('F', 'M' and the proposed 'X') from the identification document.
103. As is correctly pointed out in the draft policy, in the current ID number system, gender is captured in the four digits after the birth date, where females are assigned numbers in the range 0000-4999 and males from 5000-9999. The green bar-coded identification document however does not add any other gender markers like 'F' or 'M'. However, the smart card ID includes 'F' or 'M' gender markers.
104. While the green bar-coded ID was also problematic in capturing gender in the identification number, it still offered some level of protection in some contexts through not capturing an explicit 'F' or 'M'. For many people, it was not so easily apparent that a person's gender recorded at birth in the identification number and a person's lived gender identity were not the same. Adding the gender marker through 'F' or 'M' makes it easy for transgender, non-binary and intersex persons who have not been able to change their legal gender to be abused and questioned about this difference in their identification document. This abuse and questioning violate their rights to privacy, dignity and equality, and the right to freedom and security of a person to live free from violence and make decisions about one's body, among others.
105. **Recommendations: Adopt a random identity number system generated using mathematical algorithms and that does not contain any information about the person. Remove all gender markers from identity documents. If continued capturing of gender markers are truly needed for statistical purposes and resource allocation, gender markers should only be captured on the National Population Register and be treated as confidential.**

Section 7.4: Principle 4

106. As was explained in the Gender DynamiX and Legal Resources Centre position paper, the *'hope and expectations carried by transgender and gender diverse asylum seekers to South Africa is to establish a new sense of home in a context considered to be more enabling. However, the constitutional promise of recognition and protection remains unfulfilled as transgender and gender diverse refugees face a web of legal issues directly related to their inability to have their refugee documents accurately reflect their gender.'*³⁴

³⁴ *Keeping the Promise of Dignity and Freedom for All: A Position Paper on Legal Gender Recognition in South Africa* pg 28
Available at: <https://drive.google.com/file/d/1Wx7d9o06qec0ka2aJ32G47JsT1BR2DI0/view>

107. While there is nothing in the application of Act 49 which specifically states that it only applies to South African residents and permanent residents, it bases its application to registration on the National Population Register. The DHA only has birth registers for South African citizens and permanent residents, it follows then that Act 49 only applies to these persons. This means that Act 49 would also not apply to refugees and asylum seekers who Act 49 does not specifically mention. As a result, there is therefore no mechanism available for transgender, gender diverse, non-binary and intersex refugees to access legal gender recognition.

108. **We are of the view that one platform of managing and recording identity profiles would enable asylum seekers and refugees to access legal gender recognition. Accordingly, we welcome any policy and legislative developments that enable refugees and asylum seekers to access legal gender recognition.**

Conclusion

109. We trust that you will find our submission useful. The contributors of this submissions are available to provide further clarity, answer any questions or engage further on this very important submission. For your reference, our contact details are on the cover page of the submission.

*****ENDS*****