



## **EU-SA Policy Dialogue on the Rights of Transgender & Intersex Persons**

---

# **SA-EU DIALOGUE ON POLICY IMPROVEMENTS FOR TRANSGENDER AND INTERSEX PERSONS**

## **CONFERENCE BACKGROUND MATERIAL PACK**

**4-5 NOVEMBER 2021  
SHERATON HOTEL, PRETORIA**



Health  
Home Affairs  
Justice and Constitutional Development





## EU-SA Policy Dialogue on the Rights of Transgender & Intersex Persons

### BEING RESPECTFUL OF GENDER

ASK PEOPLE WHAT THEIR PRONOUNS ARE.  
CALL THEM BY THE NAME THEY GIVE YOU.  
LISTEN WHEN TRANS AND INTERSEX PEOPLE  
TALK ABOUT HOW GENDERED LANGUAGE  
AFFECTS THEM.

Hi Sarah,  
I'd like to introduce you to my new friend.  
Their name is Sihle.



### LEGAL GENDER RECOGNITION

HAVING ONE'S GENDER LEGALLY  
RECOGNISED DOESN'T JUST FEEL  
VALIDATING. IT AFFECTS ACCESS TO  
EMPLOYMENT, HOUSING, BANKING,  
ENCOUNTERS WITH LAW ENFORCEMENT,  
HOW ONE IS TREATED BY COLLEAGUES AND  
MANY OTHER ASPECTS OF LIFE.

DIFFERENT PEOPLE HAVE DIFFERENT NEEDS  
IN REGARDS TO LIVING A LIFE WHERE THEIR  
GENDER FEELS AFFIRMED.

— BE IT HORMONES, SURGERIES OR  
THERAPY, OR NONE OF THE ABOVE —

BUT WE ALL DESERVE TO HAVE OUR  
GENDER IDENTITIES RESPECTED AND UPHOLD  
BY THE LAW.

### GENDER

HOW A PERSON IDENTIFIES.  
WHEN THIS ALLIGNS WITH  
THE SEX THEY ARE ASSIGNED  
AT BIRTH A PERSON IS  
CISGENDER, IF NOT THEY  
ARE TRANSGENDER.

E.G. MAN, WOMAN,  
NON-BINARY, ETC.

### ORIENTATION

A PERSON'S SEXUAL  
AND/OR ROMANTIC  
ATTRACTIVE TO  
OTHERS.

E.G. STRAIGHT, GAY,  
LESBIAN, BISEXUAL, ETC.

### SEX

PHYSICAL CHARACTERISTICS WITH  
WHICH A PERSON IS BORN.  
THESE MAY OR MAY NOT FIT TYPICAL  
DEFINITIONS FOR MALE OR FEMALE  
BODIES.

E.G. GENITALS, GONADS, CHROMOSOMES,  
SEX HORMONES, ETC.

NOTE: NONE OF THESE ATTRIBUTES ARE NECESSARILY RELATED



Health  
Home Affairs  
Justice and Constitutional Development



SA-EU STRATEGIC PARTNERSHIP  
THE DIALOGUE FACILITY

## WELCOME

### THE GOAL:

Welcome to this gathering. The goal of this SA-EU Dialogue is to discuss how to revise South African national policy so that it fully protects the human rights of Transgender and Intersex persons. We aim to draft four policy briefs to address the well-being and safety of **Transgender** and Intersex persons, in the domains of legal gender recognition, health, education and inclusion, and migration. Two policy areas will be especially important: **legal gender recognition (LGR)** and **Intersex genital mutilation (IGM)**.

### THE DAYS:

**DAY ONE** (4 November) will focus on the existing South African legal framework that governs legal gender recognition, and on the need to transform that framework so that each person can determine what their legal gender is. **Self-determination** is the key principle supporting this transformation.

**DAY TWO** (5 November) will address the rights violations that intersex persons' experience, and the need to develop a legal and policy framework that protects the rights of Intersex people and, crucially, prohibits IGM. **Self-determination** and **bodily autonomy** are two key principles that support the proposed ban of IGM.

**DAY THREE** (6 November) will be dedicated to discussing and finalising our recommendations.

### THE MATERIALS:

Dialogue participants receive two packets of informational material. There is the hard copy packet, which you are holding in your hands: first pages this "Welcome" note with following sub-sections on Basic Questions, a list of Key Terms, a Guide to Pronoun Usage, Why should Act 49 be repealed and an overview of Transgender & Intersex issues in the areas of Education, Health and Migration. There is also the most important policy documents and research papers you will consult during this conference. In your conference pack you have also received a drive containing an electronic conference packet. Your electronic packet includes many more resources: amongst others, the text of relevant legislation, an extensive glossary of terms relating to gender, sex and sexuality, and educational materials about Transgender and Intersex experience. To discover what your drive contains, please open the "Table of Contents" document—and then proceed to explore.

## BASIC QUESTIONS

### 1. Why do these issues matter in a country where there are many serious challenges? In other words, why is changing policy regarding legal gender recognition important? And why should IGM be banned?

Identity documents are essential for functioning in our world. When the gender designation on a legal identity document does not reflect the gender which the person lives, that person can be in physical danger when an identity document "outs" them as transgender. In addition, people who do not have gender-accurate ID may be prevented from participating in fundamental activities for which valid ID is required, such as employment, banking, travel and voting. In other words, legal gender recognition is necessary for transgender people to meet their basic needs; moreover, without legal gender recognition, transgender people's safety and security is at risk. Legal gender recognition is not only a matter of well-being, it is a matter of basic rights and survival.

Intersex persons, like all people, have the right to make decisions about their bodies and their identities. Infants and children cannot consent to IGM and other medically unnecessary interventions. Non-consensual and medically unnecessary procedures to "correct" certain people's bodies are in violations of Intersex people's human rights.

### 2. If anyone can change their legal gender, don't we open the door to identity fraud?

No. In jurisdictions where self-determination is legally recognised—in countries such as Argentina, Malta and Sweden—there is no evidence that identity fraud has increased, nor that there have been any other negative consequences.

### 3. If transgender people can decide their own gender, don't we put women's safety at risk? (For example, couldn't men falsely identify themselves as women in order to access women-only spaces.)

There is no evidence that women's safety is compromised when the rights of transgender people are protected. Women (including transgender women) and transgender people (of all gender identities) are frequent targets of gender- and sexuality-based violence. Rather than think about women and transgender people as groups with opposing interests, it is important to recognise—and work to eliminate—the violence that both groups experience. It is also important to remember that transgender people and women are not separate groups: many transgender people identify as women and some women are transgender. Also, many transgender people who identify as men, masculine, or non-binary have lived part of their lives being treated as girls and/or women. Women and transgender people share gender-based oppression and experience gender-based violence.

## KEY TERMS

**Assigned sex:** The sex assigned to a person at birth (currently in South Africa, either “male” or “female”). Typically, a health practitioner looks at the infant's genitalia and assigns the infant a sex. Assigned sex is a legal and medical category. It does not reflect a person's self-identified gender or the complexity of biological sex.

**Bodily autonomy:** The principle that a person can decide what happens to their own body. Bodily autonomy is a human right.

**Consent:** The capacity to say yes or no. To respect consent is to respect a person's right to determine who they are, how they live and what happens to their body.

**Gender identity:** A person's internal sense of their gender (“I feel like I am . . .”).

**Gender expression:** The outward expression of someone's gender identity, such as their style and way of being.

**Gender marker:** The gender designation on forms of legal identification (currently in South Africa, the gender markers are “M” and “F”).

**Intersex:** : An umbrella term for differences in sex traits or reproductive anatomy. Intersex people are born with these differences or develop them in childhood. There are many possible variations in genitalia, hormones, internal anatomy, or chromosomes.

**IGM (Intersex genital mutilation):** Non-consensual, medically unnecessary, genital surgeries intended to “correct” the bodies of Intersex people. Intersex people can also be subject to other non-consensual, medically unnecessary, interventions such as imposed hormone treatments, forced exams and sterilisation.

**Legal gender recognition:** When the law recognises how a person identifies their gender; in other words, forms of legal identification reflect how a person identifies, regardless of their sex assigned at birth.

**Self-determination:** The principle that a person can make their own choices about their life and body. In relation to legal gender recognition, self-determination means that any person has the authority to define their own gender and to have that gender be legally recognised.

**Sexual orientation:** A person's primary sexual or romantic attraction, such as lesbian, gay, bisexual or heterosexual.

**Transgender:** An umbrella term that includes all people who do not identify with the gender/sex assigned to them at birth. Transgender people may or may not choose to medically change their bodies.

**X (designation):** An unspecified or indeterminate gender marker on forms of legal identification. “X” does not indicate a “third gender.” It simply indicates that the person does not identify as male/man or as female/woman.



## PRONOUNS: A QUICK GUIDE TO HOW TO USE THEM

### She/her, He/him, They/them and More . . .

When we talk about pronouns in relation to Transgender and Intersex people, we usually mean third-person pronouns. In English (unlike in many other languages, including many African languages), third-person singular pronouns have been gendered: she/her/hers and he/him/his. In recent years, Transgender people and their allies have worked hard to raise awareness about respectful pronoun usage.

### Here are some principles and facts that should inform how you refer to someone using a pronoun:

- **Do not assume** you know what gender someone identifies as, or what pronoun that person uses.
- **If you do not know**, and it is appropriate to the relationship and situation, you can ask the person.
- **If you make a mistake with someone's pronoun, simply apologise and move on.** It is okay: everyone makes mistakes sometimes. You do not need to explain yourself. Simply acknowledge the mistake, apologise, and continue.
- It is generally a **good practice** to include pronouns in group introductions (name, pronoun, work role . . .).
- That way, everyone has an opportunity to communicate their pronoun and learn the pronouns of others.
- **They/them is a valid singular pronoun** in English. Some Transgender people use they/them pronouns; it is correct and respectful to use "they" and "them" to refer to those people.
- **Not all Transgendered people use they/them pronouns.** Most use she/her and he/him.
- **Some people use other gendered pronouns**, such as ze/hir.
- **Some people are flexible or fluid about their pronoun usage.** For example, someone may use both "he/him" and "they/them."

## WHY SHOULD ACT 49 BE REPEALED?

Act 49 (South Africa's Alteration of Sex Description and Status Act (Act No. 49 of 2003)) is the law that currently determines how a person can change the gender marker on their legal identification. It is important to repeal Act 49 because the Act makes it very difficult for Transgender and Intersex people to change their legal gender, owing to the pathological implications when applying for gender markers, a lack of sensitisation amongst DHA service providers the reiteration of a binary perspective of gender and other discriminatory practices. When a legal gender marker does not reflect a person's self-identified gender, then there are fundamental obstacles to accessing employment, banking, voting, and travel. At worst, a Transgender person's life can be in danger when inaccurate ID "outs" them.

A paper co-published by the Legal Resources Centre and Gender Dynamix, *Keeping the Promise of Dignity and Freedom for All: A Position Paper on Legal Gender Recognition for All*, clearly summarises the problems of Act 49 and the need for new legislation:

Rather than alleviate the burdens of trans and gender diverse people in South Africa, since its inception the Act has suffered from a lack of accompanying directives and regulations, a narrow interpretation and discriminatory implementation. Given this, trans and gender diverse people in South African regularly experience human rights violations on account of their gender identity not being legally recognised in practice by the Department of Home Affairs (DHA). [. . .]

When persons are deprived of legal recognition of their self-identified gender/sex, it results in a multitude of social, economic, political and legal challenges. Models of legal gender recognition that are premised on rigid, outdated biomedical frameworks and binary concepts of sex and gender are discriminatory and exclusionary. They function to deny legal recognition to the majority of trans, gender diverse and intersex persons who require access to gender marker changes on their identity documents. This exposes them to a range of human rights violations on the continuum of violence from societal prejudices to discriminatory practices within institutions, coercive medical treatments, incidents of gender-based violence and heinous hate crimes. Non-recognition and inadequate protections maintain gender-based violence and gender oppression by causing undue exposure to a range of violations. Gender recognition law and policy reform is a fundamental step towards ensuring that every person's gender identity, gender expression and sex characteristics are respected and protected. (Matthyse, Payne, Mudarikwa, Smit, Camminga & Rossouw, 12)

## TRANSGENDER AND INTERSEX ISSUES IN THE AREAS OF EDUCATION, HEALTH AND MIGRATION

Because access to education, to unbiased and informed medical care and to the right to freedom of movement and residence are essential for the well-being of Transgender and Intersex people, government bodies concerned with education, health and migration play especially important roles in ensuring that all Transgender and Intersex people's basic rights are protected.

Transgender and Intersex people are people: people who need to study (and teach), who need to access medical care, and who need to cross regional and national borders. Moreover, the key topics of this Dialogue are closely linked to the domains of education, health and migration: legal gender recognition and bodily autonomy are especially pertinent to education, health and migration—areas in which accurate legal identification is essential and in which Transgender and Intersex people often face the greatest challenges.

In *Keeping the Promise of Dignity and Freedom for All*, the authors cite the 2018 report of an Independent Expert to the United Nations General Assembly. They note that his comments about Transgender people's experience, as a result of a lack of legal gender recognition, and across multiple domains, accurately describes the situation in South Africa:

[. . .] trans and gender-diverse persons whose identity is not adequately recognised suffer denial and violations of the right to health; discrimination, exclusion and bullying in accessing education contexts; discrimination in employment, housing and access to social security; violations of the rights of the child; and arbitrary restrictions on the rights to freedom of expression, peaceful assembly and association, the right to freedom of movement and residence, and the right to leave any country including one's own. (48)

Here we will briefly outline some ways that Transgender and Intersex rights intersect with the domains of education, health and migration.

### Education

When Transgender students' gender identity is not recognised, it is difficult for them to access education. Accurate legal gender identification is an important part of accessing gender recognition.

Safe and gender-affirming schools (and other educational institutions) are essential for Transgender and Intersex students' safety—and for their right to an education.

### Health

Affirming, inclusive and informed healthcare is essential for the well-being of Transgender and Intersex people. Both policymakers and health practitioners have an important role in respecting patients' self-identified gender and their right to bodily autonomy. Both policymakers and health practitioners therefore also play an important role in putting an end to medically unnecessary, non-consensual surgeries on Intersex minors (IGM).

### Migration

When Transgender people cross borders, it is essential that they are able to access legal identification that accurately reflects the gender that they live and express. When Transgender people lack such identification, they are vulnerable to violence. Refugees and asylum seekers are in an especially precarious position.

Although South Africa is unusual in that Transgender and Intersex refugees and asylum seekers are constitutionally protected, in practice Transgender and Intersex refugees and asylum seekers continue to face challenges to accessing their rights. Policymakers have a particular obligation to protect the rights of Transgender and Intersex refugees, asylum seekers and migrants.





# INDEX:

1. LEGAL GENDER RECOGNITION	1
APPENDIX 1 - MINORS ZERO .....	7
APPENDIX 2 - INTERSEX .....	11
2. EDUCATION AND INCLUSION	15
3. MIGRATION	19
4. HEALTH	25
5. TRANS AND INTERSEX 101	31
6. PHASE ONE - SYNTHESISED DOCUMENTATION FROM EU STUDY TOUR, DESK RESEARCH AND POLICY ANALYSIS REPORT	51
7. DESK STUDY FOR TRANSGENDER AND INTERSEX POLICY IN SOUTH AFRICA AND THE EUROPEAN UNION	71





## EU-SA Policy Dialogue on the Rights of Transgender & Intersex Persons

# LEGAL GENDER RECOGNITION

Prepared by Dr B Camminga  
[cammingab@gmail.com](mailto:cammingab@gmail.com)



Health  
Home Affairs  
Justice and Constitutional Development



## LEGAL GENDER RECOGNITION ZERO DRAFT

States can legally recognise a transgender person's gender identity by allowing for the change of name and gender in official documents and registries. This process is called legal gender recognition. The Sex Description and Sex Status Act 49 of 2003 is South Africa's present legislative option governing legal gender recognition. At its inception it was somewhat forward thinking for its time. However over the years transgender and intersex people have struggled with its implementation due to bureaucratic hurdles, a lack of clarity, the lack of accompanying protocols and its increasingly onerous requirements. Lack of identification documents acknowledging a transgender or intersex person's gender identity makes them vulnerable to discrimination and violence, violations of their right to privacy and dignity. As a consequence, transgender and intersex persons are excluded from their full participation in and contribution to society, including in the labour market. For instance, having educational or training certificates that do not reflect their gender is a common cause of unemployment among trans and intersex persons. This exclusion also extends to non-binary identified people, that is those who identify as neither male nor female, find no relief in the present Act. A UK study on non-binary persons shows that they are often affected by low self-esteem and mental health issues due to their lack of social visibility and legal recognition. Thus legal recognition could provide some relief.<sup>1</sup> A study from ILGA Europe also suggests that a further positive aspect of recognising that "female and male gender categories are insufficient in describing the variety of existing gender identities is that it could enhance a process of depathologisation and demedicalisation of intersex bodies."<sup>2</sup>

There is also obviously the option to maintain the current status quo of justifying binary requirements for purely strategic reasons. However, legal scholar Peter Dunne suggests:

Arguments, which absolutely dismiss identities as non-existent or childish, inappropriately censure self-identification and suggest that, unlike the cisgender and binary-trans populations, all non-binary persons are incapable of exercising gendered agency. A core justification for legally acknowledging preferred gender is that, by forcing persons to live and experience an identity with which they have no self-connection, the law imposes a disproportionate burden which is incompatible with basic human rights standards. A key (prior) assumption in that analysis is that individuals genuinely do experience the preferred gender, which they are claiming. The fact that non-male and non-female identities are politically-charged does not mean that they are inevitably inauthentic or disingenuous ... achieving greater trans rights by disowning complicated or less popular trans identities is unlikely to result in substantive equality. If trans communities are only empowered to the extent that they conform to a recognisable, heteronormative ideal, this leaves in place historic, rigid gender norms, which harm all trans-identified persons.<sup>3</sup>

Given the socio-economic marginalisation transgender people experience, charging for gender recognition may pose an accessibility hurdle. In Argentina, gender recognition is free. Given that this is the first time the State would be acknowledging the actual gender identity of an individual, there is an argument to be made that much like receiving one's first ID document, this process should also be free.

## POSSIBLE REQUESTS FOR POLICY CHANGES:

### A NEW ACT THAT OFFERS A QUICK, TRANSPARENT AND ACCESSIBLE MODEL OF LEGAL GENDER RECOGNITION BASED ON GENDER SELF-DETERMINATION AND SELF-DECLARATION.

1. An Act to cover gender expression, gender identity and sex characteristics which as far as possible avoids identitarian language but caters to the particular needs of what we now call transgender and intersex people and communities. The naming of the original Act was a contentious issue. Initially, when it was introduced, referencing its apartheid legacy, it was called the Realignment of Sexual Orientation Bill<sup>4</sup>; the move to the Sex Description and Sex Status Act<sup>5</sup> was a compromise. Several other names were suggested but its naming was an issue compromised on in order to address the substance of the Act, which in its original form was outdated and inflammatory to transgender and intersex people. We have come a long way from that moment and it may also be necessary to rename this Act appropriately.
- Moreover, the Identification Act 68 of 1997 notes in Section 7.1.A states that what appears in a South African Identity document is gender.<sup>6</sup>



2. *Timely:* The present length of time people must wait for their identity documents is far too long and violates transgender and intersex persons right to privacy while the application is processed. The time between application and the granting of new documents should be as short as possible. At the very least, it should take the same amount of time as applying for an ID document does for the general population.<sup>7</sup>
3. *Transparent:* The legal provision needs to prescribe a clear procedure on how to change one's gender marker. The pitfall of the current law is that the procedure is misunderstood by frontline staff or is not understood at all. Any future law or policy needs to have a set of procedural guidelines for officials.<sup>8</sup>
4. *Accessible:* This is mentioned above with regards to cost and below with regards to medicalisation. It is critical that no barriers are in place that might render the legal gender recognition procedure inaccessible. Accessibility needs to be ensured for all transgender people independent of their medical status, race, age or other status (e.g. disability). Also, if a transgender person cannot fulfil certain requirements for age, religious, health or other reasons, they should not be barred from having their gender identity recognised.<sup>9</sup>
5. *Self-determination and self-declaration:* A person's self-declaration of their gender identity for legal gender recognition without the requirement of proof or validation by a medical expert or a mental health diagnosis.
  - The minimum threshold for the applicability of the Sex Description and Sex Status Act 49 in South Africa (medical treatment) is far too high. It forces unnecessary medicalisation on transgender and intersex people who may not desire it. Moreover, the requirement for surgical and/or medical intervention is increasingly considered cruel and inhumane. Self-determination has been successfully implemented in Argentina, Malta, Portugal and Ireland.

Given the shift in various medical protocols, it is also becoming increasingly difficult to provide an explicit diagnosis. The 11th iteration of ICD (International Classification of Diseases list) no longer frames gender identity as a disorder and has shifted towards depathologisation.<sup>10</sup> However, intersex continues to be framed as a disorder and many professionals work from the assumption that "normalising" surgeries are necessary for infants and children. Critics continue to argue that pathologisation and the idea of normalising surgeries continue to work against a positive model of healthcare for intersex people and are a form of mutilation. The World Professional Association for Transgender Health's (WPATH) Standards of Care also emphasise the need for procedures based on self-determination that do not require additional proof and assessments by third parties such as psychiatrists and other medical personnel.<sup>12</sup>

6. *The removal of all requirements for changes of a physical nature, to be facilitated through surgery or other forms of medicalisation, in order to have gender legally recognised as M, F or X.* Other forms of medicalisation include the requirement of a psychiatric or psychological diagnosis. Not only are these requirements overly demanding on transgender-identifying people, they are also, given the socio-economic status of the majority of transgender people in South Africa, exclusionary. Many healthcare workers locally receive little training on transgender and intersex, during their studies, and finding a professional who can provide a diagnosis may also be difficult for applicants. Lastly, the requirements rely on a Western model of gender identity and expression that centralises medicalisation. This model is not necessarily coherent with transgender existence in South Africa not least of all due to economic barriers.
7. *Marriage and divorce:* An extension to all 11 provinces of the current ruling in the Western Cape,<sup>13</sup> with an understanding that changing a sex entry in a birth certificate cannot be hindered by an individual's marriage status. In essence, clarify that there is no divorce requirement before being able to access legal gender recognition.
8. Minors must be able to access legal gender recognition at the age of majority and, prior to this, there should be an alternate mechanism for access made available, such as a letter from a parent or legal guardian. (See Appendix 1: Minors)
  - Young trans and intersex people may encounter rejection and other problems from their environment in everyday life, such as bullying and exclusion. There is growing evidence to suggest that absolutely excluding transgender minors from gender recognition is not in the best interests of the child. Facilitating access for minors would need to be streamlined with the Children's Act. The process would also need to take into account what would happen in instances where consent is withheld by parents or guardians. Maltese and Norwegian legislation highlight that the best interest of the child is paramount in proceedings concerning

children. In Norway, legal gender recognition is available from the age of six, and the parent makes the application on the child's behalf. From 16, as with Malta, Ireland and the Netherlands, a child is able to make their own application. Malta does not have any lower age limit.

9. Introduce a positive obligation for government entities to ensure that their services meet the objectives of this new Act.
10. Outline the costs and appeal procedures. The current law does not make clear how the decision can be appealed and all the costs involved in application.
11. Procedures which are accessible to people residing in South Africa including migrants, asylum seekers and refugees. This is of particular relevance for persons who originate from States that do not provide for legal gender recognition or in which it is impossible or very impractical to seek legal gender recognition.<sup>14</sup>
12. Name change: The end of gazetting of forename changes.

The gazetting of forename changes can often indicate that a person has obtained legal gender recognition. Should a person be seeking employment, such action can inadvertently "out" transgender and intersex people and may not only jeopardise their application, but can also be considered a breach of privacy.

13. Guidelines and protocols for implementation that also serve as a source of information for public and private institutions.<sup>15</sup>
14. Consider including a third gender option (X, indicating unspecified) in identity documents for those who seek it.
15. ID Numbers: Best practice would suggest the implementation of randomised ID numbers

Denmark is similar to South Africa in that identity documents contain a social security or identity number reflecting binary gender in its last digit (even digits stand for female and odd digits for male gender). Adults in Denmark can change the gendered digit of this number from odd to even without fulfilling any requirements, except for a six-month waiting period<sup>16</sup>. The effectiveness of the X marker, available in Denmark, is however reduced due to this.

16. Banning of intersex genital mutilation (see Appendix 2: Intersex)
17. *Prisoners and those in detention*: At present prisoners are incarcerated according to the sex which appears on the birth register

Only the Western Cape has some form of Standard Operating Procedure (SOP) for transgender people who have been arrested. It does not apply to prisoners awaiting trial or those convicted. The SOP calls for transgender people who have been arrested to be treated with dignity and respect and to be placed in "separate detention facilities at the police station where they were arrested". They must also be "recorded in the gender column of the custody register (SAPS 14) with a red pen as 'T'".<sup>19</sup>

The Maltese Act stipulates that a person detained in a gender segregated facility may have their gender recognised "by means of an affidavit confirming such lived gender and the intention of the person to continue living according to such gender throughout the period of detention"<sup>20</sup>. In the Jade September case, it was made clear by the judge that September's ability to express her gender was covered by her right to freedom of expression and the curtailment of it impinged on her right to dignity and equality. It was however noted that separate detention facilities in South Africa would not be possible given the already resource-constrained system and insufficient space.<sup>21</sup> It was made clear that though the applicant's documents still stated male, allowing her to wear make-up, grow her hair, have her pronouns respected and present as a woman were all elements of her identity that allowed her to live with dignity and experience dignified detention. The court offered two options aside from returning her make-up and jewellery: either she be housed in a single cell at a male prison and be allowed to express her gender identity or a transfer to a single cell at a female facility<sup>22</sup>. Gender identity laws in Argentina, Portugal and Norway do not mention those in detention.



**WHILE IT IS THE ULTIMATE GOAL TO LIVE IN A SOUTH AFRICA WHERE GENDER DOES NOT MATTER AND DOES NOT APPEAR ON ANY ENABLING DOCUMENTS, AT THIS PARTICULAR JUNCTURE WE PUT FORWARD THE FOLLOWING POLICY POSITION:**

That South Africa be moved to a system where one of three markers can appear on a person's ID, passport, and the population register: F (female), M (Male), and X (unspecified).

This mechanism must be entirely free of:

1. Pathologisation
2. Medicalisation
3. Financial charges/costs
4. Gate keeping (Department of Home Affairs (DHA) offices in any event have commissioners of oaths that can commission applicants' affidavits to declare that they desire the marker change.)

There are broadly six reasons for this decision:

1. The total removal of all gender markers would lose sight of the important affirming value that those markers have for many people, including those who have fought hard to change those markers under current legislation. On the other hand, the simple addition of the X marker (to the existing F and M) would be inclusive of non-binary persons and intersex persons who do not identify as either M or F. We acknowledge that while it is possible to remove gender markers from the Smart Card system (returning to the system used with the previous Green ID book, which did not indicate a gender marker) the removal of gender from all documents would, at this juncture, pose several hurdles.
2. The removal of all gender markers would present a problem in relation to passports, which will always require a gender marker of some sort. The simple addition of the X marker (to the existing F and M options) resolves this problem for non-binary persons and intersex persons who identify as neither M or F.
3. The addition of the X marker to the registration and identification systems of the Department of Home Affairs is practically easier to implement, due to the way in which the existing systems are designed and function. We are advised by the DHA that, while the current system does not allow for the X marker, its addition would be practicable in the medium-term. The complete removal of gender markers from the system however, would present a significant challenge over a long and unspecified period time.
4. Advocating for the complete removal of all gender markers could lead to significant conflict with other social movements and interest groups, such as the gender-based violence sector, with whom our alliances are already complicated at times. For example, those advocating for the rights of women and girls will undoubtedly resist any changes to the legal recognition of gender system that will affect data collection in relation to a wide range of important issues for women and girls: sexual and other violence, poverty, education, employment, health care, basic services, and countless others.
5. More importantly, given the current South African context and the lived reality of all women and girls in direct relation to their sex, gender identities, or expression, it would be inappropriate for us to advocate for law reform that would have the practical, psychological, or symbolic effect of negating those experiences, identities, and voices.
6. Having a choice between F, M or X markers is in line with international practice.
7. The implementation of randomised ID numbers to ensure access to adequate identification which holds the possibility of capturing all South Africans

<sup>1</sup> Valentine, Vic. 2015. 'Non-Binary People's Experiences in the UK'. Scottish Trans Equality Network.

<sup>2</sup> Holzer, Lena. 2018. 'Non-Binary Gender Registration Models in Europe: Report on Third Gender Marker or No Gender Marker Options'. Brussels: ILGA Europe p. 40.

<sup>3</sup> Dunne, Peter. 2018. 'The Conditions for Obtaining Legal Gender Recognition: A Human Rights Evaluation'. Doctor of Philosophy (Law), Dublin: Trinity College, Dublin p. 327-330.

<sup>4</sup> South African Law Commission. 1995. 'Report on the Investigation into the Legal Consequences of Sexual Realignment and Related Matters'. Project 52. Centurion: South African Law Commission.

<sup>5</sup> Camminga, B. 2019. Transgender Refugees and the Imagined South Africa: Bodies over Borders and Borders over Bodies. New York: Palgrave Macmillan.

<sup>6</sup> South Africa. Identification Act 68 of 1997 at 7.1.A

<sup>7</sup> Kohler, Richard, and Julia Ehr. 2016. 'Legal Gender Recognition in Europe'. Berlin: Transgender Europe (TGEU).

<sup>8</sup> Kohler, Richard, and Julia Ehr. 2016. 'Legal Gender Recognition in Europe'. Berlin: Transgender Europe (TGEU).

<sup>9</sup> Kohler, Richard, and Julia Ehr. 2016. 'Legal Gender Recognition in Europe'. Berlin: Transgender Europe (TGEU).

<sup>10</sup> Commissioner for Human Rights. 2019. 'ICD11 Is a Stride toward Depathologisation of Trans People, but More Is Needed'. May 27. [https://www.coe.int/en/web/commissioner/view/-/asset\\_publisher/ugj3i6qSEkhZ/content/icd11-is-a-stride-toward-depathologisation-of-trans-people-but-more-is-needed](https://www.coe.int/en/web/commissioner/view/-/asset_publisher/ugj3i6qSEkhZ/content/icd11-is-a-stride-toward-depathologisation-of-trans-people-but-more-is-needed).

<sup>11</sup> Commissioner for Human Rights. 2019. 'ICD11 Is a Stride toward Depathologisation of Trans People, but More Is Needed'. May 27. [https://www.coe.int/en/web/commissioner/view/-/asset\\_publisher/ugj3i6qSEkhZ/content/icd11-is-a-stride-toward-depathologisation-of-trans-people-but-more-is-needed](https://www.coe.int/en/web/commissioner/view/-/asset_publisher/ugj3i6qSEkhZ/content/icd11-is-a-stride-toward-depathologisation-of-trans-people-but-more-is-needed).

<sup>12</sup> World Professional Association for Transgender Health. 2017. 'WPATH Identity Recognition Statement'. <https://www.wpath.org/media/cms/Documents/Web%20Transfer/Policies/WPATH%20Identity%20Recognition%20Statement%2011.15.17.pdf>

<sup>13</sup> KOS and Others v Minister of Home Affairs and Others (2298/2017) [2017] ZAWCHC 90; [2017] 4 All SA 468 (WCC); 2017. (6) SA 588 (WCC) (6 September 2017). 2017 The Hon. Mr Justice Binns-Ward. High Court of South Africa Cape Town.

<sup>14</sup> Kohler, Richard, and Julia Ehr. 2016. 'Legal Gender Recognition in Europe'. Berlin: Transgender Europe (TGEU), p. 18.

<sup>15</sup> Holzer, Lena. 2018. 'Non-Binary Gender Registration Models in Europe: Report on Third Gender Marker or No Gender Marker Options'. Brussels: ILGA Europe, p. 19.

<sup>16</sup> Holzer, Lena. 2018. 'Non-Binary Gender Registration Models in Europe: Report on Third Gender Marker or No Gender Marker Options'. Brussels: ILGA Europe, p. 20.

<sup>17</sup> South African Police Service: Western Cape. 2013. 'Standard Operational Procedure: Detention of Transgender Prisoners'. Western Cape: SAPS.

<sup>18</sup> South African Police Service: Western Cape. 2013. 'Standard Operational Procedure: Detention of Transgender Prisoners'. Western Cape: SAPS at 9.2a

<sup>19</sup> South African Police Service: Western Cape. 2013. 'Standard Operational Procedure: Detention of Transgender Prisoners'. Western Cape: SAPS at 9.2c

<sup>20</sup> Malta (2015) Chapter 540 Gender Identity, Gender Expression and Sex Characteristics Act at 9A

<sup>21</sup> Jade September v Sunramoney and Others. 2019. Equality Court of South Africa, Western Cape Division at 132.

<sup>22</sup> Jade September v Sunramoney and Others. 2019. Equality Court of South Africa, Western Cape Division at 164.



## **EU-SA Policy Dialogue on the Rights of Transgender & Intersex Persons**

# **LEGAL GENDER RECOGNITION APPENDIX 1: MINORS ZERO**

Prepared by Dr B Camminga  
[cammingab@gmail.com](mailto:cammingab@gmail.com)



Health  
Home Affairs  
Justice and Constitutional Development



## LEGAL GENDER RECOGNITION (LGR) AND ACCESS TO AFFIRMING HEALTHCARE

In Europe, only six countries (Ireland, the Netherlands, Norway, Sweden, Malta and Belgium) specifically allow minors to legally transition in that they can adjust their legal gender marker on official government documentation. However, the age of majority varies across jurisdictions. In Belgium and Sweden, if applicants below the age of majority but older than 12 years have the support of their guardian, they can access LGR. In Norway, the same is true but from the age of seven. Malta is the only country in the group that does not enforce a minimum age, though parental consent is still required until the age of 16. Law and legal recognition as it pertains to transgender minors and, to a lesser degree, intersex minors is an evolving area of law. It must be noted that the age of majority can function as something that limits or prohibits recognition as do parental consent requirements. In Denmark, while adults have self-determination rights, minors are excluded.

The majority of countries in South America that have enacted gender identity protections exclude people under 18 years. However, Argentina offers acknowledgement for transgender and intersex youth. South African rules in this regard are at best unclear. In the majority of countries worldwide, transgender and gender-nonconforming children cannot have their gender identity acknowledged prior to achieving the age of majority. They are either actively excluded through the age of majority requirements, rules regarding guardian consent or the lack of protocols which would acknowledge them. There are of course fears and concerns regarding acknowledging transgender minors with regards to stable identities and premature applications potentially adversely affecting the applicants' mental health and causing regret. Arguments against acknowledging minors include a belief that in an environment where homophobic bullying is commonplace, lesbian, gay and bisexual (LGB) children might obtain gender recognition in order to reframe same sex attractions. In essence, that LGB youth might seek LGR as a means to access heterosexual privilege. This ignores the increasing evidence globally which suggests that transgender minors experience far greater discrimination in school settings given their visibility, and also works to invalidate the identities of transgender youth.<sup>1</sup>

There is also the concomitant concern regarding the medicalisation of young bodies. In countries that allow recognition before the age of majority, consent from a guardian or parent is required. An increasing number of researchers, healthcare practitioners and states support affirmative interventions. Many scholars argue that validating the lived experiences of minors are some of the most effective methods of pursuing the best interests of the child.<sup>2</sup> According to the Paediatric Endocrine Society Special Interest Group on Transgender Health, "the best predictor of positive psychological outcomes is parental support".<sup>3</sup> They also point to a recent study suggesting that transgender children who are able to undergo social transition have rates of depression comparable with their cisgender peers.<sup>4</sup> This approach is endorsed by the World Professional Association for Transgender Health (WPATH), although they although recommend strictly controlled policies for minors.<sup>5</sup>

Any policy will have to consider the role of parents and legal guardians but bear in mind, when gender recognition is vested exclusively in the consent of parents, it ignores the "well-documented precariousness in which many trans youth live". Transgender youth globally are often forced into homelessness due to familial rejection.<sup>6</sup> Studies in South Africa on this are limited.<sup>7</sup> These children frequently have little contact with parents and struggle in state care. Parental consent could, in these instances, present a hurdle rather than a means to facilitation.<sup>8</sup> Even when transgender youth find themselves in the care of the state, officials may not always act in their best interests of because of preconceived prejudices or simply due to the nature of having to work in an overburdened system. Any guidelines would also have to acknowledge and consider the needs of those being cared for by the state. Indeed, any model for LGR needs to respond to the lived realities of transgender youth in South Africa. Allowing for LGR on the basis of self-determination would allow for legal and social gender possibilities for transgender youth. Should the need to re-amend gender markers occur later in life, this would not be a traumatic process nor have long-lasting effects in the same way that the present system, which requires medicalisation, has.

South African law understands the concept of "evolving capacity" in children<sup>9</sup>. Thus the age of consent for medical procedures begins at 12 years of age for children. Section 129(2) of the Children's Act provides:

A child may consent to his or her own medical treatment or the medical treatment of his or her child if-

- a. The child is over the age of 12 years; and
- b. The child is of sufficient maturity and has the mental capacity to understand the benefits, risks, social and other implications of the treatment.<sup>10</sup>



## SOCIAL TRANSITION

Another option would be to provide protection for social transition. This model would allow transgender minors to explore their gender in an affirming environment supported by legal protections without amending their gender markers. Minors would be respected with regards to name, pronouns and use of public facilities such as bathrooms. As legal scholar Peter Dunne explains:

Institutions, such as schools and public recreational services, would be required to make reasonable accommodations to affirm a child's social transition. Any institution, which wished to be exempt, would have to prove that: (a) acknowledging the child's social transition is superseded by another legitimate concern; and (b) that the child's preferred gender has been respected to the greatest extent possible. Social discrimination – either the fear that the child would be subject to abuse or that the child's identity would harm others – cannot justify an exemption to the general rule.<sup>11</sup>

There may however be instances where social transition is not the best route for a minor, especially where they express an "intense, persistent and consistent" transgender identity.<sup>12</sup> In these instances, there may be little reason to delay or withhold legal recognition. Dunne continues:

This would particularly be the case where social transitions cannot cover all public or private interactions and where children, who only live in their preferred gender, are continuously required to 'out' their trans identity. In such exceptional situations, and although the law operates a presumption for social transitions, there may be policy reasons to legally acknowledge the child.<sup>13</sup>

## EDUCATION

Transgender and intersex children are certainly visible in South Africa, with increasing cases of schools having to address their policies with regards to uniforms, enrolment and admittance, bathroom access,<sup>15</sup> name and pronoun use<sup>16</sup> and bullying.<sup>17</sup> Ideally, not only would transgender and intersex children be included in any future policy and legislation on LGR, but there is also a need to consider education policies in light of the challenges they may face, and their access to gender sensitive and affirming healthcare. A policy directed at schools with clear instructions on some of the issues schools are already facing may be necessary. In light of the ruling at the Limpopo Equality Court in the Nare Mphela case, which outlined the abuse and dehumanising treatment occurring in the education environment for transgender and intersex youth, clearer guidelines for schools and educators may be a necessary first step.<sup>18</sup>

Schools across South Africa are already dealing with these issues on a case-by-case basis. The Western Cape Education Department (WCED) has urged schools in the province to embrace inclusivity and diversity by allowing transgender and intersex students to wear the uniforms they feel most comfortable in. They have also requested a revision of administrative codes of conduct to protect Lesbian, Gay, Bisexual, Transgender, Queer or Questioning, and Intersex (LGBTQI) learners from discrimination and bullying.<sup>19</sup> The 2015 booklet, *Challenging Homophobic Bullying in Schools*, produced by WCED is a good starting point in terms of policy provision and guidance.<sup>20</sup> Those working with transgender youth support this suggestion. According to Ron Addinall, a sexologist and social psychologist based at the University of Cape Town, "Things would be much better if we had a national policy that clearly stipulates how transgender learners should be supported and cared for"<sup>21</sup>. Amanda Rinquest, Attorney at the Equal Education Law Centre (EELC), notes that in many cases, educators and principals are simply not aware of the rights of learners "or what the law says generally about discrimination at schools."<sup>22</sup>

- <sup>1</sup> Taylor, Catherine, and Tracey Peter. 2011. 'Every Class in Every School': Winnipeg, Manitoba: Egale; OUT LGBT Well-being. 2016. 'Hate Crimes against Lesbian, Gay, Bisexual and Transgender (LGBT) People in South Africa'. Pretoria: OUT LGBT Well-being.
- <sup>2</sup> Vries, Annelou L. C. de, Jenifer K. McGuire, Thomas D. Steensma, Eva C. F. Wagenaar, Theo A. H. Doreleijers, and Peggy T. Cohen-Kettenis. 2014. 'Young Adult Psychological Outcome after Puberty Suppression and Gender Reassignment'. *Pediatrics* 134 (4): 696–704. 3 Pediatric Endocrine Society. 2016. 'Statement on Gender Affirmative Approach to Care from the Pediatric Endocrine Society Special Interest Group on Transgender Health'. Pediatric Endocrine Society.  
[https://www.pedsendo.org/members/members\\_only/PDF/TG\\_SIG\\_Position%20Statement\\_10\\_20\\_16.pdf](https://www.pedsendo.org/members/members_only/PDF/TG_SIG_Position%20Statement_10_20_16.pdf), p. 2
- <sup>4</sup> Bauer, Greta R., and Jack Pyne. 2012. 'Impacts of Strong Parental Support for Trans Youth: A Report Prepared for Children's Aid Society of Toronto and Delisle Youth Services'. *Trans Pulse*.  
[https://www.researchgate.net/publication/284988129\\_Impacts\\_of\\_strong\\_parental\\_support\\_for\\_trans\\_youth\\_A\\_report\\_prepared\\_for\\_Children's\\_Aid\\_Society\\_of\\_Toronto\\_and\\_Delisle\\_Youth\\_Services](https://www.researchgate.net/publication/284988129_Impacts_of_strong_parental_support_for_trans_youth_A_report_prepared_for_Children's_Aid_Society_of_Toronto_and_Delisle_Youth_Services).
- <sup>5</sup> World Professional Association for Transgender Health. 2012. 'Standards of Care for the Health of Transsexual, Transgender and Gender-Nonconforming People'. 7. World Professional Association for Transgender Health. [https://www.wpath.org/media/cms/Documents/SOC%20v7/Standards%20of%20Care\\_V7%20Full%20Book\\_English.pdf](https://www.wpath.org/media/cms/Documents/SOC%20v7/Standards%20of%20Care_V7%20Full%20Book_English.pdf).
- <sup>6</sup> Wahlquist, Calla. 2017. 'Transgender and Homeless: The Young People Who Can't Get the Support They Need'. *The Guardian*, April 5, sec. Society. <https://www.theguardian.com/society/2017/apr/06/transgender-and-homeless-the-young-people-who-cant-get-the-support-they-need>.
- <sup>7</sup> Collison, Carl. 2016. 'There's No Place like Home for Queer Youth Kicked out by Their Families'. *The Mail & Guardian*, November 9. <https://mg.co.za/article/2016-11-09-00-theres-no-place-like-home-for-queer-youth-kicked-out-by-their-families/>.
- <sup>8</sup> Collinson, Carl. 2018. 'Homeless Trans Folk out in the Cold'. *The Mail & Guardian*, April 20. <https://mg.co.za/article/2018-04-20-00-homeless-trans-folk-out-in-the-cold/>.
- <sup>9</sup> Strode, Ann, Catherine Slack, and Zaynab Essack. n.d. 'Child Consent in South African Law: Implications for Researchers, Service Providers and Policy-Makers'. *SAMJ: South African Medical Journal* 100 (4): 247–49.
- <sup>10</sup> South Africa, Children's Act 38 of 2005 at 129(2)
- <sup>11</sup> Dunne, Peter. 2018. 'The Conditions for Obtaining Legal Gender Recognition: A Human Rights Evaluation'. Doctor of Philosophy (Law), Dublin: Trinity College, Dublin p. 305
- <sup>12</sup> Singal, Jesse. 2016. 'What's Missing From the Conversation About Transgender Kids'. *The Cut*. July 25. <https://www.thecut.com/2016/07/whats-missing-from-the-conversation-about-transgender-kids.html>.
- <sup>13</sup> Dunne, Peter. 2018. 'The Conditions for Obtaining Legal Gender Recognition: A Human Rights Evaluation'. Doctor of Philosophy (Law), Dublin: Trinity College, Dublin p. 305
- <sup>14</sup> Govendor, Prega. 2020. 'Transgender Teen's Move to All-Girls Government School Makes History'. *TimesLIVE*. Accessed March 3. <https://www.timeslive.co.za/news/south-africa/2019-05-05-transgender-teens-move-to-all-girls-government-school-makes-history/>
- <sup>15</sup> BBC News. 2019. 'The Schools Learning from Transgender Students', January 2, sec. Africa. <https://www.bbc.com/news/world-africa-46213884>.
- <sup>16</sup> BBC News. 2019. 'The Schools Learning from Transgender Students', January 2, sec. Africa. <https://www.bbc.com/news/world-africa-46213884>.
- <sup>17</sup> Department of Basic Education Republic of South Africa. 2016. 'Safer Schools for All: Challenging Homophobic Bullying'. Western Cape: Western Cape Department of Basic Education. <https://www.education.gov.za/Portals/0/Documents/Publications/Homophobic%20Bullying%20in%20Schools.pdf?ver=2016-02-19-133822-337>.
- <sup>18</sup> Mphela v Manamela and others (2016) case no1/2016 Seshego Magistrates Court (Equality Court)
- <sup>19</sup> Daniel, Luke. 2018. 'Transgender Students Allowed to Choose between Uniforms, Says Education Department'. *The South African*. October 9. <https://www.thesouthafrican.com/news/transgender-students-uniforms-western-cape-education/>.
- <sup>20</sup> Department of Basic Education Republic of South Africa. 2016. 'Safer Schools for All: Challenging Homophobic Bullying'. Western Cape: Western Cape Department of Basic Education. <https://www.education.gov.za/Portals/0/Documents/Publications/Homophobic%20Bullying%20in%20Schools.pdf?ver=2016-02-19-133822-337>.
- <sup>21</sup> BBC News. 2019. 'The Schools Learning from Transgender Students', January 2, sec. Africa. <https://www.bbc.com/news/world-africa-46213884>.
- <sup>22</sup> Staff Reporter. 2017. 'Why Are Our Schools Unsafe for LGBTQI+ Children?' *The Mail & Guardian*, March 22. <https://mg.co.za/article/2017-03-22-why-are-our-schools-unsafe-for-lgbtqi-children/>.



## EU-SA Policy Dialogue on the Rights of Transgender & Intersex Persons

# APPENDIX 2: INTERSEX

Prepared by Dr B Camminga  
cammingab@gmail.com



Health  
Home Affairs  
Justice and Constitutional Development



## PRINCIPLE 32

Principle 32 of the Yogyakarta Principles Plus 10, on the Right to Bodily and Mental Integrity, stipulates:

Everyone has the right to bodily and mental integrity, autonomy and self-determination ... No one shall be subjected to invasive or irreversible medical procedures that modify sex characteristics without their free, prior and informed consent, unless necessary to avoid serious, urgent and irreparable harm to the concerned person.<sup>1</sup>

In a 2014 intra-agency statement, the World Health Organisation recommends that, in the absence of medical necessity, treatments that result in sterilisation should be postponed until the “person is sufficiently mature to participate in informed decision-making and consent”. The WHO also cautions against other medically unnecessary surgery on intersex children.<sup>2</sup> The “ePrinciples and Guidelines on the Implementation of Economic, Social and Cultural Rights”, authored by the African Commission on Human and Peoples’ Rights and set out in the African Charter on Human and Peoples’ Rights guidelines, explicitly recognises intersex people as a vulnerable and disadvantaged group who faced, or continue to face, significant impediments to their enjoyment of economic, social and cultural rights.<sup>3</sup> A panel discussion, “Intersex human rights: Challenges and opportunities”, convened in Banjul, the Gambia, on the sidelines of the 61st Ordinary Session of the African Commission on Human and Peoples’ Rights, noted:

Intersex persons in Africa continue to face human rights violations which include non-consensual medically unnecessary genital normalising surgeries and genital mutilation on minors; infanticide and baby abandoning; lack of appropriate legal recognition and administrative processes allowing intersex persons to acquire or amend identity documents; and unfair discrimination in schools, health care facilities, competitive sports, work, access to public services, detention and many other spheres of life.<sup>4</sup>

The Kenyan Intersex Task Force’s 2018 report also suggests that surgery should, whenever possible, be postponed until the child can provide informed consent. They add that “inadequate policy and legislative framework has hampered development of supportive systems for intersex persons in the country”<sup>5</sup>. Zimbabwe’s Constitution, under the Right to Personal Security, underscores the need for consent in medical procedures.<sup>6</sup> Though seemingly this has never been tested with regards to intersex people. In South Africa, the Promotion of Equality and Prevention of Unfair Discrimination Act (2000) includes a definition of intersex (“‘intersex’ means a congenital sexual differentiation which is atypical, to whatever degree”) and the provision that “sex” shall include intersex. The present Alteration of Sex Description and Sex Status Act (2003) provides for the alteration of documents on the basis of “evolution through natural development”, which would seem to reference intersex people but whether this is the case remains unclear. The Support Initiative for People with Congenital Disorders (SIPD), based in Uganda, conducted a baseline survey on intersex persons in East Africa in 2015. The report makes the following recommendations:

1. End Intersex Genital Mutilation;
2. Document other sex- and gender-based violence against intersex persons;
3. Include information regarding intersex people in health and social development education, service access and employment policies to prevent harassment, abuse and discrimination; and
4. Include intersex people in health and human rights initiatives.<sup>9</sup>

In South Africa, the Children’s Act (No. 38 of 2005) states:

A child may consent to his or her own medical treatment or to the medical treatment of his or her child if- (a) the child is over the age of 12 years; and (b) the child is of sufficient maturity and has the mental capacity to understand the benefits, risks, social and other implications of the treatment.<sup>10</sup>

This then seemingly covers the age of consent.



## REQUESTS FOR POLICY CHANGE:

1. The banning of all intersex surgeries. Surgical and hormonal interventions for children in relation to their intersex status should only be carried out in case of medical emergency based on informed consent.
2. Ending the pathologisation of intersex variations in the medical field.
3. The basic and continuing training of doctors, midwives, nurses and other medical staff should include the avoidance of discrimination and insensitivity towards intersex persons.
4. Comprehensive documentation to be retained for a specified period of time and the right to access all documents for intersex persons.
5. Relevant experts and medical practitioners should provide counselling to intersex persons and their parents or legal guardians.
6. The law amended to provide for intersex persons to register as 'female', 'male' or 'X' once they have reached an age whereby they are capable of making the decision for themselves. The alternative would be a delay or postponement in registration or registration as the parents see fit, with the option to change at a later date, as is the case in Malta. To date, no parents have opted for the delay option in Malta.<sup>11</sup>
7. Development of protocols on surgical and hormonal interventions that constitute medical emergencies.<sup>12</sup>
8. Intersex-affirming hospital policy.

<sup>1</sup> International Commission of Jurists (ICJ). 2017. 'The Yogyakarta Principles Plus 10 - Additional Principles and State Obligation on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Expression and Sex Characteristics to Complement the Yogyakarta Principles'. Geneva. [www.refworld.org/docid/5c5d4e2e4.html](http://www.refworld.org/docid/5c5d4e2e4.html), Principle 32.

<sup>2</sup> Office of the High Commissioner for Human Rights, UN Women, Joint United Nations Programme on HIV/AIDS (UNAIDS), UN Development Program (UNDP), United Nations Population Fund (UNFPA), and World Health Organisation (WHO). 2014. 'Eliminating Forced, Coercive and Otherwise Involuntary Sterilization'. Geneva: World Health Organisation, p. 14.

<sup>3</sup> Intersex Task Force. 2018. 'The Report on the Taskforce on Policy, Legal, Institutional and Administrative Reforms Regarding Intersex Persons in Kenya'. Nairobi: USAID, Ministry of Foreign Affairs Denmark, International Development Law Organisations, The Open Society Initiative for Eastern Africa, p. 32.

<sup>4</sup> Intersex Task Force. 2018. 'The Report on the Taskforce on Policy, Legal, Institutional and Administrative Reforms Regarding Intersex Persons in Kenya'. Nairobi: USAID, Ministry of Foreign Affairs Denmark, International Development Law Organisations, The Open Society Initiative for Eastern Africa, p. 32.

<sup>5</sup> Intersex Task Force. 2018. 'The Report on the Taskforce on Policy, Legal, Institutional and Administrative Reforms Regarding Intersex Persons in Kenya'. Nairobi: USAID, Ministry of Foreign Affairs Denmark, International Development Law Organisations, The Open Society Initiative for Eastern Africa, p. 3.

<sup>6</sup> Zimbabwe. Constitution of Zimbabwe Amendment Act 20, 2013 at 52c.

<sup>7</sup> South Africa. Promotion of Equality and Prevention of Unfair Discrimination Act 4. 2000 at 1.

<sup>8</sup> South Africa. Alteration of Sex Description and Sex Status Act 49. 2003 at 2.1.

<sup>9</sup> The Support Initiative for people with Congenital Disorders (SIPD). 2017. 'Baseline Survey On Intersex Realities In East Africa'. SIPD Uganda. October 2. <http://sipduganda.org/baseline-survey-on-intersex-realities-in-east-africa/>.

<sup>10</sup> South Africa. The Children's Act 38. 2005 at 129.

<sup>11</sup> Holzer, Lena. 2018. 'Non-Binary Gender Registration Models in Europe: Report on Third Gender Marker or No Gender Marker Options'. Brussels: ILGA Europe p. 62

<sup>12</sup> Intersex Task Force. 2018. 'The Report on the Taskforce on Policy, Legal, Institutional and Administrative Reforms Regarding Intersex Persons in Kenya'. Nairobi: USAID, Ministry of Foreign Affairs Denmark, International Development Law Organisations, The Open Society Initiative for Eastern Africa, p. 44.





## EU-SA Policy Dialogue on the Rights of Transgender & Intersex Persons

# EDUCATION AND INCLUSION

Prepared by Dr B Camminga  
[cammingab@gmail.com](mailto:cammingab@gmail.com)



Health  
Home Affairs  
Justice and Constitutional Development



## EDUCATION AND INCLUSION

In South Africa, there has been some progress with regards to transgender youth in the school system, particularly in the Western Cape. The Western Cape Education Department (WCED) has publicly stated that students should be allowed to wear the uniform in which they feel comfortable, which most resonates with their identity. Some schools have taken this up, allowing students to wear the uniform appropriate to their gender identity and expression. However, the ways in which children are expected to navigate the school system is often still within binary conceptions of gender identity. It cannot be overlooked that many of the current shifts in South Africa in terms of schools accommodating transgender and gender diverse children have been in private schools with greater access to resources.

There have been incidents in South Africa that suggest increasing visibility in schools. In 2010, a transgender student at a school in East London fought to be able to wear the boys' school uniform—trousers.<sup>1</sup> The student was eventually forced to move institutions because the school, denying the child's gender identity supported by letters from both parents and a mental health practitioner, felt that allowing "a girl to wear trousers would open up the school to ridicule".<sup>2</sup> Perhaps the most widely publicised case in South Africa is that of Nare Mphela, a Limpopo Department of Education to court. Nare could not complete her schooling due to the harassment she experienced and a lack of support from the school.<sup>3</sup> These ordeals affect the mental health of youth and often lead to them having to move schools. Bullying and the resultant dropout rates affect transgender and gender-nonconforming youth for the rest of their lives.

The South African Democratic Teachers Union (SADTU) in the Western Cape ran a series of lesbian, gay, bisexual, transgender and intersex (LGBTI) sensitisation workshops at forty schools in 2016, which helped shift attitudes and understanding.<sup>4</sup> It is often the case that though schools and educational institutions discuss sexual orientation, gender identity and expression and sex characteristics are less well explained or focused on. These obstacles extend to higher education as well. A 2016 report by Josephine Cornell, Kopano Ratele and Shose Kessi looked into the obstacles queer people face at higher learning institutions. It says: "Globally, within dominant educational discourses, ideal students are still typically represented as white, middle-class, male, cisgender and heterosexual. Furthermore, students who occupy these categories tend to hold symbolic power within these institutions."<sup>5</sup> Transgender students are frequently ridiculed, insulted and run the risk of being physically attacked when they use public bathrooms.<sup>6</sup> Schools and higher education institutions do not currently have policies regarding names, pronouns, bathrooms and gender markers. Due to fear, transgender and gender non-conforming students report that they, refrain from "urinating, defecating and changing menstrual items such as tampons and sanitary towels to avoid mocking and discrimination."<sup>7</sup>

The report also identified a need for "consciousness-raising and education within the curriculum". With proper support from school governing bodies, teachers and parents, it noted, it is possible to provide a more conducive school environment for young transgender learners.<sup>8</sup> Indeed, the 2015 National School Safety Framework developed in conjunction with the Department of Basic Education makes no mention of gender identity, gender expression or sex characteristics or how to support learners who may be gender non-conforming.<sup>9</sup> The manual does however mention "Sex/gender, sexual orientation (straight, gay, bisexual)" once. There is no further guidance on gender identity or expression.<sup>10</sup> The trainer's manual, which accompanies the National School Safety Framework and was created mainly for teachers, makes no mention at all of sexual orientation, gender identity/ expression or sex characteristics.<sup>11</sup> The Department of Basic Education does have a Bill of Responsibilities for the Youth of South Africa included in its workbook for addressing bullying in schools, which outlines the roles and responsibilities of youth in South Africa:

Responsibility in ensuring the right to equality: To treat every person equally and fairly. To not discriminate against others on the basis of their race, gender, religion, national-, ethnic- or social origin, disability, culture, language, status or appearance  
 Responsibility in ensuring the right to freedom of expression: To respect other people's right to freedom of expression. To acknowledge too that there are limits to this freedom, and to never express views that advocate hatred, or are based on prejudices with regard to race, ethnicity, gender or religion.<sup>12</sup>

The workbook, as with the trainer's manual, does not mention LGBTI youth or related issues. It does make reference to gender as different from sex, but there is no discussion with regards to sex characteristics and gender identity



and expression and how that might be respected.<sup>13</sup> In 2011, representatives from the South African government, education and non-governmental organisations, including the Gay and Lesbian Memory in Action Archives (GALA), engaged with the United Nations Educational, Scientific and Cultural Organization (UNESCO). The outcome of this process was *Out in the Open: Education Sector Responses to Violence Based on Sexual Orientation and Gender Identity/Expression*, which noted that transgender and gender non-conforming students in the Southern African region face higher rates of violence and discrimination than other students.<sup>14</sup> The manual suggests that in order for education institutions to protect the safety and wellbeing of students who are intersex, transgender or do not conform to gender norms, anti-violence and anti-discrimination policies are required that specifically mention gender identity/expression. Moreover, education institutions are advised to:

- protect transgender students' right to privacy and confidentiality in relation to their gender status;
- respect students' choice to identify as their desired gender by using their selected pronouns and names, which may or may not correspond to the gender they were assigned at birth, and ensure they are used in official documents, such as certificates, diplomas and student cards;
- respect students' clothing and appearance choices;
- train teachers and support staff about gender identity/expression issues;
- state within policies that diverse gender identities/expressions are welcome.<sup>15</sup>

## REQUESTS FOR POLICY CHANGE:

1. Revision of the current "Challenging Homophobic Bullying in Schools"<sup>16</sup> workbook to include specific forms of gender-based bullying or a transgender and intersex specific bullying booklet.
2. A call to the Teachers Unions and National Student Governing Body Unions to undertake gender sensitivity training,
3. Development of specific policies with strict implementation steps to address:
  - Gender neutral uniform: The ability to wear uniforms which best affirm a transgender or gender non-conforming student's gender or a move towards gender neutral uniforms for all students as best practice.
  - Confidentiality policy: To be adhered to by educators when dealing with information around sex assigned at birth and sex characteristics, so children are not outed to other students and fellow employees.
  - Zero tolerance for bullying: Addressing bullying and violence with regard to change room and toilet use.
4. A policy regarding names that allows those in the education system at any level to use the names with which they identify.
5. Facilities policy: Either schools provide single stall restrooms or allow children to use the restroom they feel most comfortable in without fear of retribution. The same for halls, dormitories and showers.
6. Accurate, comprehensive and affirming material and information on sexual, biological, physical and psychological diversity
  - Principle 16 of the Yogyakarta Principles plus 10 Principles on The Right to Education provides that states shall: "Ensure inclusion of comprehensive, affirmative and accurate material on sexual, biological, physical and psychological diversity".<sup>17</sup>
7. Institutions of higher learning to develop name and pronoun policies.
8. Amendment to the National School Safety Framework making explicit mention of gender identity and sex characteristics.
9. Inclusion of gender identity and sexual characteristics in the Comprehensive Sexuality Education Framework.
10. The Department of Basic and Higher Education formally undertakes monitoring and evaluation of the implementation of these policies.
11. Easing of amendment rules for Matric certificates and qualifications, allowing individuals to amend their details at any point in time.

12. Universities do away with addressing students in gendered terms by default and add titles where necessary. The University of the Witwatersrand added the title Mx to their options for students to be used in university correspondence and internal use. According to the university:

This decision affirms those who are transgender, non-binary or gender non-conforming within the University community, who wish to hold a title that affirms their identity. The University recognises that it is invalidating and distressing for a person who, for an example, was assigned female at birth but identifies as male to be constantly addressed by a non-affirming title in University correspondence and systems. Increasingly, people who are transgender or non-binary opt to use the gender-neutral title, 'Mx', which is legally recognised in many countries across the world.

## ACTS THAT MAY NEED TO BE UPDATED:

<sup>1</sup> Sokopo, Asa. 2010. 'Activists Help Transgender Teen Forced to Wear Skirt'. The Herald, December 10.

<sup>2</sup> Sokopo, Asa. 2010. 'Activists Help Transgender Teen Forced to Wear Skirt'. The Herald, December 10.

<sup>3</sup> Chabalala, Jeanette. 2017. 'Former Limpopo Principal Found Guilty of Violating Transgender Pupil's Rights'. News24. March 10. <http://www.news24.com/SouthAfrica/News/former-limpopo-principal-found-guilty-of-violating-transgender-pupils-rights-20170310>.

<sup>4</sup> Collison, Carl. 2017. 'Victory for Queer Kids in Limpopo Equality Court Ruling'. The M&G Online. March 22. <https://mg.co.za/article/2017-03-21-victory-for-queer-kids-in-limpopo-equality-court-ruling/>.

<sup>5</sup> Collison, Carl. 2017. 'Victory for Queer Kids in Limpopo Equality Court Ruling'. The M&G Online. March 22. <https://mg.co.za/article/2017-03-21-victory-for-queer-kids-in-limpopo-equality-court-ruling/>.

<sup>6</sup> Cornell, Josephine, Kopano Ratele, and Shose Kessi. n.d. 'Race, Gender and Sexuality in Student Experiences of Violence and Resistances on a University Campus'. Perspectives in Education 34 (2): 104.

<sup>7</sup> Collison, Carl. 2018. 'Trans Toilet Access Still a Struggle'. The M&G Online. June 22. <https://mg.co.za/article/2018-06-22-00-trans-toilet-access-still-a-struggle/>.

<sup>8</sup> Collison, Carl. 2018. 'Trans Toilet Access Still a Struggle'. The M&G Online. June 22. <https://mg.co.za/article/2018-06-22-00-trans-toilet-access-still-a-struggle/>.

<sup>9</sup> Centre for Justice and Crime Prevention and Department of Basic Education Republic of South Africa. 2015. 'National School Safety Framework: Trainers Manual'. Claremont: Center for Justice and Crime Prevention.

<sup>10</sup> Centre for Justice and Crime Prevention and Department of Basic Education Republic of South Africa.

<sup>11</sup> Centre for Justice and Crime Prevention and Department of Basic Education Republic of South Africa. 2015. 'National School Safety Framework: Trainers Manual'. Claremont: Center for Justice and Crime Prevention.

<sup>12</sup> Centre for Justice and Crime Prevention and Department of Basic Education Republic of South Africa. 2012. 'Addressing Bullying in Schools'. Claremont: Centre for Justice and Crime Prevention, p. 14.

<sup>13</sup> Centre for Justice and Crime Prevention and Department of Basic Education Republic of South Africa. 2012. 'Addressing Bullying in Schools'. Claremont: Centre for Justice and Crime Prevention, p. 20.

<sup>14</sup> United Nations Educational, Scientific and Cultural Organization (UNESCO). 2016. Out in the Open: Education Sector Responses to Violence Based on Sexual Orientation and Gender Identity/Expression. Place of publication not identified: Action Canada for Sexual Health and Rights. <http://deslibris.ca/ID/10062639>. p. 82.

<sup>15</sup> United Nations Educational, Scientific and Cultural Organization (UNESCO). 2016. Out in the Open: Education Sector Responses to Violence Based on Sexual Orientation and Gender Identity/Expression. Place of publication not identified: Action Canada for Sexual Health and Rights. <http://deslibris.ca/ID/10062639>. p. 83.

<sup>16</sup> International Commission of Jurists (ICJ). 2017. 'The Yogyakarta Principles Plus 10 - Additional Principles and State Obligation on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Expression and Sex Characteristics to Complement the Yogyakarta Principles'. Geneva. [www.refworld.org/docid/5c5d4e2e4.html](http://www.refworld.org/docid/5c5d4e2e4.html). Principle 16.

<sup>17</sup> Transformation Office. 2018. 'Gender Affirming Titles - Wits University'. July 16.

<https://www.wits.ac.za/transformationoffice/programmes-and-projects/sexual-orientation-and-gender-identity-advocacy/gender-affirming-titles/>.



## **EU-SA Policy Dialogue on the Rights of Transgender & Intersex Persons**

# **MIGRATION**

Prepared by Dr B Camminga  
[cammingab@gmail.com](mailto:cammingab@gmail.com)



Health  
Home Affairs  
Justice and Constitutional Development



## MIGRATION

One of the most significant forms of structural violence that transgender and intersex people face in their country of origin is the refusal of states to recognise their gender identity regardless of any physical sex characteristics.<sup>1</sup> Transgender and intersex asylum seekers come to South Africa in order to escape transphobic discrimination, homophobic persecution and violence in their country of origin<sup>2</sup>. It is therefore vital that these asylum seekers are able to enter a process facilitating the legal recognition of their gender identity legally in South Africa and have this correctly reflected in all legal documentation. This must apply from point of entry onwards.<sup>3</sup> Not to have this process be accessible from point of entry onwards could jeopardise further processes regarding asylum claims. This applies equally to intersex persons applying for asylum, who should be able to access the appropriate sex marker in the asylum application process. As it stands, the Alteration of Sex Description and Sex Status Act 49 of 2003 ("Act 49") only applies to persons on the National Population Register; it is silent on asylum seekers, refugees and those with permanent residence status, none of whom are captured on the Register. In practice, this means that Act 49 does not apply to these groups, or cannot be applied to them without an amendment or a court order interpreting its application as extending to these groups. The latter would be an expensive and lengthy process.

Transgender and intersex persons seeking asylum should not be subjected to discrimination while a decision regarding their right to remain is pending<sup>4</sup>. Appropriate legal documentation would go a long way towards combatting discrimination toward transgender and intersex persons. The majority will not have had access to updated documentation with their correct and acknowledged gender identity from their country of origin. They may also have faced discrimination or persecution for attempting to attain such documents in their country of origin. To self-declare one's gender and have it legally recognised would enable new asylum applicants to access gender appropriate services, housing<sup>5</sup> and support, and reduce the risk of gender-related abuse and discrimination.<sup>6</sup> This is also in line with a human rights-based approach. The Yogyakarta Principles endorse open, accessible and transparent processes, stating that "no eligibility criteria such as economic status, health, marital or parental status, or any third party opinion, shall be prerequisite to change one's name, legal sex or gender".<sup>7</sup> Furthermore, provisional recommendations from the 2021 UNHCR-IE Global Roundtable on Protection and Solutions for LGBTIQ+ People in Forced Displacement suggest that states implement systems and structures to ensure that all refugees, asylum seekers and forcibly displaced people be able to "amend their name and gender markers, based on self-determination and irrespective of details contained in identification documents issued to them from any country of nationality".<sup>8</sup>

Crucially, acknowledgement of gender identity and sex characteristics by the state through all stages of the asylum application process, from point of entry to final adjudication of claim and in all associated documentation, can only assist with broader recognition of gender diversity and gender rights within South African society. Equally importantly, such acknowledgment would also reduce potential for discrimination on the part of officials tasked with processing the asylum seeker's claim. The UNHCR outlines in their resettlement assessment tool the following with regards to trans and intersex refugees:

Transgender and intersex refugees who have expressed a gender that differs from the biological sex on their documents or records may wish to have the new gender reflected in the RRF [Resettlement Registration Form] (and other registration and documentation). As a starting point, each person's profound, self defined gender identity should be respected, regardless of whether the refugee has undergone any surgery or hormone treatment.<sup>9</sup>

## GENDER IDENTITY RECOGNITION FOR REFUGEES: SELF DETERMINATION

A number of states have attempted to translate the principles outlined above into the domestic context through jurisprudence. While there are very few existing policies to draw on at present, there are a number of judicial rulings that can serve as models for affirming frameworks.





## LEGAL AND SOCIAL DISCONNECT RESULTS IN NOT HAVING DOCUMENTS RECOGNISING LIVED GENDER IDENTITY: THE CASE OF ICELAND

One state that is currently struggling with this issue is Iceland, where a transgender refugee is requesting their gender identity be recognised on all documents.<sup>10</sup> Domestic courts in several jurisdictions have ruled on, or are currently considering, the necessity of gender recognition, including in cases involving refugees and asylum seekers. These cases highlight the legal and social contradiction that happens when a country offers asylum, but does not provide documents recognising a person's lived gender identity from the outset of their claim.

## MEDICAL INTERVENTIONS ARE NOT A PREREQUISITE FOR LEGAL GENDER RECOGNITION: THE CASE OF HUNGARY

In Hungary, there were no provisions in law for legal gender recognition (LGR) beyond that assigned at birth. In 2017, a transgender Iranian refugee challenged this in Hungary's Constitutional Court. He was successful, and the impact of the Court's ruling was not only relevant for transgender foreigners: the decision confirmed that LGR and name change is a fundamental right for all transgender persons and derive from the principle of human dignity.<sup>11</sup> Significantly, the Court also emphasised "that medical interventions are not a prerequisite for legal gender recognition"<sup>12</sup>.

## NON-ACCESS IN COUNTRY OF ORIGIN SHOULD NOT TRANSLATE INTO NON-ACCESS IN COUNTRY OF ASYLUM: THE CASE OF GREECE

In Greece at the beginning of 2019, a similar decision was reached in the case of a transgender woman from Bangladesh. The District Court of Mitilini noted that a key characteristic of the "refugee identity is the rupture in an individual's relations with their home country, where they are at risk of persecution".<sup>13</sup> This rupture meant that the person in question could not make the requested changes in her country of origin. Therefore, the court ruled, it would fall to the Greek authorities to ensure that the applicant is able to fully exercise her rights in Greece and that this should not be predicated on the recognition (or lack thereof) in country of origin.<sup>14</sup> The court found that the changes were necessary in order to protect the applicant's dignity and mental health, and granted her request.<sup>15</sup> It must be noted, however, that – as with the aforementioned Hungarian case – this was directly related to the applicant's status as a person with refugee documents or permanent residence status.

## AMENDING DOCUMENTS

Several other states have implemented policy provisions for amending documents, both during the period when an asylum seeker is already in the asylum adjudication process, or following their recognition as a refugee. There are examples of this from Canada, Argentina and Scotland.

## COURT APPLICATION TO AMEND: CANADA

In Canada, refugees and asylum seekers can make a court application to amend their gender marker. This requires access to lawyers and potentially finances in order to approach a court. Article 4 (8) of Malta's Gender Identity, Gender Expression and Sex Characteristics Act states:

A person who was granted international protection in terms of the Refugees Act, and in terms of any other subsidiary legislation issued under the Refugees Act, and who wants to change the recorded gender and first name, if the person so wishes to change the first name, shall make a declaration confirmed on oath before the Commissioner for Refugees declaring the person's self-determined gender and first name. The Commissioner for Refugees shall record such amendment in their asylum application form and protection certificate within fifteen days.<sup>16</sup>

This ostensibly covers not only refugees but also those whose claims to refuge have not as yet been adjudicated – that is, asylum seekers.

## RESOLUTION FROM THE NATIONAL MIGRATION DEPARTMENT: ARGENTINA

In Argentina, asylum seekers and refugees can change their name and gender marker to align with their gender identity. This must be done through a "resolution" by the National Migration Department. Unlike in other jurisdictions, this process is also open to asylum seekers, who are able to adjust their gender marker "at the beginning of the procedure or at any time of the request, in order to ensure their right to gender identity ... registry modification is made for all those who request it regardless of the country of origin or habitual residence".<sup>17</sup> From February

2020, asylum seeker forms in Argentina include the following options for identification: “female, male, trans female, trans male, non-binary, transvestite, other”<sup>18</sup>. It should be noted that there is very little published material available regarding intersex people who have sought asylum.

### LEGISLATIVE AMENDMENT: THE SCOTLAND GENDER RECOGNITION ACT

In Scotland, a similar process to that of South Africa is being undertaken with regards to the Scottish Gender Recognition Act (2004). Enabling transgender asylum seekers to access, early on, identity documents with a gender marker in line with their gender identity is considered best practice by several organisations and groups globally, including Stonewall Scotland<sup>19</sup> and Transgender Europe.<sup>20</sup> Recognition could be based on self-declaration and last for the duration of the asylum procedure. If granted refugee status, the recognised gender marker should transfer onto refugee documents.

### ENSURING INCLUSION OF INTERSEX PERSONS

It should be noted that there is very little published material available regarding intersex people who have sought asylum. Needless to say, many of the developments outlined here would apply to intersex people in South Africa. Any policy created to protect the rights of transgender and intersex people in South Africa must encompass all those granted documents of identification by the South African state, including people who possess temporary documents, such as asylum seekers.

### CONCLUDING REMARKS AND POLICY CHANGE SUGGESTIONS:

1. A policy on transgender and intersex refugees and asylum seekers which takes into account South African law (would possibly include all others applying under sexual orientation);
2. Protocols and procedures for addressing the needs of transgender and intersex refugees and asylum seekers.

<sup>1</sup> The reasons this can take place can vary considerably depending upon whether a person is trans or intersex. It is important to distinguish between these concepts and realities, and even though this document speaks primarily to trans experiences, because of available data, it is important to recognise that these concerns apply equally to intersex persons.

<sup>2</sup> Examples of official documents where this must apply throughout the process should include: Asylum Transit Visa, Asylum Seeker Visa, Refugee Recognition Document, Permanent Residence documentation and further.

<sup>3</sup> A key example of this would be access to shelters. Many of which insist that individuals provided with temporary accommodation at their facility are housed in sex-segregated dormitories according to the gender identity reflected on the individual's identity documentation, such as an asylum seeker visa (previously permit).

<sup>4</sup> In practice, it is incredibly difficult for an asylum seeker or refugee to change any detail reflected on their documentation. This includes trying to change an incorrect birth date, incorrect name or spelling thereof, or changing an incorrect record of the person's country of origin. In addition, recently effected amendments to the Refugees Act and its Regulations state unequivocally that any details filled in on an asylum seeker's original application form (BI-1590) will be considered binding on the asylum applicant. This is likely to make it even more difficult for such a person should they seek to change a detail at a later date.

<sup>5</sup> International Commission of Jurists (ICJ). 2017. 'The Yogyakarta Principles Plus 10 - Additional Principles

<sup>6</sup> The reasons this can take place can vary considerably depending upon whether a person is trans or intersex. It is important to distinguish between these concepts and realities, and even though this document speaks primarily to trans experiences, because of available data, it is important to recognise that these concerns apply equally to intersex persons.

<sup>7</sup> Examples of official documents where this must apply throughout the process should include: Asylum Transit Visa, Asylum Seeker Visa, Refugee Recognition Document, Permanent Residence documentation and further.

<sup>8</sup> A key example of this would be access to shelters. Many of which insist that individuals provided with temporary accommodation at their facility are housed in sex-segregated dormitories according to the gender identity reflected on the individual's identity documentation, such as an asylum seeker visa (previously permit).

<sup>9</sup> In practice, it is incredibly difficult for an asylum seeker or refugee to change any detail reflected on their documentation. This includes trying to change an incorrect birth date, incorrect name or spelling thereof, or changing an incorrect record of the person's country of origin. In addition, recently effected amendments to the Refugees Act and its Regulations state unequivocally that any details filled in on an asylum seeker's original application form (BI-1590) will be considered binding on the asylum applicant. This is likely to make it even more difficult for such a person should they seek to change a detail at a later date.

- <sup>10</sup> International Commission of Jurists (ICJ). 2017. 'The Yogyakarta Principles Plus 10 - Additional Principles and State Obligation on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Expression and Sex Characteristics to Complement the Yogyakarta Principles'. Geneva. P. 9
- <sup>11</sup> Fontaine, Paul. 2018. 'Trans Refugee Misgendered By Immigration Office, Despite Getting Asylum In Part For Being Trans'. The Reykjavik Grapevine. May 17. <https://grapevine.is/news/2018/05/17/trans-refugee-misgendered-by-immigration-office-despite-getting-asylum-in-part-for-being-trans/>.
- <sup>12</sup> RANA v. HUNGARY. 2017. Constitutional Court. 40888/17
- <sup>13</sup> Cikkek, Friss. 2018. 'Hungarian Constitutional Court Sides with Trans Refugee on Legal Gender Recognition'. Hátér Society. June 21. <http://en.hatter.hu/news/hungarian-constitutional-court-sides-with-trans-refugee-on-legal-gender-recognition>.
- <sup>14</sup> 'Greece – District Court of Mitilini Allows Transgender Refugee to Change ID Documents'. 2018. European Database of Asylum Law. December 31. </en/content/greece-%E2%80%93-district-court-mitilini-allows-transgender-refugee-change-id-documents>.
- <sup>15</sup> 'Greece – District Court of Mitilini Allows Transgender Refugee to Change ID Documents'. 2018. European Database of Asylum Law. December 31. </en/content/greece-%E2%80%93-district-court-mitilini-allows-transgender-refugee-change-id-documents>.
- <sup>16</sup> 'Greece – District Court of Mitilini Allows Transgender Refugee to Change ID Documents'. 2018. European Database of Asylum Law. December 31. </en/content/greece-%E2%80%93-district-court-mitilini-allows-transgender-refugee-change-id-documents>.
- <sup>17</sup> Malta. 2015. Chapter 540 Gender Identity, Gender Expression and Sex Characteristics Act.
- <sup>18</sup> Ruiz, Mariano, and B Camminga. 2020. '[Sogi] Examples Needed of Legal Gender Recognition for Refugees or Asylum Seekers Who Are Not Permanent Residents', February 25.
- <sup>19</sup> Ruiz, Mariano, and B Camminga. 2020. '[Sogi] Examples Needed of Legal Gender Recognition for Refugees or Asylum Seekers Who Are Not Permanent Residents', February 25.
- <sup>20</sup> Bridger, Sophie. 2019. 'Gender Recognition Act Reform: Consultation Response'. Scotland: Stonewall Scotland. [https://www.stonewallscotland.org.uk/sites/default/files/gra\\_consultation\\_response\\_scotland\\_final.pdf](https://www.stonewallscotland.org.uk/sites/default/files/gra_consultation_response_scotland_final.pdf).
- <sup>21</sup> Köhler, Richard, Alecs Recher, and Julia Ehrt. 2013. 'Legal Gender Recognition in Europe'. Berlin: Transgender Europe (TGEU), p. 18.









## EU-SA Policy Dialogue on the Rights of Transgender & Intersex Persons

# HEALTH

Prepared by Dr B Camminga  
cammingab@gmail.com



Health  
Home Affairs  
Justice and Constitutional Development



## HEALTH

Transgender and intersex people seek healthcare on two levels: the basic level of treating day-to-day health conditions that all people experience, and the level of accessing trans and intersex-specific healthcare, such as gender-affirming surgery and hormone replacement therapy (HRT). Since the mid- 1970s, South Africa has offered what we might now call “affirmative healthcare”.<sup>1</sup> But while transgender healthcare has been increasingly depathologised, intersex health remains heavily medicalised and pathologised. It should be noted that not all transgender people seek gender-affirming treatment. Many transgender and intersex people simply require therapeutic care, given the daily difficulties of being a transgender or intersex person in a gender- and sex-normative society where the threat of violence is incredibly high. For those who do seek treatment, hormone therapy is the main medical intervention sought and hormones are included in the national health department’s Essential Medicine List. However, only a few hospitals in the public healthcare system provide hormone treatment, due to a lack of training and to a lack of availability of endocrinologists.<sup>2</sup>

The increasing visibility of transgender and intersex people has put added strain on the current healthcare system. Of South Africa’s public hospitals, only Chris Hani Baragwanath in Soweto; Steve Biko in Pretoria; Groote Schuur and Red Cross War Memorial Children’s Hospital in Cape Town<sup>3</sup>; Helen Joseph in Johannesburg and Grey’s Hospital in Pietermaritzburg<sup>4</sup> offer gender-affirming healthcare services.<sup>5</sup> Intersex-specific care, though at times similar to transgender-specific care, is also available at these hospitals. The South African Association of Paediatric Surgeons lists seven paediatric centres that still practice intersex genital mutilation (IGM). These hospitals include: The Red Cross War Memorial Hospital; Chris Hani Baragwanath Hospital; the Department of Paediatric Surgery at Free State University; Tygerberg Hospital; East London Hospital and the University of KwaZulu-Natal’s Paediatric Department.<sup>6</sup> In other public-sector facilities, services may be offered on an ad-hoc basis. However, access to these services is dependent on whether you live close to these facilities and on the length of their waiting lists. The present waiting list at Groote Schuur for gender-affirming surgery, for example, is more than twenty years.<sup>7</sup> Overall, a lack of access to healthcare that is competent and affirming remains a serious concern.<sup>8</sup> When accessing healthcare facilities, whether in private or public healthcare settings, transgender and intersex people often “experience severe and specifically gender-bias motivated discrimination” from South African healthcare professionals.<sup>9</sup>

There is a general lack of national policy and of available state guidelines or protocols on transgender and intersex care. This has had several significant impacts. Healthcare practitioners note spending a substantial amount of time advocating for gender-affirming care with other healthcare professionals and institutions who are less willing. There is often confusion, and a lack of alignment with local understandings and needs, as well as a consideration of context with regards to the variation of international guidelines being used.<sup>10</sup> This is frustrating to both healthcare practitioners and their patients. The absence of national guidelines or protocols has “often required that service professionals be “creative” in order to get their client the service they need”.<sup>11</sup> A natural consequence of the lack of guidelines and protocols has been the limited number of informed healthcare professionals across the healthcare sector willing to provide gender-affirming healthcare, as mentioned earlier.

Policies on transgender and intersex care and training of healthcare workers will contribute to improving healthcare access for the transgender and intersex populations. Healthcare practitioners are not mandated to use international guidelines to inform their practice, thus they “are left to seek out guidance and best-practice guidelines in their own time and of their own volition”.<sup>12</sup> Moreover, given that “the public health sector in South Africa is extremely resource constrained...pragmatic adaption of international guidelines is important and necessary”.<sup>13</sup> Guidelines would also assist those healthcare practitioners who want to provide affirming care, but find themselves in constrained, combative, prejudicial and unsupportive institutional contexts.<sup>14</sup> To that end, according to healthcare practitioners, policies and guidelines “might help combat some of the prejudice that transgender and gender diverse people face in the health system and beyond”.<sup>15</sup> Transgender and intersex health can only be enhanced where there is safer and more patient-focused access to affirming pathways. Where this is not a pre-requisite for medical intervention in order to access legal gender recognition, there will inevitably be less pressure on an overburdened health system. The same is true for IGM, in that operating on an infant in the majority of cases leads to more surgeries as the child develops. Postponing surgery until the child is able to give consent avoids not only unnecessary harm and abuse, but also unnecessary costs in the long-term.



## POSSIBLE REQUESTS FOR POLICY CHANGES:

1. The development of national policy guidelines, protocols and classifications that depathologise variations in sex characteristics and the development of gender-affirming healthcare are appropriate to the South African context and which outline transgender and intersex care for adults and minors.
  - A study from 2017 notes, “a small minority of health care providers offer gender affirming care, this is almost exclusively on their own initiative and is usually unsupported by wider structures and institutions. The ad hoc, discretionary nature of services means that access to care is dependent on whether a transgender person is fortunate enough to access a sympathetic and knowledgeable health care provider”.<sup>16</sup>
2. The development of a holistic, patient-centred approach to gender-affirming healthcare.
3. *Depathologisation*: transgender people will no longer need to be diagnosed with gender dysphoria in order to have their gender legally recognised.
4. *Demedicalisation*: the changing in perceptions that all transgender and intersex people require medical treatment and can only be understood in relation to medical frameworks
5. End to shortages in lifesaving medication, i.e. hormones for intersex and transgender people.
6. Increase the number of theatre days for gender-affirming surgeries:
  - In the Western Cape, the provincial Department of Health only allocates four theatre days a year for gender-affirming surgeries<sup>17</sup>.
7. The banning of all intersex surgeries. Surgical and hormonal interventions for children in relation to their intersex status should only be carried out in case of medical emergency based on informed consent:
  - The South African State directly funds these procedures through their support for public university clinics, Regional Children’s hospitals and paediatric hospitals<sup>18</sup>. In its briefing to the UN’s children’s rights committee in 2016, the Department of Social Development conceded that government was aware of the need to stop the practice of Intersex Genital Mutilation.<sup>19</sup>
8. All professionals and healthcare providers who have a specific role to play in intersex people’s wellbeing are adequately trained to provide such services and refrain from prejudicial behaviour.
9. Ensure that intersex people are able to realise the right to full information and are given access to their own medical records and history.
10. Easy access to a medical or surgical ombudsman in order to hold public and private sector surgeons and doctors accountable for conducting experimental care on transgender and intersex clients.
11. Placement in hospitals, prisons or schools should always respect the person’s gender identity and not be based on genitals or sex assigned at birth.
12. Inclusion of gender diversity and intersex issues in medical school curricula. Recent research suggests transgender and intersex health-related topics are largely absent from health sciences curricula<sup>20</sup>.
13. Trans and intersex people experience the same health problems as everyone else and have very few differing needs. If a health problem is unrelated to gender-affirming care, assessment and treatment should be the same as other patients.
14. To include intersex education in antenatal counselling and support.<sup>21</sup>
15. To ensure that all professionals and healthcare providers that have a specific role to play in intersex people’s wellbeing are adequately trained to provide quality services.<sup>22</sup>
16. Relationships to be built with medical practitioners in other countries with affirming healthcare such as Argentina or Malta, where medical practitioners might also conduct study visits or exchanges

## THE FOLLOWING POINTS SHOULD ALSO BE CONSIDERED WITH SPECIFIC REGARDS TO HEALTH FOR TRANSGENDER AND INTERSEX PEOPLE INCLUDING TRANSGENDER AND INTERSEX MINORS :

### TRANSGENDER

- The general principles of depathologisation, self-determination and informed consent (for all healthcare decisions) should be applied to all South African policy and legislation, not only on legislation and policy specific to healthcare. These principles are in line with the Constitution of South Africa.
- Although international guidelines generally recommend that care be provided by specialist clinics and multi-disciplinary teams, in the South African context, the lack of resources means that confining gender-affirming healthcare to specialist multi-disciplinary teams will severely limit access to treatment. We therefore recommend a decentralized approach, in which gender-affirming healthcare is made available at primary health care facilities, to be administered by suitably trained general practitioners, rather than only by specialists, such as endocrinologists. The need for multi-disciplinary teams will be limited to more complex cases, such as those of minors, or where patients have multiple healthcare issues.
- The role of specialist transgender clinics should be to make gender-affirming healthcare and sexual health services more accessible to transgender and gender-diverse individuals, not to limit access by creating exclusive centres for gender-affirming healthcare.
- Limited access to psychologists is also a major issue in the public sector in South Africa, and we therefore recommend that social workers and registered counsellors be provided with training on providing counselling and support to transgender, intersex and gender-diverse individuals.
- In order to improve access to gender-affirming healthcare, we recommend that training on gender-affirming healthcare be provided at the tertiary training level for healthcare workers, including at Medical Schools, Nursing Colleges, etc. Training at Medical Schools and in Continued Professional Development Programs should specifically aim at encouraging interest in order to increase the number of healthcare professionals – especially those in limited numbers, such as surgeons – who are willing to receive training and develop expertise in gender-affirming healthcare.
- We call on the Department of Health to adopt the national gender-affirming healthcare guidelines, which are currently being drafted, and to ensure that the proposed National Health Insurance (NHI) works in line with this policy and includes improved access to gender-affirming healthcare, and avoids adopting a gate-keeping model.
- To ensure the depathologisation of transgender and gender diversity, the national guidelines, health policy and legislation should be in line with the WHO International Classification of Diseases (ICD) 11, and not refer to diagnostic categories listed in the International Classification of Diseases (ICD) 10.
- Transgender and gender-diverse individuals do have specific primary healthcare needs, including needs related to sexual and reproductive health, drug interactions, risk profiles and screening, and public health messaging. In addition, transgender and gender-diverse persons often face barriers to accessing healthcare associated with stigma and discrimination. The training of healthcare providers and the adequate provision of services and facilities (including gender-neutral toilets and bathrooms) is therefore imperative in order to ensure equal access to health care services.
- In order to motivate for additional resources to be dedicated to the provision of gender-affirming healthcare, civil society needs to present research showing that:
  - A lack of access to gender-affirming healthcare contributes to self-medication and risk-taking behaviour, which in turn has negative public health consequences.
  - Transgender people who receive gender-affirming healthcare are better equipped to adopt healthy life-style choices and control medical conditions such as diabetes and heart disease.
  - Access to gender-affirming healthcare allows transgender and gender-diverse persons to move from being marginalised (and often homeless and unemployed) to being contributors to society.



## INTERSEX

- The principals of informed consent and self-determination are particularly important for intersex individuals, who continue to be subjected to human rights violations, such as infant genital mutilation, which undermine their Constitutional rights to human dignity, bodily and psychological integrity, and their right to make their own decisions regarding reproduction.
- We support the position that infant genital surgery (intersex genital mutilation) should be banned, except in instances of medical emergency – legislation, policy and guidelines should clearly state that the definition of medical emergency refers only to physical health, and not to perceived psychological or social factors.
- Antenatal care should include providing parents with evidence-based information on intersex.
- Families and doctors should use all available information to make the best possible decision on a gender-of-rearing for intersex children, to be used until children are able to self-identify and give informed consent for gender-affirming healthcare, should they wish to receive it.
- Gender-affirming health care for intersex adults should be made available, and should be based on informed consent.
- Sanctions should exist for healthcare providers who violate the rights of intersex children and who conduct medical interventions (including infant genital mutilation) without informed consent from the patient (not the parents or caregivers). In addition to this, redress should be available for intersex persons whose rights have been violated in the healthcare system, and who have been subjected to surgery and other medical interventions without consent.
- In the South African context, traditional and religious beliefs are still a major barrier to access to healthcare for intersex individuals. Medical training at tertiary institutions should address the discriminatory practices that stem from these beliefs, but where healthcare providers refuse to provide medical treatment based on their personal beliefs (which may include the traditional belief that harm will befall the healthcare workers providing medical care), the state has a duty to ensure that healthcare services are still provided to intersex individuals, and that all state facilities have properly trained healthcare workers who are available and willing to treat intersex persons.

## MINORS

- The age at which minors can consent to their own medical treatment should be explicitly stated as 12, and where necessary, legislation should be amended to ensure that the position of children in this regard is consistent.
- Guidelines on determining the best interests of the child should be drafted, and should be based on the rights of the child, as expressed in the Constitution of South Africa, with reference to the interpretation of these rights by the courts; to evidence-based best practice in providing gender-affirming healthcare to children, and to the medical and psychological needs of the specific child.
- It will generally be in the best interests of the child for their parents, guardians or caregivers to be in agreement with, and supportive of, the child receiving gender-affirming health treatment. However, the lack of parental support should not be a barrier to treatment, and instead there should be a parallel process of providing minors with appropriate treatment, while building family and social support with the assistance of psychologists or social workers.
- We recommend that there be separate policies addressing the needs of transgender and intersex minors, as these two groups face significantly different challenges. Intersex children tend to be over-medicalised and subjected to surgical procedures and medical treatment without informed consent, whereas transgender children tend to be denied access to medical treatment. Separate policies for each group would prevent a situation in which recommendations for increased access to medical treatment for transgender minors are used as an excuse for pathologising and imposing medical treatment on intersex minors; or, conversely, a situation in which recommendations for intersex children are employed as a pretext for denying transgender children access to gender-affirming healthcare.
- Minors may be excluded from accessing transgender and intersex services as these are located at adult healthcare facilities. It needs to be ensured that minors are able to access transgender and intersex healthcare, particularly age-specific healthcare services (such as puberty blocking hormones for transgender and gender-diverse adolescents).

- <sup>1</sup> Vincent, Louise, and B Camminga. 2009. 'Putting the "T" into South African Human Rights: Transsexuality in the Post-Apartheid Order'. *Sexualities* 12 (6): 678–700.
- <sup>2</sup> McLachlan, Chris/tine. 2019. 'Que(e)Ring Trans and Gender Diversity'. *South African Journal of Psychology* 49 (1): 12.
- <sup>3</sup> Spencer, Sarah, Talia Meer, and Alex Müller. 2017. "'The Care Is the Best You Can Give at the Time": Health Care Professionals' Experiences in Providing Gender Affirming Care in South Africa'. *PLOS ONE* 12 (7): p. 7.
- <sup>4</sup> Spencer, Sarah, Talia Meer, and Alex Müller. 2017. "'The Care Is the Best You Can Give at the Time": Health Care Professionals' Experiences in Providing Gender Affirming Care in South Africa'. *PLOS ONE* 12 (7): p. 7.
- <sup>5</sup> Oberholzer, Sanet. 2020. 'Conversations: Transgender Healthcare in Crisis'. SowetanLIVE. Accessed March 4. <https://www.sowetanlive.co.za/s-mag/2019-04-05-conversations-transgender-healthcare-in-crisis/>.
- <sup>6</sup> Sehoole, Joshua, and Lungile Maquba. 2018. 'National Dialogue on the Protection and Promotion of the Human Rights of Intersex People'. Johannesburg: Iranti-org, p. 16.
- <sup>7</sup> Wilson, D, A Marais, A Villiers, Ronald Addinall, and Megan Campbell. 2014. 'Transgender Issues in South Africa, with Particular Reference to the Groote Schuur Hospital Transgender Unit'. *South African Medical Journal* 104 (June). doi:10.7196/SAMJ.8392.
- <sup>8</sup> Sehoole, Joshua, and Lungile Maquba. 2018. 'National Dialogue on the Protection and Promotion of the Human Rights of Intersex People'. Johannesburg: Iranti-org, p. 14-15.
- <sup>9</sup> Spencer, Sarah, Talia Meer, and Alex Müller. 2017. "'The Care Is the Best You Can Give at the Time": Health Care Professionals' Experiences in Providing Gender Affirming Care in South Africa'. Edited by Angelo Brandelli Costa. *PLOS ONE* 12 (7): p. 4.
- <sup>10</sup> Spencer, Sarah, Talia Meer, and Alex Müller. 2017. "'The Care Is the Best You Can Give at the Time": Health Care Professionals' Experiences in Providing Gender Affirming Care in South Africa'. *PLOS ONE* 12 (7): p. 10.
- <sup>11</sup> Spencer, Sarah, Talia Meer, and Alex Müller. 2017. "'The Care Is the Best You Can Give at the Time": Health Care Professionals' Experiences in Providing Gender Affirming Care in South Africa'. *PLOS ONE* 12 (7): p. 10.
- <sup>12</sup> Spencer, Sarah, Talia Meer, and Alex Müller. 2017. "'The Care Is the Best You Can Give at the Time": Health Care Professionals' Experiences in Providing Gender Affirming Care in South Africa'. *PLOS ONE* 12 (7): p. 9.
- <sup>13</sup> Spencer, Sarah, Talia Meer, and Alex Müller. 2017. "'The Care Is the Best You Can Give at the Time": Health Care Professionals' Experiences in Providing Gender Affirming Care in South Africa'. *PLOS ONE* 12 (7): p. 9.
- <sup>14</sup> Luvuno, Zamasomi P. B., Busisiwe Ncama, and Gugu Mchunu. 2019. 'Transgender Population's Experiences with Regard to Accessing Reproductive Health Care in Kwazulu-Natal, South Africa: A Qualitative Study'. *African Journal of Primary Health Care & Family Medicine* 11 (1). <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6676963/>.
- <sup>15</sup> Spencer, Sarah, Talia Meer, and Alex Müller. 2017. "'The Care Is the Best You Can Give at the Time": Health Care Professionals' Experiences in Providing Gender Affirming Care in South Africa'. *PLOS ONE* 12 (7): p. 13.
- <sup>16</sup> Spencer, Sarah, Talia Meer, and Alex Müller. 2017. "'The Care Is the Best You Can Give at the Time": Health Care Professionals' Experiences in Providing Gender Affirming Care in South Africa'. Edited by Angelo Brandelli Costa. *PLOS ONE* 12 (7): p. 1.
- <sup>17</sup> Spencer, Sarah, Talia Meer, and Alex Müller. 2017. "'The Care Is the Best You Can Give at the Time": Health Care Professionals' Experiences in Providing Gender Affirming Care in South Africa'. *PLOS ONE* 12 (7): p. 7.
- <sup>18</sup> Sehoole, Joshua, and Lungile Maquba. 2018. 'National Dialogue on the Protection and Promotion of the Human Rights of Intersex People'. Johannesburg: Iranti-org, p. 17.
- <sup>19</sup> Collison, Carl. 2016. 'SA Joins the Global Fight to Stop Unnecessary Genital Surgery on Intersex Babies'. *The Mail & Guardian*. October 27. <https://mg.co.za/article/2016-10-27-00-sa-joins-the-global-fight-to-stop-unnecessary-genital-surgery-on-intersex-babies/>.
- <sup>20</sup> Spencer, Sarah, Talia Meer, and Alex Müller. 2017. "'The Care Is the Best You Can Give at the Time": Health Care Professionals' Experiences in Providing Gender Affirming Care in South Africa'. *PLOS ONE* 12 (7): p. 12.
- <sup>21</sup> Intersex Africa. 2019. 'African Intersex Movement - Africa's Regional Intersex Network - Established'. Astraea Lesbian Foundation For Justice. July 3. <https://www.astraeafoundation.org/stories/african-intersex-movement-statement/>.
- <sup>22</sup> Intersex Africa. 2019. 'African Intersex Movement - Africa's Regional Intersex Network - Established'. Astraea Lesbian Foundation For Justice. July 3. <https://www.astraeafoundation.org/stories/african-intersex-movement-statement/>.





**EU-SA**  
Policy Dialogue on the Rights of  
Transgender & Intersex Persons



SA-EU Dialogue Facility

# TRANS & INTERSEX 1 0 1



Health  
Home Affairs  
Justice and Constitutional Development





An Iranti Publication:  
**Speak. Learn. Act**

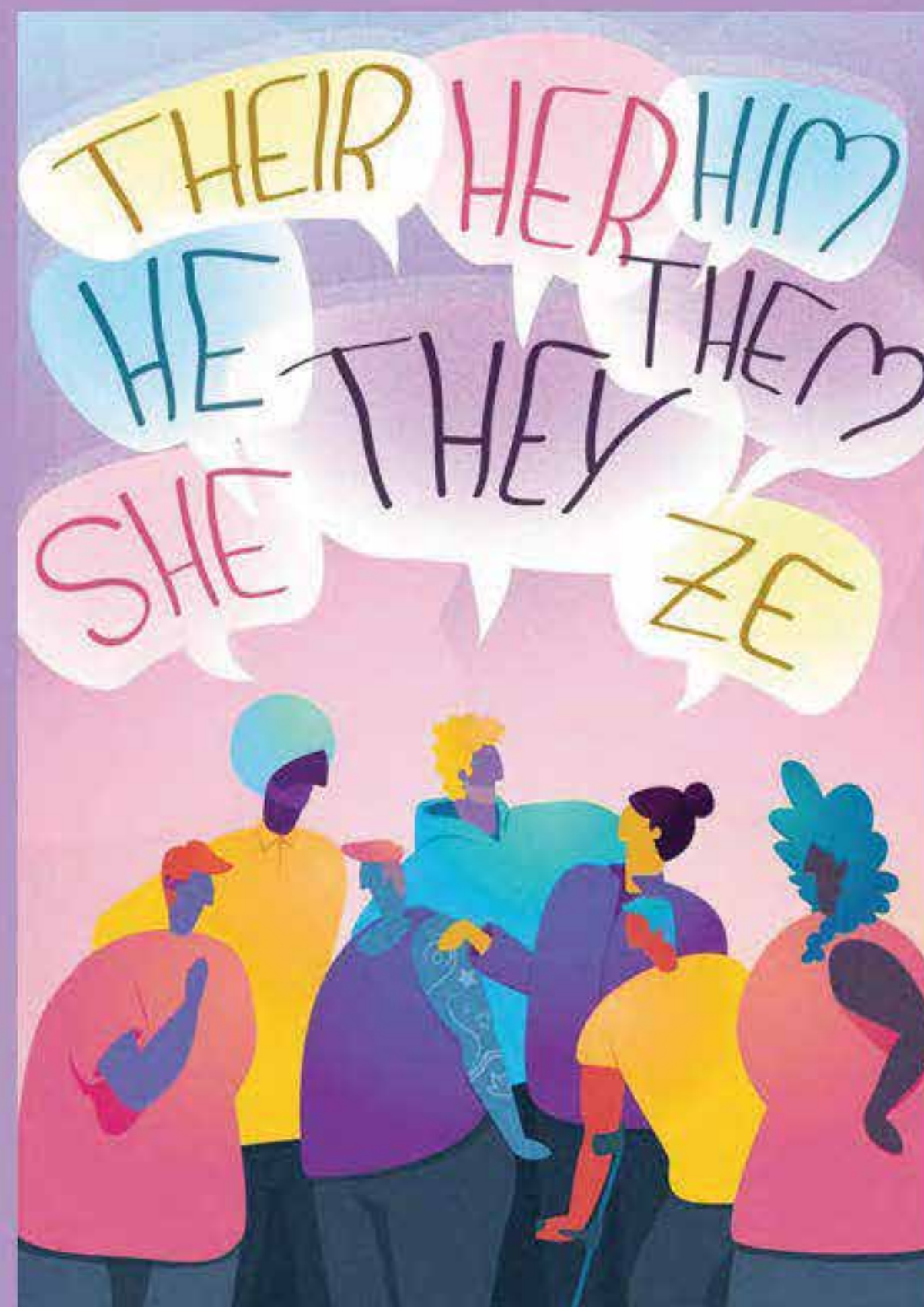
Date: February 2020  
Website: [www.iranti.org.za](http://www.iranti.org.za)  
Email: [info@iranti.org.za](mailto:info@iranti.org.za)  
Tel: +2711 339 1468

Author: Joshua Schoole

**T**his publication was written with the intention to be a beginner's guide to those who seek an elementary understanding of diversity in sex and gender in order to become better allies of trans and intersex people.

We hope it serves as a useful reference for anyone new to trans and intersex issues regardless of background; including families, educators, civil servants, social service providers, healthcare workers, and the general public. It is best used as an introductory exploration to further reading, as well as engagement with and listening to the lived experiences of trans and intersex people themselves.

Digital copies of this publication can be requested from Iranti via the email address provided and are available on the Iranti website for download.





## SPEAK

### Terminology

**H**ave you come across a term in conversation about trans and intersex people that you were unsure about? Are you writing about trans and intersex people and would like to brush up on your terminology? Are there terms in other sections of this guide unfamiliar to you? Have a look at our glossary below for useful language in speaking about diversity in sex and gender.

#### Bodily Autonomy:

The simple but radical concept that individuals have the right to control what does and does not happen to their bodies.

*When we have full bodily autonomy, not only are we empowered to make decisions about our health and future – without coercion or control by others – we also have the support and resources needed to meaningfully carry out these decisions.*

#### Birth Name:

Is the name given to a person at birth. This is often referred to as a person's legal name.

#### Deadname:

Is a term used by some to refer to the birth name of a person who has since changed their name.

*"Dead-naming" occurs when someone, intentionally or not, refers to a person by the name they used before they transitioned.*

#### Chosen Name:

someone has chosen for themselves.

*Transgender people often choose a new name if they are socially transitioning, because their birth name may have implied a gender they don't identify with or may carry trauma even if it was gender neutral.*

#### Cisgender:

Is an adjective describing a person whose gender identity matches their sex assigned at birth.

*Most cisgender people are endosex, some are intersex. Cisgender people have diverse sexual orientations, and may be straight, gay, bisexual, lesbian, etc.*

#### Depathologise:

Is a term meaning to no longer view something as a medical condition or illness.

#### Endosex:

Is a term to describe those who are not intersex, meaning, they were born with sex characteristics which meet medical and social norms for typically 'male' or 'female' bodies.

*Most endosex (sex-typical) people are also cisgender (i.e. identify with the sex assigned at birth), while some are transgender. Endosex people also have diverse sexual orientations, and can be straight, gay, bisexual, lesbian, etc.*

#### 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 its execution – including distinguishing between required and non-essential personnel.

The South African Sterilization Act defines consent as: "consent given freely and voluntarily without any inducement and may only be given if the person giving it has:

a. been given clear explanation and adequate description of the

i. proposed plan of the procedure; and

ii. consequences, risks and the reversible or irreversible nature of the sterilisation procedure;



- b. been given advice that the consent may be withdrawn any time before the treatment; and
- c. signed the prescribed consent form

#### Gender-Affirming Care:

Is healthcare focused on affirming a person's gender identity. This can include gender-affirming therapy and/or gender-affirming hormonal care to alter secondary sex characteristics and/or gender-affirming surgeries to alter primary sex characteristics.

#### Gender Expression:

Is how a person communicates their gender to the world, including but not limited to: hairstyle, clothing, a person's name, pronouns, and behaviour. Society identifies these cues as masculine, feminine or androgynous, although what is considered masculine or feminine changes over time and varies by culture and place.

#### Gender Identity:

Is one's own deeply held, internal sense of one's gender.

#### Gender Marker (aka Sex Descriptor):

Is the indicator recorded on legal identification documents of a person's gender.

#### Human Rights:

Are the basic rights and freedoms that belong to every person in the world, from birth until death. They apply regardless of where you are from, what you believe or how you choose to live your life. Everyone is entitled to these rights, without discrimination. They are universal in the sense of being applicable everywhere and at every time, and they are egalitarian in the sense of being the same for everyone. These values are defined and protected by law nationally, regionally and internationally.

#### Hermaphrodite:

An outdated, misleading, stigmatising term historically used to refer to intersex people.

While some intersex people reclaim the word "hermaphrodite" with pride to reference themselves (like words such as "moffie" or "stabane" have been reclaimed by some LGBT people), unless a person identifies themselves in this way, it is a term that should not be used.

#### Intersex:

An umbrella term for people born with any of several variations in sex characteristics including chromosomes, gonads, sex hormones, or genitals that do not fit the typical definitions for assigned male or female bodies.

Such variations may involve genital ambiguity and combinations of chromosomal genotype and sexual phenotype other than XY and XX. While most intersex people are cisgender (i.e. identify with the sex they were assigned at birth) some are transgender (i.e. do not identify with the sex they were assigned at birth). Intersex people also have diverse sexual orientations, and can be straight, gay, bisexual, lesbian, etc.

#### Intersex Genital Mutilation (also "IGM"):

Are surgical, hormonal and other medical interventions performed to modify atypical or ambiguous genitalia and other sex characteristics, primarily for the purposes of making a person's appearance suit social classifications of male or female.

These interventions are often coerced, harmful, uninformed and medically unnecessary. They are typically performed without the full, free and informed consent of the person concerned. IGM is often irreversible – for example resulting in permanent infertility, permanent pain, incontinence, loss of sexual sensation, and lifelong mental suffering. IGM may include other harmful medical interventions/treatments which may not be considered necessary for "normal" children without evidence of benefit for the child concern but justified by societal and/or religious standards.



**Legal Name:**

The name that identifies a person for legal purposes, appearing on their birth certificate, identification document and passport.

*As part of their social transition, transgender people may apply for a legal name change.*

**Legal Gender Recognition:**

Is the ability to have your gender legally recognised.

*Many trans and intersex people face problems in daily life because their legal gender on their ID does not reflect their actual or lived gender. Picking up a parcel at the post office, applying for a job, opening a bank account, getting a social grant, interactions with police, and other instances that need one to produce identification can become a repeated source of harassment, unfounded suspicion, and even violence. Legal gender recognition goes beyond being an administrative act: it is essential in order for people to be able to live a life of dignity and respect.*

**Misgender:**

Is to refer to someone (especially a transgender person) using a word, especially a pronoun or form of address that does not correctly reflect the gender with which they identify.

**Pathologise:**

Is to view something as a medical condition or illness

**Pronouns:**

The words we use when referring to someone instead of using their name.

*In English, these are typically gender-specific: he/him/his for males and she/her/hers for females. There are also gender-neutral pronouns, including they/them/theirs. Pronouns in gendered languages form part of a person's gender expression. Using the pronouns a person uses for themselves is an important way of affirming their gender identity.*

**Self-determination/Self-identification:**

Is the simple idea that one's gender identity can be determined by oneself.

*Each person's self-determined gender is integral to their personality and is one of the most basic aspects of autonomy, dignity and freedom. In a legal context, the principle of self-determination means ensuring that no one will be forced to undergo medical procedures, including surgery, sterilisation or hormonal therapy, as a requirement for legal recognition of their gender identity. It also entails that no status, such as marriage or parenthood, may be invoked to prevent the legal recognition of a person's gender identity. No one shall be subjected to pressure to conceal, suppress or deny their gender identity, in accordance with the rights to equality, dignity and freedom – concepts central to a human rights-based approach.*

**Sex/Sex characteristics:**

While infants are assigned a sex, usually based on the appearance of their external genitalia at birth, a person's sex is actually a combination of several sex characteristics including chromosomes, hormones, and internal reproductive organs not commonly examined at birth, as well as secondary sex characteristics such as facial hair and breasts.

**Sex Assigned at Birth:**

The sex classification people receive at birth ("male" or "female", often recorded on a birth certificate), typically based on external reproductive anatomy.

**Sexual Orientation:**

A person's enduring physical, romantic, and/or emotional attraction to another person. Straight, lesbian, bisexual and gay are examples of sexual orientations.



**Transgender:**

An umbrella term, sometimes abbreviated as "trans," which indicates that a person has a gender identity that is different from their sex assigned at birth. A transgender woman (also "trans woman") is a woman who has a female gender identity and was assigned male at birth. A transgender man is a man who has a male gender identity and was assigned female at birth (also "trans man"). Non-binary transgender people have a gender identity that is neither male nor female. While most transgender people are endosex, some intersex people also identify as transgender. Transgender people have diverse sexual orientations, and can be straight, gay, bisexual, lesbian, etc.

**Transition:**

The process a transgender person undertakes to align their gender expression and/or sex characteristics with their gender identity.

Transition can be social, in which a person may change their name or pronouns or change their gender expression to be more masculine, more feminine, or more androgynous; medical, in which a person uses physical interventions, such as hormone replacement therapy (HRT) and/or surgery to alter sex characteristics; or it can involve in both social and medical components. While many transgender people undergo social and medical gender transitions, not everyone has the ability or desire to do so.

A person cannot transition to "become" intersex because being intersex is defined as having a physical variation in sex characteristics present at birth.

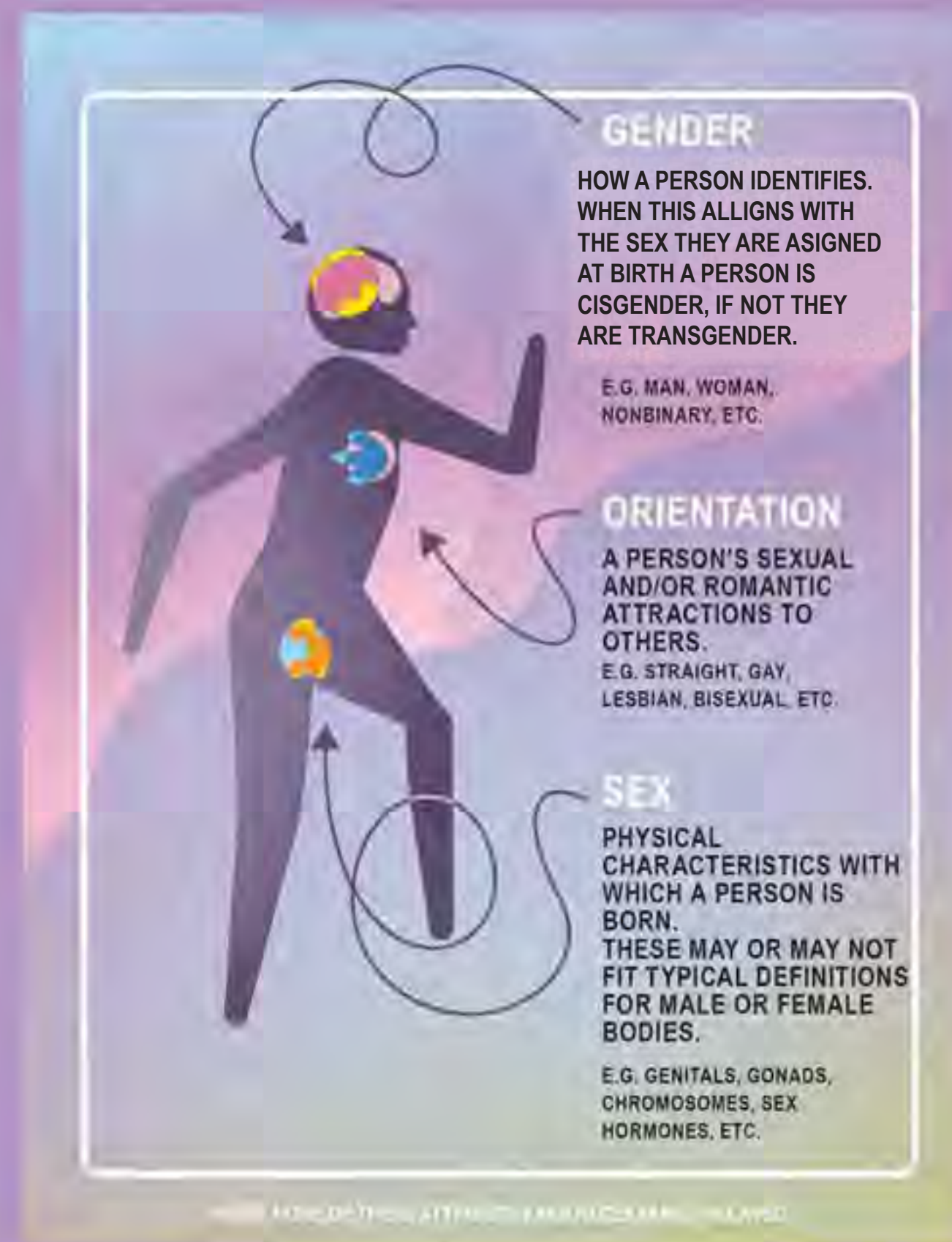
**Transsexual:**

An outdated term historically used to refer to a person who had a binary gender identity that differed from their sex assigned at birth, and who sought surgical intervention as part of their gender transition.

Unless a person identifies themselves as transsexual rather than transgender, this term can be pathologising and should not be used.

**Yogyakarta Principles:**

Principles that address a broad range of international human rights standards and their application to issues of sexual orientation, gender identity and sex characteristics. They are a universal guide to human rights which affirm binding international legal standards with which all member-states must comply.





# LEARN

## Frequently Asked Questions

**Q** What is the difference between gender identity and sexual orientation?

**A** Gender identity refers to your own sense of gender (who you are), while sexual orientation refers to the gender or genders of individuals who you might find yourself romantically or sexually attracted to (who you love).

*Just like cisgender people can be straight, gay, lesbian, bisexual and queer, so too can transgender and intersex people. Do not make assumptions about an intersex or transgender person's sexual orientation.*

**Q** What is the difference between sex and gender?

**A** Sex is what society assigns you at birth based on your external genitalia, whereas gender refers to social norms that society places on people based on their genitalia.

*People tend to use the terms "sex" and "gender" interchangeably. But, while connected, the two terms are not equivalent. Generally, we assign a newborn's sex as either male or female based on the baby's genitals. Once a sex is assigned, we presume the child's gender. For some people, this is cause for little, if any, concern or further thought because their gender aligns with gender-related ideas and assumptions associated with their sex. However, when individuals or groups do not "fit" established gender norms they often face stigma, discriminatory practices or social exclusion.*

**Q** Is intersex the third sex?

**A** No. All human sex differences are encompassed by the terms "male", "female" and "intersex".

*Intersex is, however, not a third sex – it is simply an umbrella term describing the continuum of differences from typically male to typically female – with over 40 known variations in the spectrum. Humans tend to be clustered towards either end of this continuum of male and female, with many smaller clusters in between.*

**Q** Do all transgender people access gender-affirming healthcare?

**A** No, not all transgender people desire, can access, or undergo gender-affirming care, nor is it a pre-requisite for transgender identity or gender expression.

**Q** What does it mean to be non-binary?

**A** Non-binary is a spectrum of gender identities that are not exclusively male or female; identities that are outside of that gender binary.

*Folks who identify as gender non-conforming, non-binary or genderqueer fall under the transgender umbrella, because they identify differently from their sex assigned at birth. Non-binary people may identify as having two or more genders (such as being bigender); having no gender (agender, genderless, genderfree); moving between genders or having a fluid gender identity (genderfluid), or simply as non-binary. There is no such thing as "looking" non-binary, as a non-binary gender identity is not associated with any specific gender expression. Like anyone else, non-binary people have a wide variety of gender expressions that can be described as masculine, androgynous, or feminine.*



## Q What is the difference between intersex and transgender?

**A** Intersex and transgender people have a shared interest in autonomy and may have distinct legal needs while facing overlapping barriers to appropriate care. While intersex individuals are forced to undergo medically unnecessary surgeries in infancy, transgender individuals are often denied desired medical treatment. Transgender people may conversely be unable to access gender-affirming documentation without undergoing surgeries that are, in some cases, unwanted. Both communities grapple with a loss of decision-making authority over their own bodies.

*The terms "transgender" and "intersex" are often confused. While a person who is transgender has a gender that is different from the one traditionally associated with the sex they were assigned at birth, a person who is intersex was born with a variation in their sexual or reproductive anatomy such that their body does not fit typical definitions of male or female. Both intersex and transgender people can identify as men, women, non-binary, or in a multitude of different ways. While transgender people may identify differently from how they were assigned, their biology at birth typically conforms to a binary understanding of sexual and reproductive anatomy.*



## Q What name and pronoun do I use?

**A** For some people, being associated with their birth name is a tremendous source of anxiety, or it is simply a part of their life they wish to leave behind. Respect the name a transgender person is currently using. If you happen to know a person's birth name (the name given to them when they were born, but which they no longer use), don't share it without that person's explicit permission. Sharing a transgender person's birth name and/or photos of a transgender person before their transition is an invasion of privacy, that often is part of non-consensual disclosure or "outing". Some transgender people feel comfortable disclosing their gender history, and some do not. A transgender person's gender history is personal information and it is up to them to share it with others. Do not casually share this information, speculate, or gossip about a person you know or think is transgender. Not only is this an invasion of privacy, it also can have negative consequences in a world that is very intolerant of gender diversity. Transgender people can lose jobs, housing, family, friends, or even their lives when other people find out about their gender history.

*Using incorrect pronouns often have the same impact. If you're unsure which pronoun a person uses, listen first to the pronoun other people use when referring to that person. Someone who knows the person well will probably use the correct pronoun. If you must ask which pronoun the person uses, start with your own.*

*For example, "Hi, I'm Thabo and I use the pronouns he and him. What about you?"*



*Then use that person's pronoun and encourage others to do the same. If you accidentally use the wrong pronoun for someone, apologize quickly and sincerely, then move forward with intention. The bigger deal you make out of the situation, the more uncomfortable it is for everyone. You may want to be made to feel better and told that it is clear you have good intentions and are still a good "ally" despite this error. Remember that your feeling badly about misgendering someone cannot take priority over the way that the person who was misgendered feels; so don't prioritize your feelings or ego in the moment. There's nothing worse than getting misgendered and then having to soothe and care-take the person who just misgendered you.*

*"Oh yeah, she....I mean he is going to go over there around noon", is a good example of acknowledging the mistake by correcting yourself mid-sentence, not derailing the conversation or making a scene, and moving on quickly with what ever the topic of conversation was, committing to do better next time.*

*You may feel inclined to say something like, "it won't happen again", "I'm working on it", "I'll get it right next time", or "it's hard for me, but I'll keep working to get it right". These sentiments, while they may be true for you, might be better acted upon than stated. That is, instead of telling the person that you are working on it and that it won't happen again, move on from the situation and on your own time (versus on theirs) work on it, practice, and try and not make the same mistake again in the future.*

*Lastly, you may hear someone being misgendered. It is appropriate to gently correct them without further embarrassing the individual who has been misgendered. This means saying something like "Phumi uses the pronoun she," and then moving on.*

**Q** Do intersex people all have a non-binary gender identity and want third gender identification document options?

**A** Intersex people can have any gender. Having an intersex body and a non-binary gender are often conflated in the media. Some intersex people have non-binary gender identity, and some do not. Intersex people are just like any other group in their diversity of identity and expression, and should be afforded their right to self-determination. Some countries are beginning to introduce laws allowing for third gender or non-binary identity documents, which sometimes includes options to register intersex infants as a third option. These kinds of laws can be dangerous for intersex people through motivating more harmful, irreversible surgeries on young children, in an attempt to avoid a state-sanctioned, forced, separate classification – increasing stigma, discrimination, shame, secrecy and human rights violations.

From a rights-based perspective, third sex / gender options should be voluntary. If only trans and/or intersex people can access that third category, or if they are compulsively assigned to a third sex, then rather than increasing freedom of expression and effecting the right to autonomy and self-determination, a third gender marker further perpetuates harm.

**Q** What is DSD? Is this the same as intersex?

**A** In 2006, the medical community replaced the term intersex with "disorders of sex development" (DSD). DSD is problematic because it reinforces the idea that intersex is a medical condition in need of correction. Using DSD, individuals that identify as intersex have no choice but to identify as "disordered", even though their natural bodies are most often healthy. It is a term rooted in pathologisation and stigma that has served to justify violations of the human rights of intersex people in medical settings. While some intersex people use the label to self-identify, it should otherwise be avoided.



## ACT

### Ally-ship

**If it is not possible to ask a person which pronoun they use, use the singular they.**

Do not assume you know how a person identifies or which pronouns they use based on their appearance. Rather, use the singular they to describe someone to refrain from assumptions.

*For example: "Every individual should be able to express their gender in a way that is comfortable for them."*

**Always use a transgender person's chosen name.**

Some transgender people are able to obtain a legal name change. However, some transgender people cannot afford a legal name change, are not yet old enough to legally change their name, or have other reasons for not pursuing a legal name change. They should be afforded the same respect for their name as anyone else.

**Trans at a glance? No ways!**

**You can't tell if someone is trans or intersex by just looking.**

Just like every other person on the planet who look, feel and grow differently – trans and intersex people don't look any certain way or come from any one background. Chances are you have interacted with people in your life and the thought that they may be trans or intersex never crossed your mind. It is not possible to look around a room and "see" if there are any trans or intersex people. (It would be like a person looking around the room to "see" if there are any gay people.) You should assume that there may be intersex or trans people at any gathering.

**Understand there is no "right" or "wrong" way to transition, and that it is different for every person.**

Some transgender people access medical care like hormones and surgeries as part of their transition to align their bodies with their gender identity. But going on hormones or having any form of surgery is not needed to be who you are. Some transgender people want their authentic gender identity to be recognized without going on hormones or undertaking surgery. Due to the expense and inaccessibility of medically and surgically transitioning most transgender people won't access medical care in their lifetime. A transgender person's identity is not dependent on medical procedures or their physicality. If someone tells you they are trans, believe them without asking what genitalia they possess or what hormones flow through their bodies.

**Avoid backhanded compliments and "helpful" tips.**

While you may intend to be supportive, comments like the following can be hurtful or even insulting:

*"I would have never known you were transgender. You look so pretty."*

*"You look just like a real woman."*

*"She's so gorgeous, I would have never guessed she was transgender."*

*"He's so hot. I'd date him even though he's transgender."*

*"You are so brave."*

*"You'd pass so much better if you wore less/more make-up, had a better wig, etc."*

Comments that suggest that being visibly gender non-conforming is something to be avoided or something that is inconsistent with a pleasing appearance, that imply that only the gender identities of cisgender folk are "real", or that a trans identity is something undesirable that can be overlooked according to the circumstances, are inaccurate and offensive.

**Challenge anti-intersex and anti-transgender remarks or jokes in public spaces.**

You may hear anti-intersex or anti-transgender comments at home, work or in public places. It's important to challenge harmful remarks or jokes whenever they're said and no matter who says them.



### Listen to transgender and intersex people.

The best way to be an ally is to listen with an open mind to intersex or transgender people speaking for themselves. Talk to intersex and transgender people in your community. Check out books, films, YouTube channels, and blogs to find out more about transgender and intersex people and the issues people within the community face.

### When talking to intersex or transgender people

do not assume that it is their duty to discuss being trans or intersex at any time, or that they will be comfortable discussing all aspects: ask if it's okay first and do not proceed without explicit consent.

*Getting consent can sound like, "Can I ask some questions about the intersex community? I know you must get this a lot so I understand if you would rather not engage with it now."*

Do not ask about a trans or intersex person's genitals, surgical status, or sex life, unless it comes up in consensual conversation - if a trans or intersex person wants to talk to you about such matters, they will bring it up themselves. Phrase questions to understand intersex or trans issues broadly, not in ways that are personal and invasive. Ensure your questions do not stigmatise or fetishize trans and intersex people.

*For example, you might ask, "what does it mean to be intersex?"*

### Educate yourself and know your own limits.

Don't be afraid to admit when you don't know something. It is better to admit you don't know something than to make assumptions or say something that may be incorrect or hurtful. Take the time to seek out the appropriate resources that will help you learn more. Remember being an ally is a sustained and persistent pattern of action; not an idle or stable noun.

### Take leadership from trans and intersex people.

Engage with trans and intersex communities and organisations, and take leadership from them in getting their human rights issues on the radar.



EU-SA  
Policy Dialogue on the Rights of  
Transgender & Intersex Persons

## Phase One – Synthesised documentation from EU study tour, desk research and junior NKE policy analysis report



SA-EU Dialogue Facility

22 January 2020

Submitted by Dr B Camminga



Health  
Home Affairs  
Justice and Constitutional Development





## Table of Contents

List of Acronyms and Abbreviations	53
1. Introduction and Executive Summary	54
2. A detailed overview of Malta's Gender Identity, Gender Expression and Sex Characteristics Act and its full implementation in practical terms	55
2.1 Education	56
2.2 Health	58
2.3 Legal Gender Recognition	59
2.4 Migration	61
3. Key Questions and Concerns	62
4. Brussels	63
Appendix 2: SA & EU Policy Mapping Chart	65
References	68

## List of Acronyms and Abbreviations

ACMS	African Centre for Migration and Society
CAT	Committee Against Torture
CSO	Civil Society Organisation
DHA	South African Department of Home Affairs
DOH	South African Department of Health
DOJ&CD	South African Department of Justice and Constitutional Development
EU	European Union
GIGESC	Gender Identity, Gender Expression and Sex Characteristics Act
IGM	Intersex Genital Mutilation
ILGA	International Lesbian, Gay, Bisexual, Trans and Intersex Association
ISSA	Intersex South Africa
LGBTQI	Lesbian, Gay, Bisexual, Transgender, Queer and Intersex
NTT	National Task Team
T&I	Transgender and Intersex
UNESCO	The United Nations Education, Scientific and Cultural Organisation
WPATH	World Professional Association for Transgender Health



## 1. Introduction and Executive Summary

The Republic of South Africa (SA) and counterparts within the European Union (EU) (Malta and Belgium) are dedicated to protecting the human rights of Transgender and Intersex (T&I) persons in their respective countries. While there have been significant strides in legislative safeguards, gaps in policy and challenges with implementation remain consistent. Thus, the South African Department of Justice and Constitutional Development, in partnership with human rights civil society organisation (CSO), Iranti-Org, is pursuing the SA-EU Dialogue opportunity for transformative interchange between the Government of Malta, the Ministry of European Affairs and Equality and ILGA Europe, facilitating engagement with Belgium-based, key EU institutions, including the European Parliament's Intergroup on LGBT Rights. This is to enhance policy dialogue and capacity building through discussion paper development and partnership opportunities between the countries and noted directorates to provide a platform for sharing evidence-based approaches to strengthen and further inform policy development work and the implementation of laws that protect the rights of T&I persons. From 27 August to 4 September 2019, representatives from various South African state departments, civil society groups and tertiary institutions met with counterparts in Malta and Brussels to learn about advances made in protecting the human rights of T&I persons in their respective countries and across the EU.

### Participants included:

#### South African Department of Justice and Constitutional Development (DOJ&CD):

- John Jeffrey, Deputy Minister
- Busisiwe Dhlamini, Deputy Director – National Task Team LGBTI Unit
- Doshara Sewpaul, Deputy State Law Advisor

#### South African Department of Home Affairs (DHA):

- Njabulo Nzuzu, Deputy Minister
- Thomas Sigama, Acting Deputy Director General – Civics (Registrations)
- Thulane Ngubane, Head of Deputy Ministers Office

#### South African Department of Health (DoH):

- Dr Gerhard Grobler, Head of Psychiatry Steve Biko Academic Hospital

#### Civil Society:

- Jabu Pereira, Iranti-org
- Nihabisieng Mokoena, Intersex South Africa (ISSA)
- Dr B Camminga, Wits University, African Centre for Migration and Society (ACMS)

## 2. A detailed overview of Malta's Gender Identity, Gender Expression and Sex Characteristics Act and its full implementation in practical terms

The Maltese Gender Identity, Gender Expression and Sex Characteristics (GIGESC) Act, Chapter 540, was introduced in 2015. As part of the country's ongoing commitment to human rights and principles of equality in the country, it forms part of Malta's *LGBTI Equality Strategy and Action Plan (2018-2022)*. The first Action Plan was from 2015-2017, running in parallel with the implementation of the Act. The aim of the 2018 Action Plan is to make "sexual orientation, gender identity, gender expression and sex characteristics become entirely inconsequential in terms of protection, treatment, access, movement and progress in society"<sup>1</sup>. The GIGESC Act is recognised globally as best practice in terms of protecting the rights of T&I people. The Act took inspiration from the Gender Identity Law passed in 2012 in Argentina<sup>2</sup>. However, the Maltese legislation is considered to go further since it includes protection for intersex people. Article 14 covers the needs of intersex people by making sex assignment treatment and/or surgical intervention on the sex characteristics of a minor unlawful until the person can provide informed consent. This is considered a vital step towards ensuring that the primary rights to self-determination, bodily integrity and personal dignity are respected.

- <sup>1</sup> It shall be unlawful for medical practitioners or other professionals to conduct any sex assignment treatment and/or surgical intervention on the sex characteristics of a minor which treatment and/or intervention can be deferred until the person to be treated can provide informed consent. Provided that such sex assignment treatment and/or surgical intervention on the sex characteristics of the minor shall be conducted if the minor gives informed consent through the person exercising parental authority or the tutor of the minor.
- <sup>2</sup> In exceptional circumstances treatment may be effected once agreement is reached between the Interdisciplinary Team and the persons exercising parental authority or tutor of the minor who is still unable to provide consent. Provided that medical intervention which is driven by social factors without the consent of the minor, will be in violation of this Act.<sup>3</sup>

The core of the GIGESC Act is the right to gender identity, as defined in Article 3:

- <sup>3</sup> (1) All persons being citizens of Malta have the right to:
  - (a) the recognition of their gender identity;
  - (b) the free development of their person according to their gender identity;
  - (c) be treated according to their gender identity and, particularly, to be identified in that way in the documents providing their identity therein; and
  - (d) bodily integrity and physical autonomy.<sup>4</sup>

The Act is the outcome of a series of court cases prior to 2015 by transgender Maltese citizens, the willingness of the Maltese government to improve the situation of its T&I citizens and the work of civil society. The initial Bill was developed by Malta's LGBTI Consultative Council. In the process, consultations were held with various local and international institutions and organisations to ensure that the law would meet current standards and protect T&I people against discrimination. The GIGESC Act provides for the recognition and registration of the gender of a person and regulates the effects of such a change, as well as the recognition and protection of the sex characteristics of a person. Since 2015, the law has been amended to extend rights to those in detention, including non-Maltese detainees. In the first year after the introduction of the Maltese Act, 44 persons changed their documents. No cases of fraudulent use are known.<sup>5</sup>



### In summary the law provides for the following:

- A right to gender identity for all persons;
- Regulates the procedure for change of legal gender for minors and adults alike
- Recognises foreign decisions regarding gender identity by a competent court or responsible authority
- For amendments of gendered characteristics on all official documents (such as the ID card and the passport) or certificates;
- Privacy of the person whose gender has been rectified on official documents;
- Introduces a positive obligation on government entities to ensure that their services meet the objectives of this Act
- The possibility for parents to postpone the entry of a gender marker on their children's birth certificate
- A right to bodily integrity and physical autonomy for all persons;
- Makes non-medically necessary treatment on the sex characteristics of a person without informed consent unlawful.
- Psychosocial counselling, support and medical interventions related to sex and/or gender;
- The revision of the protocol regulating sex assignment treatment and/or surgical interventions on the sex characteristics of a person;
- Introduces 'gender expression' and 'sex characteristics' within the list of grounds for aggravated circumstances under the Criminal Code.<sup>11</sup>

## 2.1 Education

"Here we are not talking about minority rights, we are talking about human rights... What rights should we give them is not the question? It is really a question of what rights do we think they should not have.

**This is a question that pushes us in the other direction"**

**(Evarist Bartolo, Minister Education and Employment)**

The GIGESC Act protects the rights of T&I learners to hold a degree that corresponds with their gender identity in noting

*"the person may also, on the payment of fee as be prescribed, and request any other competent authority, department, employer, educational or other institution to issue any official document or certificate relative to them indicating the gender and first name of the person as entered in the Gender Register."*

Malta's educational policies supporting T&I students are documented in the Ministry of Education's *Trans, Gender Variant and Intersex Students in School Policy* (2016),<sup>12</sup> which aims to foster inclusion, promote diversity, and ensure a safe learning environment, and the *Addressing Bullying Behaviour in Schools*<sup>13</sup> policy that notes harassment faced by gender diverse youth in schools. The *2014-2024 Framework for the Education Strategy for Malta: Respect for All Framework* offers concrete ways schools can create supportive learning environments.<sup>14</sup> In 2019, the Ministry for Education launched two additional documents: 'A National Inclusive Education Framework' and 'A Policy on Inclusive Education in Schools'. Among the groups it aims to address are: *'Learners of different genders, Learners with different sexual orientations, Learners of different gender identities and expressions, Learners with LGBTIQ parents.'*<sup>15</sup>

Malta's Ministry for Education and Employment's *Policy and Inclusive Education in Schools: Route to Quality Inclusion* (2019) centres comprehensive and inclusive education. The focus is on an *'Inclusive Education system implemented as an endeavour to achieve no-discrimination in education'*<sup>16</sup>. They draw their definition of inclusion from the United Nations Education, Scientific and Cultural Organisation (UNESCO)

*"education is not simply about making schools available for those who already have access to them. It is about being proactive in identifying the barriers and obstacles learners encounter attempting to access opportunities for quality education, as well as in removing barriers and obstacles that lead to exclusion"*<sup>17</sup>

The policy guides schools to focus not only on inclusion but also dismantling mechanisms and practices of exclusion. Inclusive education is wider than the learner but focuses on the system itself and barriers to learner access. Malta's education system has shifted from *'a 'one size fits all' educational model towards a socially just education that aims to increase the system's ability to respond to learners'*<sup>18</sup>. Gender and sexual diversity fall among one of the six areas of diversity focus. This is unpacked as removing barriers for *'learners of different genders, learners with different sexual orientations, learners of different gender identities and expression and learners with LGBTIQ parents'*<sup>19</sup>. The policy views inclusive education as a continuous developmental process. The *Trans, Gender Variant and Intersex Students in Schools Policy* takes all aspects of school life into account, allowing schools to approach these issues from many angles (the curriculum, support to students, working with parents, working with civil society, etc.).

Human testimony was key to driving the changes for Malta, not just from trans people but family, parents and mothers. This is what made the difference at institutional and legal levels: meeting the victims of the system. Malta practices what they call a *'whole school approach'* to the creation of a supportive learning environment for T&I youth. Within this approach, logistics, infrastructure and the language used to address issues is important. Issues of toilets, sports and kit are all questions of inclusion. The traditional Maltese school uniform of the shirt and tie has been replaced with a tracksuit as a far more gender inclusive option. Schools are now all co-ed. After implementing the GIGESC Act, schools were tasked with assessing their policies in relation to questions of what was essential to education outcomes and what in their policies, was extraneous, rather than just looking at T&I kids. There have been issues with physical and cyber bullying, which have been far less prevalent when Heads of Schools are seen as supportive of inclusion and diversity. Children of LGBTI parents are also often stigmatised.

For Malta, the key critical intervention to including gender and sexual diversity in education spaces has been making these issues part of the core curriculum. Here, comprehensive sex education is part of the core curriculum. For students, opting out is not an available option. Religion and religious reservations are taken into consideration but are always measured against human rights. It was noted that since there are no grounds for opting out of other facets of education in Malta, why would gender and sexual diversity (as part of core curriculum) be any different? Students are encouraged to think critically and engage with images and words. For the school system in Malta, engaging with images of inclusion and diversity are important to ensuring inclusion and diversity. Tools such as a standardised *Life Skills Workbook* across schools support this. It was stressed that changing laws and curriculums are nothing without a commitment to training teachers to make the understanding of gender a reality. Embedding these issues in the core curriculum allow for mainstreaming and assists in working towards creating enabling school environments.

Policies addressing bullying behaviour in schools directly address the needs of trans, intersex and gender variant students in schools. This is monitored through the *Safe Schools Program*, which has a set of forms that schools are required to fill in. As yet, they do not have monitoring of feedback from schools, however there are reviews of schools that look at students, teachers and parents, in essence the culture of a school. They suggested that the key to some of their school successes has been following a piloting model rather than an imposition model. This means going into schools and supporting teachers, ultimately supporting schools to work better. Specialist teachers cover life skills courses and this part of the curriculum. In order to get schools and parents on board, Malta has a school council but no parents group, although some independent schools have governing bodies. The focus has been on getting parents and schools to understand needs at an individual level.



## 2.2 Health

For Malta, gender affirmation is a key determinant of transgender health and is comprised of four domains. The first, addressed by the GIGESC Act, is legal. The Act bans conversion therapy and specifically addresses the depathologisation of gender identity, specifying that gender identity/expression should in no way hamper access to health services. The other aspects of gender affirmation include *"the psychological aspect referring to the felt, internal gender of the person, the social aspect referring to the pronoun and name that is used while addressing the person and the medical aspects which relates to hormonal and surgical therapies"*<sup>18</sup>. The fundamental tenant of depathologisation is drawn directly from the World Professional Association for Transgender Health (WPATH) who note:

*"The expression of gender characteristics, including identities, that are not stereotypically associated with one's assigned sex at birth is a common and culturally-diverse human phenomenon which should not be judged as inherently pathological or negative"*<sup>19</sup>

Malta's February 2018 legal notice documented the National Health Service's inclusion of gender identity and sex characteristics related conditions in the entitlement schedule.<sup>20</sup> Once it was included in the National Health Service, funding was ring fenced in order to make it a reality. That same year, the Ministry for Health proposed the use of the Standards of Care delivered by WPATH as a foundation for their own transgender healthcare protocols<sup>19</sup> to provide *"safe and effective pathways to achieving lasting personal comfort with their gendered selves in order to maximise overall health and social wellbeing"*<sup>21</sup>. Self-determination and the value of harm reduction approaches are emphasised. Greatly supported by civil society, this move towards health inclusion was also part of the Maltese Labour Party manifesto of 2017. Offering a holistic human rights-based approach, Malta's first Gender Wellbeing Clinic was opened in November 2018, increasing accessibility of gender affirming healthcare.<sup>21</sup> For the Minister, the naming of the clinic with its focus on wellbeing is a critical indicator of the State's overall approach.

The health model they follow is an individual care and informed consent model or a shared decision model underpinned by depathologisation. On first referral to the Gender Wellbeing Clinic, a needs assessment is carried out. This is done to identify the individual needs and expectations of the client. An individualised pathway is then mapped out. Full access to mental healthcare services are available but are, critically, not required. A depathologised approach means that the lead on assessment is the endocrinologist rather than a psychologist or psychiatrist. Psychiatric care is only given to address issues of suicide. Clients are evenly split between trans men and trans women. There are also a few children.

The age of informed consent in Malta is 16. Adolescents and children, or those below the age of 16, would need a child psychologist to sign off prior to medical and surgical intervention. Hormones, however, are accessible to those under the age of consent if the parents consent on the child's behalf. For children and adolescents, reversible treatments are considered before 16 years, while partly or fully irreversible treatment is usually only considered after 16 years. Paediatric experts are also part of the team in order to ensure care of minors.

Now that they provide affirming healthcare, the focus has shifted to improving its quality and access. Demand was higher than initially anticipated when the clinic first opened and civil society has been able to give feedback. The clinic offers voice therapy, psycho-social support and professional mental healthcare. The team at the clinic is made up of people who are each experts in their own field but also willing to learn. They all have general medical training as doctors. Given the highly specialised nature of service and the relatively small numbers compared to the wider population, the Ministry has focused on training a highly dedicated and specialised multidisciplinary team. Specialist training in transgender healthcare was provided by Gent University in Belgium. Malta struggles with a shortage of psychologists and social workers.

For many trans people, access to affirming healthcare or *"sex-specific care and transition-related care"* is a critical element of overall health.<sup>22</sup> This may include cervical smears for trans men or prostate exams for trans women. To provide trans-inclusive healthcare, Malta provides training for the health workforce with the aim of making the broader service user friendly. Key to their health policy is a person-entered approach, which focuses on the physical, mental and social aspects of care of the individual.<sup>23</sup> Some of the problems they have had to tackle include health inequalities based on the cultural and social investment in binary gender norms and heterosexuality, which often result in the discrimination and marginalisation of trans people. The outcome of this is often adverse health seeking behaviours. Misgendering remains an issue, particularly for non-binary people. Healthcare staff are *"frequently, often unknowingly, responsible for misgendering"*.

Intersex health has always been part of the State healthcare policy. Any sex 'normalising', sex 'altering' or sex 'assigning' treatment on intersex children at birth or intersex minors is banned. Unless life threatening, the decision is deferred to the child and they can make that decision from the age of 14. It is crucial to keep transgender and intersex healthcare separate because the considerations are different. Parents of intersex children are provided with support and the child, during their life, has regular endocrinologist follow ups with an interdisciplinary team. The law stipulates that there must be treatment guidelines for intersex children.

## 2.3 Legal Gender Recognition

**The GIGESC Act declares the right to self-defined gender identity and supporting legal documents. Adopting best practices for legal gender recognition from Argentina and overall increased safeguards for T&I persons, the Act recognises the rights of all citizens to have their gender identity legally documented and recognised. As noted, the Act further breaks with normalised pathologisation, providing strengthened protections banning sex-assigning operations on intersex infants and children, assuring informed consent and offering a global, good practice model.**

Prior to the current system in Malta, gender recognition worked on the basis of pathologisation. Changing your legal gender on documents required diagnosis, forced hormones and surgeries. Before the law changed, the procedure to change documentation was cumbersome and *"irreversible gender reassignment surgery was required"*. Surgery at the time was not funded, making access increasingly difficult. The Argentinian law was very useful to Malta and was adapted to their specific context. The GIGESC Act focuses on physical integrity and bodily autonomy. In its shaping there was broad-based civil society engagement, especially around intersex issues and needs. There were several court cases before the change in law, all of which involved trans women. However, the change in law, partly able to be actualised due to a decline in the Church's influence, allowed more trans men to come forward given its foundation of self-determination and recognition of sex characteristics, gender identity and expression. The process itself does not take longer than 30 days from application to a change in the Public Register (described below). Thus far it seems that the low threshold procedures for legal gender recognition based on self-determination have eased pressure and discrimination.



In contrast to South Africa, Malta works on a notary system, which means that presently, should one wish to alter their gender identity, they need to approach a Notary Public and have a deed established. Once done, the deed is irreversible. Minors, those who are below the age of 16, cannot approach a Notary. In this instance, parents have to go before the court, who then decides if it is in the best interest of the child. The Public Notary only records what they are told. The only proviso to their job is that they must ensure that those who approach them are lucid. The Public Register holds the names and other identifying markers of Maltese citizens, including sex. It is there to record facts. The Notary changes the facts and takes these to the State to amend in the Public Register. Should the person wish to have the change revoked, they need to go to court. The long version of the Maltese birth certificate shows the annotation process while the short does not. There is also a limit on who can request a full birth certificate. Parents can apply on behalf of minors for changes of name and gender. There is no age restriction on this in Malta and the law is clear that no psychiatric intervention or medical diagnosis is required for minors to gain access. There are detailed provisions in the law on what to do if parents disagree but the focus is on the best interests of the child.

At birth, parents can choose to designate 'f' for 'female', 'm' for 'male', 'X' for those who are not male or female-identified or 'I' for intersex. At 18, 'I' falls away and a decision must be made to be either 'M', 'F' or 'X'. Everything is self-declared and self-identified, there are no gatekeepers, even for intersex people. Should intervention, in an exceptional circumstance, be necessary for an intersex infant or youth, agreement of an interdisciplinary team and the parents is necessary.

## Prisons, Detention and Police

In November 2016, the law was voted to be extended to prisoners in detention. *The Trans, Gender Variant and Intersex Inmate Policy* regulates accommodation, respect for names, access to clothing and facilities for those in detention, including non-Maltese detainees. A person detained in a gender-segregated facility in Malta may have their gender recognised by means of an affidavit confirming gender and the intention to continue to live as such throughout their period of detention. This does not have to appear on their identity documents. The affidavit is enough for them to be moved to the facility of their gender identity. Malta currently has four trans women inmates integrated into the female prison population. There is, however, a distinction between gender identity and expression. For example, they had a trans woman who wanted to (and was allowed to) express her gender but remain in the male prison because her ID said male. So, prisoners can self-identify according to their lived gender. In regards to non-Maltese detainees, the law was amended to allow specific provisions for persons in detention who are not Maltese citizens. Their documents are not changed but they are treated according to their gender identity.

The police policy was in formulation during our visit. Hate Crimes form part of Chapter 9 of the Laws of Malta. All officers and recruits are given training on LGBTQI+ issues and hate crimes. It was noted that the training of prison wardens has been a challenge.

## 2.4 Migration

The enactment of the Refugees Act in 2002 established the Commissioner for Refugees, who is responsible for registering applications of asylum. They receive roughly 1700 applications per year, although in 2019, they had 3000+. Malta has one of the highest rates of irregular migrant arrivals per capita in Europe.<sup>i</sup> On arrival, an asylum seeker registers with an application form. This goes to the Dublin Unit to decide if they are Malta's responsibility.<sup>ii</sup> Malta aims to close cases within six months of application. Questions are adapted to claims. LGBTQI+ specific data is not collected for statistical purposes but most of their LGBTQI+ claimants are from West Africa and Libya. They have specifically trained LGBTQI+ caseworkers. Transcripts of interviews are made available to claimants after interviews. The questions caseworkers ask rely on psycho-social understandings and emotional questions as well as specific questions about the situation in countries of origin for LGBTQI+ people and risk in relation to person and country. They believe it is more efficient to depart from an open conversation rather than taking an aggressive stance. They use international tools and guidelines on LGBTQI+ asylum, particularly those provided by Belgium and Italy.

The Government of Malta's Chapter 420 Refugees Act of 2001 includes protections for those in particular social groups inclusive of gender diversity.<sup>26</sup> The GIGESC Act:

*"(8) A person who was granted international protection in terms of the Refugees Act, and in terms of any other subsidiary legislation issued under the Refugees Act, and who wants to change the recorded gender and first name, if the person so wishes to change the first name, shall make a declaration confirmed on oath before the Commissioner for Refugees declaring the person's self-determined gender and first name. The Commissioner for Refugees shall record such amendment in their asylum application form and protection certificate within fifteen days."*<sup>27</sup>

Malta's Procedural Standards for Granting and Withdrawing International Protection (S.L. 420.07) states:

*"persons who conduct interviews for asylum claims should be sufficiently competent to take account 'of the personal or general circumstances surrounding the application including the applicant's cultural origin, gender, sexual orientation, gender identity or vulnerability'"*<sup>28</sup>

These guidelines provide strategies to mitigate prejudice throughout the asylum process.

It is unlikely that T&I asylum claimants will have documents from their country of origin acknowledging their gender identity. Without recognition of their gender identity in their country of asylum, T&I asylum seekers can be left in limbo, often worse off than the countries they fled. Being without adequate documentation can severely hamper their integration. Transgender migrants are particularly vulnerable to transphobic violence. Given that migrants and asylum seekers are at higher risk of being accused of fraudulent behaviour, documents acknowledging gender are key to employment, finding housing and, if need be, turning to law enforcement.



### 3. Key Questions and Concerns

Key question asked by the South African delegation during the various meetings in Malta included the following:

#### What happens in prisons?

Hosts reminded the group that it is notable that whenever we talk about trans people the conversation generally runs to transgender prisoners. As noted so far, four trans women have been integrated into a women's facility in Malta, though it must be noted that the number of female prisoners overall in Malta is significantly low. Statistically, transgender detainees across countries "are at the bottom of the prison hierarchy making abusive intent unlikely". Trans women face high levels of discrimination and violence in detention. The focus should be on ensuring women in detention are safe, trans or not.<sup>29</sup>

#### Can you change your mind or switch or change back?

Delegates were reminded that though this was very rare, levels of stigma would have an impact on this. Maltese delegates noted that people had 'de-transitioned' but it was stressed that this was often due to painful situations at home or difficulties surviving. It was reiterated that in their experience, the idea that people just switch at will was over-exaggerated. It was also noted that the issues of trans people are not going to go away and what is needed to move forward is open minds and open hearts. In Belgium you can but, like Malta, you have to go to court. They have not had anyone do so thus far. To date, experiences from countries with accessible gender recognition do not suggest evidence of switching or changing back. The effort and personal impact involved are simply too high. The effort involved in gender recognition should not be overlooked or undermined.

#### What is the risk of self-determination?

In Malta, central to the law is bodily integrity and the right to gender identity. There is a supposed risk related to the fears in the question above regarding those who might 'switch back and forth', but no practical experience supports this perception. In the few cases where people have de-transitioned, decisive factors have been distress resulting from transphobia, along with poor response/support from family and friends and social pressure.

#### The X marker: what would this mean for South Africa? Should it appear on ID documents?

Malta also permits an 'X' option on identification documents since 6 September 2017, but it functions as a non-declaration of sex or 'unspecified'. It was noted that even if a state provided the 'X' marker option, the individual would need to bear in mind the issues that may arise with regards to recognition in countries they may travel to. The X on a passport does not however translate into an X in the birth register, this remains either 'M' or 'F'. This is something that will need to be considered further by both the State and CSOs in South Africa.

### 4. Brussels

This portion of the trip focused predominantly on EU-level initiatives and particular approaches undertaken by different EU countries. Malta, alongside Denmark, Norway and Ireland, are considered to have set the path in terms of providing "quick, transparent and accessible procedures based on self-determination" for legal gender recognition in Europe. Breaking with previous traditions of gatekeeping and pathologising, none of these states require a 'Gender Identity Disorder' diagnosis or psychological opinion. The ideal, based on the Maltese approach, is that the self-determined gender identity of a person would be enough for a change of documents, including the birth certificate.

#### The European Parliament LGBTI Intergroup

Founded in 1999 with 153 members, the Intergroup monitors work on LGBTI rights at the EU level. Their priorities are asylum, freedom of movement, transgender and intersex rights and ending the persecution of LGBTI people. They condemn the pathologisation of intersex people. So far only Malta and Portugal have followed this route. For the Intergroup, the issue is not just intersex surgeries but sex norm treatment, which affects the entire life of an intersex person. Intersex people in the EU struggle with lack of access to medical records and different routes to access gender recognition.

In 2015, the Intergroup produced a report on transgender rights based on self-determination. The Council of Europe also has a resolution on transgender rights calling for self-determination. However, there are differences within the EU. Seven countries still require sterilisation of trans people, while three countries recognise non-binary people. Belgium has a new transgender law which focuses, like Malta, on de-pathologisation. It is still binary but a medical diagnosis is no longer needed to access legal gender recognition. At the time of our visit there was an ongoing constitutional challenge to implement a non-binary option.

The opposition to the Intergroup's work is growing. Eastern Europe in particular has a growing narrative of abnormality and 'being unnatural'. This is dangerous and is leading to violence. The Intergroup is trying to understand this pushback, as they did not see it coming. Using the terminology of 'gender ideology', opposition groups and populist politicians have publicly pushed back on Sexual Health and Reproductive Rights (SHR) and LGBTI rights. They use this language to frame these rights as 'against the order of nature'.

#### Cianan Russell, ILGA-Europe

The Rainbow Europe Map was presented as a way for ILGA Europe to advance LGBTQI+ rights. The map ranks states in relation to one another and the various rights and protections they have in place with regards to LGBTQI+ people. Based on the map, European states have worked to improve their ranking in relation to each other.

#### Ellen Murray, Executive Director Transgender Northern Ireland

Reform in the UK is mostly based on the right to family and privacy. There is general support for de-pathologisation and the large political parties all support this. The timelines in the UK for the reform of the Act are unclear because of Brexit. Campaigns in Scotland and Northern Ireland have fared much better. The Legal Gender Recognition Act is being used by anti-transgender academics and media figures as a weapon of fear mongering. There is consistent misrepresentation of the Act, often framed as medicalising children.



### Marjolein van der Brink, Utrecht University, Netherlands

The Netherlands also has a waiting list for healthcare access, which still requires a declaration by an expert that this is a permanent transition. This is about to be dropped to separate the legal issues from medical issues because it both medicalises the legal practice and actively requires doctors to have legal competency. The few instances (2-4) of people changing back in the Netherlands was of those that were elderly or late life transitions. They felt they were not accepted and returned to where they started.

### Bente Keulen, Netherlands Network Intersex/DSD

Malta is the only country to have banned Intersex Genital Mutilation (IGM) thus far, although the Committee Against Torture (CAT) has also qualified IGM as torture. Intersex surgeries are rarely a once off, especially if done when the child is an infant. Delaying surgery until the child can consent also saves on the cost of healthcare for intersex people. Early operations lead to heightened risk of cancer. Leaving the child means fewer health risks and surgeries and more money for healthcare later, although it is critical that parents then receive psychological support. Kenya was suggested as a possible source of options for South Africa. It was noted that intersex issues are far newer because for so long intersex people have been silent as a result of having been taught to hide; most were too ashamed.

## Appendix 1: Glossary<sup>96</sup>

Biological sex	A person's combination of genitals, chromosomes and hormones; usually categorized as "male" or "female" based on visual inspection of genitals via ultrasound or at birth.
Bisexual	A sexual orientation in which a person romantically, emotionally, or sexually is attracted to more than one sex, gender or gender identity though not concurrently, in the same way or degree.
Cisgender	A term used to describe a person whose gender identity aligns with those typically associated with the sex assigned to them.
Depathologisation	Being transgender should not be viewed or characterised as psychologically abnormal. Unlisted in 2016 as a mental disorder in the World Health Organisation's International Classification of Diseases.
Gay	A term used to refer to the sexual orientation of men who are emotionally and/or sexually attracted to men; although sometimes used in reference to the general LGB community.
Gender	Social and cultural codes to differentiate what a society sees as "feminine" and "masculine" behaviour and/or characteristics. It exists independently of sex and does not always correlate with the sex assigned at birth.
Gender binary	The concept that gender is firmly an either/or option of male/man/masculine or female/women/feminine based on sex assigned at birth, rather than a spectrum of diverse gender identities and expressions. It is often seen as restrictive and problematic, significantly for those who do not conform to a particular gender.
Gender affirming surgery	Surgical procedures that change one's body to conform to their gender identity, to bring the primary and secondary sex characteristics into alignment with their internal self-perception.
Gender expression	The outwardly expression of one's gender identity in appearance and mode of dress, as well as often behaviour and interests. It is often influenced by gendered stereotypes and typically categorized as masculine or feminine, less commonly as androgynous. It could be congruent as well as incongruent if a person is not supported, safe, or have the resources necessary to live authentic self-expression.
Gender identity	A person's internal, holistic, and deeply held sense of their gender. Unlike gender expression, gender identity is not visible to others.
Gender incongruence	Incongruence between a person's own experience of their gender (gender identity) and the sex assigned to them at birth (birth-assigned sex).



Gender marker	Designated on a person's identity documents (usually as M or F, but in the case of Belgium, also X) including, but not limited to: ID cards, birth certificates, passports and immigration documents, work permits, driver's licences, and health and education related documentation.
Gender non-binary	Used by those whose gender identity is seen as existing beyond (or between, different from, outside) the gender binary of man and woman.
Gender non-conforming	Used as self-identification for those who do not conform to traditional gender expectations or expression.
Intersex	A term that refers to a diversity of conditions and traits that cause individuals to be born with chromosomes, gonads, and/or genitals and differ from what is considered typical for female or male bodies.
Legal gender recognition	The official procedure to change a person's name and gender identifier in official registries and identity documents.
Lesbian	Refer to the sexual orientation of women who are affectionally, emotionally, and sexually attracted to women.
LGBTI	An acronym commonly used to refer to Lesbian, Gay, Bisexual, Transgender, Intersex.
Sex	The classification of a person as male or female. A person's sex is a combination of bodily characteristics including: chromosomes, hormones, internal and external reproductive organs, and secondary sex characteristics.
Sex characteristics	In reference to intersex people as they are born with physical sex characteristics that don't fit medical or social norms for female or male bodies.
Sexual orientation	A person's sense of attraction to, or sexual desire for, people of the same sex, opposite sex, both sexes, without reference to sex or gender.
Social transition	A transgender or intersex person's process of creating a life that is congruent with their gender identity. It may involve a person changing their gender expression to corresponds with their gender identity.
SOGI	Used in international human rights forums, which unites sexual orientation and gender identity in order to denote a status requiring protection in the same way as race, sex, ethnicity, religion or gender.

Transgender	Used to refer to a person whose gender identity is incongruent with (or does not "match") the biological sex they were assigned at birth. A transgender person usually adopts, or would prefer to adopt, a gender expression congruent with their gender identity but may or may not desire to alter their physical characteristics to conform to their gender identity. The term includes multiple gender identities, such as trans man, trans woman, non-binary, etc.
Transitioning	The period during which a person begins to live as the gender congruent with their identity. It may include changing legal documents, one's name, taking hormones, or/and having surgery.
Transphobia	A matrix of cultural and personal beliefs, opinions, attitudes and aggressive behaviours based on prejudice, disgust, fear and/or hatred directed against individuals or groups who do not conform to, or who transgress societal gender expectations and norms. Transphobia also includes institutionalized forms of discrimination such as criminalization, pathologisation, or stigmatization of non-conforming gender identities and gender expressions.



## References

- 1) Malta Human Rights and Integration Directorate. 2018. 'LGBTI Equality Strategy and Action Plan (2018-2022)' Malta Ministry for European Affairs and Equality, p. 1
- 2) Given the similarities in legislative make up between South Africa and Argentina, it was suggested that this law might be central to framing how a similar South African law might work.
- 3) Malta (2015) Chapter 540 Gender Identity, Gender Expression and Sex Characteristics Act
- 4) Malta (2015) Chapter 540 Gender Identity, Gender Expression and Sex Characteristics Act
- 5) Kohler, Richard, and Julia Ehrt. 2016. 'Legal Gender Recognition in Europe' Berlin: Transgender Europe (TGEU), p. 72
- 6) The Government of Malta. 2015. 'Gender Identity, Gender Expression And Sex Characteristics Act' Meae Gov.Mt. [https://meae.gov.mt/en/Public\\_Consultations/MSDC/Pages/Consultations/GIGESC.aspx](https://meae.gov.mt/en/Public_Consultations/MSDC/Pages/Consultations/GIGESC.aspx)
- 7) Malta (2015) Chapter 540 Gender Identity, Gender Expression and Sex Characteristics Act
- 8) Government of Malta. 2016. 'The Trans, Gender Variant and Intersex Students in School Policy'
- 9) Government of Malta. 2014. 'The Addressing Bullying Behaviour in Schools'
- 10) Ministry of Education and Employment in Malta. 2014. 'Respect for All Framework'
- 11) Ministry of Education and Employment in Malta. 2019. 'A National and Inclusive Education Framework'
- 12) Ministry of Education and Employment in Malta. 2019. 'Policy and Inclusive Education in Schools Route to Quality Inclusion', p. 12
- 13) UNESCO. 2012. 'Shaping the Education of Tomorrow'. Retrieved from: [https://www.academia.edu/10934372/Shaping\\_the\\_Education\\_of\\_Tomorrow\\_2012\\_Report\\_on\\_the\\_UN\\_DESD](https://www.academia.edu/10934372/Shaping_the_Education_of_Tomorrow_2012_Report_on_the_UN_DESD)
- 14) Ministry of Education and Employment in Malta. 2019. 'Policy and Inclusive Education in Schools Route to Quality Inclusion', p. 25
- 15) Ministry of Education and Employment in Malta. 2019. 'Policy and Inclusive Education in Schools Route to Quality Inclusion', p. 26
- 16) Office of the Deputy Prime Minister Ministry for Health. 2019. 'Transgender Healthcare' Malta Government of Malta, p. 7
- 17) World Professional Association for Transgender Health. 2010. 'WPATH De-Psychopathologisation Statement' World Professional Association for Transgender Health. Retrieved from [https://amo\\_hub\\_content.s3.amazonaws.com/Association140/files/de-psychopathologisation%205-26-10%20on%20letterhead.pdf](https://amo_hub_content.s3.amazonaws.com/Association140/files/de-psychopathologisation%205-26-10%20on%20letterhead.pdf)
- 18) Malta Human Rights and Integration Directorate. 2018. 'LGBTI Equality Strategy and Action Plan (2018-2022)' Malta Ministry for European Affairs and Equality
- 19) Office of the Deputy Prime Minister Ministry for Health. 2019. 'Transgender Healthcare' Malta Government of Malta
- 20) Office of the Deputy Prime Minister Ministry for Health. 2019. 'Transgender Healthcare' Malta Government of Malta p. 15
- 21) Office of the Deputy Prime Minister Ministry for Health. 2019. 'Transgender Healthcare' Malta Government of Malta
- 22) Office of the Deputy Prime Minister Ministry for Health. 2019. 'Transgender Healthcare' Malta Government of Malta, p. 13
- 23) Office of the Deputy Prime Minister Ministry for Health. 2019. 'Transgender Healthcare' Malta Government of Malta p. 11
- 24) Lutterbeck, Derek, and Ceta Mainwaring. n.d. 'The EU's "Soft Underbelly"? Malta and Irregular Immigration' In *Eurafrican Migration: Legal, Economic and Social Responses to Irregular Migration*, edited by Rino Coluccello and Simon Massey, 38-56. London: Palgrave Macmillan, p. 43.
- 25) Every single asylum claim in the EU territory needs to be examined to ensure the claimant has not also claimed elsewhere in the EU. According to the Dublin Convention, the Dublin Unit ascertains country responsible for asylum application.
- 26) Government of Malta, Refugees Act Chapter 420, 2001
- 27) Government of Malta, Chapter 540 Gender Identity, Gender Expression and Sex Characteristics Act, 2015
- 28) Government of Malta, Subsidiary Legislation 420.07, Procedural Standards for Granting and Withdrawing International Protection Regulations, 11 December 2015.
- 29) Kohler, Richard, and Julia Ehrt. 2016. 'Legal Gender Recognition in Europe' Berlin: Transgender Europe (TGEU), p. 78
- 30) Kohler, Richard, and Julia Ehrt. 2016. 'Legal Gender Recognition in Europe' Berlin: Transgender Europe (TGEU), p. 78





**EU-SA**  
Policy Dialogue on the Rights of  
Transgender & Intersex Persons

# Desk Study for Transgender & Intersex Policy in South Africa & the European Union



SA-EU Strategic Partnership  
THE DIALOGUE FACILITY

SA-EU Dialogue Facility

(EuropeAid/137708/DH/SER/ZA)

10 January 2020

Submitted by Wendy Kessman



Health  
Home Affairs  
Justice and Constitutional Development

**GENDER  
DYNAMIX**





## Table of Contents

List of Acronyms and Abbreviations	73
1. Introduction and Executive Summary	76
2. Methodology	78
3. T&I Human Rights Context	79
4. SA-EU Dialogue Objectives and Implications	80
5. The Role of Key Stakeholders in SA/EU T&I Policy Development and Implementation	80
6. Existing Framework and Alignment of T&I Policies Within International Human Rights Bodies	82
7. Mapping of Existing SA/EU T&I Policies	82
8. Analysis of Strengths and Gaps in Implementation of T&I Policy	86
9. Case Studies:	88
A. South Africa: Alteration of Sex Description and Sex Status Act, No. 29 of 2003	
B. Malta: Gender Identity, Gender Expression and Sex Characteristics Act - Chapter 540 of 2014	
C. Malta: Trans, Gender Variant, and Intersex Students in Schools Policy of 2015/ Addressing Bullying Behaviour in Schools Policy of 2014	
D. Belgium: Legal Gender Recognition	
E. Spain: Implementation of Gender Affirming Healthcare	
F. Argentina: Gender Identity Law of 2012	
G. Kenya: 2018 Taskforce on Policy, Legal, Institutional and Administrative Reforms regarding Intersex Persons	
10. Recommendations from the SA-EU Dialogue Task-Team for Strengthening T&I Policy Development and Implementation	92
Appendix 1: Glossary	94
Appendix 2: SA & EU Policy Mapping Chart	97
References	99

## List of Acronyms and Abbreviations

ACMS	African Centre for Migration and Society at Wits University
AD (LGBTIQ)	Alternattiva Demokratika (Democratic Alternative – Malta)
Astraea	Astraea Lesbian Foundation for Justice
BE	Belgium
CGE	Commission for Gender Equality
CoE	Council of Europe
CRL	Commission for the Promotion and Protection of the Rights of Culture, Religious, and Linguistic Communities
CSO	Civil Society Organization
DBE	Department of Basic Education (South Africa)
DCS	Department of Correctional Services (South Africa)
DHA	Department of Home Affairs (South Africa)
DHET	Department of Higher Education and Training (South Africa)
DOH	Department of Health (South Africa)
DOJ&CD	Department of Justice and Constitutional Development (South Africa)
DOW	Department of Women (South Africa)
DPPG	Drachma Parents/Family Group (Malta)
DSD	Department of Social Development (South Africa)
ECHR	European Convention on Human Rights
Equinet	European Network of Equality Bodies
ERC	Equal Rights Coalition
EU	European Union
EUD	European Union Delegation
FHR	Foundation for Human Rights
FOI PM	Forum Opportunitajiet Indaqs Partit Nazzjonalista (Malta)
FRA	European Union Agency for Fundamental Rights
GWC	Gender Wellbeing Clinic
GWU	General Workers' Union
HIV	Human Immunodeficiency Virus
HPCSA	Health Professionals Council of South Africa
HRID	Human Rights and Integration Directorate
HSRC	Human Sciences Research Council
IGLYO	International Lesbian, Gay, Bisexual, Transgender, Queer and Intersex Youth and Student Organisation (Belgium)
ILGA	International Lesbian, Gay, Bisexual, Trans and Intersex Association



ISLA	Initiative for Strategic Litigation in Africa
ISSA	Intersex South Africa
LGBTI(Q)	Lesbian, gay, bisexual, transgender and intersex (queer)
LHR	Lawyers for Human Rights
LRC	Legal Resources Centre
MEAE	Ministry for European Affairs and Equality (Malta)
MEDE	Ministry for Education and Employment (Malta)
MFCSS	Ministry for the Family, Children's Rights and Social Solidarity (Malta)
MGRM	Malta Gay Rights Movement
MHAS	Ministry for Home Affairs and National Security (Malta)
MHF	Migrant Health Forum
MPF	Malta Police Force
MT	Malta
NDP	National Development Plan
NELFA	Network of European LGBTIQ* Families Associations
NGO	Non-governmental organization
NHS	National Health Service
NTT	National Task Team (South Africa)
OHSA	Occupational Health and Safety Authority
OII	Organisation Intersex International
ODPM	Office of the Deputy Prime Minister and Ministry for Health (Malta)
OPM	Office of the Prime Minister
SAHRC	South African Human Rights Commission
SAMA	South African Medical Association
SAPS	South African Police Service
SHE	Sistazhood, Social, Health and Empowerment Feminist Collective of Transgender Women of Africa
SWEAT	Sisonke and Sex Workers Education and Advocacy Taskforce (South Africa)
SOGIE	Sexual orientation and gender identity and expression
SOGIESC	Sexual orientation, gender identity, gender expression and sex characteristics
SRJC	Sexual and Reproductive Justice Coalition
TGEU	Transgender Europe
T&I	Transgender and Intersex
TIA	Trans Intersex Africa
TNN	Transgender Network Nederland
UN	United Nations

Unia	Interfederal Centre for Equal Opportunities and Opposition to Racism and Discrimination
UoM	University of Malta
GIU	Gender Identity Units (Spain)
WHO	World Health Organization
WPATH	World Professional Association for Transgender Health



## 1. Introduction and Executive Summary

The Republic of South Africa and counterparts within the European Union (Malta & Belgium) have indicated their dedication to protecting the human rights of transgender and intersex (T&I) persons in their respective countries. While there have been significant strides in legislative safeguards, gaps in policy and challenges with implementation remain consistent. Thus, the South African Department of Justice and Constitutional Development, in partnership with human rights civil-society organisation (CSO) Irlanti-Org, is pursuing the South African – European Union (SA-EU) Dialogue opportunity for transformative interchange between the Government of Malta, the Ministry of European Affairs and Equality, and International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA) Europe, facilitating engagement with Belgium-based key European Union (EU) institutions including the European Parliament's Intergroup on LGBT Rights. This is to enhance policy dialogue, capacity building through discussion paper development, and partnership opportunities between the countries and noted directorates that aim to provide a platform for sharing evidence-based approaches that strengthen respective work to further inform policy development and implementation of laws that protect the rights of T&I persons.

This study provides a thorough documentation and analysis of existing and current T&I policy regarding legal recognition, health, education and migration within South Africa and the EU, particularly Malta and Belgium. This policy is framed within the noted international human rights law. Stakeholders, both in South Africa and European Union Member States (EU MS), will be provided with an enhanced basis of knowledge for strengthened and informed engagement. This desk study provides baseline information to participants invested in enhanced policy development, providing insight on current challenges in implementation, and recommendations for strengthened and informed participation and means of redress.

## Review of Key Findings on Existing T&I Policy in:

### South Africa:

- The Constitution of South Africa ensures protection against discrimination based on sex, sexual orientation, and gender, which has been read to include gender identity and expression.
- Alteration of Sex Description and Sex Status Act, No. 49 of 2003 supports the changing of one's gender marker. T&I CSOs in South Africa note barriers in the law's inclusion of pathologising language and medical requirements, binary definitions of gender, as well as bureaucratic processing delays that hinder implementation.
- South Africa's Promotion of Equality and Prevention of Unfair Discrimination Act, Act No. 4 2000 (PEPUDA or Equality Act) ensures protection against discrimination based on gender in health and education. The Act specifically references intersex persons including intersex in the definition of sex.
- Transgender South Africans are offered gender-affirming health care services in only four public hospitals: Chris Hani Baragwanath in Soweto, Steve Biko in Pretoria, Helen Joseph in Johannesburg and Groote Schuur in Cape Town.
- The South African Department of Basic Education is in the process of updating and revising the Homophobic Bullying in Schools Policy to be inclusive of transgender, gender diverse, and intersex learners.
- Although the South African Refugee Act of 1998 protects the right to asylum for members of particular social groups "social groups: including, among others, a group of persons of particular gender, sexual orientation, disability, class or caste" there are numerous cases of discrimination reported in processing asylum requests of members of a particular social group.

### Malta:

- Malta's Gender Identity, Gender Expression and Sex Characteristics Act, Chapter 540 declares the right to self-defined gender identity and supporting legal documents.
- In 2018, The Ministry for Health in Malta proposed the use of standards of care delivered by The World Professional Association for Transgender Health (WPATH).
- Malta's Policy on Inclusive Education in Schools: Route to Quality Inclusion enhances support for T&I students within the background of the 2014-2024 Framework for the Education Strategy for Malta: Respect for All Framework. This is complemented by additional strategies and policy documents: A National Inclusive Education Framework' and 'A Policy on Inclusive Education in Schools' launched in April 2019, as well as the 'Education's Trans, Gender Variant and Intersex Students in School Policy in 2016' aiming to foster inclusion, promote diversity, and ensure a safe learning environment, as well as 'The Addressing Bullying Behaviour in Schools' policy that notes harassment faced by gender diverse youth in schools.
- Chapter 540 Gender Identity, Gender Expression and Sex Characteristics Act of 2015 is inclusive of all persons regardless of citizenship: "(8) A person who was granted international protection in terms of the Refugees Act, and in terms of any other subsidiary legislation issued under the Refugees Act" extending the law to all within Malta's borders.
- Malta's Procedural Standards for Granting and Withdrawing International Protection (S.L. 420.07) state that persons who conduct interviews for asylum claims should be sufficiently competent to take account of the personal or general circumstances surrounding the application including the applicant's cultural origin, gender, sexual orientation, gender identity or vulnerability. These guidelines provide strategies to mitigate prejudice throughout the asylum process.

### Belgium:

- Belgium amended their legal gender recognition law in June 2019 to be inclusive of a non-binary "X" option and allow delay in adding gender markers on birth certificates and identity documents of intersex persons.
- The law pertaining to health for T&I persons does not address service provision. There continues to be no anti-discrimination protections or restrictions on unnecessary medical interventions on intersex persons in Belgium.
- In 2018, school curriculum approved by Flemish parliament made lessons on sexual orientation, gender identity and gender issues compulsory in Belgium.
- In 2018, legislation was passed widening the scope for detention of asylum-seekers and curbing the right to appeal negative asylum decisions, yet Belgium ranks number one for asylum protections according to ILGA Europe's 2019 Annual Review of the human rights situation of LGBTI people.

## Noted Case Studies on T&I Policy in South Africa and the EU

- South Africa: Alteration of Sex Description and Sex Status Act, No. 49 of 2003
- Malta: Gender Identity, Gender Expression and Sex Characteristics Act - Chapter 540 of 2014
- Malta: Trans, Gender Variant, and Intersex Students in Schools Policy of 2015/ Addressing Bullying Behaviour in Schools Policy of 2014
- Belgium: Legal Gender Recognition
- Spain: Implementation of Gender Affirming Healthcare
- Argentina: Gender Identity Law of 2012
- Kenya: 2018 Taskforce on Policy, Legal, Institutional and Administrative Reforms regarding Intersex Persons



## 2. Methodology

This desk study on transgender and intersex policy in South Africa and within European Union Member States, particularly Malta and Belgium, is informed by an accumulation of governmental policy documents, legal analysis, official press statements, civil-society, state, and international governing bodies' reports, research, academic books and articles, websites, and main-stream media. This paper was researched with the greatest care but does not claim to be complete. The desk study intends to answer and provide greater context for the following research questions:

- Review and document the current T&I policy in South Africa and the EU with focus on Malta and Belgium;
- Identify and explore strengths and gaps in noted policy and implementation;
- Provide background on T&I policy environment within SA and identified EU MS, power structures, and community contribution in policy development;
- Identify key stakeholders in SA/EU T&I policy development and implementation, and document role, influence, and level of engagement;
- Provide recommendations in approaches for strengthening T&I policy in South Africa, including notable methods and best practices on T&I legal gender recognition, health, education, and migration policy development and implementation;
- Identify opportunities and entry points for South African CSOs to enhance engagement with policy makers;
- Offer context and documentation necessary for an informed and proactive study tour, conference and round table with SA/ EU stakeholders.

The scope of this paper is limited to T&I policy relating to legal gender recognition, health, education, and migration in the noted countries, and is not inclusive of all policy relating to T&I populations. For example, while South Africa includes gender identity and intersex protections in the 2018 Prevention and Combating of Hate Crimes and Hate Speech Bill, it is not related to the four specific themes of legal gender recognition, health, education, and migration and therefore does not meet inclusion criteria. These four themes were selected by the SA-EU dialogue task team as the specific areas of focus and determined the scope of the paper and policy reviewed.

Case studies presented in Section 9 include noteworthy policies in South Africa, Malta and Belgium, as well as examples from Spain, Kenya, and Argentina. While Spain, Kenya, and Argentina are not included in the overall mapping and policy analysis, they are incorporated as supplementary illustrations that provide policy context and examination of implementation of T&I policy in countries with similar economic context of South Africa. The inclusion of Kenya and Argentina as relevant case studies highlight the role and significance of countries from the Global South in establishing best practices and setting international standards of care. The inclusion of these case studies aims to note their inspiration and document the influence of their progressive policies and interventions on South African and EU T&I legislation and rights framework.

## 3. T&I Human Rights Context

Transgender and intersex (T&I) persons within South Africa (SA) and European Union Member States (EU MS), experience significant human rights violations on the basis of gender identity, expression, and bodily diversity, creating an environment of anxiety, pathologisation, and exclusion. Policies regarding legal gender recognition, health, education, and their intersections with migration have framed a context where access to rights are often contingent on implementation of government mandates. Limited access, societal ostracization, and limitations in accountability exist, both within South Africa and the EU, regardless of progressive policies and narratives of inclusion and acceptance.

In South Africa, around half a million people (450,000) reported they physically harmed a gender non-conforming person in the last 12 months.<sup>1</sup> The persistent stigma and psychological impact of an inaccurate gender marker on identity documents directly inhibits access to education, employment, health services and migrants' right to claim asylum. T&I persons seeking legal gender recognition can face rejections due to inaccessible medical transition requirements, processing delays that have been known to drag anywhere between 1-7 years, denial of health services, and overall discrimination and financial constraints associated with the process.<sup>2</sup> T&I youths' rights are particularly impacted, as 56% indicated they experience discrimination and harassment within schools, with the highest rates in KwaZulu-Natal at 79%.<sup>3</sup> Further rights abuses exist for intersex persons, as shame, inaccessibility of medical records and affirming healthcare, lack of informed consent, infanticide, and unwanted genital surgeries on children need to be challenged.<sup>4</sup> With a rise in visibility of T&I persons fleeing violence in their respective countries, migrants and refugees are a growing sub-population whose realities increasingly confront barriers to their constitutionally protected right to claim asylum.<sup>5</sup> Increasingly tight borders and limited access to legal gender recognition produces compounding barriers with few legal protections and exceptionally limited space for refuge. How to best facilitate protection, recognition, and resource allocation for refugees and migrants within broader T&I policy provision is an emergent issue for both South Africa and the EU.

T&I persons within EU MS too face stigma, discrimination and threats of violence. Intersex persons throughout the EU experience pathologisation, lack of healthcare access, and prejudice by health care providers including reported physical and psychological abuse by medical personnel.<sup>6</sup> Educational spaces are especially fraught with harassment, as more than half of students surveyed in the Institute for the equality of women and men's *Being Transgender in Belgium: 10 Years Later* noted experiences of inappropriate curiosity, infringement of privacy, and misuse of pronouns, with higher rates reported in primary and secondary schools, and correlating overall with poorer general health.<sup>7</sup> Substantial complaints of discrimination based on gender identity and sex characteristics in Belgium led to government initiation of research and T&I policy development.<sup>8</sup>

While strengthened policy within South Africa and EU MS can only improve the human rights contexts for T&I persons, it is only one component in addressing stigma and the lived experience of state and societal repression. To create truly inclusive communities and enabling environments for T&I persons, policy and community interventions must remain intersectional and shaped by those who the policies aim to protect.



## 4. SA-EU Dialogue Objectives and Implications

The primary objective of the SA-EU engagement is to enhance policy dialogue through discussion paper development, and partnership between South Africa and counterparts in the European Union (Malta and Belgium) to inform and advance the shaping of policy, legislation and implementation of laws that protect the rights of T&I persons. Through investment in knowledge sharing and increased opportunities to engage in evidence and value-based policy development, South African and EU counterparts will enhance linkages, governmental accountability, and tools for proficiency to meet the needs and specific vulnerabilities of marginalized persons, ensuring access to, and improved experience of, human rights. This is facilitated through investment in activities including an EU study tour for South African policymakers, a conference and round table for T&I policy development with government and civil-society stakeholders and documented through the production and dissemination of subsequent policy briefs that further support the dialogue. The outcomes of the assignment aim to enhance and mobilise the shaping of policy to rectify multilateral systematic barriers, synthesize protections, and build relationships that offer guidance for a strengthened legislative process.

Malta has a global reputation as the "gold standard" for LGBTI rights as declared by the United Nations Human Rights Office.<sup>9</sup> ILGA Europe and their vital organising efforts with EU institutions provide a rich platform for strategic partnerships that facilitate shared learning of best practices and valuable methodologies. South Africa's rich history of grassroots activism and organizing has led to a robust civil-society that can offer insight and tactics for Malta to strengthen participation at the community level. The proposed engagement is an opportune space for shared experience with South African stakeholders to emerge with an enriched policy discussion paper that builds on existing constitutional protections based on diversity in gender and bodily characteristics, and offers the tools for greater government accountability, a consistent challenge in ensuring accessibility of rights and justice.

## 5. The Role of Key Stakeholders in SA/EU T&I Policy Development and Implementation

While governments maintain responsibility for the development and implementation of T&I policy, they often act in response to advocacy and litigation from civil society.<sup>2</sup> In South Africa, this is led by the Department of Justice and Constitutional Development (SA DOJ & CD), as they have and continue to demonstrate commitment to the adoption of the National Intervention Strategy for Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) Sector and uphold the mandate of a National Task Team (NTT). The SA DOJ & CD's role and continued influence is to engage with key government departments to respond to and report on the needs and specific vulnerability of LGBTI persons.<sup>10</sup> The Deputy Minister of Justice, John Jeffery, has been a vocal with their support for enhanced policy protections for LGBTI persons in South Africa, including with the development of the NTT and by offering the keynote address for the 2017 National Engagement on the Promotion and Protection of the Human Rights of Intersex Persons.<sup>4</sup> The SA DOJ & CD is uniquely situated to influence and lead coordination for the development and establishment of synthesized LGBTI policies and governmental coordinating body. The South African Department of Home Affairs (DHA) has great stake in the policy development and implementation process to ensure policy reform is feasible and implemented with accountability. The DHA LGBTI taskforce serves as a mechanism for follow-up and an ear for advocacy through the process.

The South African Department of Health (DOH) subsequently has a role in policy development and implementation of health-related T&I policy to ensure health centres are equipped for reform and health rights are upheld. The South African Department of Basic Education (DBE) has a key role in education-related policy development to support transgender and intersex learners. Engagement from key government departments is essential for constructive reforms and implementation. Without government support, the development of enhanced T&I policy protections and coordination would not be possible.

T&I policy is further shaped by key civil society stakeholders and their individual contributions through lobbying, campaigning, and providing response intended to strengthen framework, language and measures for accountability. The role of Civil Society and South Africa's Chapter 9 Institutions within T&I policy development is to amplify voices that speak to the urgent needs and realities of T&I persons. Through impactful stories, and messaging that offers insight and alternative narratives, civil-society, human-rights institutions and grassroots community-based organisations directly impact government and societal understanding and capacity for empathy. Awareness-raising, documentation and analysis on the impact of policy, and active multi-level dissemination of outcomes will better inform engagement and map ways forward. The noted policy relating to protections of T&I persons in South Africa and in the EU, all went through an exhaustive process of consultations where opportunities for comment were provided.<sup>7</sup> This is documented in submissions reports and oral statements offering response on proposed policy. NGOs and Chapter 9 institutions who have provided past comment, such as Imani, Gender Dynamix, and South African Human Rights Commission (SAHRC) are stakeholders in the current dialogues on T&I policy.

Malta's LGBTIQ Consultative Council operates in an advisory role implemented by the Minister for Social Dialogue, Consumer Affairs and Civil Liberties. The intention of the Council is to instruct government on how to best design legislation in consultation with the Minister to promote the rights of LGBTIQ persons. The development of the Human Rights Integration Directorate (HRID) and the Sexual Orientation, Gender Identity, Gender Expression & Sex Characteristics Unit in 2018 provided further support in the advancement and coordination of T&I government policy in Malta. Malta's LGBTIQ Legal and Policy Framework notes the support and contributions from Aditus Foundation, Allied Rainbow Communities (ARC), Drachma and Drachma Parents, LGBTI+ Gozo, The Malta LGBTIQ Rights Movement (MGRM), and the We Are LGBTQI Youth and Student Organization. The Maltese Government engaged with civil society to request comment throughout crafting of the Gender Identity, Gender Expression and Sex Characteristics Act, and continue to play a valuable role in T&I community and policy development. Government and civil society are subsequently responsible for initiating research that aims to provide evidence for strengthened protections and informed strategies for intervention. Key stakeholders also include partners in Belgium, Ireland, the Netherlands, and elsewhere in the EU who support engagement through their study tour participation for T&I policy dialogue including human rights organisations serving transgender and intersex persons.<sup>11</sup>



## 6. Existing Framework and Alignment of T&I Policies within International Human Rights Bodies

Policies supporting the protection and promoting the human rights of T&I persons within South Africa and EU MS are framed and reinforced by declarations from international human rights bodies, as well as EU institutions, such as the European Parliament's Intergroup on LGBT Rights, that work to ensure human rights obligations under such mandates as the Lisbon Treaty<sup>12</sup>, the Charter of Fundamental Rights<sup>13</sup>, and the European Convention for the Protection of Human Rights and Fundamental Freedoms.<sup>14</sup> The 2006 Yogyakarta Principles<sup>15</sup> and 2017 Yogyakarta Principles Plus 10 (YP+10)<sup>16</sup> have further provided a clear directive establishing international human rights law addressing persons of diverse sexual orientations, gender identities, gender expressions and sex characteristics ensuring the right to privacy, truth in reporting of violations, state and legal protection and recognition. Further directives that speak to the global rights of T&I persons include the ICCS Convention No. 29 on the Recognition of decisions recording a sex reassignment<sup>17</sup> and the 2013 UN Special Rapporteur statement on torture and other cruel, inhuman or degrading treatment or punishment condemning medical-based violations on intersex persons.<sup>18</sup>

South Africa has supported international mandates for increased protections for T&I persons, including strongly supporting renewal of the Sexual Orientation and Gender Identity Independent Expert at the 2019 41st UN Human Rights Commission<sup>19</sup> and committing to uphold the African Charter on Rights and Welfare of the Child (ACRWC) as well as the African Commission of Human and People's Rights (ACHPR) Resolution 275 on the Protection against Violence and other Human Rights Violations against Persons on the Basis of their Real or Imputed Sexual Orientation or Gender Identity.<sup>20</sup>

A November 2018 Summit between South Africa and the European Union reaffirmed mutual commitment to multilateralism, democracy, a rules-based global order, and a joint promotion of development, security, and rights for all.<sup>21</sup> South Africa's 2019-2020 term in the United Nations (UN) Security Council grants an opportunity to advance peace and security, globally and within SA borders. The Trade, Development and Co-operation Agreement (TDCA) strategic partnerships commit to progress economic and political credibility in the global arena; a vital prerequisite to that goal is an enhanced commitment and greater accountability to international human rights and international humanitarian law.<sup>22</sup>

This is further reflected in 2030 South African National Development Plan that recognises gender-based violence as an issue that deeply impacts T&I communities.<sup>23</sup> This initiative is designed to build on an existing foundation of policy dialogues with the Department of Justice and Constitutional Development and the LGBTI community, including the December 2017 National Dialogue on the Protection and Promotion of the Human Rights of Intersex People.<sup>24</sup>

## 7. Mapping of existing SA/EU T&I Policies

To combat violence and promote the inalienable rights all persons who face stigma and discrimination on the basis of gender identity and bodily characteristics, South Africa and EU MS, Malta and Belgium have established policy aimed to protect T&I persons in relation legal gender recognition, health, education and migration.

### South African T&I Policies:

Section 9 of the South African Constitution, applying to both state and private parties, forbids discrimination based on sex, gender or sexual orientation.<sup>25</sup>

The Constitutional Court has stated that this section must be interpreted as prohibiting discrimination against transgender and intersex persons.<sup>26</sup> Act No. 49, 2003: Alteration of Sex Description and Sex Status Act<sup>27</sup> in South Africa amended the Births and Deaths Registration Act No. 51 of 1992<sup>28</sup> to allow certain groups of people to apply to the National Department of Home Affairs to legally alter their sex description on their birth register and obtain a new birth certificate. 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 evolution, and 3) people who are intersex.<sup>29</sup>

Section 2 details the applicant categories and requirements in applying to have ones "sex description" changed. In particular reference to intersex persons, Act 49's indicates that gender is not predetermined at birth and is subject to individual identity. Section 2(2) 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; and (i) a report prepared by a medical practitioner corroborating that the applicant is intersexed; and (ii) a report prepared by a qualified psychologist or social worker corroborating that the applicant is living and 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.<sup>30</sup>

South Africa's Promotion of Equality and Prevention of Unfair Discrimination Act, Act No. 4 2000 (PEPUDA or Equality Act) defines 'harassment' as unwanted conduct which is persistent or serious and demeans, humiliates or creates a hostile or intimidating environment or is calculated to induce submission by actual or threatened adverse consequences and which is related to: a) sex, gender or sexual orientation; or b) a person's membership or presumed membership of a group identified by one or more of the prohibited grounds or a characteristic associated with such group. Including in relation to health care services and benefits as in a) subjecting persons to medical experiments without their informed consent; b) unfairly denying or refusing any person access to health care facilities or failing to make health care facilities accessible to any person; c) refusing to provide emergency medical treatment to persons of particular groups identified by one or more of the prohibited grounds.<sup>31</sup> Section 12(b) right to bodily and psychological integrity provides legal grounds for the rights of intersex persons, including children, to make choices about their bodies.<sup>32</sup> Only one medical aid in South Africa, Bankmed, has covered gender-affirming health care.<sup>33</sup>

PEPUDA subsequently protects T&I learners in educational spaces from a) unfairly excluding learners from educational institutions, b) unfairly withholding scholarships, bursaries, or any other form of assistance from learners of particular groups identified by the prohibited grounds and, c) the failure to reasonably and practicably accommodate diversity in education.<sup>34</sup> This legislation supplements South African Constitutional protections from discrimination including based on gender, sex and sexual orientation. A 2005 amendment noted the definition of sex includes intersex people. National Educational Policy Act requires the South African Department of Basic Education, schools and school authorities "to foster an enabling education system that supports the full personal development of each learner and contributes to the moral, social, cultural, political and economic development of South Africa."<sup>35</sup> The National School Safety Framework (NSSF) provides an inclusive guide for South Africa schools, districts and provinces to realise a safe and enabling learning environment for all students,<sup>36</sup> supported by "the Department of Basic Education policy affirming the responsibilities of schools in addressing bullying."<sup>37</sup> Section 28 of the Constitution notes that "a child's best interest are of paramount importance in every matter concerning the child."<sup>38</sup> According to legal prescience, and in support of T&I learners, decisions must be made in the best interest of the child.<sup>39</sup> The Equality Act's ban on harassment is considered to protect the right to privacy and psychological and bodily integrity of students, including the freedom to wear the school uniforms and use the toilet that corresponds to one's gender identity.<sup>40</sup> This right is further endorsed with policy inclusive of gender diverse youth within the Western Cape Education Department<sup>41</sup> as well as a supportive dress code and toilet policy for transgender learners in Gauteng.<sup>42</sup> The South African Department of Education's code of conduct requires all to "treat everyone with respect regardless of differences in culture, religion, ability, race, gender, age, sexual orientation or social class."<sup>43</sup>



The Republic of South Africa's constitutional promise of rights for *all people in the country and affirms the democratic values of human dignity, equality, and freedom*<sup>31</sup> *is legally inclusive of all persons regardless of citizenship*. *The right to freedom of movement, dignity, security of person, and the right of everyone in South Africa to access housing, health care, and education* is a cornerstone of the Bill of Rights (1996).<sup>32</sup> *South Africa is the only country on the African continent that not only recognises but also constitutionally protects transgender individuals; these are rights that acknowledge their very existence.*<sup>33</sup> The Refugee Act of 1998 protects the right to asylum for members of a particular social group *social groups including, among others, a group of persons of particular gender, sexual orientation, disability, class or caste*<sup>34</sup> reinforced by the 1951 United Nations Convention Relating to the Status of Refugees and its accompanying Protocol and the 1969 Organisation of African Unity (OAU) Convention governing the Specific Aspects of Refugee Problems in Africa, the Refugees Act of 1998 provides protection to those seeking asylum due to persecution based on gender, inclusive of gender identity and expression and in consideration of the court's constitutional understanding of gender.<sup>35</sup> Despite progressive inclusion, T&I policy in South Africa is largely impacted by misinterpretation, poor implementation, lack of protocols or redress for reported violations.

## EU T&I Policies:

In ensuring full access to and realisation of equal rights, Article 21 of the Charter of Fundamental Rights of the European Union prohibits discrimination based on any ground such as sex.<sup>36</sup>

Under EU law, those persecuted based on gender identity qualify for refugee status.<sup>37</sup> The Qualification Directive (2011/95/EU) binding for all EU MS (except for UK, Ireland, and Denmark, who have opted out) documents criteria for international protection. Article 10 specifically notes *gender-related aspects, including gender identity, shall be given due consideration for the purposes of determining membership of a particular social group or identifying a characteristic of such a group.*<sup>38</sup> Reception Conditions Directive (2013/33/EU), binding of all EU MS (with the exception of Denmark) does not refer to gender identity.<sup>39</sup> Article 18 (3) of the directive, indicates Member States must consider *gender- and age-specific concerns and the situation of vulnerable persons when housing applicants for international protection*.<sup>40</sup> Article 21 lists persons who qualify as vulnerable based on the directive. This list is not complete, indicating space for T&I persons to be subsequently regarded as vulnerable. In 2013 the European Parliament called on Member States to certify asylum professionals including evaluators and interpreters obtain satisfactory training on asylum claims of LGBTI persons.<sup>41</sup>

The European Court of Human Rights adopted Resolution 2048 (2015) on discrimination against transgender people in Europe, noting *the emergence of a right to gender identity*.<sup>42</sup> The Council of Europe established its Recommendation 2010(05) that States should facilitate access to trans-specific healthcare saying *Member states should take appropriate measures to ensure that transgender persons have effective access to appropriate gender reassignment services, including psychological, endocrinological and surgical expertise in the field of transgender health care, without being subject to unreasonable requirements, no person should be subjected to gender reassignment procedures without his or her consent*.<sup>43</sup> Parliamentary Assembly further noted that member states should *ensure that gender reassignment procedures are reimbursed by public health*.<sup>44</sup>

## Malta T&I Policies:

Malta's Chapter 540 Gender Identity, Gender Expression and Sex Characteristics Act XI of 2015 declared the right to gender identity, stating all persons as citizens of Malta have the right to a) the recognition of their gender identity; b) the free development of their person according to their gender identity; c) be treated according to their gender identity and, particularly, to be identified in that way in the documents providing their identity therein; and d) bodily integrity and physical autonomy.<sup>45</sup> Chapter 540 also introduced a legal definition of *lived gender*, defined as each person's gender identity and its public expression over a sustained period of time.<sup>46</sup> Malta's February 2018 legal notice documented the National Health Service's inclusion of gender identity and sex characteristics related conditions in the entitlement schedule.<sup>47</sup>

The Mental Health Act Chapter 525<sup>48</sup> affirms the rights of mental healthcare users and bans discrimination.<sup>49</sup> In 2018, The Ministry for Health in Malta proposed the use of standards of care delivered by The World Professional Association for Transgender Health (WPATH) as a foundation for healthcare protocols.<sup>48</sup> Greatly supported by civil society, Malta's first Gender Wellbeing Clinic was opened in 2018 increasing accessibility of gender-affirming health care.<sup>50</sup>

Chapter 540 further protects the rights of T&I learners to hold a degree that corresponds with gender identity in noting *the person may also, on the payment of fee as be prescribed, and request any other competent authority, department, employer, educational or other institution to issue any official document or certificate relative to them indicating the gender and first name of the person as entered in the Gender Register.*<sup>51</sup> Article 8 of Chapter 456 Equality between Men and Women Act, in Malta bans discrimination in accessing education.<sup>52</sup> Malta's educational policies supporting T&I students are documented in the Ministry of Education's Trans, Gender Variant and Intersex Students in School Policy in 2016<sup>53</sup>, aiming to foster inclusion, promote diversity, and ensure a safe learning environment, and The Addressing Bullying Behaviour in Schools policy that notes harassment faced by gender diverse youth in schools.<sup>54</sup> The 2014-2024 Framework for the Education Strategy for Malta: Respect for All Framework is designed to offer concrete ways schools can create supportive learning environments.<sup>55</sup> In 2019 the Ministry for Education launched two additional documents: 'A National Inclusive Education Framework' and 'A Policy on Inclusive Education in Schools'. Among the groups it aims to address are *Learners of different genders; Learners with different sexual orientations; Learners of different gender identities and expressions; Learners with LGBTIQ parents*.<sup>56</sup>

The Government of Malta's Chapter 420 Refugees Act of 2001 includes protections for those in particular social groups inclusive of gender diversity.<sup>57</sup> Chapter 540 Gender Identity, Gender Expression and Sex Characteristics Act of 2015 indicated *(8) A person who was granted international protection in terms of the Refugees Act and in terms of any other subsidiary legislation issued under the Refugees Act and who wants to change the recorded gender and first name, if the person so wishes to change the first name, shall make a declaration confirmed on oath before the Commissioner for Refugees declaring the person's self-determined gender and first name. The Commissioner for Refugees shall record such amendment in their asylum application form and protection certificate within fifteen days.*<sup>58</sup>

## Belgium T&I Policies:

Belgium's Judgement No. 99 of June 19<sup>th</sup> 2019<sup>59</sup> extends the right to a non-binary gender marker and self-determination over name-change, amending the Transsexuality Act of 10 May 2007, and the June 2017 amendment recognizing the right to one's own gender. Legal recognition is no longer based on medical certificates, or the Court as was before the noted amendments, but now relies on a citizen's autonomous gender identity.<sup>60</sup> The Belgium Act of 10 May 2007 challenging gender inequality amended in July 2014 documents gender identity and gender expression in Article 4 as prohibited grounds of discrimination.<sup>61</sup> Before the amendment, only *change of gender* was protected by law. The law does not address service provision.<sup>62</sup> There continues to be no anti-discrimination protections or restrictions on unnecessary medical interventions on intersex persons in Belgium.<sup>63</sup>

In 2018, school curriculum approved by the Flemish parliament made lessons on sexual orientation, gender identity, and gender issues compulsory in Belgium.<sup>64</sup> A starting point for T&I education policy was provided by the Common Declaration on Gender Aware and LGBT Friendly Policy in Education. This documented the strengthening of engagement between the education department, institutions, and stakeholders working to create safe spaces for T&I persons in schools.<sup>65</sup>

Legislation was passed in 2018 widening the scope for detention of asylum-seekers and curbing the right to appeal negative asylum decisions.<sup>66</sup> December 2018 also brought the introduction of quotas by the Belgian Aliens Office allowing no more than 50 persons to register for asylum per day.<sup>67</sup> Irrespective, Belgium continues to rank number one for asylum protections according to ILGA Europe's 2019 Annual Review of the human rights situation of LGBTI people.<sup>68</sup>



## 8. Analysis of Strengths & Gaps in Implementation of T&I Policy in SA/EU

Regardless of the noted policies, procedures for enactment and governmental coordinating bodies the T&I policies, both South Africa and EU MS continue to face challenges with implementation and accountability.

### South Africa's Strengths & Gaps in Implementation of T&I Policy in:

#### Legal Gender Recognition

Lack of legal gender recognition contributes to stigma, discrimination, and harassment of T&I persons every time identification documents must be produced, including but not limited to: crossing borders, accessing banking, healthcare, educational, and employment spaces. While there have been reports of significant delays in processing applications for change in gender marker, the South African Department of Home Affairs has begun to address concerns brought forth through civil society organisations on the persistent barriers faced by T&I persons regarding legal gender recognition. The engagement was documented through the department's 2018-2019 annual report stating the occurrence of *'Ministerial meeting with LGBTI community representatives'*.<sup>171</sup> This meeting offers a foundation for further conversation that has potential to lead to progressive reform of Act 49 if the urgency is upheld.

#### Health

Transgender South Africans are offered gender-affirming health care services in only four public hospitals. Chris Hani Baragwanath in Soweto, Steve Biko in Pretoria, Helen Joseph in Johannesburg and Groote Schuur in Cape Town. There is a substantial geographical gap with the inexistence of trans-specific public care in KwaZulu-Natal.<sup>172</sup> With high-cost and limited medical aid available for gender-affirming health care, the Western Cape Health Department is approved to allocate only four days of the year for gender-affirming surgeries at Groote Schuur Hospital<sup>173</sup> where they offer Standards of Care guided by the World Professional Association for Transgender Health.<sup>174</sup> While private gender-affirming care does exist, it can cost upwards of ZAR 600 000.<sup>175</sup> Stigma and discrimination of transgender and intersex persons leads to great health disparities, and can be perpetuated by harmful attitudes by health care providers.<sup>176</sup>

#### Education

In 2017, the Limpopo Department of Education was ordered by the Equality Court to pay a transgender learner ZAR 60 000 in damages for trauma caused by administrative abuse. The South African Human Rights Commission subsequently requested the principal and school staff be required to undergo sensitivity training.<sup>177</sup> Teachers' need for enhanced guidance is evident, as in response to inclusion and affirmation of a transgender learner, administrators stated *'We had our normal ignorant questions. The teachers did not know what it meant either.'*<sup>178</sup> Strengthened T&I policies in schools must be inclusive of interventions at the teacher and administrative training level, ensuring directives are implemented and schools adhere to a student's right to a safe learning environment. Current national mobilisation within educational spaces in South Africa, joined with recent inclusive legal rulings, have led the Department of Basic Education to implement a task team dedicated to reshaping sexuality and identity framework for inclusive policies and curriculum. There have been great strides in the development and implementation of supportive policy for transgender and intersex learners. This includes the 2019 revision of life orientation curriculum to include lessons on gender, sexuality, and bodily diversity. The South African Department of Education has pushed back on false and misleading media reports used to sensationalise the revisions, and has taken steps to reaffirm inclusion.<sup>179</sup> Basic Education Minister, Mrs Angie Motshekga noted the revisions have come through reviews that assessed the omission, among others,

of sexual and gender diversity. *'In terms of sexuality the Lesbian, Gay, Bisexual, Transgendered, Intersex and Queer (LGBTIQ) community is rarely represented.'*<sup>180</sup> The changes have come partnered with national movement towards more inclusive school dress codes and school toilet policies as noted in Section 7. Education policies show some of the most progressive movement towards creating a more enabling learning environment for all transgender and intersex learners. This progress can be greatly strengthened through more equal geographic distribution of supportive policy and implementation.

#### Migration

In spite of policy protections for gender diverse asylum seekers in South Africa, there are noted gaps in implementation and accountability regarding redress for unfairly rejected claims. Numerous cases of LGBTI persons' rejected asylum cases have dominated the media narrative.<sup>181,182</sup> Support from civil society makes significant impact in the state's handling of asylum cases. Incidents of harassment are motivated by bias and an overall lack of awareness of gender diversity and relevant protections. Eligibility interviews are noted as too short, invasive, and often rely on stereotypical presumptions on gender identity and bodily diversity. Despite the South African formal commitment to protections based on gender identity and bodily diversity, the state has legally contested nearly every precedent setting case intended to determine rights under the Equality Clause.<sup>183</sup> Persistent barriers faced by gender diverse asylum seekers present a consistent and unaddressed gap in policy implementation greatly impacting transgender and intersex persons.

#### EU MS T&I Policy Analysis:

EU MS as well face challenges in implementing accessible healthcare that is inclusive and affirming of gender diversity and bodily characteristics. The Maltese Ministry for Health continues to train health service providers with the proficiency and skills necessary for standards of care in line with international quality directives,<sup>184</sup> yet a 2018 NGO report documents intersex children from Malta and Luxembourg undergoing intersex genital mutilation (IGM) in Belgium.<sup>185</sup> The Maltese health authorities have denied these allegations and the existence of proof of the claims. Belgium's gaps in healthcare for T&I persons is indicated as more prominent in the Wallonia region, with more reported negative healthcare experiences than in the Brussels-Capital Region.<sup>186</sup> Within the EU, one in five respondents who accessed health services (22%) or social services (19%) in the year preceding the survey felt personnel discriminated against them for being transgender.<sup>187</sup>

As of 2018, Belgium schools are now subject to evaluation on specific performance metrics, as the Equality Body published the Diversity Barometer Education on exclusion in the education system, covering the three education systems of Flanders, Wallonia and the German speaking part of Belgium. The report indicated the recognized need to address LGBTI topics but reported teachers did not know how to do so.<sup>188</sup> To confront gaps in T&I inclusive education, Belgium implemented an awareness-raising campaign and database of related resources for students and educators called *'Are you hooked up?'* promoting LGBTI persons as multifaceted individuals, not solely defined by their gender identity.<sup>189</sup> Significant gaps in SOGI related knowledge and limited school policies related to gender diverse and intersex youth are to the detriment of an enabling educational environment and continue to be a reality for T&I students globally. Interruption of gender affirming healthcare hinders the rights of T&I persons to claim asylum, constituting further barriers to safety and dignity.<sup>190</sup> Belgium's 2018-2019 Interfederal Action Plan against discrimination and violence against LGBTI people notes a framework to implement a joint approach for the reception of LGBTI people.<sup>191</sup> In 2017, to address these gaps, the Belgium Office of the Commissioner General for Refugees and Stateless Persons (CGRS) organized a training session titled *'Interpreting gender-related asylum stories'* aiming for greater awareness of gender identity and the challenges reported in discussing gender in asylum interviews.<sup>192</sup> Within these intersections, T&I migrants and refugees most consistently face human rights violations due to persecution based on diverse gender identities and bodily characteristics compounded with xenophobic policies and administrative gatekeepers. Transgender Europe notes asylum seekers need gender-affirming healthcare upon arrival, as there are serious physical and psychological consequences associated with both gender dysphoria and withdrawal of (hormone replacement therapy) HRT.<sup>193</sup> Insufficient implementation of T&I policy protections, and collective lack of redress remains the most significant barrier to accessing inalienable rights and freedoms.



## 9. Case Studies:

### A. South Africa: Alteration of Sex Description and Sex Status Act, No. 49 of 2003.

Lack While South Africa passed the Alteration of Sex Description and Sex Status Act No. 49, 16 years ago in 2003, the substandard implementation and real-life consequences of limited scope and narrow legal definitions has left significant gaps in access and proper execution.<sup>2</sup> Even with this policy, limited linkages and insufficient adherence has led to the need for interrogation and revaluation to support streamlined, cross-cutting legislation for legal gender recognition. Section 2 of Act 49 directs that: *'any person whose sexual characteristics have been altered by surgical or medical treatment or by evolution 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'*<sup>3</sup> Drafting of the legislation was driven by persistent litigation against the South African Department of Home Affairs, and called on Portfolio Committee Hearings receiving comment from four civil-society organisations, including SAHRC, and four individual submissions. The Portfolio Committee for Home Affairs submitted comments on 9 September 2003, with prominent intersex activist Sally Gross offering critical feedback and advocating for increased protections. Shortfalls in the law are often a matter of insufficient legal definitions limiting access for non-binary persons, creating bureaucratic and financial restraints associated with the taxing process, denial of gender-affirming healthcare, forced divorce, discrimination, and exclusion of asylum seekers.<sup>2</sup> Notably, *'Act 49 does not in fact cater to or for identities specifically. Instead, by avoiding the use of identitarian language and allowing for minimal medical intervention in terms of actualising "social identity as a member of a particular gender, the Act arguable reflects a nuanced understanding of sex/gender within the South African socio-economic context.'*<sup>4</sup> Misinterpretation, and a general lack of understanding of the law compound with persistent stigma and discrimination against T&I persons in South Africa, as the policy continues to cite pathologising and binary notions of gender in the requirements for application. Greater accountability, and systems for reporting and redress are increasingly necessary to ensure full access to legal gender recognition. Act 49 serves as a notable case study as a target for reform and point of advocacy for civil society organisations that serve transgender and intersex South Africans.

### B. Malta: Gender Identity, Gender Expression and Sex Characteristics Act - Chapter 540 of 2014

Adopting best practices for legal gender recognition from Argentina, and overall increased safeguards for T&I persons, the Maltese Gender Identity, Gender Expression and Sex Characteristics Act recognizes the rights of all citizens to have their gender identity legally documented and recognized. *'In Article 3, the right to gender identity is defined as follows: "(1) All persons being citizens of Malta have the right to: a) the recognition of their gender identity; b) the free development of their person according to their gender identity; c) be treated according to their gender identity and, particularly, to be identified in that way in the documents providing their identity therein; and d) bodily integrity and physical autonomy.'*<sup>5</sup> The GIGESC Act further breaks with normalized pathologisation, providing strengthened protections banning sex-assigning operations on intersex infants and children,<sup>6</sup> assuring informed consent, and offering a global good practice model.<sup>50</sup> Chapter 540 of 2014 can provide an example of policy that removes legal barriers associated with binary categories of gender.

*Other key features of the GIGESC Act are*

- The right to gender identity, gender expression, physical autonomy and bodily integrity, regardless of age;
- A quick, transparent, and accessible notary gender recognition procedure, where requirement of any psychological or medical proof is forbidden;
- Gender recognition is accessible to minors, recognised refugees and non-citizens in detention.

- Children have to be listened to in gender recognition proceedings, and their best interest has to be given paramount consideration;
- Criminalising unnecessary medical interventions or treatment on the sex characteristics of a person without their informed consent;
- All Parent/s (including those of intersex new-borns) can delay the registration of the gender marker in the birth certificate until the age of 18;
- It provides anti-discrimination protection across public services: the public sector and the private sector.<sup>43</sup>

### C. Malta: Trans, Gender Variant, and Intersex Students in Schools Policy of 2015/ Addressing Bullying Behaviour in Schools Policy of 2014

Maltese Educational Policies have a "whole school" approach to the creation of a supportive learning environment for T&I youth. Through addressing the impact of bullying and harassment in education, Malta takes steps towards greater accountability by documenting those responsible for upholding the directive to ensure increased access to safe schools. This case study offers an account of education policy that documents how a student's gender identity can be validated through various approaches: *'Trans, gender variant and intersex students in schools policy' takes all aspects of school life into account, allowing schools to approach these issues from many angles (the curriculum, support to students, working with parents, working with civil society). The policy touches upon:*

- Access to gender-specific activities and areas
- School documentation
- Names and pronouns
- Uniforms
- Students transitions
- Bullying
- Training
- School Community Partnerships
- Intersex specific needs and issues
- The policy only establishes minimum requirements: schools may provide stronger protection.<sup>50</sup>

### D. Belgium: Legal Gender Recognition

Belgium's ruling on legal gender recognition No. 99 of June 19th 2019<sup>51</sup> extends the right of citizens to have an X, non-binary, gender marker as well as full self-determination over name-change, amending the Transsexuality Act of 10 May 2007, and the June 2017 amendment recognizing the right to one's own gender. Legal recognition is no longer based on pathologizing, and often inaccessible, medical requirements, or the Courts as was before the noted amendments, but now relies on a persons' self-actualizing gender identity.<sup>52</sup> In Belgium, change of name is possible from age 12. From age 16, a minor can access legal procedures and change their gender marker (with parental consent and pathologisation). Children and young people can use the name corresponding to their gender identity in most areas of social life, such as school, leisure, and sport.<sup>52</sup> The Belgium amendment highlights an example of how existing policy regarding gender identity can be reformed and improved upon with greater interrogation of implementation and government support for revision.

*'Judgment 99/2019 constitutional Court PRESS RELEASE ABOUT JUDGMENT 99/2019: The transgender law is partially unconstitutional because of the treatment discrimination against persons whose gender identity is non-binary and people whose gender identity is fluid.*



According to the Constitutional Court, the transgender law of 25 June 2017 is unconstitutional in many respects. In the first place, there is a gap in that the registration of sex in the birth certificate is limited to binary categories man or woman. On the basis of the principle of self-determination, the legislator aims to allow individuals to put sex recorded in their act of birth in line with their personal experience. In this perspective, it is not reasonably justified that persons whose gender identity is non-binary are obliged to accept, in their birth certificate, a registration of the sex on the basis of the choice between woman and man which does not correspond to their identity of gender lived intimately. However, it is up to the legislator alone to develop a solution to remedy the unconstitutionality. The Court also annuls the provisions which in principle make it irrevocable to change the registration of the sex in the birth certificate and that do not allow a change of first name for reasons of trans identity only once. A heavy procedure of return to initial sex before the family court is, it is true, is provided for, but it is not justified in view of the objectives pursued. It discriminates against people whose identity evolves over time.<sup>34</sup>

## E. Spain: Implementation of Gender Affirming Healthcare

The Spanish case of gender-affirming healthcare offers an example of public implementation transgender-specific care. While conditions in Spain reflect a sustained economic recession, a significant hike in public debt, budgetary deficit, rising unemployment rate, coupled with a reduction in household incomes,<sup>35</sup> all Spanish citizens maintain the right to health protection and care under the National Healthcare System, regardless of employment or socio-economic access.<sup>36</sup> There are, however, regions within the country that do not offer inclusive policies or care, budgetary and geographical differences in policy remain persistent challenges in implementation resulting in unequal access. *The National Healthcare System in Spain is the coordinating body which encompasses the provision of welfare benefits and healthcare services, whose regulations are based on the Spanish Constitution of 1978, the General Healthcare Act 14/1986 and Act 16/2003 on Cohesion and Quality in the National Health System. In Spain, the Department of Health, Social Affairs and Equality has taken on a coordinating role and oversees health matters at national level, according to the decentralisation principle laid down in the Constitution.*<sup>37</sup> Resident Health Cards grant access to services, legally inclusive of migrants whose rights to asylum are recognized by law and joint agreements between the noted country of origin. While encoded in law, the right to healthcare access remains distant in practice, as the recession greatly impacted the availability of gender-affirming healthcare.<sup>38</sup> In 2008 the Spanish Department of Health determined transgender persons to be eligible for coverage of affirming care offered by the National Healthcare System<sup>39</sup>, and implemented by Gender Identity Units (GIU), where care is provided based on WPATH Standards of Care 7. GIUs are now found in 10 autonomous communities, with more planned, many of these clinics operating as national models.<sup>40</sup> Nationally, health services and all health services are established on self-affirmation of gender identity. Early 2018 brought legislative proposals to unify and synthesize healthcare throughout the country, further coordinating GIUs but continuing to advocate for individual budgets.<sup>41</sup>

## F. Argentina: Gender Identity Law of 2012

In full consideration of best practices and highest standards of care, it is necessary to recognize excellent cases from the Global South, specifically that of inclusive and affirming Gender Identity Law in Argentina.<sup>42</sup> Argentina's policy has offered a framework that provided inspiration for international adoption legal protections for transgender persons, including Malta's Gender Identity, Gender Expression and Sex Characteristics Act – Chapter 540 of 2014.<sup>43</sup> The Argentine law was the most progressive legislation at the time of enactment, and to this day offers a model for gender identity legislation based on human rights and self-determination.<sup>44</sup> The legislation supports the *"free development of their person according to their gender identity"* and maintains the right *"to be treated according to their gender identity and, particularly, to be identified in that way in the documents proving their identity in terms of the first name/s, image and sex recorded there."*<sup>45</sup> In the most advanced aspect of the law, the Act is the first to not require steps towards medical transition including HRT and gender-affirming surgery.<sup>46</sup> Any Argentinian through supplying an affidavit may change their name and gender on their birth certificates supporting identity documents, there are no pathologising requirements. In a move for greater access to gender affirming care, Argentinian public health systems must offer wide-ranging health care including HRT and gender-affirming surgery stating *"Public health officials, be they from the state, private or trade union-run health insurance systems, must guarantee in an ongoing way the rights recognized by this law. All medical procedures contemplated in this article are included in the Compulsory Medical Plan."*<sup>47</sup> As the first country to secure the right to self-determined gender identity without required medical intervention and with ensured access to gender-affirming health care, Argentina's legislation provided policy that serves as a global foundation for enhanced rights, greater access to care and justice for transgender persons.<sup>48</sup>

## G. Kenya: 2018 Taskforce on Policy, Legal, Institutional and Administrative Reforms regarding Intersex Persons

Kenya has made great progress towards strengthened rights and recognition for intersex persons and can serve as a valuable example of a collaborative process in research and policy reform. With support from Chapter 4 of the Bill of Rights, judicial decisions have supported *"protection against discrimination and from torture, cruel, inhumane and degrading treatment"* and the *"Persons Deprived of Liberty Act (2014), which identifies the need for recognition before the law through introduction of an Intersex (I) marker, public awareness, generation of statistics, access to healthcare and redress for human rights violations."*<sup>49</sup> In May, 2017, the Office of the Attorney-General and Department of Justice developed the Taskforce on Policy, Legal, Institutional and Administrative Reforms regarding the Intersex Persons in Kenya.

*The mandate of the taskforce is to:*

- i. Compile comprehensive data regarding the number, distribution and challenges of Intersex persons;
- ii. Provide a comparative analysis of approaches to care, treatment and protection of intersex persons;
- iii. Conduct an analysis of the policy, legal, medical, administrative and institutional frameworks governing structures and systems with regard to Intersex persons;
- iv. Recommend reforms to safeguard the interests of intersex persons; v. Present a prioritized implementation matrix based on the immediate, medium- and long-term reforms governing the intersex persons; and
- v. Undertake any other activities required for effective discharge of the mandate.<sup>50</sup>

The taskforce has led to developments in greater recognition for intersex persons, as the Kenyan Bureau of Statistics notes intersex as a "third gender" and implemented documentation and inclusion of an intersex option in the 2019 census.<sup>51</sup> This case provides a strong example of how governments can initiate reform and support research on the policy gaps impacting intersex persons.



## 10. Recommendations from the SA-EU Dialogue Task-Team for Strengthening T&I Policy Development and Implementation

### Recommendations to South African Government Stakeholders to Strengthen T&I Policy Development & Implementation

The legal right to gender recognition is an essential component to one's right to privacy, dignity and bodily autonomy. Inclusive and accessible policies should be founded on self-defined gender identity, provide non-binary gender options, afford rights available to all persons regardless of statehood, be fully inclusive in recognition and protection of intersex people, embrace intersectionality in broader human rights protections, and holistically depathologise.<sup>72</sup> Considerations should be made for revision providing alternatives to, or delays in indicating gender markers on identification documents, particularly in cases where the sex of a new-born is unclear.

In order to address the noted policy gaps in access to gender-affirming health care revision of the Alteration of Sex Description and Sex Status Act 49 of 2003 is recommended to prevent misinterpretation of the law, and develop strategies for reporting discrimination, unwarranted applicant rejections, as well as long and intentional delays in processing due to bias.

Policy addressing the right to health for T&I persons are essential to ensure gender identity is self-defined, be inclusive of gender-affirming care, provide access to medical aid for T&I inclusive healthcare coverage, approach gender-affirming care holistically and inclusive of mental health services, remove all pathologizing language and directives, ensure informed consent, offer HRT on a sliding scale at no/low-cost, remain geographically and economically accessible, and offer clear procedures for reporting rights violations. It is vital for effective policy to fully ban IGM and amend the Children's Act to include recognition of the right to informed consent to surgical intervention by intersex children, as well as the Sterilization Act to cover intersex surgeries and establish legal definition of procedures considered medically necessary interventions on intersex children.<sup>73</sup>

Revised policies combatting homophobic bullying in South African schools should be inclusive of interventions addressing bullying and harassment faced by transgender, gender-diverse, and intersex learners. They should be clear on policies indicating the use of chosen name, gender identity, options for gender-neutral school uniform, protect the privacy of youth even from parents, recognize the importance of self-determination and solid support structures for youth. *'Every learner should be helped to develop a sense of personal pride and identity in which they are confident and respectful towards other people's identities.'*<sup>74</sup> Further provide clear protections against mistreatment, discrimination, harassment and recognise the role and responsibility of teachers and school administrators in creating an empowering learning environment. *'The improvement of queer (LGBTI) learners' experiences in schools can only be achieved through teacher-focused and context-specific interventions. Such interventions would need to take into account issues of internalisation and intersections particularly between gender and sexuality and religion and/or culture.'*<sup>75</sup> Cross-cutting education and training on T&I issues is needed for educators and health care providers in order to strengthen implementation and the combat stigma.

All policies supporting and protecting T&I persons should be inclusive of migrants and asylum seekers and ensure the right to claim asylum as a member of a protected group is upheld as recognised in South African and international law. The establishment of clear protocols for asylum claims of T&I persons informed through a greater understanding of gender and sexual diversity, and of the 1998 Refugee Act, will strengthen lawful implementation and clear systems for reporting violations and procedures for synthesised accountability and redress. *'The notion of gender related aspects should be interpreted broadly in order to encompass persecution faced by intersex individuals.'*<sup>76</sup> Processing of asylum claims from T&I persons should avoid decisions based on stereotypes and generalisations.

Processing of asylum claims from T&I persons should avoid decisions based on stereotypes and generalisations. T&I asylum seekers should not experience excessive delays in decisions or bias from DHA officials and have the right to feel safe in DHA processing queues. All asylum and refugee documentation provided by DHA must include procedures through which gender markers can be amended.

### Recommendations to Civil Society to Strengthen T&I Policy Development & Implementation

Civil society can provide key guidance on best practices, offering a global perspective aimed to enhance T&I persons' access to and experience of rights. CSOs within South Africa are essential to the crafting of T&I policy protections ensuring inclusivity and measures for effective implementation. Through the policy development it is essential for CSOs to engage with policy makers in every step of the process, including providing comment for a strengthened engagement as well as promote greater attention to context and proper implementation. CSOs should advocate for enhanced reporting systems that aim to document violations and strengthen accountability. Strategies for strengthened policy needs to remain inclusive of campaigns aimed at addressing public response and greater understanding of human rights experiences for T&I persons. CSOs can offer evidence-based policy reform through the production and dissemination of research aimed at documenting the lived realities of T&I policy. It is vital for community-based organisations and T&I persons themselves to maintain amplified voices throughout the policy dialogue and discussion paper development.

### Recommendations to EU Stakeholders in SA-EU T&I Policy Engagement

EU stakeholders must work to enhance linkages to strengthen relationship building and shared learning of best practices. EU partners can provide support through interrogation of their own policy development process, and offer recommendations for enhanced research, implementation, training, and policy enforcement. EU partners must prioritise South African voices and actively engage with feedback from T&I persons themselves in the crafting of policy. EU stakeholders can learn from South Africa's strong civil society in efforts to build upon their own.



## Appendix 1: Glossary<sup>96</sup>

<b>Biological sex</b>	A person's combination of genitals, chromosomes and hormones; usually categorized as "male" or "female" based on visual inspection of genitals via ultrasound or at birth.
<b>Bisexual</b>	A sexual orientation in which a person romantically, emotionally, or sexually is attracted to more than one sex, gender or gender identity though not concurrently, in the same way or degree.
<b>Cisgender</b>	A term used to describe a person whose gender identity aligns with those typically associated with the sex assigned to them.
<b>Depathologisation</b>	Being transgender should not be viewed or characterised as psychologically abnormal. Unlisted in 2018 as a mental disorder in the World Health Organisation's International Classification of Diseases.
<b>Gay</b>	A term used to refer to the sexual orientation of men who are emotionally and/or sexually attracted to men; although sometimes used in reference to the general LGB community.
<b>Gender</b>	Social and cultural codes to differentiate what a society sees as "feminine" and "masculine" behaviour and/or characteristics. It exists independently of sex and does not always correlate with the sex assigned at birth.
<b>Gender binary</b>	The concept that gender is firmly an either/or option of male/man/masculine or female/women/feminine based on sex assigned at birth, rather than a spectrum of diverse gender identities and expressions. It is often seen as restrictive and problematic, significantly for those who do not conform to a particular gender.
<b>Gender affirming surgery</b>	Surgical procedures that change one's body to conform to their gender identity, to bring the primary and secondary sex characteristics into alignment with their internal self-perception.
<b>Gender expression</b>	The outwardly expression of one's gender identity in appearance and mode of dress, as well as often behaviour and interests. It is often influenced by gendered stereotypes and typically categorized as masculine or feminine, less commonly as androgynous. It could be congruent as well as incongruent if a person is not supported, safe, or have the resources necessary to live authentic self-expression.
<b>Gender identity</b>	A person's internal, holistic, and deeply held sense of their gender. Unlike gender expression, gender identity is not visible to others.
<b>Gender incongruence</b>	Incongruence between a person's own experience of their gender (gender identity) and the sex assigned to them at birth (birth-assigned sex).

<b>Gender marker</b>	Designated on a person's identity documents (usually as M or F, but in the case of Belgium, also X) including, but not limited to: ID cards, birth certificates, passports and immigration documents, work permits, driver's licences, and health and education related documentation.
<b>Gender non-binary</b>	Used by those whose gender identity is seen as existing beyond (or between, different from, outside) the gender binary of man and woman.
<b>Gender non-conforming</b>	Used as self-identification for those who do not conform to traditional gender expectations or expression.
<b>Intersex</b>	A term that refers to a diversity of conditions and traits that cause individuals to be born with chromosomes, gonads, and/or genitals and differ from what is considered typical for female or male bodies.
<b>Legal gender recognition</b>	The official procedure to change a person's name and gender identifier in official registries and identity documents.
<b>Lesbian</b>	Refer to the sexual orientation of women who are affectionally, emotionally, and sexually attracted to women.
<b>LGBTI</b>	An acronym commonly used to refer to Lesbian, Gay, Bisexual, Transgender, Intersex.
<b>Sex</b>	The classification of a person as male or female. A person's sex is a combination of bodily characteristics including: chromosomes, hormones, internal and external reproductive organs, and secondary sex characteristics.
<b>Sex characteristics</b>	In reference to intersex people as they are born with physical sex characteristics that don't fit medical or social norms for female or male bodies.
<b>Sexual orientation</b>	A person's sense of attraction to, or sexual desire for, people of the same sex, opposite sex, both sexes, without reference to sex or gender.
<b>Social transition</b>	A transgender or intersex person's process of creating a life that is congruent with their gender identity. It may involve a person changing their gender expression to corresponds with their gender identity.
<b>SOGI</b>	Used in international human rights forums, which unites sexual orientation and gender identity in order to denote a status requiring protection in the same way as race, sex, ethnicity, religion or gender.



**Transgender** Used to refer to a person whose gender identity is incongruent with (or does not "match") the biological sex they were assigned at birth. A transgender person usually adopts, or would prefer to adopt, a gender expression congruent with their gender identity but may or may not desire to alter their physical characteristics to conform to their gender identity. The term includes multiple gender identities, such as trans man, trans woman, non-binary, etc.

**Transitioning** The period during which a person begins to live as the gender congruent with their identity. It may include changing legal documents, one's name, taking hormones, or/and having surgery.

**Transphobia** A matrix of cultural and personal beliefs, opinions, attitudes and aggressive behaviours based on prejudice, disgust, fear and/or hatred directed against individuals or groups who do not conform to, or who transgress societal gender expectations and norms. Transphobia also includes institutionalised forms of discrimination such as criminalisation, pathologisation, or stigmatisation of non-conforming gender identities and gender expressions.

## Appendix 2: SA & EU Policy Mapping Chart

### Existing Trans Policy/Noted Reports & Research

Country	Legal Gender Recognition	Education	Health	Migration
South Africa	Act 49 - Alteration of Sex Description and Sex Status Act	Bullying in Schools - Department of Basic Education	The South African National LGBTI HIV Plan, 2017-2022.	The Refugee Act [No. 130 of 1998]. B. Gunninga. Transgender Refugees and the Imagined South Africa: Bodies Over Borders and Borders Over Bodies, Global queer politics, ISSN 2589-1317, Springer, 2018.
Malta	Chapter 540 - Gender Identity, Gender Expression and Sex Characteristics Act	Trans, Gender Variant, and Intersex Students in Schools Policy. Addressing Bullying Behaviour in Schools Policy - 2014. National Inclusive Education Framework Policy on Inclusive Education in Schools launched April 2019.	Transgender Health.	UNHCR - Malta Procedural standards for granting and withdrawing international protection regulations (L.N. 420.07).
Belgium	Legal Gender Recognition Law 2017	Government of Belgium, Common Declaration on a Gender Aware and LGBT Friendly Policy in Education, 2012.		Refugee Legal Aid - LGBT Resources Belgium. Annual Report on Migration in Belgium - 2017.
Other (specified example)			Spain - Transgender Europe, Overdiagnosed but Underserved, 2017. Spain - Best Practices in the National Health System.	EU - Current migration situation in the EU: Lesbian, gay, bisexual, transgender and inter sex asylum seekers. Best Practices LGBTI Asylum Applicants in EU - ILGA 2014.



## Existing Intersex Policy/ Noted Reports & Research

Country	Legal Gender Recognition	Education	Health	Migration
South Africa	Act 48 - Alteration of Sex Description and Sex Status Act		National Dialogue on the Protection and Promotion of the Human Rights of Intersex People	The Refugees Act (No. 130 of 1998)
Malta	Chapter 540 - Gender Identity, Gender Expression and Sex Characteristics Act	Trans, Gender Variant, and Intersex Students in Schools Policy. Addressing Bullying Behaviour in Schools Policy - 2014.	Chapter 540 - Gender Identity, Gender Expression and Sex Characteristics Act.	UChapter 540 - Gender Identity, Gender Expression and Sex Characteristics Act - inclusive of asylum seekers.
Belgium	Legal Gender Recognition Law 2017		Intersex Gender Mutilations - Human Rights Violations Of Children With Variations Of Reproductive Anatomy	Annual Report on Migration in Belgium - 2017. Refugee Legal Aid - LGBT Resources Belgium
Other (specified example)	European Parliament - The Rights of Intersex People. Kenya - Equality in Dignity and Rights: Promoting the Rights of Intersex Persons in Kenya. Malta Declaration - 2013.			EU - Current migration situation in the EU; Lesbian, gay, bisexual, transgender and inter sex asylum seekers. Best Practices LGBTI Asylum Applicants in EU - ILGA 2014.

## References

- 1) The Other Foundation, Progressive Prudes: A survey of attitudes towards homosexuality & gender non-conformity in South Africa, 2016
- 2) Legal Resources Centre, Gender Dynamix, Briefing Paper: Alteration of Sex Description and Sex Status Act, No. 49 of 2003, 2015
- 3) OUT LGBT Well-being, Hate Crimes Against Lesbian, Gay, Bisexual and Transgender (LGBT) People in South Africa, 2016
- 4) The South African Department of Justice and Constitutional Development, Iranti-Org, Intersex South Africa (ISSA), Foundation for Human Rights, National Dialogue on the Protection and Promotion of the Human Rights of Intersex People, 2018
- 5) The Republic of South Africa, Refugees Act 130 of 1998
- 6) Transgender Europe (TGEU), Human Rights and Gender Identity Best Practice Catalogue Second Revised Version December 2016, 2016
- 7) Institute for the equality of women and men, Being Transgender in Belgium: 10 Years Later, 2017
- 8) Oll Europe, ILGA Europe, Standing Up for the Human Rights of Intersex People - How Can You Help?, December 2015
- 9) Times of Malta, Watch: Malta is the 'gold standard' of LGBT reform, says UN equality boss, 27 September 2017
- 10) Republic of South Africa, Department of Justice and Constitutional Development, National Intervention Strategy for Lesbian, Gay, Bisexual, Transgender, and Intersex (LGBTI) Sector, 2013
- 11) Iranti, Multilateral EU-SA Engagement Underway, 3 September 2019
- 12) Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, 13 December 2007
- 13) European Union, Charter of Fundamental Rights of the European Union, 26 October 2012
- 14) Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950
- 15) International Commission of Jurists (ICJ), Yogyakarta Principles - Principles on the application of international human rights law in relation to sexual orientation and gender identity, March 2007
- 16) International Commission of Jurists (ICJ), The Yogyakarta Principles Plus 10 - Additional Principles and State Obligation on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Expression and Sex Characteristics to Complement the Yogyakarta Principles, 10 November 2017
- 17) UN Human Rights Council, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, 1 February 2013
- 18) MambaOnline, Victory as UN renews LGBTIQ watchdog role, 13 July 2019
- 19) African Commission on Human and Peoples' Rights, Resolution 275: Protection against Violence and other Human Rights Violations against Persons on the basis of their real or imputed Sexual Orientation or Gender Identity, 2014
- 20) Republic of South Africa, European Union - South Africa Summit Joint Statement, Brussels, 15 November 2018
- 21) Trade, Development and Cooperation Agreement (TDCA): Council Decision 2004/441/EC of 26 April 2004 concerning the conclusion of the Trade, Development and Cooperation Agreement
- 22) Republic of South Africa, National Development Plan 2030
- 23) Constitution of the Republic of South Africa [South Africa], 10 December 1996



- 24) Ehlers v Bohler Uddeholm Africa (Pty) Ltd 2010 (JS296/09) [2010] ZALC 117 (2010) 31 ILJ 2383 (LC) (13 August 2010)
- 25) Republic of South Africa, No. 49 of 2003, Alteration of Sex Description and Sex Status Act, 2003
- 26) Republic of South Africa, No 128 Births and Deaths Registration Act, 1992
- 27) Republic of South Africa, Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, 2002
- 28) IOL News, Transgender clinic's 25-year waiting list, 21 May 2016
- 29) Department of Basic Education/Centre for Justice and Crime Prevention (2012) School Safety Framework: Addressing bullying in schools. Cape Town: Centre for Justice and Crime Prevention.
- 30) The South African Department of Basic Education, Homophobic Bullying in Schools, 2015
- 31) Gender Dynamix, Gender Identity & Gender Expression in South African Schools Manual, 2018
- 32) Section 27, Chapter 9, Sexual Orientation and Gender Identity in Schools, Education Rights Handbook, 2017
- 33) The South African, Transgender students allowed to choose between uniforms, says Education Department, 10 September 2018
- 34) Times Live, Gender-free toilets for trans pupils, 14 October 2018
- 35) The South African Department of Basic Education, Example of a Code of Conduct for a School, Pretoria, South Africa, Department of Education 2008
- 36) B. Camminga, Transgender Refugees and the Imagined South Africa: Bodies Over Borders and Borders Over Bodies, Global queer politics, ISSN 2569-1317, Springer, 2018
- 37) FRA- European Union Agency for Fundamental Rights, Current migration situation in the EU: Lesbian, gay, bisexual, transgender and intersex asylum seekers, March 2017
- 38) Directive 377/9, 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-party nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted
- 39) Directive 2013/33/EU of the European Parliament and the Council, laying down standards for the reception of applicants for international protection, 6 June 2013
- 40) Ulrike Lunacek, EU Roadmap against homophobia and discrimination on grounds of sexual orientation and gender identity: texts adopted by parliament, 2014
- 41) Council of Europe, Protecting Human Rights of Transgender Persons: A short guide to legal gender recognition, 2015
- 42) Transgender Europe (TGEU), Asylum seekers' need for trans-specific healthcare: Trans-specific healthcare in Reception Conditions, 2018
- 43) Government of Malta, Chapter 540 Gender Identity, Gender Expression and Sex Characteristics Act, 2015
- 44) European Commission, A comparative analysis of gender equality law in Europe, 2018
- 45) Government of Malta, LGBTIQ Equality Strategy & Action Plan 2018-2022
- 46) Government of Malta, Mental Health Act Chapter 525, amended 2017
- 47) Human Rights and Integration Directorate SOGIGESC Unit, Malta's LGBTIQ Legal and Policy Framework: I Belong Handout, 2018
- 48) Government of Malta, Office of the Deputy Ministry for Health Care, Transgender Healthcare, 2018
- 49) Government of Malta, Chapter 456 Equality for Men and Women Act, 2003
- 50) Government of Malta, The Trans, Gender Variant and Intersex Students in School Policy, 2016
- 51) Government of Malta, The Addressing Bullying Behaviour in Schools, 2014
- 52) Ministry of Education and Employment in Malta, Respect for All Framework, 2014
- 53) Ministry of Education and Employment in Malta, A National and Inclusive Education Framework, 2019
- 54) Government of Malta, Refugees Act Chapter 420, 2001
- 55) Government of Belgium, Role number: 6813 Judgment No. 99/2019 of 19 June 2019 ILGA Europe, Annual Review of the Human Rights Situation of Lesbian, Gay, Bisexual, Trans and Intersex People in Belgium covering the period of January to December 2018, 2019
- 56) Transgender Europe (TGEU), Belgium – New Gender Recognition Law with obstacles, May 2017
- 57) Institute for the equality of women and men, Being Transgender in Belgium: 10 Years Later, 2017
- 58) Transgender Europe (TGEU), Belgium – New Gender Recognition Law with obstacles, May 2017
- 59) ILGA Europe, Annual Review of the Human Rights Situation of Lesbian, Gay, Bisexual, Trans, and Intersex People in Belgium covering the period of January to December 2018, 2019
- 60) Government of Belgium, Common Declaration on a Gender Aware and LGBT Friendly Policy in Education, 2012
- 61) Amnesty International, International Report, Belgium, Refugees and asylum-seekers, 2017/2018
- 62) Asylum Application Database (AIDA), Belgium: Barriers to Registration of Asylum Applications, December 2018
- 63) South African Department of Home Affairs, Annual Report 2018-2019
- 64) Sowetan Live, Conversations: Transgender healthcare in crisis, 5 April 2019
- 65) IOL, Transgender clinic's 25-year waiting list, 21 May 2016
- 66) Groot Schuur Hospital, Transgender Clinic: About US (<http://www.psychiatry.uct.ac.za/psych/clinical-services/groote-schuur-hospital/>)
- 67) Muller, A. Scrambling for access: availability, accessibility, acceptability and quality of healthcare for lesbian, gay, bisexual and transgender people in South Africa. BMC International Health and Human Rights (2017) 17:16
- 68) Botha, Kellyn, 'Victory for transgender learner in Limpopo a long time coming? Daily Maverick, 24 March 2017
- 69) Gender Dynamix, Transphobia in Schools, Sibusiso Kheswa, 2013
- 70) South African Department of Basic Education, Media Statements: Basic Education rejects misleading reports on life orientation curriculum, 29 October 2019
- 71) South African Department of Basic Education, Media Statements: Minister Motshekga launches Ministerial Task Team's Textbook Evaluation Report, 9 April 2019
- 72) Access Chapter 2, The Voice: Life experiences of LGBTI refugees and asylum seekers in South Africa, 2019
- 73) Heinrich Boll Stiftung, A Double Challenge: LGBTI Refugees and Asylum Seekers in South Africa, 11 October 2018
- 74) Daily Maverick, It's hard just to make it another day: LGBTQ+ refugees struggle to survive in SA, 2 December 2019
- 75) Organization for Refuge, Asylum & Migration (ORAM), Blind Alleys: The Unseen Struggles of Lesbian, Gay, Bisexual, Transgender and Intersex Urban Refugees in Mexico, Uganda and South Africa. PART II Country Findings: South Africa, February 2013
- 76) Thierry Bosman, StopIGM.org/ Zwischengeschlecht.org, Intersex Genital Mutilations: Human Rights Violations of Children with Variations of Reproductive Anatomy. NGO Report (for Session) to the 5th and 6th Report of Belgium on the Convention on the Rights of the Child, 2018
- 77) FRA – European Union Agency for Fundamental Rights, Being Trans in the European Union: Comparative analysis of EU LGBT survey data, 2014



- 78) European Commission, Summary Report: Policies to combat bullying based on sexual orientation, gender identity/expression or sex characteristics in educational institutions, 2017
- 79) European Migration Network, Annual Report on Migration and Asylum in Belgium, 2018
- 80) IGLYO, Position Paper on Intersex, January 2017
- 81) Government of Belgium, Role number 6813 Judgment No. 99/2019 of 19 June 2019
- 82) Transgender Europe (TGEU), Legal Gender Recognition and the Best Interest of the Child, November 2018
- 83) Government of Belgium, Judgment 99/ 2019 Constitutional Court PRESS RELEASE ABOUT JUDGMENT 99/2019
- 84) European Observatory on Health Systems and Policies, Spain: Health System Review, 2018
- 85) Transgender Europe (TGEU) Overdiagnosed but Underserved. Trans Healthcare in Georgia, Poland, Serbia, Spain, and Sweden. Trans Health Survey, 2017
- 86) STP 2012, Spanish Network for Depathologization of Trans Identities, Best Practices Guide to Trans Health Care in the National Health System, 2012
- 87) World Health Organisation, 'Growing recognition of transgender health' 2016
- 88) Divan V et al. Transgender social inclusion and equality: a pivotal path to development. Journal of the International AIDS Society 2016, 19
- 89) TGEU, English Translation of Argentina's Gender Identity Law as approved by the Senate of Argentina on May 8, 2012. Buenos Aires, November 30th 2012
- 90) The New Yorker, Latin America's Transgender-Rights Leader, 10 August 2015
- 91) Kenya National Commission on Human Rights, Equal in Dignity and Rights: Promoting the Rights of Intersex Persons in Kenya, 2018
- 92) SBS News (31 August 2019) How recognising intersex people opens access to fundamental rights in Kenya
- 93) Open Society Foundations, License To Be Yourself: Laws and advocacy for legal gender recognition of trans people, 2014
- 94) Thabo Msibi (2012) 'I'm used to it now' experiences of homophobia among queer youth in South African township schools, Gender and Education, 24:5, 515-533, DOI:10.1080/09540253.2011.645021
- 95) ILGA Europe, Guidelines on transposition of the asylum qualification Directive, protecting LGBTI asylum seekers, 2012
- 96) Transgender Europe (TGEU), Glossary, 2016



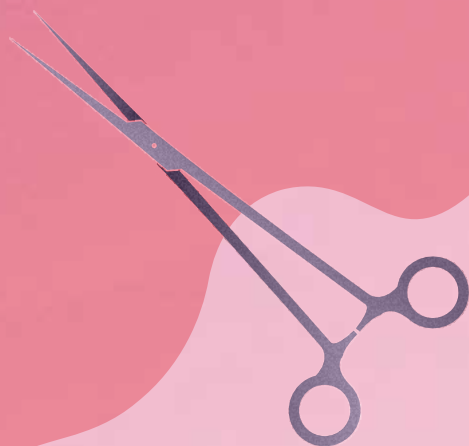


## EU-SA Policy Dialogue on the Rights of Transgender & Intersex Persons

### INTERSEX GENITAL MUTILATION (IGM)

DESPITE THE FACT THAT THE UNITED NATIONS HAS DECLARED THIS PRACTICE A HUMAN RIGHTS VIOLATION, IT IS STILL PERFORMED ON INFANTS ALL ACROSS THE GLOBE.

THE MAJORITY OF THESE PROCEDURES ARE NOT LIFE SAVING AND ARE PERFORMED SOLELY DUE TO SOCIAL STIGMA.



IGM IS ASSOCIATED WITH SEVERAL POSSIBLE COMPLICATIONS LATER IN AN INTERSEX PERSON'S LIFE,

E.G.

INTERSEX PEOPLE MAY NOT IDENTIFY WITH THE SEX ASSIGNED TO THEM.

THE REMOVAL OF "NON-TYPICAL" GONADS MAY LEAD TO A LIFELONG DEPENDENCY ON HORMONAL MEDICATION.

### 1.7% OF THE WORLD POPULATION

IS ESTIMATED TO BE INTERSEX.

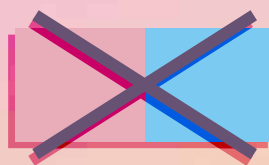
THAT'S THE SAME PERCENTAGE OF THE POPULATION THAT HAS RED HAIR.

INTERSEX RIGHTS IS NOT A FRINGE ISSUE.



### DEPATHOLOGISE

VARIATIONS IN SEX CHARACTERISTICS ARE NATURAL AND NOT DISORDERS.



BIOLOGICAL SEX IS NOT A BINARY.  
IT IS A SPECTRUM.