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## SUBMISSION ON DRAFT NATIONAL IDENTIFICATION AND REGISTRATION BILL

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*“Some States recognize the gender identity of trans persons, but establish abusive requirements for such recognition that further violate human rights when a change of gender or name is sought in official records: forced, coerced or otherwise involuntary sterilization; medical procedures related to transition, including surgeries and hormonal therapies; undergoing medical diagnosis, psychological appraisals or other or treatment; as well as third-party consent for adults, forced divorce and age-of-offspring restrictions.”<sup>1</sup>*

The Department of Home Affairs has introduced the draft National Identification and Registration Bill (“**the Bill**”). According to the department, the Bill seeks to:

provide for the establishment of a single, inclusive and integrated national identification system for the Republic and for that reason to provide for the

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<sup>1</sup>Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity.

Act to apply to permanent residents and foreigners who sojourn temporarily within the Republic;

provide for the compilation and maintenance of a population register and identification database;

provide for the assignment of national identity numbers and reference numbers;

provide for the issuance of national identity cards and temporary identity, deaths, births and marriage certificates; and to provide for matters connected therewith.

Within international human rights law, there is a well-established framework prescribing respect for gender identity. This submission is made with that in mind.

The call from the transgender and intersex (T & I) community in South Africa concerning Legal Gender Recognition (“**LGR**”) has been clear and consistent. The trans and intersex community are of the opinion that the Constitution protects the trans and intersex community from unfair discrimination on the basis of sex and gender and that that imperative means that, we have asked for the repeal of the Alteration of Sex Description and Sex Status Act 49 of 2003.

We submit that the Alteration of Sex Description and Sex Status Act 49 of 2003 should be replaced with “a fast, efficient, accessible, cost-effective and non-discriminatory administrative procedure that respects the human rights of trans and gender diverse persons in South Africa to legal gender recognition.”

In February 2017, on the basis of the legal obligation of non-discrimination, the recommendations by United Nations human rights mechanisms and a survey of international good practices, the United Nations High Commissioner for Human Rights recommended certain features for the process of recognition, with which the mandate holder concurs. Under those parameters, the process of recognition should:

Enables individuals in South Africa to have their gender legally recognised;

Is based on self-determination and self-declaration;

Includes an option of 'X' to indicate 'unspecified';

Includes an option to omit gender from identity documents completely;

Be a simple administrative process;

Not require applicants to fulfil abusive requirements, such as medical certification, surgery, treatment, sterilization or divorce; and

Ensure that minors have access to recognition of their gender identity

In November 2021, The South African Departments of Home Affairs, Justice and Constitutional Development and Health, in partnership with the European Union (EU), the African Centre for Migration & Society (ACMS) and South African civil society organisations Iranti, Gender Dynamix (GDX) and Intersex South Africa (ISSA), participated in a dialogue on policy improvements to protect the rights of

Transgender and Intersex (T&I) people in South Africa. The two-day event (4 and 5 November 2021), held at the Sheraton Hotel in Pretoria, included delegates and speakers from the EU, the United Nations (UN), and the departments mentioned above of the South African government, as well as activists and civil society members from local and international organisations. During the Policy Dialogue, two specific commitments were made by South African Department present:

A commitment to repeal the current South African legislation on the changing of legal gender (the Alteration of Sex Description and Status Act, No. 49 of 2003, known as “**Act 49**”).

A commitment to creating a gender-neutral national identity number, removing gender markers from the Smart Card ID and making available an 'X' gender marker, indicating 'unspecified'. Crucially, all citizens would have access to the 'X' gender marker, while all ID numbers would become gender-neutral.

In December 2020, the Department of Home Affairs circulated a Draft Identity Management Policy and, in early 2021, a group of civil society organisations concerned with T&I rights, as well as interested members of the public, responded to the draft policy. Drawing from the 2021 Policy Dialogue, respondents to the proposed Draft Policy maintained that national ID cards should no longer indicate gender, either by display or through the ID number. Civil society was particularly concerned about the seeming confusion regarding the possible inclusion of an 'X' gender marker constituting a 'third gender' category reserved exclusively for T&I people. Civil society clarified that while a third gender category might work in countries such as India, where such a community has existed historically, this was

not the case in South Africa. Therefore, it would not be possible for the 'X' to work in the same manner. Rather, the civil society response asserted 'X' should be available on the National Population Register as with the 'M' or 'F' designation, the 'X' should indicate 'unspecified' and should be an option available to all South Africans as is the current situation regarding 'M' or 'F' (as facilitated through Act 49)

We acknowledge that the National Identification Registration Bill represents an effort to grapple with some of these issues. In particular, we acknowledge that the proposed Bill addresses items one and four in the request list from the T&I community in South Africa. However, we raise several concerns with the content and legality of what the proposed Bill puts forward.

We are particularly concerned that the proposed Bill moves away from a commitment made at the Policy Dialogue. We also note, with some concern, the use of identitarian language such as 'non-binary' as a special population that the Bill will serve, though this is not something that has been requested by civil society organisations representing T&I people in South Africa. Instead, this community has consistently asked for the following:

Three categories (M/F/X) to exist;

That these be made available to all on the basis of self-determination and self-definition

Gender-neutral ID numbers become the standard

Gender markers to be removed from the Smart Card (as was the case on the Green ID)

## Below we outline several concerns with the current proposed Act

### Transgender and Intersex persons

The current legal situation allows for the changing of gender markers through Act 49. The Act, however, only provides for binary gender markers. Thus, it only serves a segment of the T&I population in South Africa. Act 49 is also, as outlined in the scholarly literature and civil society reports, a pathologising and constitutionally flawed document dating back to the 1980s. The proposed Bill seeks to provide for "non-binary people" by allowing for a gender-neutral identity number. While a step forward for many, this is a step for a slim minority. The T&I community in South Africa is diverse.

The law in South Africa has long acknowledged that while the language is contingent, the experience the language attempts to name or describe is not. Thus laws in South Africa attempt to protect or extend protections on the basis of core attributes rather than the language used to describe these. By way of example, constitutional protections extend to sexual orientation rather than homosexuality or 'gay people'.

One of the key "Objects of Act" is to empower the "(b) empower the Director-General to issue a gender-neutral identity number to non-binary person". The proposed Bill does not define 'non-binary'. It does suggest, however, that a person will have to

identify as non-binary for the Director-General to issue a gender-neutral identity number.

While we acknowledge the efforts of the Department to extend a more expansive recognition of gender to the T&I community framing this around identitarian language will do the opposite of the proposed Act's intention. 'Non-binary' is a term some might use to describe their gender, but it is not the only term used. Thus, it represents a small community in South Africa. As argued in previous submissions, it is necessary to cater for the diversity of gender in South Africa as an African country. The best way for this to happen is to allow for an X, indicating unspecified and a gender-neutral ID number available on an opt-in basis to all. Framing a law around a term will force people to identify with this term to gain access.

Even requirements that may at first seem neutral can become unacceptable hindrances or be utilised to obstruct respect for gender identity. The Constitutional Court in its jurisprudence has recognised and confirmed that “a seemingly benign or neutral distinction that nevertheless has a disproportionate impact on certain groups amounts to indirect discrimination”. It is on this basis that we take the view that the differentiation on gender identity nevertheless may constitute indirect discrimination

### **The Alternation of Sex Description and Sex Status Act 49**

The Draft Identity Management Policy noted that the new Identity Management Act would repeal Act 49. The Act, as it currently stands, is unconstitutional and is open to legal challenge should it remain in place. Since its implementation, there have been mounting concerns raised by civil society regarding its haphazard implementation and the absence of knowledge with regard to its requirements. Act

49 also lacks any accompanying directives, which has negatively impacted its implementation. This is well evidenced in scholarly research and has been widely covered in South African news media. As a result, many South Africans continue to live in limbo, unable to access LGR in South Africa.

While we acknowledge the efforts in this Bill to extend LGR to a specific minority, the proposed Bill is unclear on the status of Act 49 and how this will work in relation to the current proposals being made. Not all transgender and intersex people are non-binary. As the history of Act 49 makes clear many are binarily gendered. Transgender men and women, along with the broader gender-diverse and intersex community in South Africa, should be able to access LGR based on self-determination and self-definition.

### **The permanent ID number**

Regarding Section 9(3) and the permanency of the ID number, it has been the practice, in line with Act 49, that once a transgender person has accessed LGR through the Act, they have been issued a new ID number indicating their correct gender. The proposed Bill suggests that ID numbers will now be assigned permanently, thus contradicting Act 49 and the proposed Bill does not repeal Act. Furthermore, the proposed Bill notes that the Direct General can issue a gender-neutral ID number. How would this be made possible given the stipulations of permanence regarding the issuance of an ID number from as early as ten years old?

Furthermore, the proposed Bill Act does not stipulate how a person might be able to access this gender-neutral ID number or approach the Director General to do so. Evidence from the lack of implementation of Act 49 suggests that this process needs to be outlined and made as easily accessible as possible. While we value the efforts



of this proposed Bill, years of poor implementation concerning Act 49 suggest that without clear guidelines and a non-pathologising process, frontline officials take it upon themselves to decide gender either through denying the existence of the Act or deliberately delaying gender marker changes.

### **Gender-neutral ID numbers**

At the November Policy Dialogue, state officials suggested there is no longer any real utility in having ID numbers which indicate gender. Various Departments capture gender through other means. The Department of Home Affairs acknowledged that they never use ID numbers to determine gender but rely on back-end info held in the National Population Register (NPR). The T&I has consistently pushed for the phasing out of gendered ID numbers in South Africa with a request that gender-neutral numbers become the norm. These numbers, as Departments have made clear, do not serve a purpose. Gender-neutral numbers are the predominant standard globally, providing a greater range and greater security based on variability. As a second option, the T&I community has suggested that if there is a need to maintain the gendered ID number, then gender-neutral numbers should be provided based on an opt-in system available to all.

Evidence regarding the current gendered ID number has shown that when indicating a gender other than that presented (for instance, a trans man carrying an ID whose number indicates he was incorrectly assigned 'F' ) opens T&I people to harassment, discrimination and abuse. When a legal gender marker or ID number does not reflect a person's self-identified gender, there are fundamental obstacles to accessing employment, banking, voting, and travel. At worst, a person's life can be in danger

when inaccurate ID "outs" them. Creating a special gender-neutral ID number only for non-binary people, awarded at the discretion of the Director-General, would, rather than affirm identities, open T&I people who are non-binary up to further harassment and exclusion.

How will the gender-neutral ID number be reflected in the passport? Will the X marker, as per International Civil Aviation Organisation (ICAO) standards and regulations become available to people in South Africa with gender-neutral ID numbers who wish to have the same on their passports.

### **At the Director-General's discretion.**

The system, as it currently works for accessing and updating a gender marker change, does not adequately provide for T&I people generally. Act 49 works similarly with applications being made to the Director General. What this has meant in practice is a series of hoops and hurdles mediated by frontline staff at Home Affairs, often leading to difficulties in accessing gender marker change. The current proposed Bill suggests implementing a new system alongside Act 49 to cater for some T&I people. In contrast, others would have to continue to ensure the discriminatory requirements and haphazard application of Act 49. As has been noted on several occasions, Act 49, given its history, is open to constitutional challenge. The present proposal for gender-neutral ID numbers to be provided at the discretion of the Director-General does not explain how this is to be actioned or accessed.

Moreover, it creates a more complicated system which may be open to abuse. It is highly probable that frontline staff will start asserting that binary transgender people take on gender-neutral or a number associated with a non-binary person, assuming

that all T&I people are non-binary. Hence our request that gender marker/ ID number change be made available to all on a self-determination model as is the case increasingly globally.

The system must serve all equally. It cannot serve only a select few through special means. Unless access for all is intended, but yet not clearly stipulated, with regards to Chapter 5 Correction, Cancellation and Replacement under Section 24(1), which states:

If an identity card does not reflect correctly the particulars of the person to whom it was issued, or a temporary identity certificate or any certificate does not reflect correctly the particulars of the person to whom it was issued, the person concerned or the guardian of the person to whom the card or certificate was issued, as the case may be, must, within the prescribed period hand over or send, by registered post, the identity card, temporary identity certificate or certificate, as the case may be, to the Director-General

Several identity management systems globally understand gender marker change as a correction of a mistake within the National Population Register. The French system is perhaps most clear on the correction to this mistake. T&I people understand their identity documents to have been issued with the incorrect markers, an error which needs correcting. The above section would make way for self-determination and self-declaration for the T&I people.

### **Clarification:**

Section 9B states the following:

in respect of gender—

(i) if that person's status is determined, the description of such gender; and

(ii) if a person's status is not determined, a numerical figure that bears no relation to the gender of the person; and

Section 9B seems to outline the request made by the T&I community in South Africa, in that a neutral gender marker "bears no relation to the gender of a person". However, of concern is what "if a person's status is not determined" means. There are no further indications as to if or how a person's status might be determined and by whom. We very much welcome a move towards ID numbers which bear no relation to the gender of the person. Still, we believe this should be the status of ID numbers more generally rather than a special situation based on determination.

Section 10 (1)

(1) The Director-General must, in respect of any person referred to in section 3(a), include in the population register the following relevant particulars available to him or her—

(b) surname, full forenames, gender where applicable, date of birth and the place

Similarly to Section 9B, clarity regarding "where applicable" is required. Overall, the proposed Bill is progressive in its attempts to include a more expansive approach to gender. It is unclear if the gender-neutral ID number removes gender entirely, is only

for cases where gender is “undetermined”, or is to be used by non-binary people. Being non-binary does not mean gender is undetermined. The person's gender is non-binary.

## Language

Finally, in an effort to move towards a more gender-inclusive population register and identity number system, it would benefit the Bill to represent all the people it wishes to encompass. Thus, perhaps it would be fitting instead of referring to "him or her" as in subsection 10(1) to use the more neutral "them". A non-binary person might well be Director General one day. Perhaps, more importantly, though, the proposed Bill outlines an effort to acknowledge the gender diversity of people in South Africa. Section 20(1), however, falls short of the overall aim of the proposed Bill as it defines the remit of authorised officers in that it only applies to (cis or trans) men and women. This section would seemingly not apply to those with gender-neutral ID numbers or, for the purposes of this proposed Act, 'non-binary' people.

An authorised officer as defined in subsection (3) may, at any time, request any person reasonably presumed to have attained the age of 16 years to prove his or her identity to that officer by the production of his or her identity card as defined in subsection (4).

Reference to ‘him or her’ or ‘his and hers’ is made throughout the proposed Act. It should be noted that in acknowledging non-binary people, sections referring only to ‘his and her’ may be read in contradiction with this acknowledgement.

## Conclusion

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.

While we welcome and acknowledge the steps this proposed Act takes, especially with regards to the removal of gender markers from ID documents as per Section 15, returning to the model used in the Green ID book, we are concerned that this proposed Act only caters to a small section of the South African T&I community. Some might even argue perhaps the most privileged section of this community. The absence of any mention of Act 49 and how it will be integrated into the new Act is deeply concerning and must be addressed. The T&I community in South Africa can no longer be expected to struggle to access LGR. This presents fundamental obstacles to accessing employment, banking, voting, and travel. As the Independent

Expert on Sexual Orientation and Gender Identity to the UN made clear in a statement to the General Assembly in 2018:

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.

Extending LGR to all people in South Africa is critical and must be guided by the community. Thus, a new National Identity Act must repeal Act 49 and offer a quick, transparent, and accessible model of LGR based on self-determination and self-declaration.

In March 2023 Argentina, on behalf of 28 states, delivered a call to the United Nations *to implement laws and policies that allow the recognition of gender identity based on self-identification*. The law on gender identity of Argentina establishes a simple administrative process based on self-determination for the modification of name and gender markers on official documents through the civil registry, without any abusive requirements. Similar laws exist in Austria, Belgium, Brazil, Chile, Colombia, Costa Rica, Denmark, Ecuador, Finland, India, Ireland, Iceland, Luxembourg, Malta, Nepal, Norway, Pakistan, Portugal, Spain, Switzerland and Uruguay.

Presenting *evidence from the 28 jurisdictions, Argentina made clear that a model for legal gender recognition based on self-determination allows people to obtain identity documents that match their gender identity and expression without going through abusive requirements. This reduces the discrimination, harassment, and violence faced by trans people in various aspects of their lives. It also provides transgender and intersex individuals access to healthcare, education, employment, housing, and other basic rights that may otherwise be denied to them due to their gender identity.*