

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

Presentation at Gender DynamiX

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Overview

This presentation:

1. Gives an historical overview of the legal situation of trans people in South Africa – specifically the right to change one's legal gender/sex description.
2. Tells how parliamentary lobbying by trans people ensured a more progressive piece of legislation.
3. Explains what the Alteration of Sex Description and Sex Status Act means, including its potentially revolutionary implications.
4. Points out inadequacies in the Act and obstacles in its implementation.
5. Makes suggestions about the way forward.

Compulsory registration of gender/sex description

Identification Act No.68 of 1997:

(The Apartheid equivalent was the Population Registration Act No.30 of 1950.)

All SA citizens and permanent residents must have an ID number:

7.(2) “An identity number shall [...] consist of a reproduction, in figure codes, of the following particulars [...] of the person to whom it has been assigned, namely—

- (a) his or her date of birth and gender; and
- (b) whether or not he or she is a South African citizen.”

8. “There shall in respect of any person [...] be included in the population register the following relevant particulars available to the Director-General, namely— [...]

- (b) his or her surname, full forenames, gender, date of birth and the place or country where he or she was born”.

Note:

- The seventh digit in an ID number indicates gender: Generally 0 to 4 indicates female, and 5 to 9 indicates male.
- The encoding of gender in ID numbers presents tremendous problems for transgender, gender diverse and intersexed people in their day-to-day lives.

South African Laws on Change of Sex Description

Period	Act
1974-1992:	<ul style="list-style-type: none"><li data-bbox="620 505 1746 725">• Births, Marriages and Deaths Registration Act No.81 of 1963 – as amended in 1974 & 1982.
1992-2003:	<ul style="list-style-type: none"><li data-bbox="620 842 1721 979">• Births and Deaths Registration Act No. 51 of 1992.
2003 to present:	<ul style="list-style-type: none"><li data-bbox="620 1096 1804 1235">• Alteration of Sex Description and Sex Status Act No.49 of 2003.

Births, Marriages and Deaths Registration Act No.81 of 1963

- Initially no provision for alteration of sex description.
- In 1974 the following provision was added (here given in its slightly amended version of 1982):

“7B. Alteration of sex description of person in his birth register. —The Director-General may on the recommendation of the Secretary for Health alter, in the birth register of any person who has undergone a change of sex, the description of the sex of such person and may for this purpose call for such medical reports and institute such investigations as he may deem necessary.”

- This provision applied until the Act was repealed in 1992.

Births and Deaths Registration Act No. 51 of 1992

- New Act of 1992 repeals and replaces the old Births, Marriages and Deaths Registration Act No.81 of 1963.
- New act no longer made provision for a change of sex description.
- Possible reason:
Nestadt's decision in *WvW* (1976) – holding that it is impossible to medically change a person's sex. Based on the British case, *Corbett v Corbett* (1971). A rigid binary biological definition of sex – chromosomes, gonads, genitals must all be of one sex (Ormrod test).
- However: Slightly amended by Act 129 of 1993:
33. (3) “A person who was in the process of undergoing a change of sex before the commencement of this Act, may on completion of the said process apply in terms of section 7B of the Births, Marriages and Deaths Registration Act, 1963, for the alteration of the sex description in his birth register.”

Result:

- Persons who started transition before 1992 could still change their sex description.
- But persons who started after 1992 not allowed to change sex description.
- However, some individuals still seems to have managed to get their sex descriptions changed via sympathetic officials/appeals to the Director-General of Home Affairs.

South African Law Commission report – March 1995

Investigation into the Legal Consequences of Sexual Realignment and Related Matters

- This was the report on which the SA Law Commission based its proposal for a Draft Bill (draft Bill was attached at end of report).
- Report was produced by the late Prof. Jerold Taitz presumably in 1980s/early 1990s.
- Probably had good intentions, but outdated research – relied on literature from the 1970s and earlier; most recent article cited on trans issues was 1986.
- Employed the classical medical transsexual model – pathologises trans people as having a psychological disorder; assumes that every ‘true’ trans person would want to have all sex reassignment surgeries, and expects all trans people to be heterosexual.
- No trans people were consulted.
- Report contains sexist stereotypes and homophobic undertones.
- It made provision only for persons who completed all genital sex reassignment surgeries.
- It discriminated against the majority of trans people, but at least a change of sex description was on the cards again as far as legislation is concerned.

Alteration of Sex Description and Sex Status Bill [B37-2003]

- SA Law Commission draft bill was complete in 1995, but process was repeatedly stalled/delayed.
- By the time it was submitted for Public Hearings in Parliament in September 2003, it had undergone some minor changes (e.g. due to cabinet minister input), but remained a very **conservative, discriminatory bill** focused on a **complete alteration** of “**sex organs**”:

“Any person whose **sex organs** have been altered by surgical or medical treatment or by evolvment through natural development resulting in a **sex change** 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.”

- It made no provision for trans people without genital surgery.
- Also no provision for intersexed and other persons who did not wish to have any medical/surgical procedures, but who may want to change the gender identity/sex description assigned to them at birth.

Public participation process failed trans people

- 2000-2003: Repeated attempts to find about and give input on the Alteration of Sex Description and Sex Status Bill, failed.
- SA Law Commission, Commission on Gender Equality (CGE) and Woodstock Parliamentary Office all proved unhelpful: No response to queries or fail to follow through on promises to facilitate participation of trans people in a process directly affecting our lives.
- 26 August 2003: Trans persons in Cape Town suddenly heard the Bill had been introduced in Parliament and the deadline for submissions was 5 September 2003, leaving us less than 10 days to give input.
- 3 Sept 2003: The Cape Town Transgender/Transsexual Support Group wrote an urgent letter to the Chairperson of the Home Affairs Portfolio Committee and met with him to request a 2-months deadline extension for a group submission and submissions by individual members.
- The letter detailed the exclusion of trans people from the public participation process to date and stressed that the SA Law Commission's research was outdated, and we needed time to do international legal research on recent trends to effectively influence the process.
- Extension not granted; parliament in a hurry to push the Bill through before 2004 elections, or it may have resulted in another delay of years. Received assurance our input would be taken into account and we could do an oral submission during the public hearings in addition to written submissions, and that there would be opportunity for later a revision process.

Cape Town Transsexual/Transgender Support Group

- Aug/Sept 2003: The Cape Town Transsexual/Transgender Support Group met a few times in Obz Café, Observatory, to discuss input on and strategy around the Bill.
- A group trans submission was compiled and submitted to Parliament by Estian Smit (with inputs received from international trans activists in the US and UK).
- An individual trans submission was submitted to Parliament by Simone Heradien.
- We also established contact with the intersexed activist, Sally Gross, to find out about and support intersexed concerns/inputs on the Bill.

Gay NGOs

Non-consultation & non-cooperation

- Equality Project and Triangle Project supported the idea of a new law allowing changes in sex description.
- However, there was no consultation of trans people in their initial development of a parliamentary submission.
- Furthermore, they subsequently refused to incorporate trans people's comments on their draft submission, even though we made it clear that their emphasis on surgery and on pathologising us would harm trans people and exclude the majority of us from benefiting from the new law.
- Equality Project went ahead with a conservative and discriminatory written submission to Parliament, trying to narrow the new act's application even further by proposing restrictive and pathologising definitions.
- Among others: reinforcing a comprehensive surgery requirement and proposing "extensive therapy and evaluation" as well as comprehensive medical treatment lasting for a specified period.
- Equality Project publicly opposed trans people at the parliamentary hearings, suggesting our proposals were unacceptable/impractical and that a change of sex description/gender identity should be strictly regulated. Verbally they did slightly back down on the surgery requirement.
- After the Cape Town Transsexual/Transgender Support Group achieved success in getting some of our amendments through Parliament, Triangle Project tried to claim trans people's parliamentary initiative as their own.

Public hearings in Parliament:

National Assembly: Home Affairs Portfolio Committee

Public Hearings:

9 Sept 2003 - Trans oral presentations:

- Cape Town Transgender/Transsexual Support Group, presentation by Estian Smit.
- Simone Heradien – individual trans presentation.

10 Sept 2003 – Intersexed oral presentation:

- Intersexed activist, Sally Gross.

Outcome:

- Trans and intersexed proposals/amendments completely ignored by the Home Affairs Portfolio Committee.
- The problematic Bill sent to the NCOP for adoption.
- We renew attempts to lobby individual Home Affairs officials and MPs.

National Council of Provinces (NCOP): Select Committee on Social Services

30 Sept 2003: Oral presentations to NCOP committee

- Cape Town Transgender/Transsexual Support Group, presentation by Estian Smit.
- Intersexed activist, Sally Gross, on behalf of intersexed persons.

Outcome:

- NCOP Social Services Select Committee unanimously adopts trans and intersexed amendments (2 Oct 2003).
- Amended Bill sent back to Home Affairs Portfolio Committee for approval.
- National Assembly Home Affairs Portfolio Committee unanimously adopts the Bill as amended by the NCOP committee (21 Nov 2003).
- Parliament passes amended Bill (around end Nov 2003).
- Alteration of Sex Description and Sex Status Act No.49 of 2003 signed by the President and published in the Government Gazette (15 March 2004).

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

Quick overview:

Applies to:

- Persons having gender reassignment.
- Intersexed persons.

Requirements:

- For gender reassignment, reports by two medical practitioners.
- For intersexed persons, reports by a medical practitioner and a psychologist/social worker.

Who may apply?

- a) Any person whose sexual characteristics have been altered by:
- i) surgical (treatment)
 - ii) **or** medical treatment
 - iii) **or by** evolvment through natural development
- resulting in gender reassignment,
- b) **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.

Note:

- “evolvment through natural development” is not defined in the Act, so it could be interpreted as changes in biological development, or as changes in psychological/social development.

Critical comment:

- The Act assumes and demands that applicants must undergo some kind of change before they qualify for an alteration of sex description.
- But what of individuals who may have expressed their gender identity since childhood regardless of society’s pressures and obstacles, and who may be unable or unwilling to undertake medical treatment? In their case there would no change to document. There is only a need to bring their legal identity in line with their personal identity. The Act does not make provision for such individuals.

Gender reassignment applicants: Key concepts

- Gender reassignment
- Sexual characteristics:
 - Primary sexual characteristics
 - Secondary sexual characteristics
 - Gender characteristics
- Medical practitioner

Gender reassignment:

“a process which is undertaken for the purpose of reassigning a person’s sex by changing physiological or other sexual characteristics, and includes any part of such a process”

Note:

- The focus is on the process and any of part of the process.
- It does not prescribe/define a specific end result.

Sexual characteristics

By law a gender reassignment applicant only needs to change **ONE** of the following to qualify for an alteration of sex description:

Primary sexual characteristics:

- “the form of the genitalia at birth” (e.g. penis, testes, clitoris, vagina)

OR:

Secondary sexual characteristics:

- “those which develop throughout life and which are dependent upon the hormonal base of the individual person” (e.g. breasts, beard, voice, body fat distribution, muscle size/strength)

OR:

Gender characteristics:

- “the ways in which a person expresses his or her social identity as a member of a particular sex by using style of dressing, the wearing of prostheses or other means” (e.g. hair style, clothes, body language)

Important note:

- Every individual’s process is unique. Not everyone wishes to, or is able to, undertake all the possible changes. The choice of changes and the sequence in which they are done depends on each individual.

What does it mean to alter your Sexual Characteristics?

“Medical treatment” that alters your primary or secondary sexual characteristics:

- Taking hormones (oestrogen or testosterone) alters both your secondary sexual characteristics and primary sexual characteristics to various degrees.
- A variety of procedures and practices (e.g. laser hair removal, speech therapy) alter your secondary sexual characteristics.
- Surgeries that alter your primary sexual characteristics (i.e. genitals/sex organs) include removal of vagina/penis/testes, or construction of vagina/testes/penis, etc.
- Surgeries that alter secondary sexual characteristics include breast implants/removals, voice modification surgery, etc.

“Medical treatment” that alters your “gender characteristics”:

- Seeing a mental health professional for support, therapy or recommendations.
- Using prostheses – e.g. to give the appearance of breasts or a penis/testes (this may also count as altering secondary/primary sexual characteristics).

“Evolution through natural development” that alters your “gender characteristics”:

- Your gender characteristics (social identity) can be altered through your naturally evolving sense of who you are and by changes in how you express yourself.
- It can include changes in your name and pronouns, body language, clothes, accessories, hair style, social activities, ways of interacting with others, sport, clubs, hobbies, etc.

Medical practitioner

“a person providing health services in terms of any law, including in terms of the—

(a) Allied Health Professions Act, 1982 (Act No. 63 of 1982);

(b) Health Professions Act, 1974 (Act No. 56 of 1974);

(c) Nursing Act, 1978 (Act No. 50 of 1978);

(d) Pharmacy Act, 1974 (Act No. **53** of 1974);

(e) Dental Technicians Act, 1979 (Act No. 19 of 1979); and

(f) Mental Health Care Act, 2002 (Act No. 17 of 2002)”

- Broad, inclusive definition of ‘medical practitioner’.
- Reflects the fact that gender reassignment is a process that varies according to individual and that could include one or more of a variety of procedures/treatments obtained from various types of health care practitioners.

Gender reassignment applicants: Medical reports required

For gender reassignment applicants, the Act requires:

1. “reports stating the nature and results of any procedures carried out and any treatment applied prepared by the medical practitioners who carried out the procedures and applied the treatment or by a medical practitioner with experience in the carrying out of such procedures and the application of such treatment”

(**Note:** this requirement only applies to persons who had surgical *or* medical treatment; it does not apply to persons who had evolvment through natural development)

2. “a report, prepared by a medical practitioner other than the one contemplated in paragraph (b) who has medically examined the applicant in order to establish his or her sexual characteristics”

(**Note:** this would be the only report required for persons who had evolvment through natural development)

Submission of birth certificate also required (issued by Home Affairs).

What should the medical reports look like?

To sum up, you need reports by TWO medical/healthcare practitioners:

- First report must state that your sexual characteristics have been altered – either by medical treatment, or by surgical treatment, or by both medical and surgical treatment, or by evolvment through natural development.
- Second report only needs to confirm what the first report says, it does not have to say anything new/different.

Important note:

- The reports/letters must be very brief and to the point – not more than a few sentences at most; no need for much detail.
- **USE THE EXACT TERMINOLOGY OF THE ACT.**
- When your reports use the Act's formulations, it makes it easy for officials to determine that you comply with the Act, and your application goes through the system quicker.

Possible scenarios

Given the wide variety of changes a person may undertake, and given the inclusive definition of “medical practitioner”, there are many different possibilities for the types of reports one could submit,. Some examples:

- Reports by two psychologists – one stating a change in your gender characteristics that resulted in gender reassignment; the second confirming your current gender characteristics.

OR:

- Reports by two traditional healers.

OR:

- A report from a speech therapist and the practitioner who did your laser hair removal.

OR:

- Any two healthcare practitioners who can testify that you had a gender reassignment by “evolvment through natural development”.

IMPORTANT NOTE:

- By law you can submit reports from any person who provides health care services. However, your application will probably go quicker if you have at least one report from a medical practitioner who is qualified to prescribe hormones or do surgery.

Intersexed applicants: Key concepts

Intersexed:

- “with reference to a person, means a person whose congenital sexual differentiation is atypical, to whatever degree”

Medical practitioner:

- “a person providing health services in terms of any law”

Intersexed applicants: Reports required

- i. “a report prepared by a medical practitioner corroborating that the applicant is intersexed”
- 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”

Critical comments:

- People comfortable with the gender identity assigned to them at birth don't need to prove that they are living “stably and satisfactorily” in their gender role; it's discrimination that proof is demanded of intersexed people.
- Why aren't people allowed to have gender roles that are fluid and constantly changing?

Appeals process

- If Director-General refuses an application, s/he must give the applicant written reasons.
- Applicant can appeal to Minister of Home Affairs – must be within 14 days.
- If Minister refuses, applicant can apply to district magistrate (applicant may be assisted by legal representative) – magistrate can order DG to alter sex description.
- Each appeal must be accompanied by the necessary documents (i.e. your medical reports, the written reasons for the DG and/or Minister's refusal) .

Rights and obligations

- “A person whose sex description has been altered, is deemed for all purposes to be a person of the sex description so altered as from the date of the recording of such alteration.”
- “Rights and obligations that have been acquired by or accrued to such a person before the alteration of his or her sex description are not adversely affected by the alteration.”

Comment:

- In practice Home Affairs requires applicants to divorce = discrimination on the basis of gender identity.

Inadequacies

- The state polices and regulates our gender identities, bodies and sex description.
- It continues to enforce a binary gender system as normative – only two genders (male and female). Relies on stereotypical notions of maleness and femaleness.
- We cannot freely choose and change our gender identities without facing tremendous legal and administrative obstacles.
- Invasion of our privacy and violation of our right to dignity to have to submit reports on our bodies and gender identities.
- Gatekeeping by medical practitioners, psychologists and social workers legally encoded.
- Reinforces a pathologisation and medicalisation of our bodies and identities.
- **We are not allowed to be the authorities on our own identities!**

Implementation problems with Home Affairs

- Home Affairs does not understand or implement the Act.
- They don't respect our needs and identities.
- In practice they still work with outdated notions of gender reassignment and what they think medical reports should consist of.
- Married applicants are required to divorce.
- Extremely long time delays (e.g. two years) in issuing new IDs – puts us at risk.
- Extremely long delays in getting a gender confirmation letter issued (at least 6 months).

Way forward

- Need to challenge Home Affairs' non-implementation of the Alteration of Sex Description and Sex Status Act 49 of 2003 – in court, if necessary.
- More generally, need to challenge state regulation of our bodies and gender identities.
- Laws such as the Identification Act should no longer require that sex/gender be recorded in the population register (similar to how race was removed).
- Most crucial: **Gender should NOT be reflected in ID numbers and ID documents** (in the same way as race is no longer recorded). Having gender encoded in our ID numbers continually puts us at risk and places an unfair administrative burden on us to constantly give account of ourselves. A lot of time, energy, money, travel, effort and courage are required of us to attempt to modify our official gender and ID number in various spheres. This could be avoided if gender is not encoded.
- All legislation should be sensitive, inclusive and affirming of body and gender diversity, and not enforce a rigid, discriminatory, binary gender system.
- For instance, laws such as the Promotion of Equality and Prevention of Unfair Discrimination Act, as well as the proposed new Gender Equality Bill, should incorporate an inclusive definition of "gender identity" – along the lines of the Yogyakarta Principles. It should explicitly incorporate the concerns and rights of transgender, intersexed and other body and gender diverse persons.