



THE SITUATION OF INTERSEX PERSONS IN
SOUTH AFRICA
SUBMISSION TO THE UNITED NATIONS
UNIVERSAL PERIODIC REVIEW (4TH CYCLE).

STATE UNDER REVIEW: SOUTH AFRICA

Jointly Submitted by: Intersex South Africa, Iranti and Triangle Project

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1. Introduction

1.1 This submission is presented for consideration as part of the Universal Periodic Review (UPR) 4th Cycle Stakeholder Report to the United Nations Human Rights Council on behalf of Intersex South Africa, Iranti, and Triangle Project.

1.2 South Africa was the first country in the world to explicitly include intersex people within the definition of 'sex' in its Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA) 4 of 2000ⁱ and grant legal gender recognition to intersex, and transgender, people through the Alteration of Sex Description and Sex Status Act 49 of 2003.ⁱⁱ Notwithstanding the above, such laws and their implementation still have significant shortcomings and have not fully translated into the protection of intersex persons' human rights and improved lived realities of intersex persons in South Africa.

1.3 Regardless of these laws and Constitutional protections, the testimonies of intersex persons still show that they face pervasive inequalities, harmful practices and discrimination based on their intersex traits. This report highlights the situation of intersex persons and gives notable assessments of how far South Africa has implemented the recommendations it accepted in the 3rd UPR cycle when it comes to intersex persons.

1.4 The submitting organizations believe that the challenges encountered by intersex people in South Africa are not adequately addressed in South Africa's national reports or in the UPR in general. This submission provides additional information to ensure that the South African review is inclusive and takes into account the persistent human rights violations that intersex people still face.

2. Bodily Integrity, Freedom and Security of the Person relating to Non-Consensual, Medically Unnecessary Treatments/Surgeries on Intersex Infants, Children and Adolescents

2.1 South Africa accepted recommendation 139: 230ⁱⁱⁱ in the 3rd cycle of Universal Periodic Review, where South Africa pledged to step up its effort to prevent harmful practices carried out on children. However, intersex persons in South Africa are often subjected, during infancy and/or childhood to non-consensual genital surgery. These surgeries performed on intersex children constitute torture and cruel, inhuman, and degrading treatment that violates the ICCPR that South Africa is a signatory to.

2.2 Children with intersex traits in South Africa have been and continue to be subjected to intersex genital mutilation (IGM) and other unnecessary medical interventions to change their sex traits without their consent, beginning in infancy and continuing throughout childhood. These children are frequently subjected to irreversible genital surgery, sex assignment, and sterilization, as well as medical display and photography of the genitals, as well as unethical medical experimentation. As a result of such experiences, intersex people suffer long-term physically and psychologically harmful consequences (including sterility, genital insensitivity, impaired sexual function, chronic pain, chronic bleeding, chronic infections, postsurgical depression, trauma, internal and external scarring and metabolic imbalances) and such practices constitute gross human rights violations.^{iv}

2.3 IGM takes a form of so-called 'normalising' feminising or 'normalising' masculinising treatments that aim to make all human bodies conform to stereotypical sex standards based on highly problematic, discriminatory notions of sex binarism, namely, the assumption that there are only two 'normal', legitimate sexes (female and male) and that each of these has a typical appearance to which members of that sex must conform in order to be healthy and happy human beings. Intersex genital mutilation (IGM) is similar to female genital mutilation in constituting treatments or interventions that are

gross human rights violations.

2.4 South Africa has also ratified the Convention on the Rights of the Child. During the review, the Committee noted with concern the high prevalence of harmful practices in South Africa. Intersex genital mutilation was listed as one of the practices that the Committee was concerned about. Following the review of the implementation of the Convention in South Africa, the Committee in its concluding remarks urged South Africa as a state party to, among other things,

“Guarantee bodily integrity, autonomy and self-determination of all children, including intersex children, by avoiding unnecessary medical or surgical treatment during infancy or childhood.”

2.5 Even though the South African government publicly recognises intersex genital mutilation (IGM) as a gross human rights violation, it continues to offer no concrete action plan to address the crisis and provide protection for intersex children.

Recommendations

We urge the Government of South Africa (GOSA) to;

- Ban genital surgery on intersex children (intersex genital mutilation), except in instances of medical emergency, where legislation, policy and guideline clearly state the definition of medical emergency as only referring to physical health and not to perceived psychological or social factors.
- Ensure that sanctions exist for healthcare providers who violate the rights of intersex children and who conduct medical interventions (including infant genital mutilation) on their sex characteristics without the full, free and informed consent of the patient (not the parents or the caregivers). Perpetrators of intersex genital mutilation will be guilty of an offence of grievous bodily harm and must be

charged in terms of all applicable criminal law and civil laws, and where applicable, disciplinary and professional charges should be brought by the respective bodies.^{vi}

- Promote the understanding that intersex bodies are healthy manifestations of human bodily diversity and that such diversity must be promoted as it is in line with the tenets of the Constitution of South Africa.
- Mandate training and education on informed consent, bodily diversity and the right to bodily integrity for all healthcare professionals in order to ensure that the medical information and healthcare services they provide to intersex persons are balanced, accurate, evidence based and informed by human rights approaches. We urge the GOSA to require psychological and other professionals to insist that parents “look for alternatives to surgical intervention in the case of intersex infants, unless for pertinent physical health reasons.
- Conduct an investigation into the prevalence of non-consensual, medically unnecessary surgeries on intersex infants, children and adolescents in the SA public and private health sectors; ensure that such human rights violations are ceased and gender-related surgeries and hormonal treatments take place only where desired by the individual in question and under conditions of full, free and informed consent; and provide mechanisms and compensation where individuals have been subjected to forced, coercive or involuntary procedures as infants or children.
- Financially support and preserve intersex advocacy and awareness to serve as community-based support structures and ensure that doctors and the public are aware of intersex people’s rights to self-determination as well as the physical and mental harms of unnecessary treatments and surgeries.

3.Unequal access to healthcare

3.1. In the 27th session, South Africa accepted recommendation 139:160 to continue its efforts to improve the health care system for all its citizens. The right to health care services is a basic human right guaranteed by the South African Constitution. Section 27 of the Constitution provides that everyone has the right to have access to healthcare services, including reproductive healthcare services and no one may be refused emergency medical treatment,^{vii} while section 27(2) imposes on the state a duty to take reasonable measures within its available resources to achieve the progressive realisation of this right.

3.2. South Africa remains an unequal society, where the quality and type of services people receive tends to be influenced significantly by their socio-economic status and ability to access services, regardless of the level of need for care. The majority of intersex people in South Africa depend on public healthcare facilities to access their right to healthcare services, as a small number of people are able to afford private medical care.^{viii}

3.3. Apart from facing the same unequal socio-economic and socio-political barriers to quality healthcare faced by South Africans generally, intersex persons also have to navigate a healthcare system that is discriminatory and unresponsive to their general and specific healthcare needs, and that lacks an understanding of the right to bodily integrity and informed consent models.

3.4. In the public health sector, there is a dearth of affirming medical healthcare for intersex individuals that upholds principles of informed consent and self-determination. There remains a lack of national policy guidelines and standards on the care for intersex individuals, and processes and procedures for intersex healthcare are often dependent on individual doctors and their own opinions.

3.5. The lack of sensitisation by public health officials further alienates intersex people, as the system operates under the sex-binary assumption that everyone has a typically male or female body, and has a gender identity and gender expression that conform to cisnormative societal expectations.

3.6. In terms of the Promotion of Access to Information Act, 2000 **everyone has the right of access (request access) to records** which includes access to their healthcare/medical records and healthcare professionals have a responsibility to safeguard said medical records.^{ix} Yet, intersex people still struggle to access their medical records when they request them from public health facilities, often because the documents cannot be located, they are lost or they have been discarded.

Recommendations

We urge the GOSA to;

- Ensure that affirming healthcare for intersex individuals is made available in public healthcare facilities, and is based on an informed consent model.
- Ensure that guidelines and policies on intersex healthcare be drafted, which should be based on the rights of the individual (the healthcare user), as expressed in the Constitution of South Africa with reference to international evidence-based best practices.
- Ensure that comprehensive documentation and health records of intersex individuals are retained and intersex people are granted access to them.

4. Legal Gender Recognition

4.1. The Alteration of Sex Description and Sex Status Act 49 of 2003 (Act 49) allows transgender, gender diverse and intersex persons to alter their legal gender in the National Birth Register and in their South African identity documents.

4.2. Two different sets of requirements apply to gender reassignment applicants and intersex applicants respectively: Whereas gender reassignment applicants need to submit medical proof of an alteration of sex characteristics resulting in gender reassignment, intersex applicants need to submit medical proof of being intersex and psychosocial proof of having lived “stably” in their gender role for a period of at least two years.

4.3. The flaws of Act 49 have been extensively documented and publicly stated by both civil society and government,^x to a point that the GOSA has recently approved a new Identity Management Policy^{xi} to remedy the issues caused by Act 49, among others.^{xii} The new policy speaks to gender-neutral ID numbers, the removal of gender/sex markers on ID documents and the capturing of biometrics, but it does not speak to how intersex people will be able change their gender markers in future, especially those who already have gender markers that do not reflect their true gender identities.^{xiii}

4.4. If the GOSA does not implement an identity policy that is based on principles of self-determination, then the state will be continuing systemic violence and discrimination against intersex people, stemming from a fundamental lack of recognition of every individual’s right to their self-identified and self-determined gender identity regardless of their sex characteristics or gender assigned at birth.

4.5. The foregoing indicates that South Africa has not taken any concrete steps to ease administrative procedures for intersex children's birth registration, as promised in accepting recommendation 139.176 of the 3rd Cycle of the UPR review.

Recommendations

We urge the GOSA to;

- Implement an Identity Management Policy that is inclusive of non-binary persons and is based on principles of gender self-determination and self-declaration i.e. a person's self-declaration of their gender identity without validation or corroboration by a medical, mental health or social worker practitioners, and in line with the Yogyakarta Principles Plus 10, Principle 31.^{xiv}

5. Unequal access to education and employment

5.1. South Africa in the 3rd Cycle accepted recommendations 139.176, 139:175 and 139: 183 that involved making efforts to achieve equal and universal access to education as well as taking concrete measures to ensure the right to education for all.

5.2. However, these recommendations' implementation has not been tailored to help intersex students. Many intersex children face discrimination in schools and are unable to complete their schooling careers, contributing to high so-called 'dropout' rates at schools that South Africa promised to address in its report to the UPR working group.^{xv} The lack of education around gender, bodily and sexual diversity, as well as the lack of binding policies and guidelines for schools to support intersex learners, creates a hostile, discriminatory environment for intersex and other gender diverse/gender non-conforming youth who are forced out of school rather than 'dropping out'.

5.3. A recent report by Intersex South Africa, looking at the impact of COVID-19 on intersex persons,^{xvi} found that the majority of intersex people supported by ISSA are either unemployed or relying on the informal sector for survival as a result of being uneducated and under-skilled.

Recommendations

We urge the GOSA to;

- Require school-governing bodies and other stakeholders (teachers, unions, education bodies) to conceptualise and implement structures within schools to

address and prevent discrimination against intersex youth. We further urge the GOSA to require schools to engage in a dialogue on how to effectively educate learners on gender, sexual and bodily diversity within the curriculum. The GOSA must take steps towards ensuring that diverse gender identities, gender expressions and sex characteristics (bodily diversity) are discussed more openly in the school environment.

ⁱ Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, <https://www.justice.gov.za/legislation/acts/2000-004.pdf>

ⁱⁱ Alteration of Sex Description and Sex Status Act 49 of 2003. https://www.gov.za/sites/default/files/gcis_document/201409/a49-03.pdf

ⁱⁱⁱ <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G17/272/57/PDF/G1727257.pdf?OpenElement>

^{iv} Bauer, M. & Truffer, D. 2016. Intersex Genital Mutilations - Human Rights Violations of Children with Variations of Sex Anatomy: NGO Report to the 2nd Periodic Report of South Africa on the Convention on the Rights of the Child (CRC), StopIGM.org/Zwischengeschlecht.org, <http://intersex.shadowreport.org/public/2016- CRC-ZA-NGO-Zwischengeschlecht-Intersex-IGM.pdf>

^{vi} Intersex South Africa, Women's Legal Centre, Triangle Project & Joshua Sehoole. (2020, 27 November). Submission to the Portfolio Committee on Social Development on the Children's Amendment Bill [B18-2020]. <https://triangle.org.za/wp-content/uploads/2020/11/ISSA-WLC-TP-Sehoole-2020-Nov-Intersex-South-Africa-Submission-on-Childrens-Amendment-Bill-regarding-Intersex-Genital-Mutilation.pdf>

^{vii} The Constitution of the Republic of South Africa, <https://www.gov.za/documents/constitution/chapter-2-bill-rights#27>

^{viii} Access to healthcare booklet. South African Human Rights Commission <https://www.sahrc.org.za/home/21/files/FINAL%20Access%20to%20Health%20Care%20Educational%20Booklet.pdf>

^{ix} GUIDELINES ON THE KEEPING OF PATIENT RECORDS. Health Professions Council of South Africa. 2008. <https://ethiqal.co.za/wp-content/uploads/2019/08/HPCSA-Guidelines-on-the-Keeping-of-Patient-Records.pdf>

^x Liberty Matthyse et al. 2020. 'Keeping the Promise of Dignity and Freedom for All: A Position Paper on Legal Gender Recognition in South Africa', Gender DynamiX and Legal Resources Centre, accessed <https://lrc.org.za/wp-content/uploads/Position-paper-on-legal-gender-recognition.pdf>

^{xi} Draft Official Identity Management Policy, 2020, https://www.gov.za/sites/default/files/gcis_document/202101/44048gon1425.pdf.

^{xii} South Africa is getting a new ID system – what you should know <https://businesstech.co.za/news/government/571460/south-africa-is-getting-a-new-id-system-what-you-should-know/#:~:text=%E2%80%9CThe%20adopted%20policy%20proposes%20a,view%20of%20a%20person>.

^{xiii} Women's Legal Centre, Triangle Project & Intersex South Africa. (2021, 15 March). Submission to the Department of Home Affairs on the Draft Official Identity Management Policy. <https://triangle.org.za/wp-content/uploads/2021/04/WLC-TP-ISSA-2021-March-Submission-to-Department-of-Home-Affairs-on-Draft-Official-Identity-Management-Policy-OIMP.pdf>

^{xiv} Yogyakarta Principles Plus 10, Principle 31, <https://yogyakartaprinciples.org/principle-31-yp10/>.

^{xv} <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G17/272/57/PDF/G1727257.pdf?OpenElement>

^{xvi} Assessing the impact of Covid-19 and the national lockdowns on ISSA members. Intersex South Africa. 2020.