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THE ALTERATION OF SEX DESCRIPTION AND SEX STATUS ACT AND GENDER DYNAMIX

1. Background

The Constitution of South Africa forbids discrimination on the basis of sex, gender and sexual orientation (amongst other grounds). The Constitutional Court has indicated that "sexual orientation" includes trans-sexuality.¹

Transsexual people are those who establish a permanent identity with the gender that is not typically associated with their biological sex, identified at birth. As most legal jurisdictions have at least some recognition of the two traditional genders at the exclusion of other categories, this raises many legal issues and aspects of trans-sexualism. Most of these issues tend to be located in what is generally considered family law, especially the issue of marriage, as well as the ability of a transsexual person to benefit from a partner's insurance or social security.²

The degree of legal recognition provided to trans-sexualism varies widely throughout the world. Many countries now extend legal recognition of sex reassignment by permitting a change of legal gender on the individual's birth certificate. The amount to which non-transsexual transgender people can benefit from the legal recognition given to transsexual people, varies. In some countries, South Africa included, an explicit medical diagnosis of trans-sexualism is necessary. In others, a diagnosis of gender identity disorder, or simply the fact that one has established a non-conforming gender role, can be sufficient for some or all of the legal recognition available. Many transsexual people have their bodies permanently changed by surgical means or semi-permanently changed by hormonal means.³

The Alteration of Sex Description and Sex Status Act (Act No. 49 of 2003) is a South African Act of Parliament which allows a person to change, under certain conditions, their sex recorded in the population registry.

Under the Act, three types of people may apply to the Department of Home Affairs for a change of the sex description in their birth record: (1) people who have undergone surgical or medical sex reassignment; (2) people whose sexual characteristics have evolved naturally and; (3) intersex people. The applicant must submit medical reports describing their situation; in the case of intersex people they must also submit a psychological report stating that they have lived for two years with their chosen gender identity.

If the application is refused, it may be appealed to the Minister of Home Affairs, and if the appeal is refused the decision may be challenged in the Magistrate's Court. Once an application is approved, the Department will issue a new birth certificate and identity document. The change in sex is valid for all purposes, but does not affect any rights or obligations the person had before it occurred.⁴

The law was criticized by the Cape Town Transsexual/Transgender Support Group because it requires medical or surgical treatment before a change can be registered.⁵ Conversely, the African Christian Democratic Party (ACDP) objected to the Act based on the belief that sex is biologically determined at

¹ De Vos (14 July 2010)

² Transgender Rights (2006)

³ Chow (2005)

⁴ Alteration of Sex Description and Sex Status Act (No. 49 of 2003)

⁵ Phahlane (10 September 2003)



birth. The ACDP and National Action were the only parties to vote against the bill in the National Assembly.⁶

Gender DynamiX, representing the views of over 15 organizations and the broader transgender community, has reported repeated and considerable administrative delays and complications in the administering of the Sex Status Act by the DHA since its inception in 2003. Gender DynamiX is the first African-based organisation solely focusing on the transgender community. The aim of the organization is to provide help, advice and information for those who seek to adjust their lives to live in the opposite gender role, as to that assigned to them at birth, or who are working to come to terms with their situation despite their genetic background.⁷

Pleas from the Cape Town Transsexual/Transgender Support Group in Parliament indicated that the Alteration of Sex Description and Sex Status Act forced them to undergo painful sexual mutilation to assume the gender they identified with given. The surgery is associated with immense risks, numerous hospital stays, immense physical pain, and frequently unsatisfactory or debilitating results.⁸

The Act requires that, in order for a person to be given an identity document confirming their sex status, they should first undergo a sex-change operation. But sex-change is a variable and complicated process involving long term hormone treatment but not necessarily the transformation of genitalia. The argument from the likes of Gender Dynamix is that for changing Sex Status it should only be required to show that the person had lived as a member of that sex for a period of a year, backed up by reports from a social worker, a psychologist or a medical practitioner.⁹

According to the Act and DHA Website changing gender applications can be made by: Persons who have undergone a sex change operation or medical treatment resulting in their **gender reassignment**. In such cases two medical reports are required:

- one by the medical practitioner who applied the procedure or medical treatment or by a medical practitioner who has experience in such procedures or treatments, and
- a report by a second medical practitioner who has independently examined the applicant to establish his/her gender.

Intersexed persons

In this category, the applicant must submit:

- a report by a medical practitioner corroborating that the applicant is intersexed, as well as
- a report by 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.

Applications must be on Form BI-526 or a written request, accompanied by the required medical reports

Questions to Gender Dynamix

⁶ SAPA (26 September 2003)

⁷ Gender DynamiX (2012)

⁸ Phahlane (2003)

⁹ Chow (2005)



1. If the requirements for the change of gender are amended in the Alteration of Sex Act to be less stringent than medical sexual reassignment, would it create legal complications in such cases as sex specific institutions like prisons or sex separated public toilets?
2. What interventions from Government could improve the difficulties encountered in administering the the Alteration of Sex Description and Sex Status Act?
3. What is the estimated total transgender population in South Africa that may wish to apply the Alteration of Sex Description and Sex Status Act? What in turn is the actual number of people nationally that are negatively affected by the administrative difficulties related to Act?

Questions to DHA

1. What administrative or other difficulties are experienced in administering the Alteration of Sex Act?
2. What can be done to address the concerns raised by Gender Dynamix?
3. Has the DHA considered introducing amendments to the Alteration of Sex Description and Sex Status Act?

References

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