**Submission on how privacy affects the evolving capacity of the child and the growth of autonomy, and what factors enhance or constrain this development.**

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*A written submission by Matimba*

This report aims to address questions posed by the Special Rapporteur on the right to privacy, pursuant to Human Rights Council resolution 37/2. This submission is made by Matimba an organisation based in South Africa.

This submission aims to provide pertinent information to ensure that the report is inclusive and conscious of the rights and challenges of minors with diverse gender identities and gender expressions who generally remain marginalised, invisibilised and oppressed in South Africa due to the continued, overt and covert, dominance of essentialist cisnormative and heteronormative conceptions of sex and gender, and binary conceptions of biological sex[[1]](#footnote-1), as reflected in the statement below:

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| *“I can’t change my gender marker yet because South Africa doesn’t legally recognize anything outside of Binary gender and sex. “*  *“I am non-binary and I would really appreciate if my ID didn’t say my birth sex.* **“** |

This submission is further informed by a pilot research carried out by Matimba on how the lack of legal gender recognition impacts on the privacy of the child and the growth of autonomy, and what factors enhance or constrain this development.

**Legal Gender Recognition - Alteration of sex description**

The Alteration of Sex Description and Sex Status Act 49 of 2003 (Act 49) brought about by the Equality Act is a legislation that seeks to legally enable transgender and intersex people to amend their identification documentation from the gender recorded at their birth to reflect their true gender identity in South Africa. In 2003, Act 49 officially became the legal mechanism through which any trans or intersex person could amend their gender marker on the population register[[2]](#footnote-2) subject to certain medical requirements being met. However, the requirements stipulated are confined to binary gender options.

Section 2 provides that: ““[a]ny person whose sexual characteristics have been altered by surgical or medical treatment or by evolvement 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.” With the Department of Home Affairs (DHA) being the designated custodian of the Act, as it is responsible for considering applications made in terms of Act 49 and issuing successful applicant(s) with new identity documentation that reflects their gender.

Act 49 allows for three groups of people to apply for alteration of sex description:

* people whose sexual characteristics have been altered through medical or surgical treatment;
* people whose sexual characteristics (which are not defined in the act) have been altered through natural evolvement, and
* people who are intersex[[3]](#footnote-3)

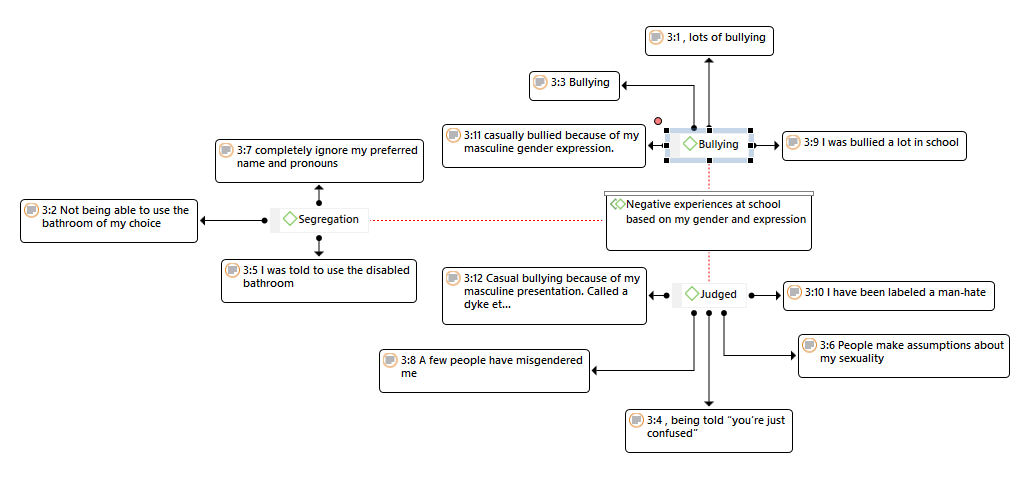
However, when Act 49 was promulgated in 2003, the legislation was seen as progressive by world standards, and despite being a signatory to the *Yogyakarta Principles* (2007),[[4]](#footnote-4) the South African government has yet to reform its laws and policies to comply with self-identification, bodily integrity and other human rights standards for gender identity and bodily diversity articulated in this instrument. Furthermore, the manner in which the Department of Home Affairs administrates Act 49 renders many transgender and intersex persons vulnerable and effectively denies them access to their rights to education, health, housing and employment, among others. The highly medicalised nature of the Act continues to put trans and gender variant minors in a position in which they must divulge privileged information to access legal gender recognition, continuously violating their right to privacy. Furthermore, by continuously using documents that do not reflect who they are, puts them in situations in which they constantly must explain themselves, continuously violates their right to privacy.

The Act is silent on trans and gender variant minors, despite other countries such as Malta, Belgium, Iceland Argentina[[5]](#footnote-5) having passed gender recognition laws or decrees that allow for legal gender recognition of trans and gender variant minors. However, parents and/or legal guardians can apply on the minor’s behalf to have their gender marker changed however, there is a wide lack of access to information around how the change can be accessed[[6]](#footnote-6). As such the resultant problems created by the lack of progressive gender recognition legislation that is inclusive of trans and gender variant minors, that respects self-identification, coupled with the lack of regulatory directives from the Department of Home Affairs and the lack of an efficient and effective processing system, are not only isolated to interactions between trans and gender diverse persons and the Department of Home Affairs.

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| *“Every part of my child's life would have been easier if we had changed his gender marker and name immediately his gender identity was expressed in a consistent manner - from age 10 at least”.* |

**Right to Basic Education: Equality in accessing education for trans and gender variant minors**

There is a general lack of education about gender diversity, bodily diversity, and sexual identities in primary and high schools in South Africa. What is more where it is provided, educators are either not well informed as they are not trained on the subject matter, or they allow their personal prejudices to impact on the subject and thus stigmatise students’ understanding of sexual orientation, bodily diversity, and gender identity and expression. [[7]](#footnote-7) Furthermore, the education community is mostly unaware of the issues experienced by trans and gender variant minors, with the lack of education around, and awareness of, gender, bodily and sexual diversity creating a hostile and discriminatory environment for trans and gender variant minors in schools, as reflected below:



There is no mention of gender, sexual, or bodily diversity in the school curriculum, where Gender identity, gender expression, intersex variations and sexual orientation are rarely discussed in a manner which ensures inclusivity and a balanced informed understanding in schools. This has serious consequences for transgender and intersex individuals who are not educated about gender and bodily diversity in their school curriculum. Trans and gender variant minors may feel pressured into conforming to the existing gender and sex binaries and stereotypes, undermining the agency and autonomy of trans and gender variant minors who are unable to express themselves fully due to the lack of inclusivity in the school curriculum.[[8]](#footnote-8) The continuous denial of the existence of trans and gender diverse minors gender identity and expression, can have an impact on their personal development (or sense of self) as they exist in a space that denies their existence, with their being constantly reminded that they do not belong.

Moreover, the above circumstances are compounded by the fact that there currently no guidelines for schools to assist learners, parents, teachers, school-governing bodies and other members of school communities on how to socially include trans and gender variant minors in their school community. Furthermore, Trans and gender variant minors reported experiencing some level of discrimination on the basis of their expressed gender identity at both primary and high school[[9]](#footnote-9). Research on the schooling system in South Africa points to the discrimination, mostly in the form of bullying, was perpetuated mainly by other learners and at times by the teaching staff.

However, the severity of the bullying and the kind of bullying (verbal or physical) experienced by trans and gender variant minors, is dependent on a number of interlinking factors, such as the kind of school the person attended, i.e. township[[10]](#footnote-10) or Model C[[11]](#footnote-11) for instance, the participant’s personality (shy or extroverted, for instance) and/or the way he/she expressed their gender identity. Furthermore, the gendered nature of the school space including uniforms, bathrooms, and not being able to participate in sports due to their gender identity and/or expression continues to put trans and gender variant minors in a space where they are continually violated, having to keep explaining themselves of defend their right to be in a space. As such continually having their sense of autonomy constantly questioned with their privacy being violated by being put in a space where have to always explain who they are in order to fit in or be accepted.

**Bodily integrity and autonomy – Access to healthcare**

Beside facing socio-economic and socio-political barriers to quality health care faced by South Africans generally, transgender persons also have to navigate a healthcare system which is unresponsive to their specific healthcare needs. Apart from general healthcare that is transgender inclusive, many transgender persons also require access to gender affirming healthcare services to enable them to alter their bodies in ways that affirm their gender identities. Furthermore, there is a dearth of transgender-specific healthcare services that provides gender affirming care.

Although a handful of hospitals located in urban centres provide some gender affirming procedures, only one hospital in the entire country provides the full range of trans-specific healthcare in accordance with the latest guidelines of the World Professional Association for Transgender Health (WPATH) and actively works together with transgender organisations to provide gender affirming healthcare (Groote Schuur Hospital, Cape Town).[[12]](#footnote-12) For trans and gender variant minors, access to healthcare is more challenging as it is dependent on their caregiver being able to provide them with the care they need. Access to public healthcare continues to be a challenge with most accessing gender affirming care by private means, but not all can access these services, further undermining trans and gender diverse minors’ agency, autonomy and ability to self-actualise.

The main challenge for trans and gender variant minors is the lack of legal gender recognition that impedes their access to healthcare, quality education and other aspects that work together to make up a whole individual capable of contributing to society.

1. Sanger, N. (2014). *Young and Transgender: Understanding the Experiences of Young Transgender Persons in Educational Institutions and the Health Sector in South Africa*. Available at <https://drive.google.com/file/d/1pbnau_x1y6_tZcIxGzKInfhrvuYt81vJ/view>. (Accessed 01 July 2020) [↑](#footnote-ref-1)
2. National Population Register of South Africa (NPR) is a government document that contains the personal information of individuals [↑](#footnote-ref-2)
3. <https://www.gov.za/sipes/default/files/gcis_document/201409/a49-03.pdf> [↑](#footnote-ref-3)
4. *Yogyakarta Principles: Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity*. 2007. <http://www.yogyakartaprinciples.org/> [↑](#footnote-ref-4)
5. Henzel, L. 2016. Back Me Up: Rights of Trans Children under the Convention on the Rights of the Child. *Working Paper, Nr 13*. (Accessed 01 July 2020). [↑](#footnote-ref-5)
6. Deyi, B., Kheswa, S., Theron, L., Mudarikwa, M., May, C., & Rubin, M. 2015, 12 01. *Briefing Paper: Alteration of Sex Description and Sex Status Act, No. 49 of 2003.* Retrieved from Cape Town: Gender Dynamix & Legal Resources Centre.: <https://drive.google.com/file/d/1xvXcmoa5OZ1gs> [↑](#footnote-ref-6)
7. Ibid [↑](#footnote-ref-7)
8. Ibid [↑](#footnote-ref-8)
9. Sanger, N. (2014). *Young and Transgender: Understanding the Experiences of Young Transgender Persons in Educational Institutions and the Health Sector in South Africa*. Available at <https://drive.google.com/file/d/1pbnau_x1y6_tZcIxGzKInfhrvuYt81vJ/view>. (Accessed 01 July 2020) [↑](#footnote-ref-9)
10. Township school- these are schools located in the township area [↑](#footnote-ref-10)
11. Model C school - Model C schools receive government funding, however they are administered and largely funded by the parent body. The term also refers to those schools that were reserved for white pupils under apartheid. The term is not officially used by the Department of Basic Education but is widely used to refer to former whites-only schools. [↑](#footnote-ref-11)
12. Klein, T. 2009. Querying medical and legal discourses of queer sexes and genders in South Africa. *Anthropology Matters Journal, Vol 10 (2)*: 1-17 [↑](#footnote-ref-12)