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Office of the United Nations High Commissioner for Human Rights  
Geneva

**BY EMAIL:** [registry@ohchr.org](mailto:registry@ohchr.org)

**RE: Right to Participate in Public Affairs**

1. We refer to your invitation to provide input on the forthcoming report on best practices, experiences, challenges (and ways to overcome), concerning the right to participate in public affairs. We hereby submit our inputs on the forthcoming report.

**INTRODUCTION TO THE LEGAL RESOURCES CENTRE**

2. The Legal Resources Centre (hereinafter referred to as the “LRC”) is a public interest, non-profit law clinic in South Africa that was founded in 1979. The LRC has since its inception shown a commitment to work towards a fully democratic society underpinned by respect for the rule of law and constitutional democracy. The LRC uses the law as an instrument of justice to facilitate the vulnerable and marginalised to assert and develop their rights; promote gender and racial equality and oppose all forms of unfair discrimination; as well as to contribute to the development of human rights jurisprudence and to the social and economic transformation of society.
3. The LRC has since its inception in 1979 operated throughout South Africa from its offices situated in the cities of Johannesburg, Cape Town, Durban and Grahamstown.

4. The LRC, through its Equality and Non-Discrimination project (“the project”), focuses on empowering marginalised and vulnerable groups by utilising creative and effective solutions to achieve its aims. These include using a range of strategies including impact litigation, law reform initiatives, participation in development processes, education and networking within and outside of South Africa. Within the arena of equality and non-discrimination, the LRC has viewed the rights of vulnerable and marginalised persons including sexual minorities, women, children, refugees and sex workers as being integral to the pursuit of social justice. It is in this context that we seek to ensure that the existing legal apparatus available and in development are appropriately cognisant of the rights and realities of vulnerable and marginalised groups. We believe that this will ensure that their experiences of discrimination and prejudice are reduced and eventually diminished. Furthermore, we believe that the national, regional and international laws are collaboratively an instrumental tool in securing substantive equality for vulnerable individuals.
5. Through strategic litigation, the LRC has played a pivotal role instrumental in developing a strong jurisprudence for equality and non-discrimination.
6. We are grateful for, and welcome this opportunity to contribute to the development of the forthcoming report on equal participation in political and public affairs.

#### **INPUTS ON FORTHCOMING REPORT ON RIGHT TO PARTICIPATE IN PUBLIC AFFAIRS**

7. Paragraph 2 in Resolution 27/24 on Equal Participation in Political and Public Affairs recognises “*that women, persons belonging to marginalized groups or minorities, and persons in vulnerable situations are among those who are most affected by discrimination in participation in political and public affairs*”.
8. Our submission focuses on the experiences and challenges faced by transgender persons in accessing their right to participate in public affairs. We focus on transgender persons as a vulnerable group in South Africa that

continue to face obstacles, including discrimination, in the enjoyment of their right to participate in the public affairs as well as in the enjoyment of other human rights that enable it.

9. In order to be able to fully enjoy the rights as entrenched in the Constitution of South African and other human rights instruments both regionally and internally, transgender persons permanently living according to their gender identity need civil status and identification documents reflecting their gender identity and corresponding name(s). Without documents matching their lived identity and the recorded gender on identification document, they are exposed to discrimination and violations of their human rights.
10. It falls within each country to regulate the procedure of how a transgender person can alter and adapt their civil status and identification documents. South Africa has accordingly taken steps to provide such regulation through the Alteration of Sex Description and Sex Status Act, No. 49 of 2003. South Africa, of course, has to be commended for taking this step in recognising the needs and rights of transgender persons.
11. However, over the past year, the LRC has received a significant increase in the number of transgender clients that are in need of legal assistance due to its strategic partnership with a transgender rights focused non-governmental organisation named Gender Dynamix. The common thread between these clients is that their rights are being marginalised as a result of the improper implementation of the Alteration of Sex Description and Sex Status Act, No. 49 of 2003 (“ **hereinafter Act 49**”).
12. The purpose of Act 49 is to enable transgender and intersex persons to alter the gender assigned to them at birth, and therefore recorded as their official gender on their legal documentation, to reflect their lived gender identity. In South Africa, this means that such an application would include the altering of both the population register and the gender marker in the identification number of the person applying. The introduction of this legislation in 2003 was a landmark

decision of the government of South Africa as it is fairly progressive, at both the regional and international levels. This legislation was also seen as a positive move towards the recognition and protection of transgender and intersex persons' constitutional rights.

13. However, the progressiveness of the legislation is continuously undermined by the ineffective and incorrect implementation by the custodians of the Act – the Department of Home Affairs (“**DHA**”). Numerous clients have reported that they have to endure long waiting periods for the processing of the application (ranging from between one to seven years).
14. After these long delays, some clients have been informed that the delays are because of one or more of the following:
  - 14.1. Their application is incomplete and they must resubmit;
  - 14.2. Their application is rejected because they have “*failed to produce evidence of surgery*”;
  - 14.3. They cannot apply simultaneously for a name and sex description alteration;
  - 14.4. They must divorce their spouses first if they are married in terms of the Marriages Act, which only recognises heterosexual marriages, since the applicant's gender will become the same as their partner's.
15. The complaint of an incomplete application noted in paragraph 14.1 is troublesome because of the period of time that often has lapsed since the initial submission and the notification of the incomplete application. Often this information is relayed only after months of contact initiated by the applicant. Additionally, sometimes this complaint is inaccurate, and a portion of the application has simply been misplaced or overseen.
16. The rejection of applications on the basis that the applicant has not provided “*evidence of surgery*”, noted in 14.2, is especially problematic for two key reasons. Firstly, the Act itself does not require surgery as a prerequisite for a sex description alteration. It lists surgery as one of three other possible conditions for eligibility – one of which is medical (hormone) treatment. Secondly, and

consequently, it violates the progressive nature of the legislation, which lies with its allowing for other terms of eligibility.

- 16.1. Furthermore, requiring surgery as a prerequisite for a gender marker alteration would prove deeply problematic and discriminatory because the main hospital that is able to offer gender reassignment surgery, Groote Schuur Hospital in Cape Town, is only allocated four slots per annum for these procedures, and currently has a waiting list of thirty people. This means that applicants would have to endure an average of a seven and a half year waiting period before they would even be allocated a slot for surgery, and only then would they be able to apply for a gender marker alteration. This discriminates against applicants that cannot afford private health care.
- 16.2. Even applicants that can afford private health care encounter severe limitations regarding their access to gender reassignment surgery because of the high cost of these procedures. Medical aids do not cover these procedures because they are considered to be “*cosmetic in nature*”. This indicates a severe misunderstanding of the nature of transgender, and the type of prejudices that transgender persons have to overcome in their efforts to be recognised as their lived gender.
17. The issue highlighted in 14.3 regarding simultaneous name and sex description alterations is troublesome because of the inconsistent nature with which it is carried out. These simultaneous alterations are significant for accomplishing formal transition to one’s desired gender. Furthermore, there is no policy that prohibits simultaneous applications. It appears that the decision to accept or reject simultaneous applications is made on an *ad hoc* basis by individual frontline staff.
18. The problem of forced divorce, noted in 14.4, lies with the marriage legislation in South Africa. There are three sets of marriage types: civil; same-sex; and customary. Each type of marriage is governed by a different Act. The problem arises when couples have a civil marriage in terms of the Marriages Act and one

of them applies for a sex description alteration. A successful application would then mean that the marriage is no longer a partnership between people of the opposite sex, which is not permissible in terms of the Marriages Act. The Department's response to this has been to require that couples in this situation divorce before the application can be processed. This presents a series of issues in relation to the Divorce Act. However, given that all the types of marriages are in community of property, it would be more efficient to convert the civil marriage into a civil union.

19. The impact of the incorrect and poor implementation of Act 49 has far-reaching consequences for transgender persons' ability to freely participate in public affairs in South Africa. Anything that requires a form of official identification becomes a barrier to their access because the identification documents that they possess do not correspond with their appearance, nor their gender identity.
20. Without appropriate identification that correctly identifies them, many transgender persons are unable to vote during all elections because of the disparity between their assigned gender marker at birth and their lived gender identity. In such instances, transgender persons are excluded from one of the most fundamental aspects of democracy, and most elementary forms of public affairs participation, simply because the bureaucratic process for issuing amended identification documents is ineffective and inefficient. They furthermore may encounter barriers with other public affair forums – such as entering Parliament in order to participate in public hearings about legislation under review. This is because identification is required to enter the Parliamentary buildings. Often their appearance and the gender marker or picture on their identification document is quite different that they are often accused of utilising a fraudulent document.
21. Additional to the hindrance to participating in public affairs, transgender persons' right to freedom of movement is also limited. This is often because picture identification is required in order to confirm the identity of the traveller. As a result transgender persons often are not able to enjoy their right to free movement as they cannot access the necessary documents. They are

discouraged from traveling without documents matching their gender identity, to avoid unwanted public outings and subsequent discrimination; they are often also suspected of utilising fraudulent identification.

22. In addition to the limitation of their right to movement, transgender persons are exposed to discrimination and violations of their right to privacy when travelling without matching documents. In some cases these negative experiences may force transgender persons to limit their participation in public affairs and services. Other barriers experienced by transgender persons, because of lack of altered identification documents, include limited access to banking services, and driving without a license that reflects their lived gender as well as being unable to register for driving test. Additionally, transgender students encounter problems with writing their examinations, which also requires photographic identification to verify that they are the correct person writing the examination. The ability to participate in general daily activities is therefore seriously undermined.
23. A major obstacle to addressing the marginalisation of the rights and needs of transgender persons is that their concerns lack the critical mass that is needed to force government to respond. At present, their concerns are treated as “minority” concerns, and they are rendered a vulnerable group.
24. It is in circumstances such as these that the attention from the international community becomes a crucial factor in holding governments accountable to its commitments to ensure that each and every citizen is able to enjoy the full spectrum of their civil and political rights, as enshrined in International Covenant on Civil and Political Rights [Ratified by South Africa on 10 December 1998].

## **CONCLUSION**

25. As already stated Paragraph 2 in Resolution 27/24 on Equal Participation in Political and Public Affairs recognises “*that women, persons belonging to marginalized groups or minorities, and persons in vulnerable situations are*

*among those who are most affected by discrimination in participation in political and public affairs”.*

26. Transgender persons constitute a marginalised and vulnerable group, as well as suffer from gender discrimination. This discrimination and prejudice would be avoided to a great extent if the legal mechanisms already in place, specifically Act 49, were implemented efficiently and appropriately.
27. Furthermore, the impact of feeling that one’s government is sincerely acting to protect the rights of a group that otherwise feels neglected and excluded is significant. At present, this is absent for transgender persons. Instead, the public and political sphere is a battleground in order to win the right to recognition; a battle that most citizens do not have to fight.
28. We therefore hope that the experiences relayed about transgender persons’ marginalisation from public affairs is one that can inform and broaden the Human Rights Council’s understanding of who is being excluded from public affairs, and why. It is insufficient to determine this based on the laws passed alone – although this is an important starting point. It requires an understanding of how these laws are being implemented and the extent to which the implementation is genuinely benefiting the groups it alleges to help.

*ENDS*

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