Alteration of Sex Description and Sex Status Act and access to services for transgender people in South Africa

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ABSTRACT
South Africa has advanced with the passing of the Alteration of the Sex Description Act to cater for transgender people. Data for this study were collected as part of Gender DynamiX’s (GDX) monitoring and evaluation of the implementation of the Alteration of Sex Description and Sex Status Act No. 49 of 2003. Between 2009 and 2011, Gender DynamiX documented the response of the Department of Home Affairs (DHA) to applications for Gender Amendment. Nine percent of cases were resolved where medical reports presented by the applicant spoke of medical gender reassignment and no surgery. In four percent of the cases the application was resolved where surgery was reported on a medical certificate. Twenty-eight percent of the medical (not surgical) cases were resolved only when there was serious legal pressure placed on the department by the applicant and GDX advocacy team. Forty percent of the cases had been pending for 18 to 24 months where proof of surgical gender reassignment was requested by the attending official. Four percent of the cases were still pending where the department requested a divorce from some couples. Fifteen percent of cases were pending without any reason being given. These findings demonstrate unlawful implementation of the Alteration of Sex Description Act. This article highlights a need to strengthen education and training of administrative home affairs officials, health care workers, and para-professionals such as NGOs and peer educators to strengthen advocacy.

Keywords: gender; identity documents; laws; medical healthcare; transgender
ALTERATION OF SEX DESCRIPTION AND SEX STATUS ACT

A range of laws are selectively enforced against transgender people in different countries (Godwin, 2010). This poses a challenge in terms of the realisation of human rights for transgender people. In order to fully grasp the notion of a transgender person, one has to come to terms with the implications of the term gender identity. This has been the hub of many a debate. However, in recent years, there seems to have been a consensus of what gender identity is. Fundamentally, the concept of gender identity is socially based (Sherif, 1982; Stevens, 2012). It is enshrined in the way children are raised and the way people associate with one another on a daily basis. In essence, a person’s gender is informed by their beliefs and notions about what a man or a woman ought to be. These socially constructed notions and beliefs ultimately inform the way that people see themselves in terms of their identity and roles at the basic structure of identity (Nduna & Jama, 2001; Sherif, 1982). Transgender is a term that has evolved over time to define the category of people who reject their original gender assignment and employ gender and/or sex changing procedures: from male to female or vice versa (Agha & Van Rossem, 2002; IDAHO committee, 2012; Stevens, 2012). The transgender community is exceptionally diverse; thus the term transgender seeks to include all members of this group, transvestites, and transsexuals alike. This definition in turn facilitates the implementation of legal statutes and health care (Braun & Clarke, 2006; Harden, Oakley, & Oliver, 2001, 2001; IDAHO committee, 2012).

Given the historical magnitude of South Africa and its neighboring countries; it is astounding that South Africa was at the forefront of legalising the rights of minority groups post-1994 (Prinsloo, 2011). However, it was unclear at the time whether the legality of this included transgender persons. The modest amount of work done for transgender individuals in particular is astonishing. As a minority group rising out of a group plagued by inequality, transgender individuals are sometimes marginalized in the broader society despite the presence of Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) movement initiatives that advocate for minority groups (Prinsloo, 2011; Van der Merwe & Padi, 2012). It would seem that the effective and influential work of Non-governmental Organisations (NGOs) has not managed to change the way that some members of society behave towards, in particular, transgender individuals (Prinsloo, 2011). Thus, it appears that stigma overwhelms statutory and national law in terms of service delivery in the health and governmental departments when transgender persons seek assistance (Braun & Clarke, 2006; Nkoana & Nduna, 2012; Prinsloo, 2011).

The South African law allows people to change their names and gender on their birth certificates and their identity documents. Post-1994, a bill was developed to allow people to change the sex description on their identity and other documents. A document entitled A Short Guide to the Amendment of the Sex Status Act 2003 refers. The Alteration of Sex Description and Sex Status Act No. 49 of 2003 (assented to 9 March 2004) was published in the Government Gazette 26148 dated 15 March,
2004. Hereafter referred to as Act 49. This document provides useful details of how a person undergoing transitioning may go about applying for a change of name and an identity document in South Africa. In this guide it is stated that “any person whose sexual characteristics have been altered by surgical or medical treatment resulting in gender reassignment 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 certificate” (Section 2 paragraph 1). According to the South African Act, gender reassignment means 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. And here sexual characteristics refer to primary or secondary sexual characteristics. Secondary sexual characteristics mean those that develop throughout life and which are dependent upon the hormonal base of the individual person such as the beard, breasts etcetera. By law, in South Africa, anybody who has had medical treatment to alter their hormonal patterns for the purpose of gender change has the right to change the gender in their identity documents. The aim of this article was to report on the results of the monitoring of the implementation of the Act.

**METHOD AND REFLEXIVITY**

This article is based on a paper presented by the first author, Robert Hamblin at the Trans Health Conference in Cape Town in November 2011. Between 2009 and 2011 Gender DynamiX (GDX) documented the response of the Department of Home Affairs (DHA) to Gender Amendment applications. This article used a mixed method approach. First the authors analysed quantitative data that were routinely collected at GDX as part of service provision. Second, data were augmented with two selected real life case studies, an acceptable method in qualitative studies (Drisko, 2004). The cases included were of GDX clients and volunteers who gave permission for information to be used.

GDX has thoroughly document 49 cases of trans people who engaged with the DHA requesting a change in their identity document (ID) as permitted under The Alteration of Sex Description and Sex Status Act No. 49 of 2003. All 49 trans people have agreed to GDX using their data. Findings are presented here as a report of the conference paper and highlight the main message of the paper based on the actual presentation and a further interview conducted by the second author with the first author, Robert Hamblin. Quotations in *italics* are taken from the presentation and represent either case study data or Hamblin’s own words.

Hamblin is a transgender man and has been an activist in the field for more than five years at the time of writing this conference paper. Hamblin was instrumental in contributing to the formation of Gender DynamiX, an organisation of which he became a board member, a chair person and an employee. His journey around changing gender is published in (Morgan, Marias, & Wellbeloved, 2009). At the
time of writing the paper Hamblin was pursuing his art work as a professional photographer (http://www.roberthamblin.com). He was intensely involved in working with trans sex workers in a collaborative project under the auspices of the Sex Worker Education and Advocacy Taskforce (SWEAT). Hamblin’s work can be described as action research. He commits himself to working from a feminist perspective and is interested in the liberation of both transgender men and women. Having community stakeholders observe their surroundings, read supplementing literature and draw from their personal experiences is in line with qualitative research engagement, in particular, from a feminist stance (Padgett, 2004; Sands, 2004). Hamblin, as an insider, is involved in conducting research with trans people. Although some may raise the insider-outsider dichotomy in research, there are no ethical concerns that discourage researching “one’s own group” (Waldrop, 2004). Hamblin’s original conference presentation was prepared for publication in New Voices in Psychology by the second author, Mzikazi Nduna, an associate professor at the University of the Witwatersrand. Nduna has been a volunteer for the transgender advocacy organization Gender DynamiX since 2007. Nduna works in the broader field of sexual and reproductive health and rights and conducts research with youth and the LGBTI sector. This article describes some successes and challenges with applications for new identity documents that reflect transition. In this article the authors also used open-ended interview data to describe some of the motivations for why people choose to transition and apply for a name change in their legal identity documents, and shares some challenges that trans people who have transitioned face.

**FINDINGS AND DISCUSSION**

This discussion section of the article presents reflections on the history of Act 49 of 2003 Sex description and alteration, findings from the monitoring and evaluation data in terms of DHA’s compliance with Act 49. Narratives that demonstrate the link between the ID (identity book) congruence and access to health care are also presented.

**Reflections on the history of Act 49 of 2003 Sex description and alteration**

This section of the findings takes the reader through a journey of the rights of trans and intersex people in South Africa with regards to the law. A concern that unfolds and becomes clearer through the monitoring of the processes of the delivery of the sex change Act is that the Bill was drafted by legal minded people with no formalized consultation with trans people or civil society. According to Hamblin, as an insider to the developments in the field, there were attempts to push through the Bill fast so as to avoid contestation and to his knowledge some Lesbian and Gay organisations did get to hear about it and the Equality project in Gauteng and the Triangle project in
Cape Town responded. These organisations supported the Bill, but further asked for stricter measures, more therapy, and for the most possible surgery as pre-conditions for transitioning. These procedures present unnecessary bureaucratic stumbling blocks, especially for the less affluent transgender people, who invariably may have hailed from the black African working class: a group which is primarily unemployed with very few resources and are often homeless people. This is a concern raised in another research report (Nkoana & Nduna, 2012). Hamblin, through his access to other networks, reported that a group of trans people in Cape Town heard about the Bill and the attempts to fast-track it. The group formed an opposition against some of the contents of the then proposed Bill and hastily formed the Cape Town transsexual and Intersex Support Group to lobby parliament for additional time to allow for more submissions. The Cape Town transsexual and Intersex Support Group led by Estian Smit replaced the original Bill with a new and more progressive proposal that was to make transitioning more accessible to people who cannot afford it by requiring only a medical transition, making sterilization and/or surgery a discretional option, a move whose ramifications are seen in access to service delivery of health care for transgender people applying for a sex change (Nkoana & Nduna, 2012). The groups’ proposals were brilliant, said Hamblin. Resultantly, the definitions of every term and concept used in that submission were included in the Bill, thus removing any possible misinterpretation. This was an example of how critical lobbying and timing saw the new proposed Bill “as is” made into an Act of Law. When this law was promulgated, South Africa led the continent in acknowledging the rights of transgender persons. Critical lobbying and opportunistic timing remain integral to advancing the conditions of transitioning for trans people in South Africa; hence this series of articles to bring to the fore a voice of the transgender movement (Mdletshe & Nduna, 2013; Nduna, 2012; Nkoana & Nduna, 2012; Van der Merwe & Padi, 2012). As an insider to developments in the field of gender identity, in particular Trans struggles in South Africa, Hamblin shared his experience at the conference in order to add to our understanding of the significance of what he described as a particularly shocking prejudice concerning identity and ID documents. The next section discusses the findings that are focused on this notion.

Findings regarding the DHA compliance with Act 49

The Promulgation of Act 49 was indeed a victory for all Trans people, feminists, and those working for the protection of gender diversity in South Africa. However, monitoring of the implementation was as undertaken by GDX reports findings that demonstrate that the implementation became different from the initial intentions as it turned out that it was a political task ticked off. From 2009 to 2011, GDX documented the response of the DHA to applications for gender amendment. GDX has thoroughly documented 49 cases of Trans people whose experiences revealed
Source: *Cape Times*, Wednesday September 10, 2003

**Figure 1.** A newspaper reports on the lobbying of a revised bill by the Cape Town Support Group  

the failure of the DHA to assist them due to staff non-compliance with Act 49. The pie chart below illustrates the actions of the DHA with regards to the applicants:

![Pie chart showing findings from GDX service statistics](image)

**Figure 2.** Pie diagram showing findings from GDX service statistics
Data collected by GDX show that nine percent of cases were resolved where medical reports presented by the applicant mentioned medical gender reassignment and no surgery. In four percent of the cases, the application was resolved where surgery was reported on a medical certificate. Twenty-eight percent of the medical (not surgical) cases were resolved only when serious legal pressure was placed on the DHA by the applicant and GDX advocacy team. Forty percent of the cases had been pending for 18 to 24 months where proof of surgical gender reassignment was requested by the attending official. Four percent of the cases were still pending at the time of writing this paper, where the said department requested a sex divorce from some couples. Fifteen percent of cases were pending without any reason being given. That about forty percent of the applicant’s cases are awaiting proof of surgical gender reassignment is evidence of the observation that the previous guidelines are still being used by the DHA staff while neglecting the current law. This arbitrary and inappropriate enforcement of legal provisions violates the rights of transgender persons here, and as noted elsewhere (Godwin, 2010).

Figure 3. Photograph of a demonstration hailing the success of the realisation of the Sex Change Bill. Photograph by Robert Hamblin

When an application is resolved on the basis of an acceptable (to the official) medical reports this results is a double edged sword situation for some trans people
who find it difficult to access the necessary medical service for transitioning (Nkoana & Nduna, 2012). Clients with difficult access to health service are asked to present a medical report at the Department of Home Affairs will not be able to access the change of identity though the Act allows for this without a medical report. This situation requires a strengthening of lobbying and advocacy work and demonstrates one of the many struggles that transgender people still face in the country, despite progressive laws as described in other papers (Nkoana & Nduna, 2012; Van der Merwe & Padi, 2012).

The monitoring of data by GDX demonstrates that no-one was appointed to oversee the implementation of the Act, or the regulations thereof, by the DHA. Hamblin says that the old Act is still what guides Home Affairs staff . . . and the ray of light on the horizon goes out again for trans people in South Africa. The monitoring of the implementation of the Act by GDX further demonstrates that the old Act, which is no longer Law, is disappointingly being used in the engagement of transpeople within the DHA. The unacceptable but continued use of the old Act and policies by certain government officials when attending to trans people is a phenomenon observed by Trans and Intersex Africa (Nkoana & Nduna, 2012). This calls for more work to be done towards the realisation of the rights promised in the Bill. The next section presents two case studies of participants who were interviewed by Hamblin to show just how important gender congruent identity documents are.

Case Study: (in) congruent gender identity and access to health services

The insert below, extracted from one of the narratives of trans people collected by Hamblin in open conversational style interviews demonstrates the intersections between (in)congruent gender identity and how this can obstruct ones access to services such as health. Name withheld for ethics imperative of protecting informant’s identity.

I was only 14 years. I knew I was not a boy, no matter what my family said. I was a cheeky child, I said what I felt. At school I always insisted that people see me as a girl. It confused them...and me, but I just could not pretend. I was in trouble all the time but I would fight...To survive I need a lot of medical attention. I don’t always fetch my medicine. I don’t always go for check-ups. When I go to the clinic I need to show my ID book...That piece of paper says I am a male...it lies about me but it is supposed to protect me. People believe the paper. It blinds them.... this paper. Every time I say I am just here for my ARVs every time I have to fight again. I am getting tired now.

This is a struggle demonstrated by others (Nkoana & Nduna, 2012; Stevens, 2012). The AIDS epidemic has opened opportunities for work with transgender people, globally, for advocacy not only for access to health services but their legal rights as well (Godwin, 2010; Stevens, 2012; World Health Organization, 2011). Primary healthcare services including HIV and AIDS management and treatment are
available at no charge in South African local clinics. However, the administrative requests for an identity document at each visit present a stumbling block for some people to access healthcare services. It is important to note that this is not the case for all as different clinics may operate differently, sometimes owing to varying levels of training and performance of duties. Be that as it may, that as a trans person the respondent had experienced difficulties accessing health services (not related to gender reassignment) is not an isolated case. This case contributes to important evidence pointing to the prejudices and inappropriate responses of healthcare workers towards trans people (Godwin, 2010; Nkoana & Nduna, 2012).

Although we do not know what the HIV incidence and prevalence is among the trans community in South Africa due to lack of data, there is anecdotal evidence that HIV and AIDS constitute a highly prevalent health problem amongst the trans community (Nduna, 2012; Stevens, 2012). In the next insert, the authors present yet another interview crafted from the bigger study in which Hamblin was involved. In an interview with a trans woman, the respondent describes how:

Five men came to my house. They had heard about me. I was alone at home and they forced their way in. They beat me and raped me. After they left I called B (a friend) to help. When we got to the hospital I had to produce my ID book. I wish I had just said that I had lost it. The nurse called me by my male name, loudly so everybody could hear. I did not care I was so broken already. When we were inside the cubicle she asked me what I wanted. B (a friend) told her what had happened and that I needed HIV post exposure prophylaxis. She snorted, told me to go home and take off my dress. We put up a fuss but nobody cared. I went home to hide. I could not go back to the hospital . . . Yes, I am HIV positive today.

Figure 4. Part of the narrative of the case study trans informant (Adapted from an interview with Hamblin)
The above insert is an example of another encounter with the supposed helping health professional that shows how trans women are failed by the state. Although we cannot state categorically in this article that the respondent’s HIV sero-conversion was linked to this incident because we do not have sufficient evidence, her narrative indicate that she was convinced that it was linked. As argued elsewhere trans women have peculiar vulnerabilities that make them stand out and be vulnerable to structural abuse from heterosexual men who do not understand gender dynamics, and from heteronomatively trained healthcare workers who also fail to understand gender dynamics, and therefore fail to abide by the law when overwhelmed by their own prejudices (Van der Merwe & Padi, 2012). This finding supports a report in a previous document that refers to how a trans woman’s HIV status was used by health professionals to deny her reassignment surgery (Morgan et al., 2009). Also, these two cases show the need not only for more advocacy around the lawful implementation of the gender reassignment law, but also for strengthened training of healthcare workers on how to respond to trans men and women (Nkoana & Nduna, 2012). This training would also need to be extended to para professionals such as health NGOs and peer educators as their knowledge and values were also found to be wanting (Mdletshe & Nduna, 2013; Stevens, 2012).

CONCLUSION

The findings of this study support the notion that some transgender people are denied legal recognition by the Department of Home Affairs when they have not undergone genital surgery. This is consistent with previous reports (Agha & Van Rossem, 2002). Statistics collected as part of the implementation of the programme as presented here and from documentation by other organisations show that transgender people are especially vulnerable with regards to proper medical care (Nkoana & Nduna, 2012). Having the right documentation is a right; it will empower transgender persons and expedite work to liberate the trans community from gender bondages. There is research that shows that trans people do use the Internet to access and share information (Agha & Van Rossem, 2002). Perhaps more information about the implementation of Act 49, rights, and generally, research on trans issues could be posted on relevant internet sites and e-lists. This would increase the visibility of some of the challenges faced by trans people and foster the needed activism.

RECOMMENDATIONS

Agreeing with other authors (Mdletshe & Nduna, 2013; Nduna, 2012; Nkoana & Nduna, 2012; Van der Merwe & Padi, 2012), we argue through this article that there cannot be advocacy of transgender needs without proper paper documentation – research, numbers, and evidence. Without paper documentation, Hamblin believes that as activists they would be seen as a lot of noisy petulant victims. Proper paper
documentation shows the seriousness of the trans community as a community to be reckoned with, knowing our rights, our own challenges, and understanding our demands. This set of conference papers (see (Mdletshe & Nduna, 2013; Nduna, 2012; Nkoana & Nduna, 2012; Van der Merwe & Padi, 2012), is the first step and indeed a new voice towards examining, sharing and stimulating research for the trans community in South Africa.

NOTE

All graphical materials included in the figures were provided by the authors.

BIOGRAPHICAL NOTES

Robert Hamblin a photographer is a founding member of GenderDynamix. Robert changed his gender from female to male – a transition which had a notable impact on his photographic work. Hamblin’s interest in masculinities and systems of power strongly influences his work with these themes running through his exhibitions: Millenium Man; The Post Christian; The Binary Farm; The Colony and Imago and Pre Transition films which also explored ideas on masculinities, gender and patriarchy. In 2013 Hamblin exhibited “... when you feeling like a lady ...” at the Klein Karoo National Art Festival. This exhibition is a project which he undertook with a support group for transgender sex workers in Observatory Cape Town. The show was nominated for a Kanna Award at the festival. Robert presents his work not in the documentary style but rather allows his multiple influences to shape his work with a more conceptual and visceral impact in mind.
Mzikazi Nduna (PhD) is a Y-rated NRF Scientist and an Associate Professor in the Department of Psychology, University of the Witwatersrand, South Africa. She has research interests in HIV/AIDS, Father Connections, sexual and reproductive health and rights, gender and gender-based violence and psychological distress pertaining to women, children and sexual minorities. She is an alumnus of the Sexuality Leadership Development and the Carnegie Fellowships and holds the ICP CHANGE fellowship Award. She has co-authored 28 peer reviewed journal articles, presented in international and local conferences and reviews articles for more than five international journals. She is a member of the gender-based violence Prevention Network for the Horn, East and Southern Africa and the SANAC Women’s Sector Expert group. In 2013, Prof Nduna is a visiting professor at the University of the Western Cape’s Department of Anthropology and Sociology.

REFERENCES


