Judicial Matters Amendment Bill, 2005

Submission to the Justice & Constitutional Development Portfolio Committee, National Assembly, in respect of section 15 – Amendments to Act 4/2000 Definition of Intersex to be added to the Equality Act

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INTRODUCTION

The South African Human Rights Commission (SAHRC) welcomes the provisions in the Judicial Matters Amendment Bill 2005, that seek to add two definitions, one of intersex and the other of sex, to the *Promotion of Equality and Prevention of Unfair Discrimination Act 4/2000 (Equality Act)*. By expressly acknowledging intersex as a ground of discrimination we are ensuring that a most vulnerable group within our society will unambiguously receive the protections that are created within the Equality Act. This will thereby contribute to supporting a diverse society in which all receive equal protection before the law. The Department of Justice is to be commended in taking these steps to amend our law. South Africa will be one of the leading countries in the world to expressly afford such protections to this vulnerable group of persons.

The purpose of this submission is to set out the reasons for the SAHRC's support of these amendments. It further puts forward suggestions relating to the definition of intersex.

BACKGROUND

A. Scientific facts

Intersex persons are persons whose sexual anatomy—external genitalia, gonadal tissue (testicles or ovaries), and/or the endocrine (hormonal) system and genetic composition that guides sexual development and function—is "ambiguous" in any one or more of a myriad of ways. They are neither categorically female nor categorically male, but rather sit somewhere on the spectrum in between.

Because the intersexual condition manifests itself in such a variety of forms and in greater and lesser degrees, there are many different ways to draw definitional boundaries and thus estimates of the incidence of intersexuality vary widely. A "conservative" estimate is that 1 in 2000 persons are intersexual to some degree—an shockingly large number, given the lack of

knowledge and awareness of the condition in both the medical community (world-wide) and the public sphere. The initial discomfort some people feel regarding intersexuality has led to the stigmatisation of intersexuals themselves, resulting in cover-up, silence, and ultimately a society-wide ignorance about what is actually in the vast majority of cases an entirely unthreatening physical condition.

B. Historical background and present conditions

The history of the "treatment" of intersexuality by the medical profession raises concerning human rights issues. In particular, it has been routine practice in many countries for doctors to "assign" sexually ambiguous infants to one sex or the other by way of cosmetic surgery to make the genitals look (often only superficially) male or female, then instructing the parents to raise the infant as that sex without ever telling the child about its original ambiguous condition. This has led to extremely traumatic results in many cases.

The treatment of intersex persons by society at large also raises important rights issues. Intersex persons—previously called by the now-disfavoured term "hermaphrodite"—have been often brutally stigmatised, cast out from their communities, and even set up as carnival sideshow attractions. By routinely subjecting infants to gender “normalisation” surgery, society has largely refused to recognize that intersexuality even exists. This enforced invisibility comes in two stages: first, attempting to erase the evidence of intersexuality through the medical paradigm of routine infant sexual assignment surgery; second, stigmatisation and a lack of public discussion and acknowledgement of intersexuality.

It is hard to collect information on the condition of intersex persons, as many do not reveal their condition. This makes it very difficult to get a clearer picture of how intersex persons are treated in South Africa. Much of what is known comes from informal investigations conducted by Sally Gross, who founded the Intersex Society of South Africa (Isosa). She has been told that in some communities, intersex infants are simply "put in bags or boxes and dumped." She has also been told that in some communities intersex individuals who survive to adulthood are driven out of society, verbally and physically assaulted, and are referred to as "stabane," a word with connotations of "less than human" (“stabane” is also used in township vernacular to refer to gay and lesbian persons in a derogatory fashion).

It is important that our society respects the dignity of everyone including those persons who are intersexed. Tolerance and understanding needs to be promoted in order that intersex persons will come forward and develop more awareness building and thereby contribute towards the collection of accurate information. For this to happen, a safe environment must be created for intersex persons. The government can assist by ensuring that there are effective laws that protect intersex persons from discrimination. South Africa has such law in the Equality Act (Promotion of Equality and Prevention of Unfair Discrimination Act 4/2000 (PEPUDA)).

AMENENDMENTS TO THE EQUALITY ACT (PEPUDA)

Arguments for why the proposed amendments to PEPUDA are necessary

A. The Act is imprecise in its references to sex, gender and sexual orientation

The first reason it is advisable to amend the Act is simply that the Act's present use of definitions and concepts is imprecise. The Act currently provides *no* definitions for sex, gender, or sexual orientation. (This despite the fact that it provides definitions for other similarly situated terms, such as "age," "family status", "marital status", etc.) Moreover, the Act's use of these terms is inconsistent almost to the point of being random. The definition of “prohibited grounds” of discrimination lists "gender, sex" apart from "sexual orientation" (S. 1(1)); the same section's definition of grounds for harassment lists "sex, gender or sexual orientation"; and Section 8, on specific prohibitions, lists only "the ground of gender"—even though many of those specific prohibitions are not exclusively directed at issues of gender identity (for example, the specific prohibition dealing with pregnancy).

The inconsistent language could encourage litigants to advance convoluted arguments that *this* particular use of terms in *this* part of the Act shouldn't cover *this* particular sort of discrimination. The best way to avoid all this confusion is to amend the Act so that it uses well-defined terms in a consistent manner that demonstrates the Act's broad coverage and inclusive nature.

B. Parliament must foreclose the possibility that a court will read intersex persons out of the Act

The Act needs to be amended to avoid any possibility that a court might decide that it affords no relief or lesser relief for intersex-based discrimination. It is tempting to think that such a misreading of the Act is unlikely, because, perhaps, despite the confusing use of terms, the "gist" is still there; or because South Africa's courts, especially its high courts, are so focussed to be inclusive that they would never think of settling on an interpretation that excluded intersex individuals.

It would be unwise to rest idly on such assumptions. The full scope of sex and gender equality is still hotly contested and misunderstood in many segments of society, even in the new South Africa. The issue of intersexuality in particular, because it is so rarely discussed and so often misunderstood, may be liable to provoke irrational and discriminatory responses, even from otherwise enlightened jurists. It is also worth noting that while intersex persons have not yet had any encounters with the legal system in South Africa, lessons from other jurisdictions raise serious concerns.

In the United States, where intersex persons have made great strides in political organization and public discussion, the equality rights of intersex

persons have not fared well in court. For years, the only case explicitly dealing with intersex-based discrimination was *Wilma Wood v. C.G. Studios*, 660 F. Supp. 176 (1987), in which a U.S. federal court held that an intersex person could not bring an employment discrimination claim after she was promptly fired when her employer learned of her intersex condition and the corrective surgery she had undergone. Interpreting an employment non-discrimination act that broadly prohibited discrimination based on "race, colour, religious creed, ancestry, age, sex, national origin or non-job related handicap or disability," the court found that while "the term 'sex', as it is used in the statute, would encompass discrimination against women because of their status as females and discrimination against males because of their status as males," it did not encompass the plaintiff's intersex condition. *Because no definition of "sex" was provided in the law itself,* the court decided it had to look to the legislative history and the intentions of the legislators themselves, and ultimately found that because the legislators didn't clearly discuss intersex-based claims, they could not have intended to include them within the scope of the act.

Another worrisome intersex anti-discrimination case, *DeMarco v. Wyoming Department of Corrections*, 300 F. Supp. 2d 1183 (2004), was handed down by another U.S. federal court just a few months ago. Miki Ann DeMarco is an intersex person with a non-functional penis, no testicles, who has lived her entire life as a woman in every respect (including being married three times over). She was sent to the Wyoming Women's Centre detention facility after her parole status was revoked due to a positive drug test. Upon arrival, she was classified as a minimum security risk, eligible to serve out her sentence in the minimum security wing—the "West wing"—which was equipped with comfortable furnishings and where she would be allowed to keep personal effects and have access to wage-earning opportunities, educational opportunities, and of course the fellowship of other inmates.

However, when prison officials discovered her penis, they immediately put her in solitary confinement in the maximum-security wing—"Pod 3"—where she was treated in every respect as a high-risk inmate for the full term of her sentence. This involved eating, sleeping, exercising—indeed, living—in complete isolation, in a cement cell with only bolted-down steel furnishings, and a complete denial of personal effects, even the "two decks of playing cards . . . [normally] provided to death row inmates." When Ms. DeMarco later brought a suit alleging that her treatment had been in violation of the Equal Protection Clause of the U.S. Constitution, the court responded by holding that intersex persons were not a "constitutionally protected class"; indeed, that they had not been "subjected to a history of purposeful unequal treatment." Examining the facts of DeMarco's treatment under the highly deferential "rational basis" test, the court (somewhat regretfully) concluded: "no equal protection violation occurred."

The SAHRC has confidence that a South African court, applying the Equality Act to a claim by an intersex person, would actively resist reaching the results seen in the above cases. Still, the lesson from these cases is that even impartial, professional legal minds may have difficulty including intersex

persons in the community of persons who deserve protection under the law. Even the remote potential for similar insensitivity to intersex equality rights in our law should be foreclosed by a resolute directive from Parliament, making it clear that intersex persons will find maximum protection from unfair discrimination under our Equality Act.

C. Amending the Act will help raise public awareness and clarify public expectations

While it is particularly important to clarify the scope of the Equality Act for the courts, which will actually apply the law, clarification of intersex persons' place in the scope of protection will also serve a broader public awareness function. As noted above, one of the most invidious problems faced by intersex persons is the refusal by society to publicly address their very existence and the many problems they face. This results in individual and collective ignorance, which leads to fear, which leads to the social stigma inflicted on intersex persons and the discrimination against them. Breaking this downward spiral—and achieving true equality—must begin with familiarization, education, and public support. The Equality Act anticipates this: it is an explicit object of the Act, set out in Section 2(e), "to provide for measures to educate the public and raise public awareness."

Including intersex in the plain language of the Act will serve to validate intersex persons presence in the community of persons deserving full equality and maximum protection against discrimination. Explicit mention in the Act will inform readers of the legislation not only that intersex persons are protected—but also indeed that they exist, and that they face entrenched problems of discrimination.

Including intersex in the Act will also make it patently clear to all that discrimination against intersex persons will not be tolerated.

In sum, in addition to its obvious law-making function, the text of the Equality Act serves important *communicative* and *expressive* functions. It is important to be sensitive to the implications of the message being communicated, and to use these additional functions to help give effect to the principles and objects of the Act.

The Proposed Amendments Represent Correct Law and a Proper Interpretation of the Equality Act

A. How the Equality Act Works

Section 6 of the Equality Act provides: “Neither the State nor any person may unfairly discriminate against any person". To determine what, exactly, is “discrimination”, and what, exactly, is “unfair”, the Act defines two tiers of "prohibited grounds" (S. 2(1)(xxii)) and establishes a corresponding “burden-shifting” programme (S. 13). The complainant always has the burden of making out a *prima facie* case of discrimination on either tier of the “prohibited grounds”. Once the complainant satisfies this requirement, the legal road

forks: if the *prima facie* prohibited ground is one of the sixteen grounds listed in the first tier (S. 2(1)(xxii)(a)), the respondent immediately assumes the burden of proving that the discrimination was fair. But if the *prima facie* prohibited ground is based on the second tier (S. 2(1)(xxii)(b)), the *complainant* must come back and prove sufficient facts to "establish" that the alleged discrimination violates certain anti-discrimination principles. The net result is that it is much easier to succeed on a claim if the alleged discrimination is based on or clearly encompassed in the definition of one of the grounds listed in subsection (a). For intersex persons, the question becomes whether they are encompassed in the listed ground of sex, or gender, or both.

B. Intersex is already within the natural meaning of "sex" as used by the Act

The conditions of male, female, and intersexual are merely different end results of the complicated and multi-factored (genetic, hormonal, etc.) process of physical development. All three conditions, or states of sexual differentiation, should thus be accorded equal status under the law. To say that sex only includes "normal" males and females would arbitrarily and irrationally exclude intersex persons. The only basis for distinguishing intersex is that it occurs less commonly than male or female. But just as we would not tolerate excluding a racial group from the legal understanding of “race” just because that group was few in number, similarly we should not tolerate the exclusion of intersex from the legal understanding of “sex”.

C. Proper interpretation of the Act includes intersex persons and provides them with maximum protection

Were there any doubt about the scientific and logical connection of “intersex” and “sex”, it is worth noting that the Act itself explicitly requires that it be interpreted and applied in a broad, inclusive fashion—one that leans in the direction of the protection of rights. Interpretation and application of the Act is governed by Section 3, which specifies that interpretation should always seek to "give effect" to "measures designed to protect or advance persons disadvantaged by past and present discrimination." (S. 3(a)). Interpretation is also to be guided by "the Preamble, objects and guiding principles of this Act." The Preamble expresses commitment to a "non-sexist" society, and one of the Act’s listed objects is "to give effect to the letter and spirit of the Constitution, in particular the . . . equal enjoyment of all rights and freedoms by every person . . . [and] the values of . . . non-sexism." (S. 2(b)). The Constitution itself, which mandated the Equality Act (S. 9), must always be "construed in a way which secures for individuals the full measure of its protection." *S v. Makwanyane and Another*, [1995] 6 BCLR 665, 677.

In the face of all of these directives toward non-sexism, inclusivity, and protection of rights, any interpretation that would in effect set aside one distinct sex for different and less rigorous protection, reserving best use of the Act exclusively to the two dominant sexes, would be clearly intolerable. Rather, status terms used in the Act should be defined clearly and broadly. Other definitions included in the Act demonstrate this. They invariably expand

the term at issue to bring in more than might otherwise be included in a colloquial understanding. They guard against potential narrow readings. For example, the definition of "marital status" specifies that it includes same-sex commitments of reciprocal support; "pregnancy" includes "intended pregnancy, potential pregnancy or termination of pregnancy"; and "socio-economic status" includes both actual and "perceived" condition of poverty. Adding a clarifying, expansive, and inclusive definition of sex would fit the existing lexicographical paradigm and help “give effect” to the objects and principles underlying the Act and Section 9 of the Constitution.

THE PROPOSED DEFINITION OF INTERSEX

There is already a definition of intersexuality on our statute books. For the sake of consistency and interpretation it would be best that further definitions conform to the existing definition. This would avoid possible difficulties with the interpretation of the terms.

The Alterations of Sex Description and Sex Status Act 49/2003 contains a definition of intersexed. The definition states as follows:

> *“Intersexed”, with reference to a person, means a person whose congenital sexual differentiation is atypical, to whatever degree*

The proposed Bill defines “intersex” as follows”

> “*‘intersex’ means an atypical congenital physical sexual differentiation”;*

The proposed definition omits the words “to whatever degree”. As has been pointed out, intersex can present in many different forms. In order to provide adequate protection to these persons it is important that the legislation is clear that all intersexed persons are receiving the protection of the Equality Act and that no discrimination based on a persons intersex status will be tolerated. Thus the words ‘to whatever degree’ ought to be incorporated within the definition.

A proposed rewording of the definition would read

> ***‘Intersex’ means congenital physical sexual differentiation, which is atypical to whatever degree.***