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Our reference: Official Identity Management Policy

Date: 26 February 2021

**The Director-General  
Department of Home Affairs  
PRETORIA**

**For attention: Mr Sihle Mthiyane  
Chief Director: Policy and Strategic Management**

**By email: [oimpolicy@dha.gov.za](mailto:oimpolicy@dha.gov.za)**

Dear Mr Mthiyane,

**RE: SUBMISSIONS ON THE DRAFT OFFICIAL IDENTITY MANAGEMENT POLICY**

1. We refer to the notice issued by the Honourable Dr Pakishe Aaron Motsoaledi, Minister of Home Affairs, in the Government Gazette of 31 December 2020, calling for public comments in respect of the draft Official Identity Management Policy (“the draft Policy”).
2. Cause for Justice (“CFJ”) hereby thanks the Honourable Minister and the Department of Home Affairs (“DHA”) for the opportunity to make these written submissions and to participate in the policy-making process.

**BACKGROUND TO CFJ AND INTEREST IN THE DRAFT POLICY**

3. CFJ is an a-political, non-partisan human rights organisation that exists to act in the public interest and in the interest of justice by promoting and protecting constitutional rights, freedoms, and obligations in South Africa. The principal ways in which CFJ does this are through participating in the policy-making and legislative process (and other state decision-making structures); public education and awareness campaigns; and court proceedings.
4. All five of CFJ’s core values give it a keen interest in the draft Policy, namely protecting the inherent worth of all persons and promoting the value of human dignity in society; protecting family life (including parental rights and children’s rights); advocating for the responsible exercise of freedom; social justice (protection of vulnerable individuals and groups, including children); and ensuring accountable government action.

**CHIEF EXECUTIVE: SA SMIT | NON-EXECUTIVES: NC SNYDERS | JP DICKS**

5. We focus our submissions on matters affecting rights, values and interests protected and/or promoted in the Bill of Rights and related matters affecting human dignity, the best interest of children, and the public interest.

## **STRUCTURE OF SUBMISSIONS**

6. Our submissions are structured under the following headings:

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### **A. NEED FOR PUBLIC CONSULTATION AT COMMUNITY-LEVEL**

7. At the outset, we want to wish the DHA all success in the policy development process and the implementation thereof. We consider wide public consultation around the conceptualisation of the policy to be of critical importance given the South African Constitution's commitment to democratic principles and processes; and especially also considering our history of excluding persons from interacting with government and making decisions that affect people *for* them without consulting them beforehand or at all.
8. In the light of the above, we implore the DHA to conduct public participation and consultation with the people of South Africa in their communities.<sup>1</sup>

### **B. EXECUTIVE SUMMARY**

9. In these submissions, we focus our comments and proposals on specific ideological terminologies, statements and proposals included in the draft Policy, which if adopted, would have the effect of enforcing a particular minority view about the nature of human identity on the

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<sup>1</sup> To the extent that intervention measures in relation to the Covid-19 pandemic create limitations on engagements in physical/geographical locations across the country, we propose that the DHA facilitate public hearings for the various geographical communities by way of virtual platforms.

whole of South African society. This minority viewpoint, which we refer to as 'radical gender ideology' because of its roots in radical feminist theory, is highly contested by a large segment of society and will have profound ramifications for society as a whole and for individuals, families, and communities, considering the impact it is having in countries and states where it has been adopted. The potential capture of the South African state by radical ideologies and theories that are not held or supported by its people and is not grounded in the so-called 'hard sciences' or in objective reality, is of grave concern and should be guarded against at all cost.

10. Our submissions address the following points:

***The DHA's mandate and the purpose of Identity Management Policy***

10.1 The DHA's mandate and the purpose of official/public 'identity management' policy – which is ***identification for public purposes***.

***The appropriate basis for public identification policy and practice***

10.2 Given the DHA' mandate and the purpose of public identity management, we submit that legitimate and effective bases of public identification would be **objective facts (objective standards)** – characteristics that are **objectively observable and verifiable**. We further submit that purely or mainly **subjective perceptions** that are not objectively observable and verifiable, such as **internal perceptions of self/one's own identity** which contradict objective facts (observable physiological characteristics), would accordingly not be appropriate bases for public identification.

10.3 Where conflicts and disparities exist between subjective internal identity, and objective facts (observable physiological characteristics), to achieve the purpose of public identification objectively observable characteristics would need to trump internal identities.

10.4 We point out that the **rejection of ideologies** that are not grounded in objective fact or of subjective/internal identities that are not objectively observable and verifiable as a basis for public identification, would **not amount to unfair discrimination**, but would be **fair** in the context of a policy the **purpose** of which is to facilitate and achieve **accurate public identification** of persons.

10.4 The adoption of such ideologies and recognition of such internal identities for public identification purposes would **bring the neutrality of the state into question**, where the state could be seen as enforcing a specific ideology or philosophical framework of the nature of human identity onto the people of South Africa in an **undemocratic manner**.

10.5 It is our assertion that radical gender ideology (and the internal identities it recognises) is a view which is **not widely held or supported** by the majority of the people of South Africa. For the DHA to develop its policy in a truly democratic fashion, it would have to engage the people of South Africa by way of **nation-wide public consultations at community-level**.

- 10.6 Where persons experience a distressing conflict between their subjectively perceived internal gender identity and their biological sex (objective physiological characteristics), the person has a clinical condition called **gender dysphoria or gender identity disorder** (which is the clinical condition underlying the transgender identity). To single out this specific disorder for recognition in the public identification system would be highly irregular and arbitrary, as there are many other clinical disorders that impact on how people view themselves and how they identify as individuals. To use **clinical disorders as bases for public identification** would open the floodgates to an **unmanageable and untenable administrative conundrum**.

### ***Justifiable exceptions in keeping with the purposes of public identification***

- 10.7 Certain gender dysphoric (transgender) individuals “**medically**” “**transition**” **in adulthood** by undergoing medical interventions to alter their physiological appearance/characteristics to be more reflective of the biological sex associated with their “trans” gender identity. Medical transition entails a **level of permanence** in how a person is objectively identifiable for purposes of public identification. Because people may oscillate between gender expressions (how they publicly express their gender identity) over the course of their gender dysphoria, the **permanence of medical transition could constitute a justifiable basis** for changing an individual’s gender identifier in the population register, as is currently provided for in the Alteration of Sex Description and Sex Status Act, 2003.

### ***The best interests of the child***

- 10.8 One of the practical implications of the constitutional “best interest of the child” principle,<sup>2</sup> is that children must be **protected from harm**. In the context of public identification, this means that parents and guardians cannot be allowed to register (and raise) a biological boy as a girl (and vice versa) or as a so-called “non-binary” person.
- 10.9 The draft Policy should not make allowance for official recognition of that which will effectively **deprive children of the stable identity** necessary for developing into healthy and flourishing individuals. Accordingly, children should only be identified according to their **objectively observable and scientifically verifiable traits** – i.e. as either male or female. To allow otherwise, will harm children.
- 10.10 On current statistics a very small percentage of children (less than 1%) will develop gender dysphoria (gender identity disorder) during childhood, and a very small percentage (5% - 20% of less than 1%) of these children will persist in this condition into adulthood. **The existence and/or persistence of this rare clinical condition should not be assumed to be in the future of a new-born child.**

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<sup>2</sup> In terms of section 28(2) of the Bill of Rights:

***“A child’s best interests are of paramount importance in every matter concerning the child.”***

- 10.11 The potential harm of **depriving a child of the stability of their biological identity** is much greater than the potential harm of not acknowledging the **0,05% statistical possibility** that they may develop the **clinical disorder, gender dysphoria**, at some point during their childhood.

### **Specific Proposals**

11. Our submissions also include **proposals** in respect of:
- The structure of ID numbers;
  - The best interests of children; and
  - Drafting proposals that will have the effect of removing ideological content from the draft Policy.<sup>3</sup>
12. In respect of ID numbers, we have a primary proposal, as well as two alternative proposals:
- **Primary proposal:** Retain biological sex/gender as the basis for identification, rather than subjective internal gender identity
  - **Alternative proposal One:** Use random, unique identity numbers that are not linked to or founded on a person's sex, date of birth, place of birth or any other marker
  - **Alternative proposal Two:** Use two personal identification markers - One for objective biological sex and one for subjective internal gender identity/gender expression

## **DETAILED COMMENTS ON THE CONTENT OF THE DRAFT POLICY**

### **C. PURPOSE OF IDENTITY MANAGEMENT: IDENTIFICATION FOR PUBLIC PURPOSES**

13. A critical consideration of "Chapter 1: The DHA mandate",<sup>4</sup> clarifies the purpose of "identity management", which is identification. On page 7, for example, the draft Policy provides as follows:

"In promoting and fulfilling the Constitution's provisions, the DHA is mandated to develop and manage an **identification** system (own emphasis added)."

This statement, demarcating the DHA's mandate insofar as it can be extracted/extrapolated from the Constitution, is then followed by references to sections 20, 28(1)(a), 21(2) and (4) and Chapter 10 of the Constitution, as well as three areas of strategic relevance implicated by its

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<sup>3</sup> For ease of reference, we have collated our proposals in Annexure A hereto.

<sup>4</sup> All references herein to "Chapter", "paragraph" and page numbers are to the relevant chapters, paragraphs, and page numbers of the draft Policy, unless the contrary is clearly specified or is evident from the context.

mandate, namely (1) citizenship and civil **registration**, (2) international migration, and (3) refugee protection. The strategic relevance of the DHA's identification mandate is accordingly tied to the **legal status of persons in relation to the sovereign state, the Republic of South Africa**, which, **beyond the DHA's mandate**, has a number of wider implications for other government departments and state obligations.

14. The aforementioned mandate is confirmed throughout the remainder of Chapter 1.1 and 1.2.
15. It accordingly goes without saying that the legitimate purpose of an identity management policy which obtains its mandate from the Constitution, is to enable the state to identify persons accurately and effectively. What this, however, also means is that where any such policy attempts to achieve other purposes beyond official identification (including legal status, registration, and documentation), or uses "identity management" to achieve ulterior purposes, the policy will be unlawful and unconstitutional, because it will be *ultra vires* its Constitutional scope and mandate.

#### D. LEGITIMATE AND EFFECTIVE FOUNDATION FOR PUBLIC IDENTIFICATION <sup>5</sup>

16. An official or public identity management policy that is both true to its purpose (legitimate and Constitutionally mandated) and efficient, is concerned with reliably identifying persons according to an **objective standard(s)**. To ensure the identification system is easy, speedy and delivers consistently correct results, it must use and rely on objectively observable and/or verifiable traits.
17. The use of purely or mainly **subjective grounds/perceptions/feelings** would be contrary to the purpose of the policy and would make its objectives (i.e. identification) unachievable, which would in turn result in it being legally invalid/void because of arbitrariness. Such grounds include, for example, certain individuals' highly *personal* understandings, perceptions, and feelings around their own identity. The most striking instances exemplifying the aforementioned arbitrariness would be those instances where subjective traits contradict objectively observable traits, for example a person whose subjectively experienced gender identity clashes with his/her physiological characteristics. While highly subjective perceptions of personal identity may be

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<sup>5</sup> We use the term "public identification" as a synonym for the term "identification for public purposes". The DHA, as a public authority/functionary, has an interest in identification to the extent that it serves some public purpose or interest. The DHA's nature, as public entity, determines the nature of its interest/the interests it serves, i.e. the public interest. The DHA does not exist to, and may not employ its resources to, serve highly private or subjective purposes or interests.

An example of highly private or subjective purposes/interests would be how someone chooses to identify in personal relational and social settings. The state typically does not have an interest in how people conduct their personal relationships or social gatherings, except to the extent that some relationships are formalised as institutions requiring legal recognition (e.g. marriage) and to the extent that people are at risk of suffering harm in relationships (e.g. GBV and child abuse) or social settings (e.g. unfair discrimination).

An example of a public interest would be how someone is identified for purposes of receiving emergency medical treatment, whether in a private or public hospital. The state has an interest in health care and in the protection of life, and accordingly how someone is identified for purposes of effective medical treatment serves a public purpose and is therefore in the public interest.

particularly dear to certain individuals, such perceptions/feelings/grounds do not assist in achieving the purposes of *public* identification.

18. Likewise, grounds for identification deriving from ***ideological interpretations and/or political agendas*** must be rejected to the extent that they are not grounded in objective reality/scientific fact or in highly credible research evidence. To found identification policy on ideology and mere political expediency divorced from objective reality, would set the policy on an unavoidable course of arbitrariness, and would raise serious questions about ***state neutrality***.
19. Objectivity/neutrality, being fact/evidence-based, and grounded in objective reality are essential features of good public policy. Policy built on any other basis (i.e. one that departs from these foundational principles) will inevitably undermine its own purposes and result in a systems failure over time.

#### **D1. CONTEXTUALLY RELEVANT CONSTITUTIONAL FRAMEWORK FOR PUBLIC IDENTIFICATION POLICY**

20. We agree with and support the draft Policy's commitment to the constitutional principles of equality, non-discrimination, and human dignity; and to the theme of inclusion.<sup>6</sup>
21. However, certain qualifications need to be made in this regard, including:
  - The term "non-discrimination" is not found in section 1 of the Constitution (Founding Provisions of the Republic of South African;
  - Section 9 of the Constitution, the "equality section", only prohibits ***unfair*** discrimination; and the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 ("PEPUDA" or the "Equality Act"), confirms same and approves of ***fair*** discrimination;
  - Any public policy and system based in objective reality, neutrality and that is evidence-based, will inevitably discriminate ***fairly*** to some extent, and exclude certain ideologies (e.g. those that are insufficiently/inappropriately grounded so as to form the basis of public policy) and certain highly subjective perceptions of personal identity; and
  - The purpose of identity management policy, i.e. identification, will determine the extent to which it will ***fairly*** discriminate, and the extent to which it is unable to facilitate inclusion of certain ideologies and subjective perceptions of identity.

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<sup>6</sup> Chapter 6.1.

## D2. UNSUITABILITY OF IDEOLOGY, PATHOLOGY AND SUBJECTIVE REALITY AS BASIS FOR PUBLIC POLICY

22. One key aspect in which the DHA policy development mechanism finds itself at a crossroads, is regarding the use of a sex/gender identifier for identification purposes. While the biological differences between men and women are well-known, objectively observable, etc., radical developments in the fields of sociology and other “soft sciences” – most notably attempts to re-interpret objectively observable reality to suit certain ideological narratives and political agendas – have created major risks for the abuse of sex/gender as an identifier for official/public identification purposes.
23. In this regard, we are particularly concerned that certain content in the draft Policy seem to promote a very specific ideological concept and narrative about the nature of human identity. This puts the draft Policy at risk of being perceived as ideologically biased and driven by political agendas – bringing the DHA’s commitment to state neutrality into question. We are particularly concerned about concepts and definitions typically used by proponents of radical gender ideology.<sup>7</sup>
24. Examples of how and where the draft Policy expresses actual ideological bias, include:

### **Definitions: “Assigned Sex”, “Sex” and “Intersex” –**

25. Biological sex is neither merely externally determined *by* nor assigned *at* birth. It is also not a mere legal label that is slapped on a person at birth – rather, it is coded into each person’s DNA and is as such immutable to the human identity.
26. The term “assigned sex” has *limited* legitimate application in the context of a small number of intersex persons who, due to anomalies of sex characteristics (disorders of sex development), may be assigned a sex at birth.

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<sup>7</sup> Radical feminists, unlike the so-called “first wave” of feminists who advocated for equality between the sexes, instead call for cultural change. Radical feminists, such as Sheila Rowbotham, for example, argue, “democratic control has to be extended to the circumstances of everyday life.” Such a prescriptive state (the public sphere) would encroach into the private sphere, so as to enforce feminist norms. Radical gender ideology also seeks to distinguish between gender and sex. In 1955 psychologist John Money made a distinction between the physical differences of men and women, i.e. sex, and the behaviour and roles a person expresses, i.e. gender. In the 1960s and 1970s, second-wave or radical feminists took this further to argue that gender was constructed by society – thus only nurture, but no nature. In Money’s understanding of gender, and others like him, they were not seeking to deny the underlying biological reality of a person’s sex. With the radical feminist idea though, there was a clear and distinct shift from biology to ideology. To affect these cultural changes in society, this ideological approach calls for a prescriptive state and an intrusion of the public into the personal. This is encapsulated in the mantra of the second wave feminists that the “personal is political” – focusing on culture (norms, values, and beliefs) with the understanding that it should be the state that should affect this culture change. The draft Policy certainly moves beyond the neutral state – it is not biology *per se*, but is imbued rather with an ideology which is being imposed on the broader society.

27. Generally, the use of the term “assigned sex” or “sex ... assigned at birth” in relation to “gender identity”, “non-binary”, “sex”, and “transgender”, is indicative of an ideology that “gender” and by implication “gender identity” can be severed completely from biological sex, because (so the argument goes) sex could have been incorrectly externally “assigned” at birth. This is a controversial and unscientific view – and the draft Policy’s use of this terminology, is demonstrative of an ideological bias that is not supported by scientific fact or credible research evidence.
28. In the case of the person who identifies as “non-binary” or “transgender”, their internal conflict of identity is not with their “assigned sex”, but with the actual biological reality of their bodily (biological) sex. Their internal/subjective sense of self is conflicted with their body/biology (objective reality), and not primarily with their sex description on a computer server in the population register or their identity document/card. To present these intense conflicts within the human psyche, which medical science considers to be a mental/sexual health disorder (i.e. it is a clinical condition), as a mere conflict with the person’s sex description for official purposes, is not only wrong, but also extremely dishonest and deceptive.
29. The misuse of language, knowingly – to bring about social or political reconstruction – or unknowingly, must be guarded against with all diligence in order to protect the integrity of our public systems and records, and maintain trust in government and other public institutions.

### ***Drafting proposals***

30. In order to improve the draft Policy and/or allay any bias, we propose the following **drafting proposals**<sup>8</sup> –
  - Amend the definition of “sex” to read as follows: “Sex” refers to the human sex chromosome – either male (XY) or female (XX), including intersex.
  - Remove the terms “assigned sex” from the Glossary, and replace all references to it, as well as to “assigned sex”, or “sex ... assigned at birth” with “sex” throughout the draft Policy.

### ***Use and Definitions of “Gender”, “Gender Identity”, “Non-Binary Person”, and “Transgender” –***

31. A correct understanding of “gender” is critical for purposes of understanding the meaning of “gender identity” and to understand the differences that may exist between “biological sex” and “gender identity”/“transgender”. While there is not full consensus about the meaning of gender,

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<sup>8</sup> Our proposals are summarised in “*Annexure A*” hereto.

the overriding and medically accepted view is that it has to do with social expression of the bodily/biological reality of being male and female.<sup>9</sup>

For the purposes of successful public identification, it is important that the draft Policy's definition of "gender", and by implication of "gender identity", is based on objective, scientific reality and not in mere subjective personal perceptions or ideological narratives that are not grounded in reality or in credible research evidence.

32. Medical science recognises two biological sexes – male and female.<sup>10</sup> The World Health Organisation ("WHO") further recognises the understanding of "gender" (or gender roles) as the social expression of this biological reality of human identity, i.e. the biological male person is a man (male gender) and the biological female person is a woman (female gender).<sup>11</sup> Accordingly, because there are no other biological sexes than male and female, there are also no other genders within human society besides men and women.
33. Accordingly, referring to "men, women, **and others**", "an **intermediate state** between man and woman, being **both** man and woman, or belonging to **another gender** altogether"<sup>12</sup> (alluding to a so-called "third gender"<sup>13</sup>), or attempting to uncouple gender (and gender identity) from its grounding in objective reality (namely the biological identity of the human person, which includes biological sex), is a highly controversial view, and indicative of an ideological bias.
34. While gender incongruence associated with the intersex person's biological reality is not controversial, acknowledging such incongruence in an official identity management system does not assist in achieving the purposes of public identification of the person, and would accordingly serve no effective purpose in this context.

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<sup>9</sup> American Psychological Association. [Answers to Your Questions About Transgender People, Gender Identity and Gender Expression](#). (2014).

<sup>10</sup> In its [Glossary of Terms and Tools for Gender, Equity and Human Rights](#), the WHO defines "sex" as:

*"The different biological and physiological characteristics **of males and females**, such as reproductive organs, chromosomes, hormones, etc."*

See also the second paragraph on page 35 under Chapter 7.1.1.

Intersex is an anomaly or exception to the norm, referring to disorders of sex development affecting approximately 0.02% of the world population, and is therefore not a third sex or gender.

<sup>11</sup> In its [Glossary of Terms and Tools for Gender, Equity and Human Rights](#), the WHO defines "gender" as:

*"Refer(ring) to the socially constructed characteristics **of women and men** – such as norms, roles and relationships of and between groups of women and men. It varies from society to society and can be changed. The concept of gender includes five important elements: relational, hierarchical, historical, contextual and institutional. While most people are born either male or female, they are taught appropriate norms and behaviours – including how they should interact with others of the same or opposite sex within households, communities and work places. When individuals or groups do not "fit" established gender norms they often face stigma, discriminatory practices or social exclusion – all of which adversely affect health."*

<sup>12</sup> See the definition of "gender" in the Glossary.

<sup>13</sup> See second paragraph on page 35 under Chapter 7.1.1.

35. The use of the term “non-binary” is problematic to the extent that it is presented as something that is a matter of fact or as representing a generally held view within society. The language of “non-binary”, “gender-queer”, “spectrum of gender identities”, “outside the gender binary”, etc., is the language, terminology, and narrative of a very specific ideology, namely radical gender ideology. Whilst people holding to this ideology might refer to themselves and others as non-binary or gender-queer, cis-gender, transgender, etc., their ideological interpretations and understandings of their internal or subjective perception of their own identities and the language and terminologies they use to describe these highly subjective feelings/perceptions, are not commonly held, or generally accepted within society.
36. The **two main problems** with basing a public identity management/identification policy **on radical gender ideology** is that –
- 36.1 It would force the public administration, as a representative trustee and functionary in service of all the people of South Africa, to adopt a particular ideological interpretation and understanding of the nature of human identity and which is not widely held or supported by the majority of the people of South Africa. It would accordingly be both a violation of state neutrality and be deeply undemocratic.
- 36.2 It would establish a principle and precedent of basing identification of persons on highly subjective/personal internal feelings and perceptions of individuals’ own identities, which are not objectively observable and verifiable, and may be in conflict with objectively observable and verifiable traits (e.g. physiological characteristics). In many instances, where these internal identities are in conflict with the person’s biological identity (objective reality), the person has a clinical condition called gender dysphoria or gender identity disorder (the clinical condition underlying the transgender identity). To single out this specific disorder to be reflected in the public identification system would be highly irregular and arbitrary. There are a host of other clinical disorders that impact on how people view themselves and how they identify as individuals, and to use clinical disorders as bases for public identification would open the floodgates to an unmanageable and untenable administrative conundrum.
- While subjective perceptions of personal identity may be particularly dear to certain individuals, such perceptions/internal identities do not assist in achieving the purposes of *public* identification. And accordingly, they are not appropriate, beneficial, or effective as bases of a public identity management system.
37. Certain gender dysphoric (transgender) individuals “medically” “transition” in adulthood by undergoing medical interventions to alter their physiological appearance/characteristics to be more reflective of the biological sex associated with their “trans” gender identity. Such interventions would include cross-sex hormones (hormone suppressants and hormone supplements) and a number of surgical interventions depending on the person’s biological sex and the biological sex they want their bodies to reflect post-transition.

38. Medical transition entails a level of permanence in how a person is objectively identifiable for purposes of public identification. Because people may oscillate between gender expressions (how they publicly express their gender identity) over the course of their gender dysphoria, the permanence of medical transition could constitute a justifiable basis for changing an individual's gender identifier in the population register, as is currently provided for in the Alteration of Sex Description and Sex Status Act, 2003. Such change in the official public identity management system is however not without risks.

### ***Summary of Recommended Approach***

39. We reiterate the necessity of grounding public policy in objective reality, generally, and identity management/public identification policy in objectively observable/verifiable traits, specifically.
40. Where conflicts and disparities exist between personal ideology and subjective internal identity on the one hand, and objective fact (in this case – biological identity) on the other, the purpose of public identification requires that objectively observable and verifiable traits trump internal identities that are not objectively observable and verifiable.
41. It is also not advisable to base public identification policy on clinical disorders (even though the existence of clinical disorders is an objective fact).
42. Where persons' decisions and actions in relation to their internal identities/gender incongruence translate into *permanent* changes in objectively observable physiological characteristics (by way of medical transition), acknowledging such change for public identification purposes could be justified.

### ***Drafting proposals***

43. In order to improve the draft Policy and/or allay any bias, we propose the following **drafting proposals**<sup>14</sup> –
- Amend the definition of “gender” as follows: “Gender” means the socially constructed roles, behaviours, activities, and attributes that a given society or culture considers appropriate for boys and men, or girls and women.<sup>15</sup>
  - Amend the definition of “gender identity” as follows: “Gender identity” means a person's perception and internal sense of their gender, which may or may not correspond to their (biological) sex.

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<sup>14</sup> Our proposals are summarised in “Annexure A” hereto.

<sup>15</sup> American Psychological Association. [Answers to Your Questions About Transgender People, Gender Identity and Gender Expression](#). (2014).

- Remove the term “non-binary person” from the Glossary, and replace all other references thereto with “medically transitioned transgender person” throughout the draft Policy.
- Amend the definition of “transgender” as follows: “Transgender” means a person whose gender identity does not correspond to his or her biological sex.
- Remove the second paragraph on page 16 of the draft Policy. As discussed above, there isn’t a public policy basis to officially recognise subjective/internal gender or sexual identities that are not objectively observable and verifiable, **for public identification purposes**. It is also incorrect that current laws and policies do not cater for changes in the gender/sex attribute of persons in the identity system. The current law does cater for this in terms of the Alteration of Sex Description and Sex Status Act, 2003. If people approaching DHA offices in terms of the legislation experience discrimination, the problem is not with the policy or legislation, but with the implementation thereof.
- Remove the last three sentences in paragraph 2 on page 35 and replace it with the following wording:
 

“Whereas gender is a binary attribute (male/man and female/woman), if an individual medically transitions to reflect physiological characteristics of the biological sex associated with their “trans” gender identity, the ID system should be updated.”
- Remove Items vii. and viii. on page 36, as the contents of these items are not based in science, but purely in radical gender ideology and subjective internal identities recognised in terms of this ideology, and divorced from the purpose of official identity management, which is public identification. The public policy rationale for the proposed development – i.e. establishing a third sex category for public identification purposes – accordingly does not exist.
- Remove the last sentence of the second bulleted item on page 40, because “intersex” is not a sex category, but a biological disorder.
- Replace the reference to “transgender persons” in the third bulleted item on page 40 with “medically transitioned transgender persons”.
- Redraft the contents of the fourth bulleted item on page 40. In its current format it represents ideological bias towards highly controversial radical gender ideology and the subjective internal identities recognised in terms of such ideology. The contents should be redrafted to remove the ideological bias, alternatively expressly acknowledging it, and presenting other ideological viewpoints on human identity alongside it.

We also specifically note the following:

- Current ID numbers contain no information about any individual's sexual orientation. To make such an allowance exclusively for persons who view themselves as non-binary or transgender, would be biased and accordingly unlawful.
- The gender of persons who view themselves as non-binary or transgender, is currently reflected in their ID numbers, as with all other persons. What is not reflected, and this again applies to all persons, is subjective "gender *identity*". For the reasons outlined above, subjective/internal gender identity is not an appropriate basis or grounding for a public identification system.
- To accommodate persons who view themselves as non-binary or transgender, or intersex persons with an alternative digit or letter, will in effect make these persons unidentifiable (or less identifiable), as their subjective internal gender identities that have not translated into objectively observable and verifiable traits by way of medical transition, will give no information about them for purposes of public identification. This will defeat the purposes of an official identity management/public identification system altogether.

## E. BEST INTERESTS OF CHILDREN

44. In terms of section 28(2) of the Bill of Rights,<sup>16</sup>

*"A child's best interests are of paramount importance in every matter concerning the child."*

45. One of the practical implications of the constitutional "best interest of the child" principle, is that children must be protected from harm. In the context of public identification, this means that parents and guardians cannot be allowed to register (and raise) a biological boy as a girl (and vice versa) or as a so-called "non-binary" person. The draft Policy cannot make allowance for official recognition of that which is tantamount to child abuse – effectively depriving innocent and vulnerable children of the stable identity necessary for developing into healthy and flourishing adults. Children should only be identified according to their biological sex (which is based in objective medical science) and not according to the personal preferences or ideological interpretations of self-serving parents and guardians. To allow otherwise, will harm children.
46. Whilst on current statistics a very small percentage of children (less than 1%) will develop gender dysphoria (gender identity disorder) during childhood, and a very small percentage (5% - 20% of less than 1%) of these children will persist in this condition into adulthood – i.e. the existence

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<sup>16</sup> Sec 28(2) of the [Constitution of the Republic of South Africa, 1996](#).

and/or permanence of this rare clinical condition should not be assumed to be in the future of a new-born child.

47. The potential harm of depriving a child of the stability of their biological identity is much greater than the potential harm of not acknowledging the 0,05% statistical possibility that they may develop clinical disorder gender dysphoria at some point during their childhood.
48. Once a child with persistent gender dysphoria reaches the age of majority and legally becomes an adult – and after having undergone medical transition – he/she can apply to have his/her identification marker changed in terms of existing legislation.
49. In order to improve the draft Policy, we make the following **drafting proposal**<sup>17</sup> –
  - Only identify children according to their objectively observable and scientifically verifiable traits – i.e. as either male or female.

## F. PROPOSALS

50. It is essential – and not discriminatory – to ground public policy and in this instance specifically, the public identification system, in objective, scientific facts, and not on subjective internal identities, ideological, or political preferences. To do otherwise, would thwart the purpose of the draft Policy – it would make accurate and effective public identification more difficult, if not unachievable.
51. In light of the above, we set out our primary and alternative proposals in respect of the structure of an ID numbers, below.

### ***PRIMARY Proposal –***

#### ***Retain biological sex/gender as the basis for identification, rather than subjective internal gender identity***

52. Human biology/physiology (biological characteristics) is the most reliable known basis for accurate and effective public identification. Medical science confirms that biological sex is a fixed constant identifying feature of human identity,<sup>18</sup> and biological sex characteristics or differences between males and females<sup>19</sup> are objectively observable, uncontroversial, and scientifically accurate – and will provide the draft Policy with the necessary objective foundation.
53. Where persons' decisions and actions in relation to their subjective internal gender identities/gender incongruence translates into permanent changes in objectively observable

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<sup>17</sup> Our proposals are summarised in “Annexure A” hereto.

<sup>18</sup> A person's DNA – established and fixed at conception – is coded either male or female and determines their biological/physiological characteristics (and their bodies will produce either male or female cells).

<sup>19</sup> Phenotypic expression of the human genotype.

physiological characteristics (by way of medical transition), acknowledging such change for public identification purposes in terms of existing legislation could be justified on public policy grounds.

**Alternative Proposal ONE:**

***Use of random, unique identity numbers that are not linked to or founded on a person's sex, date of birth, place of birth or any other marker***<sup>20</sup>

54. This approach would recognise that South Africa is a pluralistic society consisting of a wide array of ideological communities who attach varying levels of importance and significance to different factors and features providing meaning and substance to their identities. Although biological sex differences are reliable and effective for purposes of public identification, if the use of these objectively observable identifying features present insurmountable difficulties for certain segments of society, the best way forward would be to do away with sex/gender as identifiers for purposes of public identification.

**Alternative Proposal TWO:**

***Using two personal identification markers:***

***One for objective biological sex and one for subjective gender identity/gender expression***

55. This approach could provide an alternative to reach a compromise between proponents of objective facts (observable traits) and subjective internal identities, even though subjective identities, which are based in either pathology (gender dysphoria) or radical gender ideology, do not constitute a justifiable public policy rationale for purposes of official identity management/public identification.
56. South Africa is a constitutional democracy and multicultural society that celebrates diversity.<sup>21</sup> This second alternative proposal would acknowledge and permit the simultaneous existence of

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<sup>20</sup> See item ix. on page 36, the first bulleted item under item vi. on page 39, and item vii. on page 40 of the draft Policy.

<sup>21</sup> In the Constitutional Court's judgment in [Minister of Home Affairs and Another v Fourie and Another \(CCT 60/04\) \[2005\] ZACC 19; 2006 \(3\) BCLR 355 \(CC\); 2006 \(1\) SA 524 \(CC\) \(1 December 2005\)](#), the court held that:

***"[95] The hallmark of an open and democratic society is its capacity to accommodate and manage difference of intensely-held world views and lifestyles in a reasonable and fair manner. The objective of the Constitution is to allow different concepts about the nature of human existence to inhabit the same public realm, and to do so in a manner that is not mutually destructive and that at the same time enables government to function in a way that shows equal concern and respect for all."***

The above pronouncement from the Constitutional Court offers much needed perspective and guidance on the importance of, and constitutional obligation to show equal concern and respect for and treatment of all (even though doing so perfectly is near impossible). One of the main challenges for any society, community, and institution that seeks to accommodate diversity, is to do so in a manner that is contextually appropriate and

different belief systems and ideologies – which in some instances take categorically and conceptually distinct, and even conflicting, views on human identity and identification. It would also affirm the fundamental rights of all groups to freedom of expression<sup>22</sup> and freedom of religion,<sup>23</sup> showing equal concern and respect for all views, beliefs, and cultures.

57. This approach also provides public health and safety benefits. Advances in medical science are making a strong case for the general benefits of – and in some instances, absolute need for – sex specific medicine and patient care.<sup>24</sup> As an example, in the event that a medically transitioned transgender person arrives at a hospital emergency room in an unconscious state, it could have life-saving consequences if attending staff, by looking at his/her identity document/card, are able to ascertain at the earliest possible moment in time that the person’s biological sex is either male or female, but their gender expression is the opposite (by virtue of having undergone medical transition).
58. A successful public identification policy enables the state and members of society to identify persons accurately and effectively – by relying on objective traits to confirm identity. Requiring two identity markers, will enable the draft Policy to achieve this purpose.

## G. CONCLUSION

59. In conclusion, we reiterate the necessity of grounding public identification policy in objective, scientific facts – and not in subjective internal identities that are not objectively observable and contradict observable physiological characteristics. It is furthermore important for the state to remain ideologically neutral or at least unbiased. We also stress the importance of upholding the best interests of the child.
60. We trust that the above submissions are of assistance to the DHA and look forward to your response thereto (if any) in due course.
61. CFJ remains at the DHA’s disposal to assist in the further development and/or amendment of the draft Policy to ensure it effectively achieves its intended purposes and does not harm children.

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gives due weight to the diverse interests represented without exchanging reasonable and fair accommodation and showing equal concern and respect for all, for special or preferential treatment/favouritism and the effective destruction of certain concepts about the nature of human existence in the process of elevating certain others.

<sup>22</sup> Section 16 of the Constitution.

<sup>23</sup> Section 15 of the Constitution.

<sup>24</sup> Prof Franck Mauvais-Jarvis, MD PhD (and others). [Sex and Gender: Modifiers of Health, Disease, and Medicine](#) in “Lancet”. Volume 396, Issue 10250 at p 565 to 582. Date: 22 August 2020.

Vera Regitz-Zagrosek, MD PhD. [Sex and Gender Differences](#) in “Health in Science and Society Series on Sex and Science”. Volume 13, Issue 7 at p 596 to 603. Date: July 2012.

Alyson J. McGregor, MD. [When It Comes to Health, Gender Matters](#) in “Lifespan: Delivering Health with Care”. Date: 20 September 2019.

Yours faithfully,

**Liesl Pretorius**  
***Legal Advisor: Law and Policy***

**Ryan Smit**  
***Director: Law and Policy***

**CFJ PROPOSALS to the DRAFT OFFICIAL IDENTITY MANAGEMENT POLICY**

**A. Proposal in respect of ID numbers:**

**1. Primary Proposal:**

- Retain biological sex/gender as the basis for identification, rather than subjective internal gender identity.

**2. Alternative Proposal One:**

- Use random, unique identity numbers that are not linked to or founded on a person's sex, date of birth, place of birth or any other marker.

**3. Alternative Proposal Two:**

- Use two personal identification markers: One for objective biological sex and one for subjective gender identity/gender expression.

**B. Proposal in respect of identification of children (best interest of children):**

Only identify children according to their objectively observable and scientifically verifiable traits – i.e. as either male or female.

**C. Drafting Proposals in respect of the content of the draft Policy:**

- Amend the definition of “sex” to read as follows: “Sex” refers to the human sex chromosome – either male (XY) or female (XX), including intersex.
- Remove the terms “assigned sex” from the Glossary, and replace all references to it, as well as to “assigned sex”, or “sex ... assigned at birth” with “sex” throughout the draft Policy.
- Amend the definition of “gender” as follows: “Gender” means the socially constructed roles, behaviours, activities, and attributes that a given society or culture considers appropriate for boys and men, or girls and women.
- Amend the definition of “gender identity” as follows: “Gender identity” means a person's perception and internal sense of their gender, which may or may not correspond to their (biological) sex.

- Remove the term “non-binary person” from the Glossary, and replace all other references thereto with “medically transitioned transgender person” throughout the draft Policy.
- Amend the definition of “transgender” as follows: “Transgender” means a person whose gender identity does not correspond to his or her biological sex.
- Remove the second paragraph on page 16 of the draft Policy.
- Remove the last three sentences in paragraph 2 on page 35 and replace it with the following wording:

“Whereas gender is a binary attribute (male/man and female/woman), if an individual medically transitions to reflect physiological characteristics of the biological sex associated with their “trans” gender identity, the ID system should be updated.”

- Remove Items vii. and viii. on page 36.
- Remove the last sentence of the second bulleted item on page 40.
- Replace the reference to “transgender persons” in the third bulleted item on page 40 with “medically transitioned transgender persons”.
- Redraft the contents of the fourth bulleted item on page 40.