



Submission to the United Nations Universal Periodic Review (4th Cycle) on the Experiences of Trans and Gender Diverse People in South Africa

State under Review: South Africa

Jointly Submitted by Gender Dynamix, Iranti, Triangle Project, Women's Legal Centre and Legal Resources Centre

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I. Introduction

1. This submission is presented for consideration as part of the Universal Periodic Review (UPR) 4th Cycle Stakeholder Report to the United Nations Human Rights Council on behalf of Gender Dynamix, Iranti, Triangle Project, Women's Legal Centre and Legal Resources Centre.
2. It focuses on the plight of transgender and gender diverse persons in South Africa seeking to have their rights respected, protected, and fulfilled. The submission is based on first-hand information obtained by these organisations in their work with transgender and gender diverse persons.
3. The submitting organisations believe that the challenges faced by transgender and gender diverse persons in South Africa are not adequately addressed in the national reports of South Africa and in the UPR in general. This submission provides further information to ensure that the review of South Africa is inclusive and cognisant of the rights and challenges faced by transgender and gender diverse persons.

II. Introduction to the authors of the submission

4. **Gender Dynamix (GDX)** is the first registered trans and gender diverse-led organisation in Africa that specifically focuses on advancing, promoting, and securing the human rights of trans and gender diverse persons in Southern Africa. The organisation's four strategic priority areas include: legal gender recognition based on self-determination; accessible gender affirming healthcare; inclusive quality education; and regional movement strengthening. GDX's

strategic drivers include advocacy and research, capacity enhancement, facilitating community access to direct services and organisational development. The organisation has a track record spanning 15 years. We firmly believe that positive change for trans and gender diverse persons is only possible through the development and maintenance of multidisciplinary and intersectoral partnerships. The organisation, therefore, partners with diverse stakeholders to bring about positive change. Website: <https://www.genderdynamix.org.za>

Iranti is a Johannesburg-based media-advocacy organisation which advocates for the rights of LGBTI+ persons, with specific focus on lesbian, transgender (including gender non-conforming) and intersex persons in Africa. Iranti works within a human rights framework raising issues on gender identities, and sexuality, through the strategic use of multimedia storytelling, research, and activism. Iranti is an organisation by and for trans, lesbian and intersex persons and was formed with the clear intention of building strategic partnerships and movements that use media as a key platform for critical engagement, mobilisation, capacity development, reframing of perceptions, and advocacy interventions across Africa. Iranti works at country, regional (Africa) and international levels. Website: <https://www.iranti.org.za>

Triangle Project is a non-profit human rights organisation offering professional services to ensure the full realisation of constitutional and human rights for lesbian, gay, bisexual, transgender, queer, intersex, plus (LGBTQI+) persons, their partners, and families. Our three-core services centre around Health and Support, Community Engagement and Empowerment, and Research and Advocacy. We offer a wide range of services to LGBTQI+ communities. These include sexual health clinical care, a needle and syringe programme, nutrition support, counselling, support groups, a helpline, public education and training services, solidarity spaces, community outreach, and court support to survivors of hate crimes. This submission falls within our Research, Advocacy and Policy Programme that works to advance the inclusion and protection of the human rights to sexual orientation, gender identity, gender expression and sex characteristics (SOGIESC) within South African legislation, policy, and practices.

Website:

<http://triangle.org.za/>

The **Women’s Legal Centre** (“The WLC”) is an African feminist legal centre that advances women’s rights and equality through strategic litigation, advocacy, education, and training. We aim to develop feminist jurisprudence that recognises and advances women’s rights. The Centre drives a feminist agenda that appreciates the impact that discrimination has on women within their different classes, race, ethnicity, sexual orientation, gender identity and disability. The Centre does its work across five programmatic areas including the right to be free from violence, women’s rights in relationships, and women’s rights to land, housing property and tenure security, women’s sexual and reproductive health rights and women’s rights to work and at conditions of work. Website: www.wlce.co.za

The **Legal Resources Centre** (“The LRC”) is a public interest, non-profit law clinic in South Africa that was founded in 1979. The LRC has since its inception shown a commitment to work towards a fully democratic society underpinned by respect for the rule of law and constitutional democracy. The LRC uses the law as an instrument for justice to facilitate the vulnerable and marginalised to assert and develop their rights; promote gender and racial equality and oppose all forms of unfair discrimination; as well as to contribute to the development of human rights jurisprudence and to the social and economic transformation of society. Website: www.lrc.org.za

III. Security of trans and gender diverse persons

5. South Africa accepted 12 recommendations focused on ensuring the protection of vulnerable groups, including LGBTI people, in the 2016 Universal Periodic Review, as contained in the report of the working group on the Universal Periodic Review of South Africa presented in the 3rd Cycle.¹ South Africa promised to take concrete steps to protect LGBTI people from stigma, harassment, and discrimination, including developing and implementing policies and plans to eliminate all forms of stereotypes and combat hate crimes. However, since its last review, the situation of trans and gender diverse people in South Africa has deteriorated, as trans and gender diverse people face the most discrimination and hate crime.
6. We acknowledge the effort from the Department of Justice and Constitutional Development (DOJCD) to improve coordination between government and civil society in combating violence.² However, there have been a number of killings and hate crime cases targeting members of LGBTIQ+ communities. These have resulted in the deaths of gender and sexual minorities, infringing on their inalienable and non-derogable right to life.
7. **Fatal Violence cases:**³ In 2021 alone, over 15 LGBTIQ+ persons were killed. [Anele Bhengu](#) was discovered along the roadside in Kwamakhutha, Kwazulu-Natal, [Bonang Gaelae's](#) throat was slashed in Sebokeng, [Nonhlanha Kunene's](#) body was found half naked in Edendale Pietermaritzburg, [Sphamandla Khoza](#) was beaten, stabbed and his throat slit in Kwamashu Durban, [Nathaniel](#)

¹ Report of the Working Group on the Universal Periodic Review assessed <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G17/272/57/PDF/G1727257.pdf?OpenElement>.

² <https://www.hrw.org/world-report/2019/country-chapters/south-africa>

³ Cases cited here are LGBTIQ+ cases in general as it is difficult to acquire trans-specific statistics because of the cis-binary framework of recording and reporting cases. Violence cases against transgender persons, in particular, most of the time go misreported in statistics for gay and lesbians.

[Spokgoane Mbele](#) was stabbed in the chest in Tshirela Vanderbijipark, [Khulekani Gomazi](#) was beaten to death in Mpophomeni in Kwazulu- Natal, [Andile Lulu Nthuthela](#) was mutilated and burnt in KwaNobuhl, Kariega, [Lonwabo Jack](#)'s body found on a pavement in Nyanga Cape Town, Lucky [Kleinboy Motshabi](#)'s stabbed and wounded body was found in a field in Dennilton Limpopo, [Phelokazi Mgathana](#) was stabbed to death in Khayelitsha, Cape town, [Lindokuhle Mapu](#) was stabbed to death in Mfuleni, Cape Town , [Aubrey Boshoga](#)'s body was dumped outside his house in Johannesburg. A few of these atrocities make it into the media, yet most go unreported or undocumented. In 2022, [Pinty Shongwe](#) was stabbed to death by a man who harassed her with unwanted advances. Nongezi Methani was killed and dumped.

8. The reflection of fatal violence cases demonstrates that violence against trans and gender diverse people is a countrywide problem, yet the government continues to offer no concrete action plan to address the crisis and insecurities that trans and gender diverse people face. In a UPR focus group conducted with trans, nonbinary and gender diverse community members on 9 March 2022, multiple participants for instance felt that the LGBTQI+ National Task Team (NTT) coordinated by the DOJCD to address transphobic, homophobic and intersexphobic hate crime and discrimination, is problematic since most of them were not aware of it, do not see effective implementation and monitoring of policies to address violence, discrimination and inequality, and therefore question the value of the NTT in its current form. Participants said that the DOJCD has the power and the money to do anything they want, but is not using this to address the needs of LGBTQI+ people.⁴
9. In a survey conducted by the Other Foundation, half a million South Africans expressed having physically harmed women who dressed and behaved 'like men' in public, 24000 have beaten up men who dressed 'like women', 700,000 have verbally abused gender diverse persons.⁵ *'A staggering four out of ten*

⁴ Triangle Project Report on a UPR Focus Group with Trans, Nonbinary and Gender Diverse Persons, conducted on 9 March 2022.

⁵ Progressive Prudes: A survey of attitudes towards homosexuality & gender non-conformity in South Africa, pg 33, accessed http://theotherfoundation.org/wp-content/uploads/2016/09/ProgPrudes_Report_d5.pdf.

*LGBT South Africans know of someone who has been murdered "for being or suspected of being" lesbian, gay, bisexual or transgender.*⁶ These statistics reflect a very toxic and violent environment for trans and gender diverse persons. Due to their gender expression, trans and gender diverse persons are exposed to a wide range of violence and insecurities.

10. Transgender women who are unhoused ('homeless') and sex workers are often arrested and discriminated against by law enforcement officers on the basis of being trans and 'different'. A focus group participant recounted an incident where members of the SistaazHood⁷ community were forced to strip naked in a public space by police officers, who performed cavity searches on them and went as far as fisting them. This violence and abuse made them afraid of reporting cases to the police. They are also reluctant to open criminal cases because they are subjected to secondary victimisation and judgement at the police stations. A trans woman said that she is often harassed by the police with comments such as why are they wearing a bra or feminine clothing even though they are 'males'. Participants stated that when police officers strip their shelters, they take everything, including government-issued identity documents (ID)s, which means that unhoused trans people must reapply for their ID whilst being houseless and unemployed.⁸
11. South Africa still criminalises sex work,⁹ which is a violation of people's constitutionally guaranteed freedom of control over their bodies.¹⁰ Trans and gender diverse sex workers have continued to be exposed to violence from police where sex workers report routine police violence, including sexual assault, beatings, use of rubber bullets, and pepper-spray sprayed into sex workers'

⁶ M Morris, 'LGBT community still face high level of violence- Report', accessed <https://www.news24.com/news24/Analysis/lgbt-community-still-faces-high-levels-of-violence-report-20171204>

⁷ Sistaazhood is a community of trans women sex workers based in Cape Town, South Africa, <https://supportistaazhood.org/>

⁸ Triangle Project Report on a UPR Focus Group with Trans, Nonbinary and Gender Diverse Persons, conducted on 9 March 2022.

⁹ Section 20(1)(a) of the Sexual Offences (previously immoralityAct) 23 of 1957, accessed https://www.gov.za/sites/default/files/gcis_document/201505/act-23-1957.pdf

¹⁰ Article 12(2)(b) of the Constitution of the Republic of South Africa 1996.

genitals.¹¹

12. The criminalization of sex work and drug use exposes trans and gender diverse people who are sex workers and/or who use drugs to extreme and repeated police violence, extortion, and detention, which leave them feeling constantly threatened. The legislation that criminalises sex work and drug use leaves trans and gender diverse sex workers and people who use drugs unprotected from their perpetrators, subject them to multiple forms of stigmatisation and ostracisation from society, deprives them of livelihoods, safe working environments and access to health services, prevents their access to equal legal protection and fosters a climate of impunity that encourages further violence and discrimination against sex workers.

Recommendations to the Government of South Africa

- § **Enact and implement legislation, policies and practices in line with the Yogyakarta Principles Plus 10, Principle 31,¹² that would remove all gender marker options from identity documents. If and where gender markers are retained in government systems, include a third gender-neutral option (X) alongside the binary female and male gender marker options. Ensure gender markers are kept confidential. Ensure that all persons, and particularly trans, nonbinary, gender diverse and intersex people can quickly and easily change their gender marker to any of these three options (F, M, X) based on gender self-determination¹³ and simple self-declaration, and without any external requirements such as reports by medical, mental health, social work or other practitioners.**
- § **Ensure that collection of data on people's gender only takes place confidentially and where legitimately required, in particular to further the realisation of human rights, justice and access to services of**

¹¹ Anna L Crago & Jayne Arnott, 'Rights Not Rescue': A Report on Female, Trans and Male Sex Workers' Human Rights in Botswana, Namibia & South Africa, accessed https://www.opensocietyfoundations.org/uploads/b8bcb899-0ed2-425c-b5ad-acea33c4dc77/summary_20081114.pdf

¹² Yogyakarta Principles Plus 10, Principle 31, <https://yogyakartaprinciples.org/principle-31-yp10/>.

¹³ Liberty Matthyse et al. 2020. 'Keeping the Promise of Dignity and Freedom for All: A Position Paper on Legal Gender Recognition in South Africa', Gender DynamiX and Legal Resources Centre, accessed <https://lrc.org.za/wp-content/uploads/Position-paper-on-legal-gender-recognition.pdf>

marginalised groups. Where gender data is collected, such as in the national census, healthcare provision and hate crime statistics, segregate data to show trans and gender diverse-specific needs and human rights violations for improved national programme interventions geared toward trans and gender diverse people.

- § Establish strong avenues that prevent, investigate, and adequately punish all threats, attacks, discrimination and intimidation against trans and gender diverse people, including when such violence is committed by members of the police and government officials.**
- § Fully decriminalise sex work in order to ensure the safety and security of trans and gender diverse sex workers.**
- § Decriminalise drug use and implement harm reduction approaches to protect the human rights of trans and gender diverse people who use drugs and ensure their access to healthcare and other services.**
- § Ensure that bylaws do not criminalise or victimise unhoused people, including unhoused trans and gender diverse people.**
- § Pass and effectively implement the legislation on Prevention and Combating of Hate Crime and Hate Speech.**

IV. Equality and Non-Discrimination

13. Due to the deeply socially conservative landscape shaped by colonialist and apartheid legacies, the lived realities of diverse gender identities and gender expressions are regarded as "un-African." The majority of South Africans are still deeply ingrained in the social fabric of cisnormativity. Despite having the most progressive laws for gender and sexual minorities in the region, South Africa's public discourse and attitudes toward trans and gender diverse people have not changed.¹⁴
14. After the 27th session, South Africa agreed to develop policies, plans and information campaigns to eliminate stereotypes and discrimination against people based on their sexual orientation and gender identity at all levels, with a

¹⁴ Hate Crimes against Lesbian, Gay, Bisexual and Transgender (LGBT) people in South Africa, 2016 accessed <https://www.out.org.za/index.php/library/reports>.

special emphasis on public officials and those in charge of law enforcement.¹⁵ However, over the last five years, trans and gender diverse people have continued to be subjected to systematic discrimination and inequality, which not only deprives them of their inalienable rights and freedoms, but also increases their risk of poverty, HIV infection and other health-related problems, as well as their access to rights such as legal citizenship and education.

15. There have been documented inequalities and discrimination aimed at trans and gender diverse people by police and other statutory bodies in charge of protecting these rights. Many trans and gender diverse people report that dealing with police and navigating the criminal justice system have left them frustrated and depressed, rather than assisting them in obtaining justice and redress. Transgender people face additional challenges in obtaining legal protection from law enforcement, and they are frequently subjected to secondary victimization by police. For example, a trans woman who got an interdict against her father-in-law because of abuse was told by police that she was born a male, so why can't she deal with her father-in-law "man to man". Such incidents make trans and gender diverse people reluctant to approach government officials for help. Training of officials is not effective if it fails to change officials' transphobic and homophobic beliefs.¹⁶
16. South Africa's separate marriage laws for heterosexual and same-gender couples cause human rights violations for trans and gender diverse people who married under the heterosexual Marriage Act and then changed/want to change their gender markers. Couples have been forced to divorce and re-marry under the Civil Union Act 17 of 2006, or their marriages were unilaterally dissolved by Home Affairs, and/or they had difficulty obtaining accurate marriage certificates with their amended details.¹⁷

¹⁵ 139.98 of the UPR recommendations to South Africa.

¹⁶ Triangle Project Report on a UPR Focus Group with Trans, Nonbinary and Gender Diverse Persons, conducted on 9 March 2022.

¹⁷ Gender DynamiX & Legal Resource Centre. 2015. *Briefing Paper: Alteration of Sex Description and Sex Status Act, No. 49 of 2003*. Cape Town: Gender DynamiX & Legal Resources Centre, https://drive.google.com/file/d/1xvXcmoa5OZ1gsrzMk-z7JbCvd_T0zz5W/view

17. Due to the general risk of discrimination, trans and gender individuals continue to conceal their gender identity at work.¹⁸ In South Africa, trans and gender diverse persons face high levels of unemployment, harassment, bullying and discrimination in the workplace.¹⁹ Their employment is sometimes unlawfully terminated, but most end up resigning due to the discrimination they face.
18. Trans and gender diverse people continue to face pervasive discrimination in healthcare and to be insulted by healthcare providers,²⁰ including in public health facilities.²¹ The National Health Act 61 of 2003²² and National Health Insurance Policy²³ do not include trans and gender diverse persons as vulnerable groups, making it difficult to attain universal health coverage for trans and gender diverse persons. Healthcare professionals frequently misgender trans and gender diverse persons, refuse treatment or make derogatory comments that create an unwelcoming environment for trans and gender diverse persons.
19. When attempting to change their legal sex description, trans and gender diverse people face legislative and administrative barriers, as well as discrimination. The Alteration of Sex Description and Sex Act 49 of 2003, as a legal framework, is associated with a number of human rights violations that limit trans and gender diverse people's access to legal gender recognition; for example, the Act pathologizes trans and gender diverse identities by enforcing discriminatory

¹⁸ Transgender Troubles in the South African Work place' careers24 accessed <https://careeradvice.careers24.com/career-advice/recruiting/transgender-trans-south-africa-workplace-advice-20160318>.

¹⁹ Sowetan live 'Transgender employees face high rates of workplace harassment' accessed <https://www.sowetanlive.co.za/news/south-africa/2021-08-26-transgender-employees-face-high-rates-of-workplace-harassment/>

²⁰ Müller A, Daskilewicz K & Southern and East African Research Collective on Health 'Are We Doing Alright? Realities of Violence, Mental Health, and Access to Healthcare Related to Sexual Orientation and Gender Identity and Expression in East and Southern Africa: Research Report Based on a Community-Led Study in Nine Countries.' (2019) accessed https://out.org.za/wp-content/uploads/2022/02/SOGIE-and-wellbeing_07_South-Africa.pdf

²¹ Mampane, J.N., 2019. Community Participation in the National Development Plan Through Primary Health Care: The Case of LGBT Organizations in South Africa. In Human Rights, Public Values, and Leadership in Healthcare Policy (pp. 160-178). IGI Global. <https://www.igi-global.com/chapter/community-participation-in-the-national-development-plan-through-primary-health-care/217260> .

²² National Health Act, No. 61 of 2003. https://www.saflii.org/za/legis/consol_act/nha2003147/

²³ National Department of Health. 2017. National Health Insurance Policy: Towards Universal Health Coverage. Government Notice No. 627 of 2017. Government Gazette, 30 June 2017, No.40955. https://www.gov.za/sites/default/files/gcis_document/201707/40955gon627.pdf

medical requirements and puts it out of reach of the majority who do not have access to gender-affirming healthcare.²⁴

20. Transgender persons in incarceration still continuously face discrimination and inequalities in gender-segregated detention facilities because their gender identity and/or gender expression differs from the gender assigned at birth. Standard Operating Procedures and a Training Manual were developed by the Department of Correctional Services (DCS) subsequent to the September vs Subramoney judgment²⁵ to address the human rights and needs of trans and LGBTI persons. However, civil society has not been consulted in their development, the judgment has not been implemented and trans people still face systemic violations in correctional settings, including denial of access to high-quality healthcare, especially gender-affirming healthcare.

Recommendations to the government of South Africa

- § **Ensure that current criminal laws are amended to include provisions of aggravated circumstances for crimes motivated by hatred and prejudice against transgender and gender diverse people.**
- § **Ensure that trans and gender diverse persons have access and gain trust in the criminal justice system by conducting timely, thorough, impartial, and serious investigations into violence, securing prosecutions, and eliminating secondary victimization. Ensure that criminal justice mechanisms protect trans and gender diverse people's right to privacy and identity.**
- § **Adopt gender-affirming policies on the management and care of transgender detainees in consultation with trans and gender diverse persons. These policies should codify obligations and expectations related to the custody and care of transgender and gender diverse detainees.**

²⁴ Liberty Matthyse et al. 2020. 'Keeping the Promise of Dignity and Freedom for All: A position paper on Legal Gender Recognition in South Africa', Gender Dynamix and Legal Resources Centre, accessed <https://lrc.org.za/wp-content/uploads/Position-paper-on-legal-gender-recognition.pdf>.

²⁵ September v Subramoney NO and Others (EC10/2016) [2019] ZAEQC 4; [2019] 4 All SA 927 (WCC) (23 September 2019), <http://www.saflii.org/za/cases/ZAEQC/2019/4.html>

- § Invest more funds in training and educating correctional staff on the best practices for custody and care of transgender and gender diverse prisoners and understanding the salience of gender identity.
- § Ensure sensitisation and training of all government staff on trans and gender diverse people's rights to gender identity and gender expression, and ensure effective mechanisms to address violations.
- § The unemployment rate among trans and gender diverse persons must be addressed, among others through being appointed in government departments and offices where they can ensure sensitisation of officials, monitor and advance the protection of trans and gender diverse rights, and escalate action to address violations.²⁶
- § Repeal the Alteration of Sex Description and Sex Status Act 49 of 2003 (Act 49) and develop new gender recognition legislation that is in line with the Yogyakarta Principles,²⁷ international human rights principles and best practices, of using a gender self-determination and self-identification model.²⁸

V. Access to Education

Rights of Trans and Gender Diverse Children to Access Basic Education

Recommendation 139.172; 139.175; 139.183; 139.98

21. The Constitution of the Republic of South Africa, 1996 (Constitution) guarantees the right to basic education for all under Section 29(1)(a). Read together with the prohibition of discrimination based on gender, sex, and sexual orientation under Section 9, this means that learners may not be discriminated against based on

²⁶ Triangle Project Report on a UPR Focus Group with Trans, Nonbinary and Gender Diverse Persons, conducted on 9 March 2022.

²⁷ Yogyakarta Principles Plus 10, Principle 31, <https://yogyakartaprinciples.org/principle-31-yp10/>.

²⁸ Liberty Matthyse et al. 2020. 'Keeping the Promise of Dignity and Freedom for All: A Position Paper on Legal Gender Recognition in South Africa', Gender DynamiX and Legal Resources Centre, accessed <https://lrc.org.za/wp-content/uploads/Position-paper-on-legal-gender-recognition.pdf>

- their gender identity or gender expression.
22. Education is a basic human right because of the role it plays in one's life. It helps to nurture human personality, feelings, thoughts and access to opportunities. Exercising other human rights is made possible through access to education. Hence education is understood as a basic fundamental human right. The right to education has been reaffirmed in a number of human rights treaty bodies that South Africa has ratified, namely the International Convention on Economic and Cultural Rights (Article 13), Covenant on the Elimination of All Forms of Racial Discrimination (article 5), Universal Declaration of Human Rights (article 26), Convention on the Rights of a Child (article 28), Convention on the Elimination of All Forms of Discrimination against Women (Article 10), Convention on the Rights of Persons with Disabilities (Article 24) and Convention on Civil and Political Rights (article 18).
 23. Trans and gender diverse learners face an incalculable amount of barriers such as transphobic attitudes, cis-centric school policies, codes of conduct, school practices as well as cisnormative national curricula that prevent them from accessing quality basic and higher education in the country.
 24. Despite South Africa's ratification of the above treaties, the reality is that trans and gender diverse learners face discrimination and prejudice on a daily basis.²⁹ *Mphela and Others v Manamela and Another*³⁰ shows how trans and gender diverse learners are mistreated, not only by their peers but by educators as well. As a result of the bullying and discrimination she experienced for wearing the school uniform corresponding to her gender, Mphela did not complete her education.³¹ More recently, media reports centred around the discrimination experienced by a transgender boy in high school who was forced to wear a girl's uniform. The learner was sent home from school and was told not to return

²⁹ Continued Discrimination in Western Cape Public and Private Schools against LGBTQI+ Learners based on their Sexual Orientation, Gender Identity, Gender Expression and/or Sex Characteristics (SOGIESC). Open letter by civil society organisations, parents and learners to the Western Cape Education Department (WCED), 9 July 2021. <https://triangle.org.za/wp-content/uploads/2021/07/TP-LRC-et-al-2021-July-Open-Letter-to-WCED-Discrimination-against-LGBTQI-learners-in-schools-based-on-SOGIESC.pdf>

³⁰ *Mphela v Manamela and others* (2016) case no1/2016 Seshego Magistrates Court (Equality Court).

³¹ Botha, Kellyn. 2017. Victory for transgender learner in Limpopo a long time coming? *Daily Maverick*, 24 Mar 2017 <https://www.dailymaverick.co.za/article/2017-03-24-victory-for-transgender-learner-in-limpopo-a-long-time-coming/>

unless they wore the uniform corresponding to their sex assigned at birth.^{32 33} Focus group participants said they were bullied and verbally harassed at school and at home for being trans, the school system fails them and accountability and inspection of schools are not working to protect them.³⁴

25. These examples are only snippets of the experiences of trans and gender diverse learners. In advocating for the right to education of trans and gender diverse learners, we have found that the Department of Basic Education (DBE) does not include bullying or discrimination against learners based on their sexual orientation or gender identity (SOGI) as a category of learners who are forced out of school. Although it is assumed that there are learners who are forced out of school as a result of bullying or discrimination based on their SOGI, there are no statistics available. As such, it is near-impossible to concretise the impact on these learners. As part of the measures to be taken to decrease the level of 'dropouts' (Recommendation 139.183), the DBE, together with Statistics South Africa (STATSSA), should include bullying or discrimination based on SOGI as a category in their questionnaire on why learners leave school early before completing their education and publish this information.
26. In speaking broadly to Recommendations 139.98, 139.175, and 139.183, it should be noted that South Africa has no legislation or policy aimed at ensuring equal access to education for trans and gender diverse learners and eradicating discrimination against them at school. The Department of Basic Education (DBE) Social Inclusion in Education Working Group (SliEWG) has developed long overdue draft national guidelines for the socio-educational inclusion of diverse sexual orientations, gender identities, expressions and sex characteristics (SOGIESC) in schools. These guidelines are currently going through DBE approval processes and are to be presented at the DBE Broad Management Meeting on 31 March 2022. The Western Cape Education Department (WCED)

³² C Thomas 'Strand: Transgender seun verbied om seununiform te dra', *Die Burger*, 23 Junie 2021, <https://www.netwerk24.com/netwerk24/Nuus/Onderwys/strand-transgender-seun-verbied-om-seununiform-te-dra-20210622>.

³³ P Govender "'All for a piece of clothing": School puts trans boy through the wringer', *Sunday Times*, 19 July 2021, <https://www.timeslive.co.za/sunday-times-daily/news/2021-07-19-all-for-a-piece-of-clothing-school-puts-trans-boy-through-the-wringer/>.

³⁴ Triangle Project Report on a UPR Focus Group with Trans, Nonbinary and Gender Diverse Persons, conducted on 9 March 2022.

is the only province that has drafted guidelines in this respect.³⁵ Although these guidelines were published in 2020, they have not been finalised and implemented. To date, they have also not incorporated important civil society comments on the guidelines, its implementation is optional (not binding) for schools and it has certain problematic clauses and statements.^{36 37 38}

27. Recommendation 139.172 indicates that the state should ensure the inclusion of comprehensive sexuality education (CSE) in the school curriculum. In 2016, the DBE piloted CSE, which aims to educate learners on a range of topics, including SOGIE and sexual and reproductive health in an age-appropriate manner.³⁹ As of 2020, the pilot was conducted in 1572 schools across 4 provinces.⁴⁰ There has been little feedback on its successes and failures, and the DBE has not approved CSE to be included in the national curriculum.
28. Ultimately, trans and gender diverse learners will only fully enjoy the right to education if the state takes concrete and targeted steps in not only adopting legislation and policy that explicitly protect these learners, but also ensuring that it is implemented at every public and private school through appropriate sensitivity training to staff and learners and effective accountability mechanisms for human rights violations.

³⁵ Province of the Western Cape: Provincial Gazette Extraordinary 8223 (23 March 2020) available at: https://static.pmg.org.za/prov-gazette-Extra_8223-Extra-Draft-Gender-Identity-2020.pdf.

³⁶ Triangle Project, Legal Resources Centre, Women’s Legal Centre & Lawyers for Human Rights. (2020, 16 October). Oral Submission on Draft Guidelines on Gender Identity and Sexual Orientation in Public Schools of the Western Cape Education Department. <https://triangle.org.za/wp-content/uploads/2020/10/TP-LRC-WLC-LHR-2020-Oral-Submission-Draft-Guidelines-on-Gender-Identity-and-Sexual-Orientation-in-Public-Schools-Western-Cape-Education-Department.pdf>

³⁷ Legal Resources Centre, Triangle Project, Women’s Legal Centre & Lawyers for Human Rights. (2020, 19 June). Submission to the Western Cape Education Department on Draft Guidelines on Gender Identity and Sexual Orientation in Public Schools of the Western Cape Education Department. <https://triangle.org.za/wp-content/uploads/2020/06/LRC-TP-WLC-LHR-2020-June-SOGIESC-Submission-on-WCED-Draft-Guidelines-on-Gender-Identity-Sexual-Orientation-in-Public-Schools.pdf>

³⁸ Continued Discrimination in Western Cape Public and Private Schools against LGBTQI+ Learners based on their Sexual Orientation, Gender Identity, Gender Expression and/or Sex Characteristics (SOGIESC). Open letter by civil society organisations, parents and learners to the Western Cape Education Department (WCED), 9 July 2021. <https://triangle.org.za/wp-content/uploads/2021/07/TP-LRC-et-al-2021-July-Open-Letter-to-WCED-Discrimination-against-LGBTQI-learners-in-schools-based-on-SOGIESC.pdf>

³⁹ Department of Basic Education “Comprehensive Sexuality Education” available at: <https://www.education.gov.za/Home/ComprehensiveSexualityEducation.aspx>.

⁴⁰ Question NW1969 to the Minister of Basic Education (1 September 2020) available at: <https://pmg.org.za/committee-question/14490/>

Rights of Trans and Gender Diverse Students to Access Higher Education

29. Article 1 of the UNESCO Convention against Discrimination in Education prohibits discrimination in educational institutions irrespective of the level or standard of education. The Higher Education Act 101 of 1997 recognises the need to redress past discrimination, ensure representivity, equal access to higher education, promote the values which underlie an open and democratic society based on human dignity, equality, and freedom. Trans and gender diverse students in South Africa experience hate speech and bullying. In preliminary findings of a study carried out in 9 universities by Gender Dynamix and the Human Science Research Council, trans and gender diverse students have reported being forced out of tertiary education institutions due to the abuse they experienced based on their gender identity and sexual orientation.
30. Tertiary institutions provide health services to students, but in the context of South African universities, the services are not inclusive for trans and gender diverse students. The exclusiveness derives from university policies that do not cover specific needs for trans and gender diverse students. In terms of accessing gender-affirming health care at university, findings reveal that 14.1% of trans and gender diverse students are not aware if universities provide affirming healthcare services, while 33.3% indicated that the tertiary institutions do not have affirming health facilities.

Recommendations to the Government of South Africa

- **Basic and higher education should be accessible for all irrespective of learners or students' gender identity and sexual orientation.**
- **The DBE should ensure there are policies in place which ensures the inclusion of gender diverse and transgender learners.**
- **The DBE should embark on a process of tracking down learners of compulsory school going age who have left school and assist them in returning to school.**

- **The DBE should roll out CSE in all schools nationally.**
- The DBE should adopt legislation or policies that accept and accommodate trans and gender diverse learners at a national level. This should cover, for example, school uniform, bathroom use, encouraging learners and staff to use their chosen name and pronouns, as well as accommodating sports participation.
- Take disciplinary measures against those implicated in bullying, victimisation and discrimination at these schools in consultation with the victims;
- Government should fund SOGIESC sensitisation trainings or programmes in schools to be attended by learners, educators and other staff;
- Government should develop inclusive, nondiscriminatory and binding national SOGIESC policies for public and private schools and tertiary education institutions that are effectively implemented and hold them accountable.

VI. Access to Health Care for Transgender and Gender Diverse Community Members

31. South Africa’s Constitution enshrines the right to access to healthcare services, including reproductive healthcare.⁴¹ The state is required to “take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of each of these rights⁴²” and therefore has a duty to ensure that, over time, universal access to healthcare is achieved.⁴³ The National Health Act aims to “provide the best possible health services that available resources can provide⁴⁴”, and also incorporates the Patient’s Rights Charter, which includes the right to provide informed consent for health care procedures and to participate in decisions regarding one’s own health care. In

⁴¹ The Constitution of the Republic of South Africa, <https://www.gov.za/documents/constitution/chapter-2-bill-rights#27>.

⁴² Ibid.

⁴³ Hassim A, Heywood M and Berger J, Eds, *Health & democracy: a guide to human rights, health law and policy in post-apartheid South Africa*, Cape Town, South Africa, SiberInk, 2007.

⁴⁴ The National Health Act, https://www.gov.za/sites/default/files/gcis_document/201409/a61-03.pdf

the private health sector, medical care is generally expensive, and funded through private medical aid schemes. Medical aids are regulated by the Medical Schemes Act, which requires schemes to provide cover for medical conditions listed as prescribed minimum benefits, and which establishes the Council for Medical Schemes to regulate the functioning of medical schemes and protect the rights of medical scheme beneficiaries.⁴⁵

Challenges in Access to Healthcare

32. Despite a progressive legal framework, transgender and gender diverse community members continue to face significant barriers in access to both the state health care system and the private sector.
33. In the state system, prejudice and discrimination remains a primary reason why many trans and gender diverse community members are unable or unwilling to access health care services, including primary health care and sexual and reproductive health care services offered at state clinics⁴⁶. Many community members report being treated in a manner which undermines their rights to equality and human dignity. The following quotes from community members illustrate this common experience:

*“When I want to access health services and I go to the nurses at the clinic, there is no one that will assist me, and they will interrogate me instead to produce an ID that matches my gender”.*⁴⁷

“The facility is not doing a good job serving transgender people. Like I did not come back to this same clinic again for my medication. I had to stop. I honestly don’t feel comfortable because of the way they speak to us. They are very rude

⁴⁵ Ibid.

⁴⁶ Ritshidze, *State of Healthcare for Key Populations*, January 2022, <https://ritshidze.org.za/wp-content/uploads/2022/01/Ritshidze-State-of-Healthcare-for-Key-Populations-2022.pdf>

⁴⁷ Gender Dynamix, *TransRural Narratives: Perspectives on the experiences of rural-based trans and gender diverse persons in South Africa*, 2020 https://www.genderdynamix.org.za/_files/ugd/3486ef_cd72f992b4374a16b2b497097601b7a1.pdf

*and almost feel like they hate us”.*⁴⁸

34. Focus group participants said people who are supposed to help often cause more harm instead, for instance when healthcare workers at clinics intentionally misgender trans individuals. They also said government needs indicators that ensure trans and gender diverse people’s health and mental health needs are captured and provided for, since we experience more health problems than cisgender people due to micro aggressions and exclusionary practices. They also shared the extreme difficulty of accessing gender-affirming healthcare, even more so if you are not in particular metros (e.g. Cape Town), but in small rural towns. A Northern Cape participant shared that when going to a community clinic to request gender-affirming healthcare, healthcare workers would tell them to get out, “why are you here for this” and choose not to acknowledge their gender and pronouns. Participants said gender affirming healthcare has become classist and inaccessible to the majority, and the government should use the money and resources that are going into useless commissions and channel it into proper healthcare for those that cannot afford it/access it.⁴⁹
35. While recognising that the state needs to balance the need to provide healthcare to all within the constraints of available resources, it is of concern that rather than seeing a progressive roll-out and improved access to gender affirming healthcare services, access to gender affirming care has remained extremely limited, and access was in fact rolled back rolled back during COVID-19 pandemic. Inequitable access to gender affirming services has been entrenched by the Department of Health’s policy of only providing gender affirming hormone therapy at tertiary hospitals. As a result, only community members in major urban centers, where these institutions are based, have access to hormone therapy. This creates significant barriers to access to care, particularly for transgender women of colour in rural areas, who carry a disproportionate burden of mental and physical health risks and socio-economic disadvantage, as documented in

⁴⁸ Ritshidze, *State of Healthcare for Key Populations*, January 2022, <https://ritshidze.org.za/wp-content/uploads/2022/01/Ritshidze-State-of-Healthcare-for-Key-Populations-2022.pdf>

⁴⁹ Triangle Project Report on a UPR Focus Group with Trans, Nonbinary and Gender Diverse Persons, conducted on 9 March 2022.

GDX's Trans Rural Narratives study.⁵⁰

36. In the absence of clear guidelines, several tertiary hospitals have unilaterally and arbitrarily imposed limits on the number of trans and gender diverse community members who are able to receive treatment at these facilities per year, which further limits access to treatment. The treatment provided is also based on outdated treatment protocols, and not in line with medical best practice.
37. In the private sector, medical care is generally very expensive, and accessed through funding via medical aid schemes. Gender affirming healthcare is not a prescribed minimum benefit, which means that there is no obligation on medical schemes to provide cover for such care. Civil society organizations have received anecdotal reports of medical schemes covering gender affirming care for individuals on an *ex gratia* basis, and one of the largest medical schemes is currently undertaking a pilot project on the provision of gender affirming care⁵¹, but without any publicly available information on the duration of the pilot project, what information is being collected and how this information will be used. Trans and gender diverse persons who access gender affirming care in the private sector generally pay for such care out of their own pockets. This is beyond the means of most South Africans, and availability of care in the private sector cannot be used as an alternative source of access for most community members in areas without state services.
38. While the Constitution specifically states that the right to access to health care includes sexual and reproductive health care, access to these services for trans and gender diverse persons is limited by the lack of planning for and provision of specific, appropriate services for this community. Disaggregated data on trans and gender diverse identities is not collected or incorporated into state data

⁵⁰ Gender Dynamix, *TransRural Narratives: Perspectives on the experiences of rural-based trans and gender diverse persons in South Africa*, 2020

https://www.genderdynamix.org.za/files/ugd/3486ef_cd72f992b4374a16b2b497097601b7a1.pdf

⁵¹ Tomson A, McLachlan C, Wattrus C, et al.; for the Southern African HIV Clinicians Society. Southern African HIV Clinicians Society gender-affirming healthcare guideline for South Africa. October 2021 https://sahivsoc.org/Files/SAHCS%20GAHC%20guidelines-expanded%20version_Oct%202021.pdf

collection and planning processes in a systematic way⁵². For example, the current national Census, which is a crucial tool for collecting information to inform state health service provision does not collect data on gender identity at all, and only collects information on sex assigned at birth⁵³. There is a lack of specific, relevant services⁵⁴, and a lack of educational material that speaks to the realities of trans and gender diverse bodies:

“Our educational materials that we find at the hospitals and at the clinics, they are only talking about (cisgender) male-female relations. So, our educational material, they need to be inclusive (...) If they are inclusive, they will be able to reach other people⁵⁵”

Recommendations to the Government of South Africa

- **The National Department of Health should adopt the National Gender Affirming Guidelines⁵⁶ that were developed in 2021 by a panel composed of community members and medical experts, and published by the SA HIV Clinicians Society. Further, these guidelines should be integrated into the provision of services as they are based on international best practice, adapted to the Southern African context, and provide a model of care based on the human rights-based values of human dignity, equality, bodily autonomy and informed consent.**

⁵² National Department of Health (NDoH), Statistics South Africa (Stats SA), South African Medical Research Council (SAMRC), and ICF. 2019. South Africa Demographic and Health Survey 2016. Pretoria, South Africa, and Rockville, Maryland, USA: NDoH, Stats SA, SAMRC, and ICF. <https://dhsprogram.com/pubs/pdf/FR337/FR337.pdf>

⁵³ Stats SA. Census 2022. <http://census.statssa.gov.za/>

⁵⁴ Ritshidze, *State of Healthcare for Key Populations*, January 2022 <https://ritshidze.org.za/wp-content/uploads/2022/01/Ritshidze-State-of-Healthcare-for-Key-Populations-2022.pdf>

⁵⁵ Gender Dynamix, *TransRural Narratives: Perspectives on the experiences of rural-based trans and gender diverse persons in South Africa*, 2020.

⁵⁶ Tomson A, McLachlan C, Wattus C, et al.; for the Southern African HIV Clinicians Society. Southern African HIV Clinicians Society gender-affirming healthcare guideline for South Africa. October 2021 https://sahivsoc.org/Files/SAHCS%20GAHC%20guidelines-expanded%20version_Oct%202021.pdf

- **Government must ensure that the National Health Insurance includes comprehensive gender-affirming healthcare in packages of care, and consult with trans and gender diverse communities on inclusion of their health needs.⁵⁷**
- **Government should urge the Council for Medical Schemes to make gender affirming health care a prescribed minimum benefit, in order to ensure that trans and gender diverse persons are able to access cover for gender affirming healthcare in an equitable manner.**
- **Statistics South Africa, the Department of Health and other entities and institutions collecting data on the population and health conditions should ensure that disaggregated health data on trans and gender diverse identities is collected, in order to ensure adequate planning for provision of services.**
- **Government should conduct public hearings on rights violations in the public health care system, to reduce the widespread stigma and discrimination trans and gender diverse persons face when accessing public health care and services. Government should invest funds in healthcare providers Professional Development programmes on gender-affirming healthcare and educating and sensitizing healthcare professionals on transgender and gender diversity, as hostile, abusive and pathologising attitudes of healthcare professionals frequently prevent trans and gender diverse individuals from receiving adequate healthcare.**

⁵⁷ **LGBTQI+ People, SOGIESC Human Rights and the National Health Insurance. Triangle Project Advocacy Brochure, 2021..**
<https://triangle.org.za/wp-content/uploads/2021/06/LGBTQI-National-Health-Insurance-NHI-Pamphlet-English-June-2021.pdf>