



**Submission to the Department of Basic Education
on the booklet on
Social Inclusion of Gender Diverse, Transgender and Intersex Learners in
Schools**

This submission has been compiled with input from the following organisations:

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I. Introduction

1. We hereby submit comments on the booklet on Social Inclusion of Gender Diverse, Transgender and Intersex Learners in Schools. This is a joint submission made by the Legal Resources Centre (**LRC**), Triangle Project, and Women's Legal Centre (**WLC**).
2. We welcome and are grateful for this opportunity to make submissions on this booklet that we believe will be important in ensuring more equal access to schools.

II. Introduction to the Organisations making this Submission

LRC

3. **The LRC**, established in 1979, is a South-African based human rights organisation with regional offices in Johannesburg, Durban, Makhanda (previously Grahamstown) and Cape Town. The organisation uses the law as an instrument of justice for the vulnerable and marginalised, who suffer discrimination by reason of race, class, gender, disability, sexual orientation, gender expression, gender identity or by reason of social, economic, and historical circumstances. The strategies employed to secure the protection and promotion of human rights include impact litigation, law reform, participation in partnerships and development processes, education, and networking within South Africa, the African continent and at the international level.
4. Through its Equality and Non-Discrimination project, the LRC focuses on realisation of the rights LGBTQI+ persons including gender diverse persons, among other classes of persons that are marginalized. The Equality and Non-Discrimination project promotes the constitutional rights of LGBTQI+ persons, communities and organisations through providing legal advice, legal representation, strategic and impact litigation and by participating in multi-pronged advocacy and law reform. These include using a range of strategies including impact litigation, law reform initiatives, participation in development processes, as well as education and networking within and outside of South Africa.
www.lrc.org.za

WLC

5. **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.

www.wlce.co.za

Triangle Project

6. **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 and intersex (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 the LGBTQI+ community. These include sexual health clinical care, counselling, support groups, a helpline, public education and training services, community outreach, court support to survivors of hate crimes and a needle and syringe programme.

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

III. General Remarks

Equality and non-discrimination

7. We premise this submission on the emphasis on equality and non-discrimination entrenched in both Section 9 of the Constitution of South Africa as well as the Promotion of Equality and Prevention of Unfair Discrimination Act, 4 of 2000. We also rely on the international and regional obligations that the state has undertaken and which bind legislative and policy development.
8. Our starting point is that an individual's sexual orientation, gender identity, gender expression and sex characteristics (SOGIESC) may not be used as a ground to limit their entitlement to enjoy all the human rights which accrue to them equally with their heterosexual, cisgender and biologically binary (non-intersex) counterparts.

8.1 In the case of *Minister of Home Affairs and Another v Fourie and Another*¹ the Constitutional Court held that there are four contexts that must always be borne in mind when analysing the prohibition of unfair discrimination on the basis of sexual orientation: diversity of family; the imperative constitutional need to acknowledge the long history of marginalisation and persecution of LGBTQI persons in South Africa and abroad; lack of comprehensive family rights for LGBTQI persons; and that our Constitution represents a radical rupture with a past based on

¹ 2006 (3) BCLR 355 (CC)

intolerance and exclusion, and the movement forward to the acceptance of the need to develop a society based on equality and respect by all for all.²

8.2 The Court then emphasised that a democratic, universalistic, caring and *aspirationally* equal society embraces everyone and accepts people for who they are. To treat people differently because of who they are, is profoundly disrespectful of the human personality and violates the right to equality.³ The Court went on to state that *respect for human rights requires the affirmation of self, not the denial of self. Equality therefore does not imply a levelling or homogenisation of behaviour or extolling one form as supreme, and another as inferior, but an acknowledgement and acceptance of difference. **At the very least, it affirms that difference should not be the basis for exclusion, marginalisation and stigma.*** (own emphasis)

8.3 Understood in this context, the Court found that the Constitution of South Africa acknowledges the variability of human beings (genetic and socio-cultural), affirms the **right to be different**, and celebrates the diversity of the nation.⁴

9. LGBTQI+ learners face pervasive exclusion, violence, discrimination and bullying in educational environments, and well-intentioned attempts at inclusion may often falter due to inadequate knowledge and understanding of the rights, needs and issues involved.

10. In their efforts to ensure inclusive and non-discriminatory educational environments for learners in South Africa, we therefore urge the DBE and other government departments to familiarise themselves with the *Yogyakarta Principles* (2007)⁵ and its recent supplement, the *Yogyakarta Principles Plus 10* (2017),⁶ which are binding on South Africa, and which guide States in the application and implementation of international human rights law in relation to Sexual Orientation, Gender Identity, Gender Expression and Sex Characteristics (SOGIESC) in their national laws, policies and practices. It is important to distinguish between these four categories and distinctive sets of rights linked to each category in order to ensure that each learner's rights are realised in relation to their particular sexual diversity, gender diversity and/or bodily diversity.

² Fourie Para 58.

³ Ibid at para 60.

⁴ Ibid at para 60.

⁵ *Yogyakarta Principles: Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity*. 2007. <http://www.yogyakartaprinciples.org/>

⁶ *Yogyakarta Principles Plus 10: Additional Principles and State Obligations on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Identity, Gender Expression and Sex Characteristics to Complement the Yogyakarta Principles*. 2017. <http://www.yogyakartaprinciples.org/>

11. For instance, it is important to note that transgender and gender diverse matters (which concern gender identity and gender expression) and intersex matters (which concern sex characteristics and bodily diversity) are sometimes erroneously conflated with each other, and both have historically been conflated with issues of sexual orientation, with sexual orientation generally receiving much more due consideration in legislation and policy. The lack of protection of trans, gender diverse and intersex persons against discrimination and violence is apparent in the continued failure to adequately distinguish, recognise and protect human rights related to (1) gender identity and gender expression, and (2) bodily diversity (particularly intersex variations and other non-binary bodies) in the laws and policies of the country. Moreover, intersex matters are generally the most invisible, marginalised and misunderstood, with severe consequences for the bodily and psychological integrity of intersex persons/persons with differences of sex development. It is therefore critically important that the policy/booklet being developed does not err in the same manner, but recognises the different rights and needs at issue.
12. This submission therefore aims to provide pertinent information in respect of classes of persons who generally remain marginalised, rendered invisible and oppressed in South Africa due to the continued, overt and covert dominance of essentialist cisnormative and heteronormative conceptions of sex, gender and sexual orientation, and binary conceptions of biological sex.

IV. SPECIFIC SUBMISSIONS PER HEADING OF THE BOOKLET

Gender Diversity in Schools

13. The title of the section is too narrow since it only refers to 'gender diversity', which is not inclusive of intersex learners, where it is bodily (not gender) diversity that is at issue. Also, in this section reference is made to homophobic bullying, which refers to sexual orientation. We therefore suggest changing the heading to be more inclusive: **"Sexual, Gender and Bodily Diversity in Schools"**
14. As this booklet is intended to specifically target the protection, respect, and promotion of gender diverse, transgender and intersex learners, we suggest replacing the phrase "bullying in general as well as homophobic bullying" with the phrase:

"which address bullying in general, including bullying targeting learners on the basis of their sexual orientation, gender identity, gender expression and sex characteristics (SOGIESC), for instance homophobic bullying, transphobic bullying and bullying that targets learners with intersex variations or differences of sex development".

15. Similarly, when addressing the concept of intersectionality, the relevant SOGIESC concepts need to be mentioned. We suggest the following statements:

“All children are vulnerable at some time in their lives, due to one or more of a range of intersecting factors, which may include age, socio-economic circumstances, gender, race, health status, level of education, geographic location and citizenship, among others. Children who belong to socially marginalised groups on the basis of their sexual orientation, gender identity, gender expression and sex characteristics (SOGIESC) face additional forms of victimisation and discrimination..”

16. We endorse the CGE suggestion to supplement the last sentence of the paragraph, but we prefer the term ‘affirming’ over ‘tolerant’ as the message should not be merely that diversity is ‘tolerated’ but that it is ‘affirmed.’ We accordingly suggest the following wording: **“As a society, our aim is to have well-rounded, educated and nurtured learners, and safe, affirming and inclusive schools”**.

Identifying as gender diverse, transgender or intersex

17. The title of this section is misleading as it could convey the erroneous idea that ‘intersex’ is an identity, whereas it refers to bodily/sex characteristics. The entire document requires greater inclusion of issues relevant to persons with intersex variations/differences of sex development. In this submission, we provide some formulations to ensure greater intersex inclusion, but more work is required, including consultation with Intersex South Africa.
18. We agree with using the term “gender diverse” rather than “gender non-conforming” throughout the document, as “gender diverse” is a more affirming term, whereas “gender non-conforming” reinforces the problematic assumption that some persons are or should be seen as outsiders who do not conform to dominant norms. Instead, it is important to use positive terms that challenge assumptions around the desirability of dominant and stereotypical gender norms. We suggest changing this section’s title to: **“Gender Diverse, Transgender and Intersex Learners”**
19. We are concerned that statements of ‘who’ transgender, intersex or gender diverse persons may be has the potential of feeding into stereotypes rather than breaking them down. People in general come from rural or urban areas, different socio-economic circumstances or from any race or religion, and therefore the emphasis should be that in all schools there are going to be transgender, gender diverse or intersex learners. Keep the focus on introducing SOGIESC diversity as part of human/learner diversity.

20. Avoid terms such as “stealth”, which comes across secretive in a negative way. Rather focus on the learner’s right to privacy or to make decisions regarding sharing information.
21. The section should be inclusive of gender diverse, trans and intersex learners, while also differentiating between them as there are differences between the subgroups. We suggest the following text for this section:

Gender Diverse, Transgender and Intersex Learners

*Every person identifies as a particular gender (**gender identity**), expresses their gender in certain ways (**gender expression**), has particular biological or bodily characteristics (**sex characteristics**), and experiences forms of attraction to other persons (**sexual orientation**).*

*A person is **gender diverse** if their gender identity or gender expression is more diverse than the social gender norms and expectations in their school, community or society. There are many different gender identities and gender expressions, not just those of girl/women and boy/man. It is important to know that gender norms vary widely across communities, societies and countries. Gender identities and gender expressions, as well as the terms used to describe them, also change over time and are influenced by different language and socio-cultural contexts.*

*A person is **transgender** if their gender identity is different from the gender assigned to them at birth. As already mentioned, there are different gender identities and any person can identify as a girl/women, boy/man, a nonbinary person (not female or male), another gender, a combination of genders or no gender.*

*A person with **differences of sex development** or an **intersex** person is someone whose bodily characteristics are more diverse than dominant social ideas of female or male bodies. Differences of sex development or intersex variations represent a large spectrum of sex-related bodily diversity among people.*

Learners in your school may be openly gender diverse, transgender or intersex, or they may wish to keep their gender identity, gender expression or bodily (sex) characteristics private. Some learners may still be exploring and discovering aspects of their gender identity, gender expression and sex characteristics (GIESC) and it may take time for them to figure out who they are or how they identify. They may not yet have a clear idea of their identities or bodies, but the school environment should be a safe

and affirming space for them to explore and figure this out. It is part of human development to change, so we should not assume that these aspects are fixed and static in learners or ourselves. It is also important to remember that every learner is unique with different needs, and this also applies to gender diverse, transgender and intersex learners.

Gender diverse and transgender learners may have different gender identity and gender expression requirements over time. For instance, some learners may identify or express themselves in a nonbinary way at one point and in a binary way later or only become comfortable with certain forms of expression over time. The environment should be supportive and enabling during the process of discovery, but also accepting and affirming once a learner is able to express their specific identity and needs. Some gender diverse and transgender learners may live and express their gender identity socially; some may alter their bodies (sex characteristics) through accessing gender affirming hormones, gender affirming surgery or other procedures; and some may alter their legal gender identity on their birth certificates. It is their right to decide whether to keep these aspects of their lives, bodies and personal histories private or to share it should they wish to.

Intersex learners or learners with differences of sex development may not have access to accurate and affirming information about intersex variations and bodily diversity. Some intersex learners may have been subjected to unconsented, unnecessary and harmful medical and social interventions and surgeries during infancy, childhood or adolescence, which may have had a severe adverse impact on their health and emotional wellbeing. Learners with differences of sex development/intersex variations must be able to feel that they are safe and their selves and bodies respected in the school environment. It is therefore important to respect and affirm diversity in bodies and sex characteristics when communicating with all learners, so that this becomes a characteristic of the school environment and culture. The bodily integrity, bodily autonomy and privacy of intersex learners must be protected. It is their right to make decisions about their bodies, and it their right whether to keep information about their bodies and personal histories private or to disclose it should they wish to.

Legislation and Policy

22. Make mention of PEPUDA and the fact that “intersex” is explicitly included in its definition of “sex”.

Terms

23. We suggest that the section providing definitions of terms be moved up to the beginning of document as it will be useful to have a clear understanding of the terms and concepts before reading the rest of the document.
24. Delete the introductory paragraph, as the Terms section does not only include trans terms, but also gender diverse and intersex terms.
25. Suggest removing the psychiatric term “Gender Dysphoria” in the booklet as it may contribute to a pathologisation of gender diversity in schools.
26. Remove the phrase “Living Stealth” as it sounds secretive in a negative way. Focus on the right to privacy and decisions to share/disclose or not.

Amend the definitions for the following terms:

27. We suggest that the following definitions of terms already included in the booklet must be amended. We here propose some alternative definitions for these terms:
 - 27.1 “**cis/cisgender**”: A person whose gender identity is the same as the gender assigned to them at birth.
 - 27.2 “**dead name**”: When a person takes on a new and gender affirming name, their birth name is referred to as a ‘dead name’.
 - 27.3 “**gender diversity**”: The range of different gender identities, gender expressions and gendered experiences that exist and constantly evolve in different socio-cultural and language contexts.
 - 27.4 “**gender expression**”: the way in which a person expresses their gender identity through their appearance (e.g. clothes, hairstyle, cosmetics, ways of speaking and social behaviour).
 - 27.5 “**gender identity**”: A person’s internal, deeply felt sense of being female, male, another gender, a combination of genders, or not having a gender.
 - 27.6 “**gender marker**”: A symbol, word or number that indicates an individual’s gender on their birth certificate, identity document or other official documentation, e.g. F (female), M (male), X (unspecified or nonbinary gender).
 - 27.7 “**nonbinary**” means a person whose gender identity and/or gender expression is not exclusively female/feminine or male/masculine, but may be both or neither, or another

- gender or combination of genders; and/or who may move in a fluid way between and across genders.
- 27.8 **“sexual orientation”**: Sexual or romantic attraction to persons of the same gender, a different gender, several genders or all genders.
- 27.9 **“trans/transgender”**: A person whose gender identity is the same as the gender assigned to them at birth.

Add the following terms:

28. Here are some definitions that we believe should be added in order to provide greater clarity to those who will be engaging with the policy at school level and who may not have the necessary knowledge in respect of the appropriate language and its meaning:
- 28.1 **“gender”** means, in relation to society, the socially constructed roles, behaviours, activities and qualities that a society or community ascribes to individuals on the basis of their sex; and in relation to individuals, their gender identity and gender expression..
- 28.2 **“sex”** means a person’s particular combination of sex characteristics, on the basis of which they are classified as female, male, a person with intersex variations or differences of sex development, and/or bodily diverse. It is important to note that sex is more than just sex organs.
- 28.3 **“sex characteristics”** means biological characteristics that relate to the sexual and reproductive system and that include chromosomes, genitals, gonads, hormone levels, breasts, facial hair, musculature, fat distribution, bone structure, body contours and voice pitch.
- 28.4 **“gender diverse”** means a person whose gender identity and/or gender expression is more diverse than the gender norms and expectations in their society or community.
- 28.5 **“legal gender recognition”** means that a person’s gender identity is recognised by their country’s laws, and that you can change your gender marker to reflect your gender identity in your identity documents, birth certificate and other official documents.
- 28.6 **“gender recognition law”** means a law that enables the recognition of your gender identity through a legal or administrative procedure to change your gender marker in your identity document, birth certificate and other official documents. South Africa’s gender recognition law is the Alteration of Sex Description and Sex Status Act, No. 49 of 2003 (also called Act 49).

- 28.7 “**gay**” means a person (often but not always male) who is emotionally and sexually attracted to persons of the same gender.
- 28.8 “**heterosexual**” means a person who is emotionally and sexually attracted to persons of a different gender.
- 28.9 “**pansexual**” means a person who is emotionally and sexually attracted to people of all genders.
- 28.10 “**asexual**” means a person who does not experience sexual attraction.

Content submissions

29. The legislation requires more than just protection and so under this section we recommend that educators, school-governing bodies and other relevant stakeholders be encouraged to not just protect but to respect and promote the rights actively, because through their actions there will be a culture of acceptance.
30. Under this section we also suggest introducing a heading that reads “**Negative impact of discrimination on learners:⁷**”
31. We recommend deleting the statement that “Being gender diverse, transgender or intersex may not be common⁸...” The population size is irrelevant in relation to the rights obligations that the Education Department has. Whether the population size is big or small, there must be rights realization and we find that often statistics on the number of persons per the population size is used to argue that “special steps” are unnecessary or places an undue burden. Please consider removing this section or changing the content.

Whole School Practices that include Gender Diverse, Transgender and Intersex Learners

32. It would be useful under this section to talk about the culture of the school and the environment that must be created that would be conducive to learning, but also for learners and staff to feel that they are protected and enabled to express their identity. As such Principals should be encouraged to approach and engage experts in order to assist in developing policies and process to create such an environment. Research indicates that where the most vulnerable needs are met, the entire community benefits from a safer and more tolerant environment.
33. It would also be appropriate to encourage a review of current policies that govern the school and which the SGB is responsible for as to ensure that there is no direct or indirect discrimination.

⁷ Page 3 heading 4

⁸ Page 3 heading 5

Guidelines for the inclusion of gender diverse, transgender and intersex learners

34. This section throughout refers to transgender learners, neglecting to raise issues faced by intersex learners. Also, the reference to DHA mentions legal gender marker changes for trans people, but neglects to mention that intersex people can also change their gender markers in terms of this Act.
35. The issue of disclosure (whether the learner is disclosing their identity or the disclosure by the teacher/principal to others) is often a very difficult issue. This section should advise schools to develop clear guidelines in respect of disclosure by learners and the obligation(s) of teachers and the principle to treat the information as confidentially as possible.
36. There is also a fine line here between confidentiality and silencing the learner, and so the environment of confidentiality should be for the purpose of protecting the learner, and assessing what the learners' needs are in respect of the disclosure and confidentiality.
37. Gender pronouns and names are important in instances of developing and asserting gender identity. Schools should adopt an approach where the learner may choose to adopt a name and pronoun with which they identify. We suggest shying away from using words such as "choice" as pronoun usage is usually not a choice but a declaration of the individual's gender and they are therefore not choosing a particular pronoun.
38. Gender neutral language should be encouraged as this often makes it easier for gender diverse learners, but also learners who are exploring their identity. By becoming neutral it becomes easier for others to not use the incorrect pronouns.
39. Schools should be encouraged to formulate a policy for toilet as well as change rooms so that there is clarity on the issue. Learners must be allowed to self-identify and where there is a clear policy to this effect it makes it easier for learners to feel enabled to access a toilet or use a change room of their choice. The school needs to facilitate the education and training of the school body on the policy to avoid discrimination or harmful behaviour.
40. Practices such as gendered lining up serve no other purpose but to enforce useless stereotypes about boys and girls. Schools should be encouraged to identify such practices and intervene to stop them from taking place. There can be no practical reason for gender-segregated practices that are harmful to some learners.
41. Consider whether it is appropriate to include the section on medical matters. The information contained here is useful and informative, but is perhaps in the wrong section of the publication as medical matters related to learner is not something that the school can develop policy on, and the staff would be ill equipped to deal with the medical needs of a gender diverse, transgender or intersex learner.

V. Conclusion

42. We trust that these submissions will be useful to the finalisation of this process. Please do not hesitate to contact the writers at Estian Smith at estian@triangle.org.za, Charlene May at charlene@wlce.co.za and Mandi Mudarikwa at mandy@lrc.org.za

*****ENDS*****