

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*

19 June 2020

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| Name of Department | Western Cape Education Department |
| Matter (title of legislation): | <i>Draft Guidelines on Gender Identity and Sexual Orientation in Public Schools of the Western Cape Education Department</i> http://pmg-assets.s3-website-eu-west-1.amazonaws.com/prov-gazette-Extra_8223-Extra-Draft-Gender-Identity-2020.pdf |
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General Remarks

Equality and Non-Discrimination

1. The contributing organisations welcome an opportunity to once again engage with the Western Cape Education Department (WCED) on their draft guidelines related to the sexual orientation and gender identity of learners at schools within the province.

We note at the outset that submissions were made by ourselves (as well as other organisations and experts) to the WCED on a previous draft of the guidelines (then called a policy) in September 2019. Further, that even though extensive submissions were made in respect of the rights of learners who are lesbian, gay, bisexual, transgender, queer or intersex (LGBTQI+), very few of our previous submissions were taken into account and incorporated into the gazetted draft.

Moreover, the gazetted draft ends with a note that misgenders the learner who had won her landmark case against the Limpopo Department of Education, including being awarded personal compensation for exactly such forms of refusal to recognise her gender identity. These acts of misgendering by the WCED in the very guidelines that should eradicate transphobia, are in violation of the judgment and defeat the purpose for which these guidelines are being developed. We therefore state at the outset that we are extremely concerned and disappointed at the level in which the public participation and engagement process is both taken seriously and engaged with.

2. As with our previous submissions, these submissions emphasise equality and non-discrimination entrenched in both Section 9 of the Constitution of South Africa and 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 (in this instance the Department of Basic Education in the Province) has undertaken and which bind legislative and policy development.
3. Our starting point is that a learner'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. This we emphasise must be the starting point to the development of any policy related to LGBTQI+ persons.
 - a. In the case of *Fourie*, 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 LGBTI persons in South Africa and abroad; lack of comprehensive family rights for LGBTI persons; and that our Constitution represents a radical rupture with a past based on 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.¹
 - b. 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.² 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).
 - c. Understood in this context, the Court found that the Constitution of South Africa acknowledges the variability of human beings (genetic and socio-

¹ Minister of Home Affairs and another v Fourie and Bonthuys CCT60/04, Para 59.
<http://www.saflii.org.za/za/cases/ZACC/2005/19.pdf>

² Ibid at para 60.

cultural), affirms the **right to be different**, and celebrates the diversity of the nation.³

4. 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.
5. In their efforts to ensure inclusive and non-discriminatory educational environments for learners in South Africa, we therefore urge the WCED and other government departments to familiarise themselves with the *Yogyakarta Principles (2007)*⁴ and its recent supplement, the *Yogyakarta Principles Plus 10 (2017)*,⁵ 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.
6. 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) sex characteristics (particularly intersex variations that are forms of bodily diversity present from birth, as well as other forms of sex-related bodily diversity, such as bodily changes brought about through gender affirming hormones or surgeries) 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 being developed by the WCED does not err in the same manner, but recognises the different rights and needs at issue.

³ Ibid at para 60.

⁴ *Yogyakarta Principles: Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity*. 2007. <http://www.yogyakartaprinciples.org/>

⁵ *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/>

7. 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. The psychological impact of systemic violence and the needs of learners in an education environment therefore need to be taken into account and policy developed to ensure that those learners who are marginalised, and rendered invisible by heteronormative, cisnormative and binary sex policies and practices are supported and have their rights included, protected and affirmed.

Inclusion of Sexual Orientation, Gender Identity, Gender Expression and Sex Characteristics (SOGIESC)

8. We note that the policy focuses on gender identity and sexual orientation, but omits an adequate focus on sex characteristics. We submit that another section is needed in the policy, titled "Sex Characteristics", and dealing with affirming, promoting and protecting the rights to bodily diversity and bodily integrity of learners. These would specifically include the rights and needs of learners with intersex variations or differences of sex development (intersex learners), as well as transgender and gender diverse learners who may have forms of sex-related bodily diversity due to accessing gender affirming healthcare, including hormones, surgeries or other procedures to modify their sex characteristics. It is important that the policy is inclusive and does not lead to further alienation.
9. Importantly, mention needs to be made of South Africa's position on protecting the right to bodily integrity of intersex persons/persons with differences of sex development, which entails protection against coercive, harmful, unconsented and unnecessary so-called 'normalising' medical interventions. South Africa for instance tabled *Resolution 40-5 Elimination of Discrimination against Women and Girls in Sport* at the United Nations Human Rights Council (2019), which:

"Calls upon States to ensure that sporting associations and bodies implement policies and practices in accordance with international human rights norms and standards, and refrain from developing and enforcing policies and practices that force, coerce or otherwise pressure women and girl athletes into undergoing unnecessary, humiliating and harmful medical procedures in order to participate in women's events in competitive sports, and to repeal rules, policies and practices that negate their rights to bodily integrity and autonomy".

10. The WCED, its officials, principals as well as teachers and SGBs in the province need to be aware that coercive, unconsented medical interventions on the sex characteristics of intersex infants, children, adolescents and adults constitute gross human rights violations. (Also consult the Yogyakarta *Principles Plus 10*, Principle 32, The Right to Bodily and Mental Integrity, in this regard.)

Amendments

Additional Definitions Required

11. 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:
- a. **“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, “gender” means an individual’s gender identity and gender expression.
 - b. **“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.
 - c. **“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.
 - d. **“sex binarism”** means the prejudiced belief that every person’s sex (body) is or should be typically female or typically male.
 - e. **“intersexphobia”** means an irrational fear or hatred of, or violence, harassment or discrimination perpetrated against intersex people.
 - f. **“cisgender”** means a person whose gender identity is the same as the gender assigned to them at birth.
 - g. **“cisnormative, cisnormativity”** refers to the prejudiced belief that everyone is or should be cisgender.
 - h. **“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.
 - i. **“nonbinary”** means a person whose gender identity and/or gender expression is not exclusively female or male, 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.

- j. **“gender marker”** means 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).
- k. **“legal gender recognition”** means that a person’s gender identity is recognised by their country’s laws, and that a person can change their gender marker to reflect their gender identity in their identity documents, birth certificate and other official documents.
- l. **“gender recognition law”** means a law that enables the recognition of an individual’s gender identity through a legal or administrative procedure to change their gender marker in their 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).
- m. **“gay”** means a person (often but not always male) who is emotionally and sexually attracted to persons of the same gender.
- n. **“heterosexual”** means a person who is emotionally and sexually attracted to persons of a different gender.
- o. **“heteronormative, heteronormativity”** means the prejudiced belief that everyone is or should be heterosexual.
- p. **“pansexual”** means a person who is emotionally and sexually attracted to people of all genders.
- q. **“asexual”** means a person who does not experience sexual attraction.

Amendments to Specific Clauses

| Clause (<i>Indicate clause/regulation number</i>) | Comment (<i>State why the clause/regulation or proposed amendment is not supported</i>) | Suggestion (<i>Suggested deletion/amendment/addition</i>) |
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| Title: Draft Guidelines on Gender Identity and Sexual Orientation in Public Schools of the Western Cape Education Department | The previously circulated draft (in 2019) was titled “Western Cape Education Department’s Gender Identity and Sexual Orientation Policy”. The change from ‘policy’ to ‘guidelines’ imply that the document will not be binding on schools. To ensure the protection of learners’ human rights and wellbeing, a | Amend to: Policy on Sexual Orientation Gender Identity, Gender Expression and Sex Characteristics (SOGIESC) in Public Schools of the Western Cape Education Department. |

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| | <p>binding policy is required, not merely optional guidelines.</p> <p>Furthermore, to be inclusive, the policy needs to address sexual orientation, gender identity, gender expression and sex characteristics (SOGIESC) - use of this acronym is in accordance with global human rights developments and is inclusive in wording and intent.</p> | |
| <p>Definition of ‘Bisexual’</p> | <p>The definition is too binary and does not include persons of diverse gender identities and sex characteristics. Again. it is important to be inclusive in wording and intent of the wording.</p> | <p>Replace with:</p> <p>“Bisexual” means a person who is emotionally and sexually attracted to persons of the same gender and persons of a different gender”</p> |
| <p>Definition of ‘Gender Characteristics’</p> | <p>The current definition was drawn from the Alteration of Sex Description and Sex Status Act, No. 49 of 2003 (Act 49), and was formulated in the context of the Act and other definitions in the Act. However, Act 49 in its entirety is outdated, discriminatory and in need of urgent reform. The Department of Home Affairs and Department of Justice and Constitutional Development have indicated a desire to address the shortcomings in the legislation. It is therefore not advisable to draw from its formulations. Generally, a definition of gender characteristics is not needed. Definitions of gender, gender identity and gender expression are sufficient, and have been provided above and below.</p> | <p>Remove the definition of gender characteristics and insert a definition of gender in its place:</p> <p>“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, “gender” means their gender identity and gender expression.</p> |

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| <p>Definition of ‘Gender Expression’</p> | <p>This definition can be improved. Avoid using binary pronouns to avoid the impression that she or he are the only options as the policy seeks to provide for inclusivity. Also, include name and pronouns in the definition as these are important ways in which a learner may choose to express their gender identity (and have it recognised by others).</p> | <p>Replace with: “gender expression” means the way in which a person expresses their gender identity through their name, pronouns, appearance, dress and behaviour.</p> |
| <p>Definition of ‘Gender Identity’</p> | <p>The definition can be improved. Avoid the term ‘perception’ and focus on an individual’s sense of self/self-identification as a particular gender.</p> | <p>Replace with: “gender identity” means a person’s internal sense of their gender, which can include a sense of being female, male, another gender, a combination of genders, or not having a gender. A person’s gender identity may be the same as the gender assigned to them at birth or it may differ from the gender assigned to them at birth.</p> |
| <p>Definition of ‘Gender Reassignment’</p> | <p>The concept ‘gender reassignment’ is outdated and misleading. This definition has partly been adopted from the Alteration of Sex Description and Sex Status Act, No. 49 of 2003 (Act 49), and was formulated in the context of the Act and other definitions in the Act.</p> <p>However, Act 49 in its entirety is outdated, discriminatory and in need of urgent reform. It is therefore not advisable to draw from its formulations. The idea of reassigning a person’s gender is not correct or appropriate as it continues to</p> | <p>Delete ‘gender reassignment’ and replace with the following: “gender affirmation” (sometimes called transition) means any processes, actions, steps or procedures taken to affirm a person’s gender identity. It may include affirming, changing or accessing one or more of the following aspects depending on the identity and unique situation of each individual: - gender expression</p> |

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| | <p>perpetuate stereotypes, which are harmful.</p> <p>Instead, some individuals seek gender affirming healthcare or may take other steps that affirm their gender identity privately and/or socially.</p> | <p>(changing one’s name, pronouns, appearance, dress and/or behaviour to affirm your gender identity),</p> <ul style="list-style-type: none"> - social and psychological validation (when a person's gender is respected and validated by those around them), - gender affirming healthcare to bring about changes to physical sex characteristics (using pubertal blockers, gender affirming hormones, gender affirming surgery and/or other procedures), and/or - legal gender recognition (changing one’s legal gender marker and/or name on identity documents and other official documents). |
| <p>Definition of ‘Hermaphrodite’</p> | <p>The use of the term ‘hermaphrodite’ is offensive and highly inappropriate, and should not be used in any attempt to define an intersex person or a person with differences of sex development. The use of language that is not affirming infringes upon the right to dignity of an intersex person and promotes hurtful stigmas. Additionally, the definition is inaccurate and promotes wrong conceptions about intersex bodies as having both sets of female and male sex organs, which is not the case biologically.</p> | <p>Remove the word ‘hermaphrodite’ and replace the definition with:</p> <p>“intersex” (also called intersex variations, or sometimes differences of sex development) means a person who is born with a combination of sex characteristics (sexual anatomy, reproductive organs, hormonal structure and/or levels, and/or chromosomal patterns) that are more diverse than typical definitions of female or male. Intersex variations constitute a wide spectrum of natural and healthy forms of human bodily</p> |

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| | <p>Appropriate terms are: intersex person and persons with intersex variations. (The medical term, persons with ‘differences of sex development’ is also sometimes used, but is generally less acceptable due to being used in medical contexts violating intersex rights).⁶</p> | <p>diversity.</p> |
| <p>Definition of ‘Homophobia’</p> | <p>The usage of the word ‘dislike’ is not strong enough to signify what homophobia is.</p> | <p>Replace with: “homophobia” means an irrational fear or hatred of, or violence, harassment or discrimination perpetrated against, homosexual people.</p> |
| <p>Definition off ‘Queer’</p> | <p>Although “queer” is used by some as an umbrella term for lesbian, gay, bisexual, transgender and intersex persons collectively, often to politically challenge dominant heteronormative, cisnormative and binary ideologies, it is not advisable to perpetuate this umbrella usage to refer to all LGBTI people.</p> <p>There is often a strong association between “queer” and same-sex sexual orientation. But many transgender and intersex people are heterosexual and do not identify as “queer”, so it is misleading to describe them as such, and also does not recognise the diversity within the various LGBTQI+ groups.</p> | <p>Replace with: “queer” means some persons of diverse sexual orientations, gender identities, gender expressions and/or sex characteristics who do not identify with dominant heteronormative, cisnormative or binary beliefs about sex, gender and sexual orientation.</p> |

⁶ For more information, see Organisation Intersex International (OII) Europe’s (2019) *Protecting Intersex People in Europe: A Toolkit for Law And Policymakers*, https://oiieurope.org/wp-content/uploads/2019/05/Protecting_intersex_in_Europe_toolkit.pdf

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| <p>Definition of ‘Transphobia’</p> | <p>The usage of the word ‘dislike’ is not strong enough to signify what transphobia is.</p> | <p>Replace with: “transphobia” means an irrational fear or hatred of, or violence, harassment or discrimination perpetrated against transgender people.</p> |
| <p>Definition of ‘Transgender’</p> | <p>The definition creates the impression that a person’s birth sex naturally implies a particular gender. Instead, the definition needs to convey the point that persons are often assigned a gender at birth that may not reflect their gender identity.</p> | <p>Replace with: “transgender” means a person whose gender identity differs from the gender assigned to them at birth.</p> |
| <p>Clause 2</p> | <p>Care must be taken to avoid the impression that only specific legislation named in the policy apply when interpreting it.</p> <p>Secondly, the WCED policy ignores existing initiatives taken by the Department of Basic Education on developing a similar policy. We recommend that the provincial policy must align with national policy development so as to avoid ambiguity and confusion.</p> | <p>Clause 2 should state that all the laws and policies of South Africa apply to the policy at all times, and the policy has simply noted these as the most relevant.</p> <p>We would suggest that you also add the <i>Yogyakarta Principles</i> (2007)⁷ and its recent supplement, the <i>Yogyakarta Principles Plus 10</i> (2017),⁸ 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</p> |

⁷ Yogyakarta Principles: Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity. 2007. <http://www.yogyakartaprinciples.org/>

⁸ 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/>

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| | | <p>and practices. In particular, consult Principle 16 on “The Right to Education” (YP, 2007) and “Relating to the Right to Education (Principle 16)” (YP+10, 2017). .</p> <p>We suggest that the policy makes reference to policies like the <i>DBE’s guide to Safer Schools for All: Challenging Homophobic Bullying in Schools</i>.</p> <p>The national DBE’s Social Inclusion in Education Working Group is currently close to finalising its policy on “<i>Social Inclusion of Gender Diverse, Transgender and Intersex Learners In Schools: Information for Principals, Educators and School Governing Bodies</i>”. We strongly advise the WCED to participate in and consult that process and ensure alignment of the WCED policy.</p> |
| <p>Clause 3: Purpose</p> | <p>This clause needs to be more inclusive.</p> <p>We also note that it is not only LGBTQI+ learners who require protection of their rights to sexual orientation, gender identity, gender expression and sex characteristics (SOGIESC), but also educators and school staff.</p> <p>We are aware of LGBTQI+ teachers and student teachers who are frequently reprimanded about their gender expression and told to dress ‘appropriately’, because they are ‘confusing’ the learners. Throughout this policy, there is therefore a need to include educators and other</p> | <p>Modify as follows:</p> <p>The purpose of this policy is to –</p> <ol style="list-style-type: none"> a. create an educational environment that does not discriminate directly or indirectly against anyone on one or more grounds, including amongst others, <u>gender</u>, <u>gender identity</u>, <u>gender expression</u>, <u>sex</u>, <u>sex characteristics</u>, sexual orientation, conscience, belief, culture and birth; b. create an educational environment free from stigma and discrimination for all learners, <u>educators</u> and <u>school staff</u> in all |

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| | school staff. | ordinary public schools <u>and independent schools</u> ; and c. protect, promote and affirm the rights to sexual orientation, gender identity, gender expression and sex characteristics (SOGIESC) of all learners, <u>educators and school staff</u> . |
| Clause 4: | <p>Section 12(3) of the South African Schools Act, 84 of 1996, identifies three types of public schools, namely:</p> <ul style="list-style-type: none"> • an ordinary public school, • a public school for learners with special education needs, or • a public school that provides education with a specialized focus on sport, performing or creative arts. <p>The draft policy states that it only applies to ordinary public schools. LGBTQI+ learners may have special education needs or attend schools with specialised focus on sport, performing or creative arts. There is no justifiable reason why the WCED policy should discriminate against learners from schools falling into the other two categories.</p> <p>In addition, independent schools should also ensure inclusion of LGBTQI+ learners.</p> | Revise the language of clause 4 to ensure that the policy applies to all public schools as envisaged in section 12(3) of the Schools Act, as well as to independent schools. |
| Clause 5: | The heading of Clause 5 is confusing as it gives the impression that it will give | We suggest that the heading for this clause change to: |

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| | <p>more information on gender identity.</p> <p>Further, the clause does not only deal with gender identity – it also deals with sexual orientation.</p> <p>Addressing it in the manner proposed is problematic as it ends up conflating gender identity and sexual orientation with each other when they are separate and distinct issues.</p> <p>Additionally, sex characteristics are omitted completely when this too must be addressed.</p> | <p>Responsive assistance and confidentiality</p> |
| <p>Clause 5.1</p> | <p>The current formulation of this clause reads as if a learner’s disclosure is a problem that must be addressed. This approach is neither supportive nor enabling of the needs of the learner and creates the impression that the learner’s rights are burdensome.</p> <p>Rather, it must be approached as a disclosure which the school welcomes in order to create an inclusive enrolment and school body.</p> <p>Further, while confidentiality and sensitivity are both important parts of the school response, they are not the only critical parts and the needs of the learner must guide the response and steps taken.</p> <p>Fundamentally, it must be emphasised from the outset that the school or the representative of the school or learners must only proceed in a manner that</p> | <p>Revise the language to ensure that it is rights affirming, which is the legal obligation on the duty bearer and not a burden to the rights holder. Ensure that it not only focuses on sensitivity and confidentiality alone, but also the next steps must be guided by what the learner disclosing wants and needs in terms of support.</p> <p>It is therefore important for this section to start off with a position that places the learner and their rights and needs at the center of the process that the school intends to follow when a disclosure is made.</p> <p>LGBTQI+ people are not a single homogenous community, and responses and needs between learners will vary. The school therefore needs to develop flexible approaches to dealing with disclosures.</p> |

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| | <p>the learner disclosing is comfortable with. Accordingly, rights to privacy and dignity, among others, also come to play.</p> | <p>Replace 5.1 with:</p> <p>“When a learner shares information about their sexual orientation, gender identity, gender expression and/or sex characteristics (SOGIESC) with the principal, educator, a fellow learner, or anyone else at the school, such learner must be treated with respect and understanding, their privacy must be protected, and they must be provided with all required support”.</p> |
| <p>Clause 5.1.1</p> | <p>A learner should not be forced to see a social worker, psychologist or any other medical professional after making a disclosure in respect of their gender identity and/or sexual orientation.</p> <p>The current draft creates the impression that LGBTI learners are people in need of medical and psycho-social intervention.</p> <p>It is our view that referral for such services should only be done if requested by the learner themselves or in consultation with the learner who may express a desire or need for such support.</p> | <p>Amend the text to ensure that the learner is the person requesting such a need for referral and consents to receiving such assistance.</p> <p>Furthermore, any psycho-social support provided must be enabling and affirming of the learner’s sexual orientation, gender identity, gender expression and/or sex characteristics.</p> <p>Schools must therefore ensure that they make use of reputable organisations and institutions that are specifically skilled in LGBTQI+ rights, needs and experiences, when referring learners in order to avoid victimisation and stigmatisation of learners.</p> |
| <p>Clause 5.1.2</p> | <p>This clause assumes that learners always disclose their gender identity and/or sexual orientation to the principal.</p> <p>Learners at school may disclose their sexual orientation, gender identity,</p> | <p>We suggest that the policy mandates all teachers, learners and other stakeholders at school to be trained to address the disclosure of sexual orientation, gender identity, gender expression and/or sex</p> |

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| | <p>gender expression and/or sex characteristics to fellow learners, teachers, administrative support staff and/or other stakeholders at school.</p> <p>Mandating the principal to always manage the disclosure process may end up with those who initially receive the disclosure having to share the information about the learner in question, which is highly problematic.</p> <p>This may place the learner at risk of being publicly exposed without their permission.</p> | <p>characteristics (SOGIESC).</p> <p>Further, each school must create a responsive chart of how each person receiving a disclosure must handle it. If necessary, guidance and assistance may be sought from the principal, but it must be made clear that at no point does any personal information about the disclosure and the person making the disclosure be shared in that step.</p> <p>Alternatively, the policy can include a process where the learner is asked to consent to have the information shared with the principal first.</p> <p>As part of the process the school may be required to develop a referral list or vetted list of service providers who can support both the school in respect of navigating the disclosure as well as the learner. This would create an enabling environment for all involved in the process.</p> |
| <p>Clause 5.1.3</p> | <p>The focus should be on ensuring the school is inclusive regardless of how many or few learners are LGBTIQI+, rather than treating them as anomalies (outcasts) in the school system.</p> <p>It is important to articulate the role and responsibility of the SGB in the process. The current clause does not clarify what the purpose and obligation on the SGB is and as such the current reading simply causes confusion in relation to why the disclosure is relevant to the</p> | <p>Remove 5.1.3 in its current form.</p> <p>Instead, clarify the role and responsibility of the SGB in the implementation of the policy.</p> <p>Replace with:</p> <p>The SGB must be notified of the SOGIESC policy and SGB members must ensure that they obtain the necessary training and understanding of the policy and the rights of learners, and ensure that the policy is applied by the school to ensure diversity and rights enjoyment</p> |

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| | <p>SGB.</p> <p>In any event such sharing information will be contradictory to clause 5.1 which emphasised confidentiality when a person discloses their SOGIESC.</p> | <p>of all learners.</p> <p>The SGB will be informed if the SOGIESC policy is violated, to ensure accountability and good governance. The SGB is not entitled to know the name and personal information of the learner, but must be empowered to act should a learner’s rights under the policy be infringed upon.</p> |
| <p>Clause 5.1.4 (a) - (d)</p> | <p>The starting point should be confidentiality and so the clause needs to reinforce this first.</p> <p>We also find the words “reasonable” and “practicable” to be problematic formulations. Once the learner has identified their needs, the school cannot deny them their rights enjoyment because it is not considered reasonable or practical. In other words, the rights of the learner cannot be limited/restricted as this would amount to discrimination. The usage of the words creates the impression that the needs/rights of the learner can be denied should the school not consider them as reasonable or practical.</p> | <p>5.1.4 Replace “his or her parent(s)” with “their parent(s)/guardian(s)”. ‘Their’ is a gender inclusive pronoun that can be used when the text is required to be gender neutral. It is also used as pronoun of choice by nonbinary persons who do not identify with the binary pronouns (she or he).</p> <p>5.1.4 (c) Amend “and his or her parent(s)” to “<u>and/or</u> their parents”. (- Again, the need for gender-neutral inclusive language).</p> <p>Replace 5.1.4 (d) with:</p> <p>5.1.4 (d) “take any further decisions required to ensure that the learner’s school experience is safe, non-discriminatory and inclusive, for example, decisions about:</p> <ul style="list-style-type: none"> ● whether the learner prefers that the information they shared, be kept confidential; ● how to ensure that the learner feels comfortable and affirmed in their sexual orientation, gender identity, gender expression and/or sex characteristics |

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| | | <p>(SOGIESC);</p> <ul style="list-style-type: none"> • how to ensure that the learner feels free to participate in the school’s extra-curricular activities.” |
| Clause 6 Heading | The use of the word Gender Expression as the title for the clause is confusing as the content does not deal with the concept itself. | Change the heading to “ Gender Recognition ” |
| Clause 6.1 | <p>Remove LGBTQI so as not to conflate all SOGIESC issues. Use gender-neutral pronouns (they/their/them) throughout this policy, not “he or she” and “his or her”.</p> <p>The right to an identity is important to all human beings and is considered to be a basic human right. Every person has the right to determine their own identity. As such, schools should be encouraged to allow learners to express their individual identities as a starting point to an inclusive and diverse school environment.</p> <p>We are concerned that the policy only recognises a forename as a gender affirming action or expression. It is important to note that there is no closed list. Expression can take the form of any learner (not just LGBTQI+ learners) needing to adopt a name, pronouns, and/or other language and practices necessary to affirm and express their gender identity.</p> | <p>Clause 6.1 must be amended to read:</p> <p>All learners have the right to express their identity and as such learners have the right to choose the name by which they want educators, school staff and fellow learners to refer to them.</p> <p>Although the school may have to capture and record on some official documentation the name of the learner as captured on their birth certificate, the school recognises that to certain learners those names infringe on their ability and right to express their gender identity freely and with acceptance.</p> <p>The school will address the affirmation needs of the learner with other learners who make up the school body so as to ensure that the learner’s rights are protected.</p> |

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| <p>Clause 6.2</p> | <p>Pronoun usage is a critically important way in which gender is expressed and identity is accepted.</p> <p>The omission of pronoun usage by the draft policy is therefore a critical flaw and a violation of the rights of learners. See our points under clause 6.1 in relation to the right to identity. The clause therefore must be reworded to ensure that the rights of learners are protected while ensuring the integrity of the Education Department’s data and information on its learners.</p> <p>Further, the clause does not clearly articulate that the learner’s personal details must be altered on CEMIS once their name/gender change has been successful at the Department of Home Affairs.</p> <p>We also believe that the school must alert a transgender or gender diverse learner of the provisions of the Alteration of Sex Description and Sex Status Act 49 of 2003, which allows a learner to officially alter their sex description on the population register and subsequently on all the identification documents like birth certificate and identification documents should they wish.</p> | <p>Include:</p> <p>All learners have the right to express their gender identity and as such learners have the right to choose the pronouns and gender which they want educators, school staff and fellow learners to refer to them by.</p> <p>Include: The school must ensure the integrity of the information recorded on the Central Management Information System (CEMIS) and as such must ensure that gender is reflected on this system as per the birth certificate of all learners. This administrative process has no bearing or influence on the pronoun and gender usage of the learner on a daily basis by staff or other learners and in such instances the student’s self-identified pronoun and gender shall be in use.</p> <p>Include:</p> <p>Schools must be equipped to provide learners with information and assistance where they want to alter their gender marker on the national population register in the same manner as they are obligated to assist learners to obtain accurate birth certificates.</p> <p>Include:</p> <p>The learner’s personal details should be altered once the school receives the confirmation letters that their personal details have been altered by the Department of</p> |
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| <p>Clause 7</p> | <p>Again, remove the LGBTQI acronym here so as not to conflate all SOGIESC issues. Use gender- neutral pronouns (they/their/them) throughout this policy.</p> <p>The clause further presents the dress code as an optional choice which the school may decide upon. This may lead some schools to exercise their “discretion” negatively, and forcing learners to wear clothes contrary to their gender identity and gender expression.</p> <p>Further, the policy suddenly introduces the parents as having both knowledge, but more importantly, a greater say in the gender expression of the learner at 7.2. This is not in line with the confidentiality that the entire policy is premised upon and would be in violation of the rights of the individual learner to express their own gender identity. We suggest deletion.</p> <p>The inclusion of neatness and cleanliness can be read as inappropriate and offensive and it serves no purpose in the policy; we recommend deleting 7.3 from the policy.</p> <p>Further, we suggest the deletion of 7.4 which seeks to enforce stereotypes that trans or gender diverse persons do not want rules to apply to them or somehow are of the opinion that they are entitled to special treatment. It serves no purpose and is contrary to what the policy</p> | <p>Delete 7.1 in its current form and replace with:</p> <p>7.1: Schools must accommodate the rights of all learners to give expression to their gender in respect of the dress code of the school, which may include wearing gender- neutral school uniforms or a combination of clothes from the available school uniform choices. These options must be available to all learners without the need to request special permission, in order to avoid reinforcing harmful gender stereotypes.</p> <p>Delete 7.2, 7.3 and 7.4. as these requirements are discriminatory and stigmatising.</p> |

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| | seeks to achieve. | |
| Clause 8 | <p>Clause 8.1 again conflates gender identity and sexual orientation. Remove the LGBTQI acronym here so as not to conflate all SOGIESC issues.</p> <p>The learner would only need to be made aware of the restrictions in terms of the National and Provincial sporting codes in instances where their gender identity or sex characteristics may preclude them from participating where they have not altered their gender marker in terms of Act 49. The codes would be irrelevant to the sexual orientation of the learner and the continued conflation will lead to confusion in the implementation.</p> | <p>Amend to:</p> <p>Learners should be encouraged to participate in school sports free from bullying, harassment and discrimination. Learners may participate in any sports code of their choice in accordance with their gender identity.</p> <p>A learner would only need to be made aware of restrictions in terms of National and Provincial Sporting Federations in instances where their gender identity and/or sex characteristics may preclude them from participating where they have not altered their gender marker in terms of the Alteration of Sex Description and Sex Status Act, No. 49 of 2003 (Act 49).</p> |
| Clause 9 | <p>All learners have the right to be and feel safe while at school and making use of facilities at school. Equally, all learners have the right to equal enjoyment of facilities and the right to dignity. Our Courts have expressed themselves on the link between dignity, equality and access to sanitation facilities. The policy must ensure that schools do not violate these rights.</p> <p>We suggest deleting and replacing 9.1 and amending 9.2.</p> | <p>Replace 9.1 with:</p> <p>9.1: Schools must ensure the safety and security of all of its learners. In order to ensure the safety and security of learners, learners may use the toilet and sanitation facilities of their choice.</p> <p>All learners must be sensitised about the rights of LGBTQI+ persons to enable the joint usage of toilet and sanitation facilities, which may include changing rooms and shower facilities.</p> <p>Replace 9.2 with:</p> <p>9.2 Schools should make</p> |

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| | | <p>provision for gender-neutral toilets and changing facilities and WCED must provide the necessary support in implementing such facilities across schools.</p> |
| <p>Clause 10</p> | <p>The clause does not mention what ‘<i>careful consideration</i>’ is. For example, there are no criteria that can guide a decision maker to make the correct decision.</p> <p>The tone of the clause suggests that other learners may be in danger of LGBTQI+ learners or that sensitivities may be valid to deny access to LGBTQI+ learners.</p> | <p>Consider including a non-exhaustive list of things that the decision maker must take into consideration to ensure that a holistic approach is followed.</p> <p>Replace with:</p> <p>The school must at all times ensure the safety and security of all of its learners. Attention is drawn to the fact that LGBTQI+ persons may be of particular risk to gender-based violence and hate crimes given its high prevalence in our society. Schools must therefore attend to the necessary risk assessments to ensure the safety of all learners on school excursions and overnight trips.</p> <p>All learners must be sensitised in respect of the rights of LGBTQI+ persons to enable the joint participation of all learners in school activities.</p> <p>Schools must ensure that learners are not excluded from activities or facilities because of their sexual orientation, gender identity, gender expression or sex characteristics (SOGIESC), whether real or perceived.</p> <p>Decisions about sleeping arrangements need to be made jointly with LGBTQI+ learners, taking into account learners’</p> |

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| | | safety, privacy and gender identity. |
| Clause 11 | Amend as indicated. | <p>Replace with:</p> <p>11.1 All learners must be allowed to exercise the dress code preferences of their choice when attending school functions and matric dances.</p> <p>11.2 Schools must ensure that all learners feel free to bring a partner of their choice to school functions and matric dances regardless of sexual orientation, gender identity, gender expression or sex characteristics.</p> |
| Clause 12 | <p>Clauses 12.1 and 12.2 are problematic as it appears to be discretionary when the Schools Act is not. Any learner seeking admission to a school must be considered within the criteria as set out in the Schools Act and schools should not be encouraged to deviate from the legislation.</p> <p>The clause also conflates sexual orientation, gender identity and sex characteristics by the continued use of the full LGBTQI+ acronym when it is not needed or relevant.</p> <p>Clause 12.3 is problematic as there is no need for consultation with other parents. This will lead to the learner being excluded and discriminated against. The admissions of a learner to a school does not require any consultation and therefore it is discriminatory to do so when it is a LGBTQI+ learner. This clause</p> | <p>The entire clause 12 should be deleted.</p> <p>Replace clause 12.3 with:</p> <p>Schools must ensure that they play an active role in educating the community from which they draw their learners about the rights of LGBTQI+ learners. The school needs to engage with the school community, including parents, in an empowering and affirming manner about the inclusion of LGBTQI+ learners at the school. It is critical that the human rights, confidentiality, dignity and privacy of learners at the school be protected.</p> |

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| | needs to be deleted along with clauses 12.4 and 12.5. | |
| Clause 13.1 | Ensure inclusion of the full SOGIESC acronym, and do not make it optional or something to work towards, but a requirement. | Replace with: 13.1 Schools must create an environment where LGBTQI+ learners receive affirmation that their sexual orientation, gender identity, gender expression and sex characteristics are respected and valued as part of humanity’s sexual diversity, gender diversity and bodily diversity. |
| Clause 14 & 15 | Both curriculum development, and training for schools, must be done with the assistance of, and in collaboration with LGBTQI+ experts and specialised organisations. This includes regular dialogues with community groups who can speak to the lived experiences of growing up LGBTQI+, and what would have made going to school a more positive, safe, and affirming experience. The development of school curricula and training materials should not be undertaken by the Department or schools in isolation, as this can result in misguided initiatives that do more harm than good. It would be useful to include a list of organisations and experts that educators can call on to provide them with guidance and assistance. This list would also be useful as learners themselves may need advice | Amend the clause to incorporate the adjacent comments, and also the following: 14.1 Expand “explore issues of sex, gender, gender identity, homophobia and transphobia” to: “explore human rights and issues of sex, gender, sexual orientation, gender identity, gender expression, sex characteristics, homophobia, transphobia and intersexphobia”. 14.2 Throughout this subclause, replace mention of gender with mention of: “sexual orientation, gender identity, gender expression and sex characteristics (SOGIESC)” and mention challenging homophobic, transphobic and intersexphobic prejudice. 14.3 Replace “sexual orientation and gender diversity” with: |

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| | <p>and support outside of what the school can provide and may not know where to ask for assistance.</p> | <p>“diverse sexual orientations, gender identities, gender expressions and sex characteristics (SOGIESC)”.</p> <p>15.1 Expand “gender diversity” to “sexual, gender and bodily diversity”.</p> <p>15.3 Replace “sexual education” with: “education about sexuality and diverse sexual orientations, gender identities, gender expressions and sex characteristics (SOGIESC)”</p> <p>15.4 Replace "sexual orientation and gender identity rights" with: “the human rights to sexual orientation, gender identity, gender expression and sex characteristics (SOGIESC)”.</p> |
| <p>Note on last page</p> | <p>As pointed out at the beginning of this submission, the note on “Mphela v Manamela and others (2016), case no 1/2016, Seshego Magistrates Court, (Equality Court)” misgenders the transgender learner by using masculine pronouns for her. She had won her landmark case against the Limpopo Department of Education, including being awarded personal compensation, for exactly these forms of refusal to recognise her gender identity. Such statements by the WCED in the very guidelines that should eradicate transphobia, are in violation of the judgment and defeat the purpose for which these guidelines are being developed.</p> | <p>Rectify the misgendering of the learner that violates her right to gender identity: Change all masculine pronouns (he, himself, him) to feminine pronouns (she, herself, her).</p> <p>Expand “gender, sex, sexual orientation, conscience, belief, culture and birth” to: “gender, sex, gender identity, gender expression, sexual orientation, sex characteristics, conscience, belief, culture and birth”.</p> |