

**Oral Submission on *Draft Guidelines on Gender Identity
and Sexual Orientation in Public Schools
of the Western Cape Education Department***

Presentation by Triangle Project, Legal Resources Centre,
Women's Legal Centre and Lawyers for Human Rights

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Introduction

- Joint oral submission by the following organisations:
 - Triangle Project
 - Legal Resources Centre
 - Women's Legal Centre
 - Lawyers for Human Rights
- LGBTQI+ NPO providing health clinic, counselling, support groups, helpline, public education and training, community outreach, court support to survivors of hate crimes, research and advocacy to advance SOGIESC human rights and social justice for LGBTQI+ people.
- Strategic Impact Litigation Organisations experienced in the field of SOGIESC human rights in South Africa.

SOGIESC Submissions on WCED SOGI Policy/Guidelines

- Two previous submissions to WCED:
 - Sept 2019: [Submission on Draft Western Cape Education Department's Gender Identity and Sexual Orientation in Policy.](#)
 - June 2020: . [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.](#)
- Other organisations, institutions and experts also made submissions that raised similar issues to ours.
- Current version of Guidelines incorporates some changes, but does not show substantive improvement and engagement with many key points in previous submissions, so not acceptable to require that only new issues be raised in engaging with this version.
- Unreasonably short notice given for today's engagement.
- This submission highlights key shortcomings that persist in the current Guidelines.

Realities of LGBTQI+ learners in South Africa

1. LGBTQI+ learners, their parents and allies are ready to share with WCED widespread experiences of bullying, exclusion, discrimination, violence and abuse in school environments.
2. School exclusion has a tremendous harmful impact on learners' wellbeing and rest of their lives.
3. [Research](#) shows that LGBTI people in South Africa experience more physical and sexual violence; higher levels of depression, anxiety and suicidality; and that social exclusion, marginalisation and stigma have a negative impact on their mental health and wellbeing.
4. A survey among 71 LGBTQI+ people using Triangle's services in the Western Cape found 30% did not complete high school, 54% were unemployed and 73% did not have enough money to meet basic needs.
5. These realities of exclusion start at school. Guidelines are not enough to address this.
6. Even worse, the current Guidelines provide schools that are homophobic, transphobic and intersexphobic with the permission and tools to continue to exclude and discriminate.
7. Affirmation of diversity in schools can help create an inclusive society where LGBTQI+ people will not have to face realities of exclusion, violence and discrimination as children and throughout their lives.
8. We need inclusive, nondiscriminatory SOGIESC policy that is effectively implemented and holds schools accountable.

Constitutional and legislative protections of SOGIESC human rights

1. Legal framework of the Constitution and PEPUDA protects equality and dignity.
2. Intersection of being a learner and LGBTQI+ person means there is a risk of discrimination, bullying and harassment.
3. As vulnerable and marginalised children, LGBTQI+ learners are a protected class within the equality framework.
4. Freedom of religion, belief and opinion cannot be exercised in a way that violates a person's fundamental rights to equality and dignity. It cannot be used to discriminate against LGBTQI+ learners on the basis of their SOGIESC.
5. Discriminatory practices in schools have a much greater, disproportionately detrimental impact on the lives of LGBTQI+ learners and their families than the obligation to ensure an inclusive, nondiscriminatory school environment would have on some unwilling individuals.
6. SOGIESC guidelines or policy must therefore ensure LGBTQI+ learners are protected and their rights realised. Familiarity with [Yogyakarta Principles and YP+10](#) required.
7. This legal context needs to be articulated in the WCED policy or guidelines to remind schools that they will be held accountable and to send a clear message that WCED will not stand for discrimination and violation of rights on the basis of a person's sexual orientation, gender identity, gender expression or sex characteristics (SOGIESC).

Vilification of LGBTQI+ learners

General negative impression created by the Guidelines of LGBTQI+ learners as constituting an exception, problem and threat:

1. Referral of learner to social worker/psychologist when disclosing SOGI creates impression that LGBTQI+ learners are a problem and in need of medical and psycho-social intervention.
2. Approach taken is LGBTQI+ learners need to be managed, rather than addressing discriminatory attitudes and exclusion in the school environment.
3. LGBTQI+ learners' rights can only be given if others are comfortable and open to this.
4. Due regard to parents' and other learners' rights, interests, views and concerns when making decisions about LGBTQI+ learners' rights creates the impression that SOGIESC rights are optional and that other learners must be kept safe from LGBTQI+ learners.
5. Single-gender schools do not have the right to decide not to admit transgender learners, and there is no need for consultation with other parents and learners.

Transgender persons have the right to express their gender identity and to have it recognised by other persons and institutions (including schools, shelters, prisons, etc.) regardless of whether their ID reflect their gender identity (September v Subramoney NO & Other (EC10/2016) [2019] All SA 927 (WCC)).

Policy vs Guidelines

1. Widespread cases of discrimination, harassment and bullying of LGBTQI+ persons in South Africa call for a binding policy.
2. We want to see a SOGIESC policy that can hold WCED and schools accountable. This is justified in the context of the constitutional legal framework.
3. Treating the legal framework in an opt-in format in the Guidelines creates the impression that the rights of LGBTQI+ learners can be ignored and only respected if one chooses to do so.
4. This impression is also given in the laws listed – need to be clarify that all laws remain applicable but the policy highlights the following (Clause 2).
5. Policy based on the constitutional framework needs to apply to all schools, not just public schools. No constitutional free zones.
6. However, if WCED chooses to adopt guidelines instead of a policy, then the guidelines need to adequately protect learners and the shortfalls highlighted in this submission need to be fixed to avoid the guidelines being used to discriminate.

SOGIESC, not just SOGI

1. Definitions, choice of terminology and gender-neutral language in the document have improved, but there remain inaccurate definitions (e.g. intersex, gender reassignment, queer, gender nonconforming, etc.) and places throughout the document where terminology needs to improve.
2. The policy fails to engage with sex characteristics. Rights and issues of intersex persons / persons born with variations in sex characteristics are not addressed at all.
3. In general, greater familiarisation with SOGIESC concepts and issues are required. Important to distinguish between these four categories and distinctive sets of rights linked to each category in order to ensure that learners' rights are realised in relation to their particular sexual diversity, gender diversity and/or bodily diversity.
4. Knowledge required of the [Yogyakarta Principles and YP+10](#) - binding on South Africa and applied by Court.

Right to bodily autonomy and choice

1. Avoid limiting the protection of the right to bodily autonomy and choice (e.g. Clause 5).
2. Avoid forcing learners into counselling, disclosing to many people, making their disclosure appear to be a problem that must be fixed. We celebrate diversity...
3. Disclosure should not be the focus, but rather creating an inclusive and affirming environment for all learners regardless of their SOGIESC.
4. Freedom of choice in dress code preferences at school functions/dances have been deleted – why?

'Reasonable' accommodation of gender expression is not enough

- Our courts in the Jade September and Nare Mphela matters spoke on the linkages between gender expression, equality and dignity.
 - September v Subramoney NO & Other (EC10/2016) [2019] All SA 927 (WCC)
 - Mphela v Manamela and others(2016)case no1/2016 Seshego Magistrates Court (Equality Court)
- These issues cannot be left to reasonable and practicable accommodations by schools. This in itself is a limitation of learners' rights to access education and equality.
- There should be clear allowances for name, pronouns, uniforms, lockers, changing rooms, sleeping arrangements, etc. – the guidelines as it stands leaves these matters to be allowed when reasonable.
- Failure to allow gender expression is discriminatory, and this should be made clear.

Legal gender recognition

1. Guidelines mentions Central Education Management Information System (CEMIS) can be updated if 'sex description' (rather use gender marker) is changed at Home Affairs.
2. Need to ensure that regardless of information on CEMIS and at Home Affairs, learners' self-identified names and pronouns must be used consistently for everyday purposes.
3. The school must inform learners of their rights to change their names at Home Affairs (Births and Deaths Registration Act), and/or their gender marker in terms of South Africa's gender recognition law (Alteration of Sex Description and Sex Status Act 49 of 2003).

Sport participation

1. Learners must be able to participate in school sports free from bullying, harassment and discrimination.
2. Learners may participate in any sports code of their choice in accordance with their gender identity and regardless of legal gender marker in ID.
3. Distinguish between recreational sport at schools and competitive sport (which may require a specific legal gender).
4. 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).
5. Schools must create inclusive, enabling and affirming environments for sport participation regardless of learners' SOGIESC or gender marker.

Access to facilities

1. Access to facilities must be guaranteed for all learners without prejudice.
2. Learners must be allowed to use facilities that affirm their gender, including toilets, changing rooms and other facilities.
3. Provide and encourage gender-neutral toilets for all learners.
4. Access to facilities cannot be limited or granted on the basis that other learners or parents would not have a problem with a particular learner getting access.
5. All learners need to be made aware that the school is an inclusive, nondiscriminatory environment and they are expected to act accordingly.

Admission is not discretionary

1. Guidelines cannot give schools more latitude on admission. Clauses 12.1 and 12.2 are problematic as it appears to be discretionary when the Schools Act is not.
2. 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.

Curriculum development and training

1. Curriculum development, and training for schools, must be done with the assistance of, and in collaboration with LGBTQI+ organisations and experts.
2. Include 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.
3. Ensure language is inclusive of:
 - Intersexphobia – not just transphobia and homophobia
 - SOGIESC – not just SOGI
 - Sexual, gender and bodily diversity – not just gender diversity
4. Ensure inclusion of comprehensive, affirmative and accurate material on sexual, biological, physical and psychological diversity, and the human rights of people of diverse sexual orientations, gender identities, gender expressions and sex characteristics, in curricula, teacher training and continuing professional development programmes (YP+10, Relating to the right to education, Principle 16).

Conclusion

- We need to hold schools accountable to human rights standards and social justice principles.
- We need an inclusive, nondiscriminatory SOGIESC policy that is effectively implemented to truly include, protect and affirm LGBTQI+ learners, educators and other staff.
- LGBTQI+ learners, their parents and allies are ready to share our knowledge and best practice examples with WCED in developing and implementing such a policy.

Contact

Triangle Project

Estian Smit

estian@triangle.org.za

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

Legal Resources Centre

Amy-Leigh Payne

amyleigh@lrc.org.za

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

Women's Legal Centre

Mandi Mudarikwa

mandi@wlce.co.za

Charlene May

charlene@wlce.co.za

<https://wlce.co.za/>

Lawyers for Human Rights

Sanja Bornman

Sanja@lhr.org.za

<https://www.lhr.org.za/>

Thank you!