

AMA'RIGHTS

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Understanding, supporting
and accessing human rights for
transgender and gender diverse
persons in South Africa

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GENDER
DYNAMIX
10
YEARS
ADVANCING
TRANSGENDER
AND GENDER
NON-CONFORMING
HUMAN RIGHTS



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Gender DynamiX, established in 2005, is a human rights organisation that aims to address human rights violations experienced by transgender (trans) and gender non-conforming persons (GNC) in South Africa.

OUR WORK

Gender DynamiX advocates for trans and GNC persons' rights to health, security and freedom of expression. We do this through training and educating medical service providers, teachers, government officials and communities at large.

We also provide advice and support to trans and GNC persons and their partners, families and employers, as well as to the general public, in order to create greater visibility and understanding of trans and GNC people, and the issues that affect their lives.

EQUALITY

Equality, in its conventional sense, simply means equal treatment. This is known as *formal equality*. However, South African law recognises *substantive law or equality in outcome*. Equality in outcome is the idea that certain forms of unequal treatment may be necessary in order to achieve an equal outcome. For instance, persons with disabilities need special mechanisms in order to assist them to manoeuvre around a space, therefore employers may be mandated by law to provide these and give special attention to hiring persons with disabilities. This is known as substantive equality.

Organisations such as Gender DynamiX are crucial in advocating for substantive equality. Despite trans and GNC people having *formal* equality and rights, they do not always enjoy *substantive* equality.

HUMAN DIGNITY

Human dignity is the equal worth a person has in relation to the rest of society. Therefore exclusionary treatment of people as though they are inferior infringes on their human dignity. It is important to understand that human dignity is not infringed upon as a result of insult and/or offence, although insult or emotional injury may indicate an infringement of human dignity.

HUMAN RIGHTS

Generally, human rights are legally recognised entitlements and

freedoms which every person has from birth. In exceptional situations they may be limited, but only if it is fair and just to do so.

The Bill of Rights (Chapter 2 of the South African Constitution) contains individual and collective rights to which everyone is entitled. These rights include the right to:

- Life
- Human dignity
- Equality and non-discrimination
The right to equality and non-discrimination stipulates that one cannot be discriminated against based on the characteristics/grounds of gender identity; gender; sexual orientation; religion; sex; race; disability; social origin and belief, among other grounds.
- Safety and security
- Housing
- Food and water
- Health
- Education
- Fair labour practices

SOCIAL JUSTICE

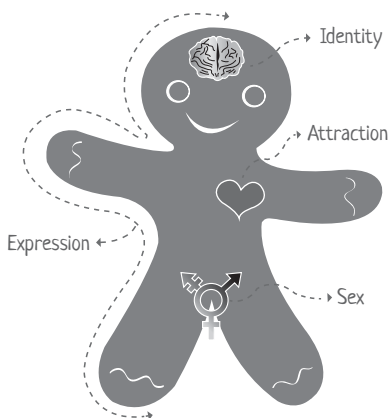
Social justice refers to the equal and fair distribution of a country's wealth. This refers to the various economic opportunities available and access to justice.

Whilst human rights emphasise legal entitlements, *social justice* emphasises the provision of economic and social support to previously disadvantaged and discriminated groups, e.g. those most affected by Apartheid.

TERMINOLOGY: IDENTITY

The Genderbread Person

Gender is one of those things everyone thinks they understand, but most people don't. Gender isn't binary. It's not either/or. In many cases it's both/and. A bit of this, a dash of that.



Gender Identity



How you, in your head, define your gender, based on how much you align (or don't) with what you understand to be your options for gender.



Gender Expression



The way you present gender through your actions, dress and demeanour, and how those presentations are interpreted based on gender norms.



Biological Sex



The physical sex characteristics you're born with and develop, including genitalia, body shape, voice pitch, body hair, hormones, chromosomes etc.



Romantically Attracted to



Sexually Attracted to



CISGENDER

A cisgender person is someone who identifies with the sex assigned them at birth, and who feels comfortable living in the gender that is conventionally associated with that body. Being cis-gender is the complete opposite of being transgender.

GENDER EXPRESSION

Gender expression refers to the ways in which a person expresses their gender through the clothes they wear, their mannerism and how they behave as a means to express their gender.

GENDER FLUID

Gender fluid people are people whose sense of gender identity shifts at various moments in their lives. At a particular moment such a person may identify more strongly with masculinity than femininity, and at another moment may identify more strongly with femininity rather than masculinity. Yet, at other times, the person may not identify with any of the two conventional genders at all.

GENDER IDENTITY

This refers to how you experience gender (sense of femininity and/or masculinity or sense of neither) for yourself. Some people identify as either feminine or masculine, some as both, and some as neither.

GENDER NON-CONFORMING (GNC)

Gender non-conforming people do not identify, or do not want to identify, as either completely masculine or feminine. GNC people are generally comfortable with their physical/biological sex but not with the gender they are expected to perform/express based on the sex they were assigned at birth.

SEX DESCRIPTION

Sex description refers to whether one has been recorded as either male or female in the Births and Deaths Register as reflected in one's identity document.

SEXUAL ORIENTATION

Sexual orientation refers to whom a person is attracted to romantically, physically, emotionally, intellectually, spiritually etc. It has nothing to do

with the gender a person identifies as. In comparison to legal recognition, more attention has been given to issues of sexual orientation than gender identity. This is the reason why the work which Gender DynamiX does is so important.

TRANSGENDER (TRANS)

A transgender person is someone whose internal gender identity does not reflect their external biological appearance or biological sex as it is recorded on their identification document. This means that transgender people do not feel that their sex-designation and gender on their identity document is reflective of their true self. Transgender people often undergo various affirming processes that enable them to claim their true gender legally and socially. It is important to note that although transgender people need access to health services not all of them need nor desire to change their biological sex. This document uses the term trans as a variation of transgender.

TRANSPHOBIA

Transphobia refers to the discrimination, prejudice and violence trans people face based on their gender identity.

HOW DOES SOUTH AFRICAN LAW PROTECT TRANS AND GNC PERSONS?

For many years the South African trans and GNC community was marginalised by being grouped under the Gay and Lesbian identity banner. This meant that issues particular to trans and GNC persons were pushed aside or completely ignored. As trans and gender diverse persons began advocating more and more for their rights, further complex issues began to surface.

In this section we outline some of the laws which enable trans and GNC people to live with equal human dignity as their cisgender counterparts.



THE RIGHT TO NAME CHANGE

Section 24 of the Births and Deaths Registration Act

The first step to aligning your gender expression with your gender identity may simply be to change your name. For many trans and GNC persons this can be an empowering change which can go a long way in helping reduce feelings of anxiety and dysphoria.

There are no medical requirements for a change of forename. Simply go to your local Home Affairs branch and complete an application with the necessary fees.

IMPORTANT!

Changing your name through Home Affairs does *not* mean that your name on your driver's licence and other official documents – such as your educational qualifications – will automatically be amended. You will have to visit your local traffic department and educational institutions to enquire about the process of changing your forenames on the relevant documents.



Should you intend to transition medically it is advisable to change your name first, as a simultaneous change of both your forenames and sex descriptor might cause unnecessary delays in your application.

The Department of Home Affairs has an informative and useful website: *Department of Home Affairs 'Amendments in ID Books & Birth Certificates'*: www.home-affairs.gov.za/index.php/amendments

THE RIGHT TO CHANGE THE SEX DESCRIPTOR ON YOUR IDENTITY DOCUMENT

Alteration of Sex Description and Sex Status, Act 49 of 2003

Act 49 allows trans persons who have begun their medical transition, and intersex persons, to change the sex descriptor in their identity documents to reflect their gender identity. Unfortunately, the current options are between male or female, with none for 'non-identifying/third gender' persons, or intersex persons who identify as intersex.

CONDITIONS OF ACT 49

Act 49 stipulates various conditions which must be fulfilled before a person is able to make the application for the sex descriptor change. These are:

Proof of medical transition by hormone and/or surgical treatment

For trans and GNC persons, and natural transition of sexual characteristics which results in gender reassignment in intersex persons, you will need:

- Two health practitioners' letters confirming the medical treatment received and observed.

Required documents

On the day of the application you need to have with you:

- Two ID-sized photos
- Your original birth certificate
- Two medical reports from a health professional (pharmacist, nurse,

mental health professional or dental technician). The first must stipulate what treatment was administered by the treating doctor, and the second must be from a medical professional who has examined you and testifies that you are currently undergoing, or have undergone, gender reassignment.

IMPORTANT!

TRANS AND GNC PERSONS

For trans and GNC persons who have undergone gender reassignment through hormonal or surgical gender affirming medical treatment, the first letter must in fact be a report stipulating:

- The nature of any procedures carried out and any treatment applied by the medical practitioner (this may include your consulting psychologist's diagnosis report and the hormonal treatments applied by your treating general practitioner, endocrinologist or physician).
- A second letter prepared by a medical practitioner other than the one who compiled the first letter, stipulating that they have examined you (the applicant) and have observed the altered sexual characteristics in line with the contents of the first letter.

The second letter is what can be termed a corroborative letter. That is, it strengthens and confirms the medical evidence contained in the first.



HOW LONG IS THE WAITING PERIOD?

Currently the waiting period to receive your documents back can range from anything between 6 months to 3 years.

CAN I APPEAL A DECISION IF MY APPLICATION IS REJECTED?

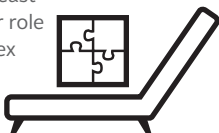
Yes, Act 49 makes provision for an appeal.

- The first step would be to contact Gender DynamiX or any other organisation closest to you in order to receive informed advice.
- The next step would be to obtain the reasons for the rejection. Act 49 stipulates that if the Director-General denies the application he/she must give written reasons for the decision.

INTERSEX PERSONS

For intersex persons the contents of the letters are slightly different. Although the Act still requires two letters, they differ slightly in that:

- The first letter is a report prepared by a medical practitioner corroborating that you are intersex.
- The second is a report prepared by a qualified psychologist/social worker corroborating that you are living, and have lived, "stably and satisfactorily for an unbroken period of at least two years in the gender role corresponding to the sex description the applicant wishes to change to".



IMPORTANT!

You have to be patient, but at the same time you must continue to follow up with the Department of Home Affairs.

It is important that you keep a record of every phone call you make to Home Affairs – including the date, time, name of the consultant you spoke to, the call reference number and what the consultant said to you. This will ensure that should you need to approach any organisation for assistance you have all the proof and information required.

Keep your proof of application in a safe place and make sure you always have it on hand should you need to take matters further.

KEEP RECORDS



Make a note of the date and time of your calls to Home Affairs



Pumla speaking!

Write down your reference number and the name of the reference consultant you spoke to



Keep notes of what the consultant said to you

You may then, as the applicant, appeal the rejection to the Minister of Home Affairs within 14 days.

Should the Minister of Home Affairs also reject the application, the ministry too must furnish written reasons for the rejection. You can then challenge Home Affairs' decision in the magistrate's court (with or without legal representation) and ask for a court order directing an

had under your 'dead' name and 'dead' pronoun still remain. Therefore you still retain parental, financial and criminal record obligations. It is up to you to ensure that your insurance policies, educational qualifications and any other formal documentation is updated.

There should be no problems as long as you provide the required proof of the various changes.

THE RIGHT TO CHANGE YOUR NAMES AND SEX DESCRIPTOR IN YOUR QUALIFICATIONS AND OTHER OFFICIAL DOCUMENTS

We've set out the steps you should take when there are problems with your application, but what happens if your sex descriptor and your name changes have been successful? Well, the story doesn't end there but the process does become relatively straight-forward and simple.

Once all your changes are reflected in your new identity document, you will have to update all other formal documents too. It is important to understand that the rights, responsibilities and obligations you

THE RIGHT TO MARRY

Trans and GNC persons have a right to get married under the Civil Union Act which provides for same-sex marriages/

IMPORTANT!

Section 6 of the Civil Union Act allows for marriage officers to object (refuse) to solemnise a same-sex civil union/marriage on the grounds of their conscience, religion and belief. But, a marriage officer must register their objection with the Minister in order for the Minister to register the objection. It is common for Home Affairs officers to turn away same-sex couples (even if their same-sex is due to unchanged gender markers). However, you have the right to ask for reasons for that Home Affairs office refusing to

solemnise your union, and should they say they object, you must ask whether the objecting officers have registered their objection with the Minister.

The Home Affairs office is also obligated to ensure they have a designated marriage officer who does not object. Should a Home Affairs branch refuse to make this clear to you, contact Gender DynamiX or any of the legal organisations listed on page 11 for further help.



unions. However, problems may arise where a couple was previously married under the Marriage Act and one partner seeks to transition and apply for a change of their sex descriptor. They might find themselves in one of two situations:

- The local branch of Home Affairs refuses the application to change the sex descriptor on the basis that a change can only be done if there is a divorce.
- The application is accepted and is successful. However, when it is returned the couple discovers that they have been divorced by the Department without their consent.

In either case it is important that you approach Gender Dynamix or any human rights law organisation nearest to for informed legal advice.

THE RIGHT TO EDUCATION

Every child and person has the right to basic education, and no school may discriminate against a child's gender identity and gender expression. Trans and GNC children are often bullied and denied the use of toilets which reflect their gender identity. Teachers must be taught to use the right pronouns and to understand their obligations under the law.

Section 29 (1) of the Constitution states:

"Everyone has the right to:

- (a) a basic education, including adult basic education; and
- (b) further education, which the state,

through reasonable measures, must make progressively available and accessible."

This means that no one may be discriminated against or denied accessing their education. School principals, teachers and governing bodies must ensure that there are policies in place which deal with bullying, and ensure that trans and GNC learners can be accommodated when it comes to uniform requirements.

All schools, private or public, are obligated to uphold the rights and values in the Constitution. Therefore bullying and other forms of exclusion which happen in private schools also infringes on the right to dignity and the right of every student not to be discriminated against.

Trans and GNC learners continue to experience a wide range of transphobia-motivated discrimination, intimidation, harassment and violence within schools. This contributes to high drop-out rates and results in a poverty cycle with fewer economic opportunities.

The various issues trans learners experience within the school environment include the denial of:

- Access to gender appropriate toilets and other sanitation facilities.
- Participation in sports and other gender-segregated games.
- Relevant information around gender and sexual health.
- A safe and secure environment in which to learn.

- An educational experience which upholds their human dignity.
- Informed teachers who are fully educated and informed about sexual orientation and gender identity.

Policy and legal interventions need to be implemented from basic education through to higher/tertiary education.

Schools must implement inclusive policy and codes of conduct which address

disciplinary measures, gender-segregated sports and other extramural activities which are separated by gender.

EXPULSION FROM SCHOOL ON THE BASIS OF GENDER EXPRESSION

Learners who have been expelled from school still have rights, termed *procedural fairness* rights. The box below gives a guideline of these rights.

PROCEDURAL FAIRNESS

All schools should have a code of conduct regarding disciplinary hearings and how they are to be conducted. Every code of conduct must contain provisions to safeguard the interests of the learner and the other party involved in the disciplinary hearing.

- The code of conduct must contain support measures/structures such as counselling for the learners involved.
- A learner must be accompanied by either their parent or a person designated by the parent. Should the parent or designated person not understand the proceedings, they may appoint either a lawyer or a third party to accompany the child. Do not be afraid to approach any

of the organisations listed on page 11 for advice on this issue.

- The school may conduct the disciplinary hearing without the parent or designated person, but only if they have good cause to do so.
- As a learner, should you be required to testify or be cross-examined during the disciplinary proceedings with the assistance of a guardian, you may ask the governing body to appoint an intermediary for you to communicate through.
- Should you be expelled, the school must inform you of your expulsion and give you reasons in writing within a reasonable time.

THE RIGHT TO A NON-DISCRIMINATORY WORK ENVIRONMENT

Section 23(1) of the Constitution states that everyone has the right to fair labour practices. Fair labour practices include a variety of rights which are contained in the Labour Relations Act and the Employment Equity Act.

Sections 5 and 6 of the Employment Equity Act requires that the employer must promote equal opportunity in the workplace by eliminating unfair discrimination in any employment policy or practice.

This means that an employer must actively ensure that discriminatory practices, both visible and invisible, are eliminated. If you feel you have been unfairly discriminated against on the basis of your gender identity or sexual orientation, it is important that you visit your nearest CCMA office. They should inform you of your rights and what potential action you can take against your employer.

IMPORTANT!

Disputes can only be taken to the CCMA under section 187 and 188 which states that the dispute must amount to an unfair labour dispute.

In order to assess whether your particular circumstances fit within the definition of an 'unfair labour practice' please consult with your local CCMA offices where someone should be able to advise you fully.

IMPORTANT NOTE: Your dispute must be referred to the CCMA within 90 days of the unfair labour practice occurring, or 90 days of you becoming aware of what you believe is an unfair labour practice. 30 of the 90 days are calculated by counting all days, including weekends and public holidays, therefore you must ensure you refer your case in good time.

USEFUL CONTACTS

TRANSGENDER AND GENDER NON-CONFORMING ORGANISATIONS

GENDER DYNAMIX

Western Cape 021 447 4797
info@genderdynamix.org.za
www.genderdynamix.org.za

IRANTI-ORG

Gauteng 011 339 1476, 011 339 1468
getinfo@iranti-org.co.za
www.iranti-org.co.za

SEX WORKERS EDUCATION AND ADVOCACY TASKFORCE (SWEAT)

Toll free 0800 60 6060
Western Cape 021 448 7875
Eastern Cape 074 124 0547
Gauteng 011 331 0077
Please-call-me 071 357 7632
info@sweat.org.za
www.sweat.org.za

SOCIAL HEALTH AND EMPOWERMENT FEMINIST COLLECTIVE OF TRANSGENDER AND INTERSEX WOMEN OF AFRICA (S.H.E)

Eastern Cape 043 722 0750
www.transfeminists.org
Blog <http://transfeminists.wordpress.com>

TRIANGLE PROJECT

Western Cape 021 422 0255
Helpline 021 712 6699
(daily 13h00 – 21h00)
info@triangle.org.za
www.triangle.org.za

EDUCATION

EQUAL EDUCATION (EE)

National 011 333 2523
Western Cape 021 361 0127
Eastern Cape 043 642 1616
info@equaleducation.org.za
www.equaleducation.org.za

LEGAL

DEPARTMENT OF HOME AFFAIRS

Toll free 0800 60 11 90
hacc@dha.gov.za
www.dha.gov.za

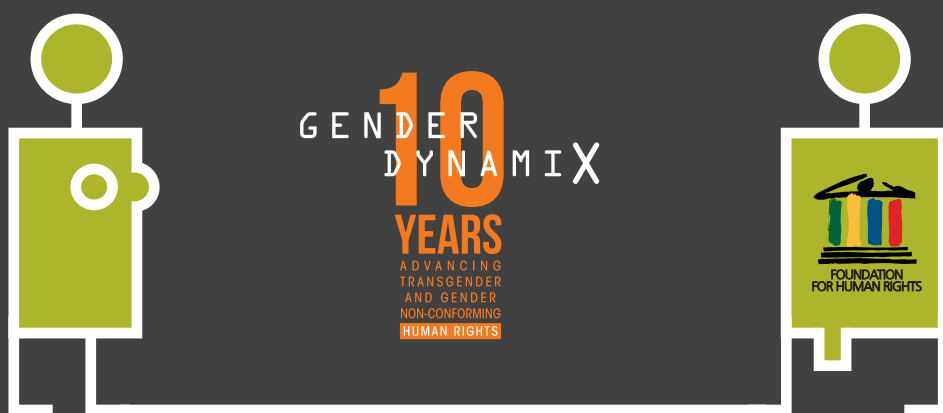
LEGAL RESOURCES CENTRE (LRC)

Western Cape 021 481 3000
Gauteng 011 403 0902
www.lrc.org.za

WORKPLACE

COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION (CCMA)

Head Office Gauteng
011 3776650/01/00
Call Centre 0861 16 16 16
info@ccma.org.za
www.ccma.org.za



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