The legal framework relevant to the provision of gender-affirming health care in South Africa: a comparative analysis

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SUMMARY

This study critically analyses the principal legislative and regulatory framework governing gender-affirming healthcare and gender identity recognition in South Africa. Arguing that conditioning legal gender recognition on invasive and often inaccessible medical alterations conflicts with constitutional guarantees of equality, dignity and access to healthcare. The study shows how structural factors, including socio-economic marginalisation, cis-heteronormative clinical practices, and limited skills and training among healthcare providers, creates practical barriers that make the rights unattainable in practice.

Making use of a qualitative, doctrinal and jurisprudential approach, supplemented by limited empirical and policy materials, the dissertation analyses key South African case law together with international human rights instruments such as the Yogyakarta Principles, to demonstrate both the possibilities and current limitations in protecting gender identity rights. It interrogates the adequacy of the legislative framework against the benchmark of comparative international jurisdictions, namely Canada, Australia and the United Kingdom.

This dissertation concludes that South Africa's legislative framework is inadequate to fully protect the constitutional rights of transgender and gender non-conforming persons, falling short of international human rights standards. It proposes targeted and specific legislative, regulatory and policy reforms.

Keywords: Alteration of Sex Description and Sex Status Act; gender-affirming healthcare; transgender; gender identity; constitutional rights; comparative jurisprudence; equality; human dignity; medical negligence; Yogyakarta Principles.

Nyakišišo ye e sekaseka ka tshekatsheko ya botebo tlhako ya godimo ya melao le melawana yeo e laolago tlhokomelo ya maphelo yeo e tiišetšago bong le kamogelo ya boitsebišo bja bong ka Afrika Borwa. E tšweletša ngangišano ya gore go dira gore kamogelo ya semolao ya bong e ithekgile ka diphetogo tša kalafo tšeo di tsenago mmele ka bogare gomme gantši di sa fihlelelege, go ganetšana le ditiišetšo tša

Molaotheo tša tekatekano, seriti le phihlelelo ya tlhokomelo ya maphelo. Nyakišišo ye e bontšha ka moo mabaka a sebopego, go akaretšwa go beelwa thoko ga batho ka maemo a ekonomi le setšhaba, mekgwa ya kliniki ya cis-heteronormative, le tlhokego ya bokgoni le tlhahlo gare ga bašomi ba tlhokomelo ya maphelo, di hlolago mapheko a tiragatšo ao a dirago gore ditokelo tše di se fihlelelege ka tiragalo.

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Mantšu a bohlokwa: Molao wa Phetolo ya Tlhaloso ya Bong le Maemo a Bong; tlhokomelo ya maphelo yeo e tiišetšago bong; transgender; boitsebišo bja bong; ditokelo tša Molaotheo; jurisprudence ya papetšo; tekatekano; seriti sa botho; bohlaswa bja kalafo; Melao ya Yogyakarta.

ACRONYMS AND ABREVIATIONS

DCS	Department of Correctional Services
GAHC	Gender-Affirming Healthcare
GAHT	Gender-Affirming Hormone Treatment
GRC	Gender Recognition Certificate
HRT	Hormone Replacement Therapy
HPC	Heath Care Professional/Provider
ICCPR	International Covenant on Civil and Political Rights
ICD	International Classification of Diseases
ICESR	International Covenant on Economic, Social and Cultural Rights
ICM	Informed Consent Model
LGBTQIA+	Lesbian, Gay, Bisexual, Transexual, Queer, Intersex, Asexual
PEPUDA	Promotion of Equality and Prevention of Unfair Discrimination Act
SAHCS	South African HIV Clinicians Society
SOC	Standards of Care
WHO	World Health Organisation
WPATH	World Professional Association for Transgender Health
TGD	Transgender and Gender Diverse
UDHR	Universal Declaration of human rights
UK	United Kingdom

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CHAPTER ONE: INTRODUCTION AND BACKGROUND

1 INTRODUCTION

On 18 July 1970, the High Court of Justice in England delivered a ruling in the case of *Corbett v Corbett*,[1] which is significant for the reason that it is the first time in English law that a court was required to make a legal determination regarding the sex of an individual, albeit with no existing authority to refer to.[2] The Judge in this matter, Lord Justice Ormrod, who was himself a physician, stated that:

> ' […] the sex of an individual and, consequently, there is no authority which is directly in point. This absence of authority is, at first sight, surprising, but is explained, I think, by two fairly recent events, the development of the technique of the operation for vagino-plasty, and its application to the treatment of male transsexuals; and the decision of the Court of Appeal in S v S (otherwise W) (No 2), in which it was held that a woman, suffering from a congenital defect of the vagina, was not incapable of consummating her marriage because the length of the vagina could be increased surgically so as to permit full penetration. There are passages in the judgments which seem to go so far as holding that an individual, born without a vagina at all, could be rendered capable of consummating a marriage by the construction of an entirely artificial one. But for this decision, the respondent would have had no defence to the prayer for a decree of nullity on the ground of incapacity. Until this decision, all matrimonial cases arising out of developmental abnormalities of the 47 reproductive system could be dealt with as case of incapacity, and, therefore, it has not been necessary to call in question the true sex of the respondents, assuming that it had occurred to any pleader to raise this issue. Now that it has been raised, this case is unlikely to be the last in which the courts will be called on to investigate and decide it. I must, therefore, approach the matter as one of principle.'[3]

Dhai succinctly observes[4] that lawyers and courts have been presented with the medical *fait accompli*,[5] in that whilst medical procedures exist and continue to develop, the law or courts must constantly catch up and ultimately make decisions on novel issues as happened in the *Corbett* case.

A case of great influence and relevance for this study in South Africa, is the 1976 case of *W v W*.[6] Also in the absence of legislation, local common law or precedent, the

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1 *Corbett v Corbett (otherwise Ashley)* [1971] P 83; [1970] 2 All ER 33.
2 [1971] P 83; [1970] 2 All ER 105A.
3 [1971] P 83; [1970] 2 All ER 105A–D.
4 Anika Dhai, 'Gender Reassignment Surgery: Medical Issues and Legal Consequences' (LLM dissertation, University of Natal 2000).
5 Dhai, 'Gender Reassignment Surgery' 50.
6 *W v W* 1976 2 SA 308 (W).

court in this case had to decide a legal dispute regarding the recognition of a person's sex for the purposes of marriage, specifically, whether a person who had undergone gender reassignment surgery could be legally recognised as belonging to the 'post-operative' sex. Having adhered to a purely biological and genetic definition of sex as per the 'Ormrod Test' laid down by Lord Ormrod in the English case of *Corbett*,[7] the court held that a person's sex could not be medically changed and consequently, that a person's sex is fixed at birth. It is worth noting that given the time of this decision and the racial climate prevailing in South Africa at the time, matters of this nature pertained to the Caucasian segment of the population, rather than to persons of colour.

Since the judgment in the case of *W v W* in 1976, South Africa has witnessed historically significant changes in law, most notably with the adoption of the Constitution of the Republic of South Africa, 1996[8], containing a Bill of Rights[9] which, read together with the prescribed limitations,[10] guarantees and protects several rights. Described by former Constitutional judge, Judge Albie Sachs as one of the most progressive Constitutions in the world,[11] the Bill of Rights guarantees and protects, among others, the rights to human dignity,[12] freedom and security of the person,[13] as well as the right to equality.[14] The right to equality[15] stipulates that no person shall be discriminated against directly or indirectly on the basis of, inter alia, gender or sex. A socio-economic right to have access to health care services, including reproductive health, is also protected under the Constitution.[16]

The protection of the rights enshrined in the Bill of Rights is extremely important and necessitated the formation of so-called section 181(1) institutions supporting constitutional democracy.[17] Of significant importance for the protection of the rights of

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7 A test originating from *Corbett v Corbett* [1970] P 583, which considered chromosomal, gonadal and genital characteristics to determine a person's sex.
8 Hereinafter referred to as 'the Constitution'.
9 Constitution of the Republic of South Africa, 1996, chap 2.
10 Constitution of the Republic of South Africa, 1996, s 36.
11 Makgala Masiteng, 'SA's Constitution Remains One of the Most Progressive in the World' *SABC News* (3 November 2024) <https://www.sabcnews.com/sabcnews/sas-constitution-remains-one-of-the-most-progressive-in-the-world/> accessed 13 November 2024.
12 Constitution of the Republic of South Africa, 1996, s 10.
13 Constitution of the Republic of South Africa, 1996, s 12.
14 Constitution of the Republic of South Africa, 1996, s 9.
15 Constitution of the Republic of South Africa, 1996, s 9(3).
16 Constitution of the Republic of South Africa, 1996, s 27(a).
17 Constitution of the Republic of South Africa, 1996, s 181.

vulnerable groups, such as the transgender community in South Africa, are the South African Human Rights Commission[18] and the Commission for Gender Equality.[19]

Following the judgment in the case of *W v W*[20] which was highly criticised for its strict and limiting interpretation, in 2003, the South African Human Rights Commission (SAHRC) highlighted the need for legislative reform to address the rights of post-operative transsexuals, citing that failure to amend the Births and Deaths Registration Act[21] would lead to constitutional challenges.[22] In the same year, the more comprehensive Alteration of Sex Description and Sex Status Act[23] (hereinafter, 'the Alteration Act') was promulgated. This Act,[24] allows individuals to change their sex description on legal documents and provides a legislative framework for the recognition and affirmation of gender rights for transexual and intersexed persons in South Africa. In acknowledging the need to change a person's sex description, the Act[25] strengthens arguments pertaining to the rights of transgender individuals.

Although the Alteration Act is often characterised as progressive within the South African law context, it conditions legal gender recognition on invasive and exclusionary criteria. These criteria require that an individual's sexual characteristics have been altered by surgical or medical treatment, or that the person was born with a condition resulting in conflicting or ambiguous biological gender markers (being intersex).[26] This raises very significant questions and may prove problematic as it does not take into consideration the existence of gender dysphoria, i.e. a condition in which an individual cannot reconcile his or her biological/physical sex with his or her psychological sexual identity,[27] without necessarily wanting to undergo an alteration of their sexual

18 Constitution of the Republic of South Africa, 1996, s 181(1)(b).
19 Constitution of the Republic of South Africa, 1996, s 181(1)(d).
20 *W v W* 1976 2 SA 308 (W).
21 Births and Deaths Registration Act 51 of 1992.
22 South African Human Rights Commission, *Submission on Alteration of Sex Description and Sex Status Bill* (Parliament, September 2003).
23 Alteration of Sex Description and Sex Status Act 49 of 2003.
24 Alteration of Sex Description and Sex Status Act 49 of 2003.
25 Alteration of Sex Description and Sex Status Act 49 of 2003.
26 'Intersex' is an umbrella term to describe people born with natural sex characteristics that do not fit typical binary notions of male or female bodies. Centre for Human Rights, 'SOGIESC Unit: Fact Sheet on Intersex Persons Rights' <https://www.chr.up.ac.za/the-intersex-project/32-units/sogiesc/281-sogiesc-intersex-rights> accessed 1 September 2024.
27 American Psychiatric Association, 'What is Gender Dysphoria?' <https://www.psychiatry.org/patients-families/gender-dysphoria/what-is-gender-dysphoria> accessed 1 December 2023.

characteristics. Moreover, the Act[28] also does not make provision for social transitioning as an alternative. This requirement for an 'alteration of sexual characteristics' may exacerbate the barrier to accessing gender-affirming healthcare and create undue pressure on persons to undergo gender-reassignment procedures, without due consideration for the permanency thereof. It may also undermine the significance of gender identity. Further questions arise regarding informed consent and the ethical duties and responsibilities that rest on medical professionals and healthcare providers to offer gender-reaffirming care and gender-reassigning procedures, particularly in a South Africa, where medical negligence claims are highly prevalent.[29]

Furthermore, the economic viability of the Act's[30] requirements pertaining to transsexual persons is likely to give rise to constitutional challenges, given the high unemployment rates, limited access to affordable healthcare and broader class disparities that render the rights promised in the Bill of Human Rights[31] illusory in practice.

2 PROBLEM STATEMENT

In 1993, former Constitutional judge, Judge Edwin Cameron authored an article titled, 'Sexual Orientation and the Constitution: A Test Case for Human Rights,[32] in which he discusses whether gays and lesbians needed legal safeguarding and why sexual orientation should be included in the Constitution as a specially protected condition.[33] The term 'sexual orientation' was specifically included as a prohibited form of unfair discrimination under both the 1993 (Interim Constitution) and the final 1996[34]

28 Alteration of Sex Description and Sex Status Act 49 of 2003.

29 South African Law Reform Commission, *Discussion Paper 154: Project 141 Medico-Legal Claims* (2021) [207] <https://www.justice.gov.za/salrc/dpapers/dp154-prj141-Medico-Legal-Claims.pdf> accessed 1 October 2024.

30 Alteration of Sex Description and Sex Status Act 49 of 2003.

31 Constitution of the Republic of South Africa, 1996, chap 2

32 Edwin Cameron, 'Sexual Orientation and the Constitution: A Test Case for Human Rights' (1993) 110 SALJ 450, 450–471.

33 Cameron, 'Sexual Orientation and the Constitution' 450.

34 Anastacia Tomson, Christine McLachlan, Camilla Wattrus and others, *Southern African HIV Clinicians Society Gender-Affirming Healthcare Guideline for South Africa* (Southern African HIV Clinicians Society, October 2021) <http://www.sahivsoc.org/Files/SAHCS%20GAHC%20guidelines.pdf> accessed 1 August 2025.

Constitution. The term ‘sexual orientation’ proves limited in that it relates only to an enduring pattern of emotional, romantic and/or sexual attraction to person of the same sex, opposite sex or both sexes.[35] The term ‘gender’, a social term that refers to the ascribed social and cultural male and female roles,[36] is also specifically included as a prohibited from of discrimination.

Despite robust constitutional protections, South Africa continues to be hampered by cultural and social biases that give rise to persistent unfair discrimination, stigmatisation and marginalisation of individuals that self-identify as Lesbian, Gay, Bi-Sexual, Transsexual, Queer and Intersexed (the LGBTQIA+ community).[37] This is further exacerbated by inherent *transphobia*[38] that manifests in the provision of general healthcare services to members of the LGBTQIA+ community, and more specifically, in the delivery of gender-affirming healthcare services to transgender persons.[39]

Of relevance to this study is the broader legal framework governing access to healthcare services in South Africa, as well as the Alteration Act, which necessitates a comprehensive scrutiny of the definitions of sex and gender, including the Act’s[40] prerequisite of an alteration of sex characteristics. As previously noted, medical alteration of sex characteristics is, in most instances, permanent and irreversible. Current international guidelines and recommended best practices pertaining to gender-affirming surgeries and the ‘alteration of sexual characteristics’ are formulated by entities predominantly informed or influenced by North American and Western European research, practices and methodologies.[41] These frameworks often fail to align with the South African context.

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35 American Psychological Association, 'Understanding What is Sexual Orientation and Homosexuality' <https://www.apa.org/topics/lgbtq/orientation> accessed 1 October 2024.

36 Iain Currie and Johan de Waal, *The Bill of Rights Handbook* (6th edn, Juta 2013).

37 Youth Policy Committee Gender Working Group, 'Hate Crimes Against Members of the LGBTQIA+ Community in South Africa' <https://saiia.org.za/youth-blogs/hate-crimes-against-members-of-the-lgbtqia-community-in-south-africa/> accessed 1 October 2024.

38 'Transphobia' refers to hate, fear or disgust for transgender people or anyone who does not fit the male/female gender binary. <https://www.webmd.com/sex-relationships/what-is-transphobia> accessed 1 October 2024.

39 Siyanda Shabalala and Megan Campbell, 'The Complexities of Trans Women's Access to Healthcare in South Africa: Moving Health Systems Beyond the Gender Binary Towards Gender Equity' <https://equityhealthj.biomedcentral.com/articles/10.1186/s12939-023-02039-6#Sec1> accessed 1 October 2024.

40 Alteration of Sex Description and Sex Status Act 49 of 2003.

41 World Professional Association for Transgender Health, 'Standards of Care Version 7' <www.wpath.org.za> accessed 1 December 2023.

The requirements imposed by the Alteration Act and the inherent failure of South African legal framework to recognise gender identity extend beyond the provision of healthcare services. This failure plays out in other realms, such as the contexts of correctional services, labour law and basic education, to name a few. One such example is the landmark case of *September v Subramoney NO and Others*[42] in which the court held that the standing orders in the Correctional Services Act[43] were unlawful, in so far as they prevented a transgender woman detained in a male correctional facility from expressing her gender identity. The court ruled in favour of Jade September, a transgender woman, who brought the case against the Department of Correctional Services, seeking to be allowed to express her gender identity while incarcerated. The court held that the refusal to allow her to express her gender identity constituted unfair discrimination and violated her constitutional rights to equality and human dignity.[44] This case is significant as it emphasises the importance of respecting the rights of transgender individuals, even within the prison system.

Similarly, in the case of *Mphela v Manamela and Others*,[45] heard in the Seshego Magistrates Court (Equality Court) in 2016, the Limpopo Department of Education was ordered to pay damages for harassment of a transgender learner arising from her expression of her gender identity at school. employee owing to the employee expressing her gender-identity in her space of employment, a school. Nare Mphela, a transgender woman, brought the case against her school principal, Kgabo Manamela, and the Limpopo Department of Education, alleging that Manamela subjected her to severe discrimination and harassment because of her gender identity. The discrimination suffered included instructing learners to harass her, making derogatory comments, and even ordering them to physically inspect her genital area. The Equality Court found in favour of Mphela, awarding her R100,000 in damages. The Limpopo Department of Education was directed to adopt and implement measures to prevent similar discrimination in future. This case represents a significant victory for

42 *September v Subramoney NO and Others* (EC10/2016) [2019] ZAEQC 4; [2019] 4 All SA 927 (WCC) (23 September 2019).
43 Correctional Services Act 111 of 1998.
44 *September v Subramoney (EC10/2016) [2019] ZAEQC 4; [2019] 4 All SA 927 (WCC), paras 164-166.*
45 *Mphela v Manamela and Others* (EC 10/2016) [2021] ZAEQC 4 (23 September 2021).

transgender rights in South Africa, highlighting the importance of protecting individuals from discrimination based on their gender identity and underscoring the obligation on educational authorities to protect learners from discrimination and harassment based on gender identity.

Although the legislative framework in South Africa theoretically guarantees, equality, human dignity, freedom of the person and access to healthcare service for all, including members of the LGBTQIA+ community, structural and systemic barriers to, inter alia, access to quality gender-affirming healthcare persist. These barriers include socio-economic marginalisation, the limited availability and uneven distribution of services, and entrenched *cis-heteronormative*[46] healthcare practices, amongst others. The challenges to be explored in this study include the inadequate context-specific research, data, policies and guidelines, as well as limited skills, knowledge, and training among healthcare and other essential service providers. The comparative analysis undertaken in this study seeks not only to evaluate the existing legal frameworks and guidelines in South Africa, but also to identify gaps and deficiencies and propose reforms that can ensure comprehensive, equitable and affirming healthcare for people of all gender identities.

The point of departure of this study is that although the explicit inclusion of ‘sexual orientation’ and ‘gender’ as prohibited forms of discrimination in the South African Constitution is widely regarded as progressive, the requirement in the Alteration Act that a person undergo a physical alteration of sexual characteristics (for example, through gender-reassignment surgery) risks undermining the expression of gender identity and may infringe on the human rights of transgender persons. It is therefore, essential to assess whether South Africa’s existing legal framework is appropriate and adequate to protects the rights of, and give due recognition to the lived realities of, transgender persons.

3 OBJECTIVES OF THE RESEARCH

[46] 'Cis-heteronormativity' is the assumption that being heterosexual is the default standard for all individuals. See <https://www.lgbtqprimaryhub.com/heteronormativity-cisnormativity> accessed 10 November 2024.

The dissertation aims to critically examine and explore the extent to which the current legal framework in South Africa constrains and potentially infringes upon the rights of transgender persons, with a focus on the right to access to health care services, which include gender-affirming healthcare. The following objectives will assist in exploring the primary research aim:

(1) Evaluate existing legal frameworks: Analyse current South African laws and regulations related to gender-affirming healthcare, highlighting their strengths and weaknesses;
(2) Identify gaps and challenges: Identify specific areas where the legal frameworks and guidelines fall short in adequately supporting gender-affirming healthcare, including any legal, social, or institutional barriers.
(3) Compare international standards and practices: Conduct a comparative analysis of South African legal framework with those in Canada, Australia and the United Kingdom, the latter known for progressive gender-affirming healthcare policies; and
(4) Propose recommendations: Develop informed recommendations for policy reforms and guidelines enhancements to ensure comprehensive, equitable, and affirming healthcare for all gender identities in South Africa.

4 RESEARCH QUESTIONS

In attempting to satisfy the research objectives, this study will set out to answer the following research questions:

4.1 To what extent does the current South African legal and legislative framework protect the rights of transgender and gender non-conforming individuals, particularly with reference to the recognition of gender identity and gender-affirming healthcare?

4.2 How and to what extent do the requirements imposed by the Alteration Act impact the legal recognition of gender identity for transgender and gender non-conforming persons in South Africa and what are the implications of the landmark

cases of *September v Subramoney NO,*[47] *Mphela v Manamela*[48] *and Mokoena v Department of Correctional Services*[49] for the legal recognition of 'gender identity'?

4.3 Given the invasive nature and irreversibility of gender-affirming surgeries and procedures, is the medical industry adequately regulated and equipped to provide gender-affirming healthcare and to what extent do heteronormative approaches to healthcare provision affect the quality of care given to transgender and gender non-conforming individuals?

4.4 Does the current legislative framework in South Africa affirm and protect the rights of transgender or gender non-conforming individuals in alignment with international human rights standards and how does the framework compare to those in Canada, Australia and the United Kingdom including the best practices or legislative reforms from these jurisdictions?

4.5 What legislative, regulatory or policy changes are necessary to ensure conformity with international standards and to ensure that gender-affirming healthcare is accessible, appropriate and ethical?

4.6 What is the value of education and training for healthcare and other essential service providers on the rights and needs of transgender and gender non-conforming persons?

5 LITERATURE REVIEW

Over the years, the discourse on the human rights of transgender or gender non-conforming persons has gained a significant traction, necessitating a closer examination of the status quo both in South Africa and internationally. This review traces the evolution of existing research relating to the definitions, clinical practices and legal frameworks governing gender reassignment procedures and, more importantly, on the human rights of transgender and gender non-conforming persons. In so doing, this review lays the foundation for the recommendations advanced herein,

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47 *September v Subramoney NO and Others* (EC10/2016) [2019] ZAEQC 4; [2019] 4 All SA 927 (WCC) (23 September 2019).

48 *Mphela v Manamela and Others* (EC 10/2016) [2021] ZAEQC 4 (23 September 2021).

49 *Mokoena v Head of Johannesburg Correctional Centre and Others* (2024/070075) [2025] ZAGPJHC 1178 (10 November 2025).

to strengthen the legal protections and access to quality healthcare for transgender and gender non-conforming persons in South Africa.

The genesis of this study lies in the Alteration Act. Of particular relevance to the review of this Act[50] is the submission by the South African Human Rights Commission on the Alteration of Sex Description and Sex Status Bill.[51] Having been approached by a number of persons who had undergone 'sex change operations,' and emphasising the need for the legal recognition, the Commission[52] called upon the Department of Home Affairs to allow the alteration of the sex descriptions in the birth register of these persons.[53] It argued that the legislative framework at the time did not adequately protect the rights and dignity of persons who had undergone gender reassignment surgery. The Commission highlighted the implications of the case of *W v W*,[54] which, by applying purely biological and genetic definitions of sex,[55] created significant barriers for persons seeking to have their gender identity reflected in official legal documents. If referred to examples of instances in which transexual persons were unfairly discriminated against following the non-recognition of their sex status.[56] The Commission advanced a range of legal arguments aligned with the European[57] and international context, followed by the recommendation (at that time) that the promulgation of the Alteration Act be expedited, in the interests of ending discrimination and promoting equality and human right in South Africa. Assented to on 9 March 2004, the Alteration Act came into operation on 15 March 2004. Section 1 of this Act refers to the following definitions that are pertinent to this study:[58]

> (1) 'gender characteristics' - the way in which a person expresses his or her social identity as a member of a particular sex by using style of dressing, the wearing of prostheses or other means;

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50 Alteration of Sex Description and Sex Status Act 49 of 2003.

51 South African Human Rights Commission, *Submission on Alteration of Sex Description and Sex Status Bill* (Parliament, September 2003).

52 *South African Human Rights Commission.*

53 South African Human Rights Commission, *Submission on Alteration of Sex Description and Sex Status Bill* (Parliament, September 2003) 1.

54 *W v W* 1976 2 SA 308 (W).

55 South African Human Rights Commission, *Submission on Alteration of Sex Description and Sex Status Bill* (Parliament, September 2003) 2.

56 South African Human Rights Commission, *Submission on Alteration of Sex Description and Sex Status Bill* (Parliament, September 2003) 5.

57 South African Human Rights Commission, *Submission on Alteration of Sex Description and Sex Status Bill* (Parliament, September 2003) 3–5.

58 Alteration of Sex Description and Sex Status Act 49 of 2003, s 1.

(2) ‘gender reassignment’ - a process which is undertaken for the purpose of reassigning a person's sex by changing physiological or other sexual characteristics, and includes any part of such a process
(3) ‘primary sexual characteristics’ - the form of the genitalia at birth;
(4) ‘secondary sexual characteristics’ - those which develop throughout life and which are dependent upon the hormonal base of the individual person; and
(5) ‘sexual characteristics’ - primary or secondary sexual characteristics or gender characteristics.

The Act provides that any person whose sexual characteristics have been altered by surgical or medical treatment or by evolvement through natural development resulting in gender reassignment, may apply to the Director General of the National Department of Home Affairs for the alteration or of his/her sex description on his/her birth register. It is evident from these definitions that ‘gender characteristics’ refers to the expression of social identity or the wearing of prostheses, thus, affirming the notion that gender is a social construct[59] susceptible to heteronormative stereotypes.

In scrutinising this Act,[60] particular reference must be had to the doctoral thesis by Mahlobogwane,[61] which provides the first comprehensive legal study of issues pertaining to gender reassignment involving children in the South African context. Although the focus of Mahlobogwane’s thesis is on transgender children and adolescents, his work provides a valuable framework for this study, which extends the investigation into the legal gaps in the South African legal framework as it applies to transgender persons more broadly. The needs and lived reality of transgender adults vis-à-vis transgender children, albeit similar in many instances, are vastly different, as evidenced in the cases of *September v Subramoney NO and Others* and *Mphela v Manamela* discussed above.

The Alteration Act was criticised in a 2023 briefing paper[62] by the Legal Resource Centre, in conjunction with Gender Dynamix. The authors argue that the title of the Act[63] implies that gender identity is a choice rather than an affirmation of a person’s

59 Shabalala and Campbell, 'The Complexities of Trans Women's Access to Healthcare in South Africa' <https://equityhealthj.biomedcentral.com/articles/10.1186/s12939-023-02039-6#Sec1> accessed 1 October 2024.

60 Alteration of Sex Description and Sex Status Act 49 of 2003.

61 Frans Mashilo Mahlobogwane, *The Legal Position Regarding the Best Interests of the Child in Gender Reassignment Decisions in South Africa* (Doctor of Laws thesis, University of South Africa 2023).

62 Busisiwe Deyi, Sibusiso Khwesa and Liesl Theron, Mandivavarira Mudarikwa, Charlene May and Maxine Rubin, 'Briefing Paper — Alteration of Sex Description Act 49 of 2003' <https://www.transgendermap.com/wp-content/uploads/sites/7/2019/05/LRC-act49-2015-web.pdf> accessed 1 October 2023.

63 Alteration of Sex Description and Sex Status Act 49 of 2003.

‘true identity’ and propose alternative titles such as the ‘Sex Recognition Act’, the ‘Gender Recognition Act’ or the ‘Alteration of Sex Designations’, as being more reflective its purpose. The briefing paper[64] further emphasises that the requirement for surgical alterations as a criterion for gender recognition benefits only those who have already undergone surgery, while discriminating against persons who could not and do not undergo such procedures, owing to logistical, socio-economical, financial and other barriers, including limited access to appropriate healthcare services. This provision is difficult to reconcile with not in keeping with the principles and values of equality as enshrined in the Constitution of the Republic of South Africa. As the Commission aptly pointed out:

> ‘Statements of commitment to the values of dignity and equality ring hollow without concrete efforts to eradicate apparent discrimination. It is insufficient to make declaration of such commitments at the international arena whilst domestic organs of government are not performing in a manner that is consistent with these commitments. In order to realize the right to dignity and equality DHA must act in a substantive manner to give effect to their obligations period until then transgender persons are condemned to being treated as second rate citizens. This is an injustice that cannot continue.’[65]

The Constitution[66] is the supreme law of the land,[67] which guarantees fundamental human rights such as equality[68] and dignity,[69] and the protection thereof. All organs of state are bound by it and are obliged to ‘respect, protect, promote and fulfil’[70] the rights enshrined therein. It is therefore necessary to analyse the extent to which the Alteration Act interacts with constitutional rights, particularly section 9, which guarantees that everyone is equal before the law and has an equal right to protection and benefit of the law.[71] This includes the right to not be discriminated against on grounds of gender, sex and sexual orientation, among others, by the state or any other person.[72]

64 Deyi and others, 'Briefing Paper — Alteration of Sex Description Act 49 of 2003'.
65 Deyi and others, 'Briefing Paper — Alteration of Sex Description Act 49 of 2003' 47.
66 Constitution of the Republic of South Africa, 1996.
67 Constitution of the Republic of South Africa, 1996, s 2.
68 Constitution of the Republic of South Africa, 1996, s 9.
69 Constitution of the Republic of South Africa, 1996, s 10.
70 Constitution of the Republic of South Africa, 1996, s 7(3).
71 Constitution of the Republic of South Africa, 1996, s 9(1).
72 Constitution of the Republic of South Africa, 1996, s 9(3).

Section 9(3) of the Constitution[73] provides that no person may be directly or indirectly discriminated against on various grounds, including sex and gender, and requires that national legislation must be enacted to prevent or prohibit unfair discrimination, such as the Promotion of Equality and Prevention of Unfair Discrimination Act.[74] Against this backdrop, the intersectionality between the Alteration Act[75] and the Constitution of the Republic of South Africa, is illustrated in *September v Subramoney NO and Others.*[76] This case is significant as it constitutes the first case in South African law in which the Yogyakarta Principles,[77] relating to the application of international human rights law in relation to sexual orientation and gender identity, were applied.

The Yogyakarta Principles affirm that gender identity is an integral part of a person's dignity and humanity, advancing the following definition:

> 'Gender identity is understood to refer to each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may evolve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expression of gender including dress speech and mannerisms.'[78]

In *September v Subramoney NO and Others*[79] the court's consideration of the applicant's experiences reflects the obligations articulated in the Yogyakarta Principles, providing a striking and unique precedent for the application of international human rights and international standards in adjudicating the rights of gender minorities. The court held that transgender individuals have the right to express their gender identity and that incarceration does not give the state an excuse not to adhere to, or protect, that right.[80]

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73 Constitution of the Republic of South Africa, 1996, s 9(4).
74 Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.
75 Alteration of Sex Description and Sex Status Act 49 of 2003.
76 *September v Subramoney NO and Others* (EC10/2016) [2019] ZAEQC 4; [2019] 4 All SA 927 (WCC) (23 September 2019).
77 International Commission of Jurists, *Yogyakarta Principles: Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity* (2007) <https://yogyakartaprinciples.org/> accessed 1 October 2023
78 International Commission of Jurists, *Yogyakarta Principles* (2007) Principle 5.
79 *September v Subramoney NO and Others* (EC10/2016) [2019] ZAEQC 4; [2019] 4 All SA 927 (WCC) (23 September 2019).
80 *September v Subramoney NO and Others* (EC10/2016) [2019] ZAEQC 4; [2019] 4 All SA 927 (WCC) (23 September 2019) paras 154- 156.

While the application of the Yogyakarta Principles in South African jurisprudence endorses international human rights standards and how they may inform the local interpretation of rights, it remains pertinent to consider the application of laws in other jurisdictions. The jurisdictions of Canada, Australia and the United Kingdom provide a useful starting point. These jurisdictions not only draw from the Yogyakarta principles; they also have developed comparatively more comprehensive frameworks for the recognition of non-binary identities by allowing self-identification without stringent medical requirements.

The Canadian Bill C-16,[81] introduced to the House of Commons on 17 May 2016, sought to amend the Canadian Human Rights Act[82] and Criminal Code[83] to include 'gender identity' and 'gender expression' to the list of prohibited grounds of discrimination. The purpose of this Bill was the express protection of the rights of minority groups, to ensure that they did not face discrimination based on their 'gender identity' and 'gender expression' in areas including employment and housing. The suggested amendment of Canadian Criminal Code on the other hand, was to provide, among others, stronger legal recourse for victims of hate crimes as a result of their 'gender identity.' As at the date of writing this chapter, all fourteen of the Canadian Territories/Provinces expressly provide human rights protection against discrimination for 'sexual orientation' and 'gender identity', whilst eleven of the fourteen Territories/Provinces expressly offer human rights protection against unfair discrimination on the grounds of 'gender expression.' One province, notably Manitoba, has included 'gender expression' implicitly among the grounds prohibiting unfair discrimination since 2016. Only the Northwest Territories and Saskatchewan do not expressly or implicitly offer protection on the grounds of 'gender expression.'[84]

In the 2014 Australian case, *NSW Registrar of Births, Deaths and Marriages v Norrie*,[85] the High Court of Australia had to adjudicate a matter relevant to this study. The sex

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81 Bill C-16, An Act to amend the Canadian Human Rights Act and the Criminal Code <https://www.parl.ca/documentviewer/en/42-1/bill/c-16/royal-assent> accessed 1 September 2024.

82 Canadian Human Rights Act RSC 1985, c H-6.

83 Criminal Code, RSC 1985, c C-46.

84 CAS Volunteer, 'Trans Rights Legislation in Canada' (11 September 2017) <https://www.cdnaids.ca/trans-rights-legislation-in-canada/> accessed 1 October 2024.

85 *NSW Registrar of Births, Deaths and Marriages v Norrie* [2014] HCA 11 (2 April 2014).

classification of the defendant (Norrie), who had undergone a 'sex affirming procedure,' remained 'ambiguous' after the surgery. The Registrar initially approved registering 'her' sex as 'non-specific' but later recanted and advised that such registration was invalid. The High Court unanimously found that the Transgender (Anti-Discrimination and Other Acts Amendment) Act 1996, (NSW) which amended the Births, Deaths, and Marriages Registration Act of 1995,[86] allowed for the registration of 'ambiguities.' The High Court reiterated the decision of *AB v Western Australia*[87] in which the judges highlighted that 'the sex of a person and a person's gender characteristics are not always unequivocally male or female and there is no threshold point at which a person is regarded as male or female.'[88]

Two Australian States and Territories, specifically the Australian Capital Territory and New South Wales, allow for individuals to change their sex on official documents to a description other than male or female, notwithstanding that this process for amendment still requires psychological and/or medical evidence.[89] These policy provisions evidence the progressive recognition of non-binary identities and further that these recognitions do not necessitate undergoing sex changes or imposing surgical intervention.[90]

Turning to the United Kingdom, the closest analogy to the South African Alteration Act, is the Gender Recognition Act 2004 which prescribes the process to be followed for the recognition of gender identity and obtaining a gender recognition certificate, medical reports and statutory declarations. The Gender Recognition Act 2004 requires that individuals seeking a 'Gender Recognition Certificate' ought to submit evidence to the effect that they have been living in the 'acquired' gender for at least two years,[91] which include the requirement to submit medical reports confirming a diagnosis of gender dysphoria.[92] This Act[93] provides an alternative to the surgically or medically

86 New South Wales*, Births, Deaths and Marriages Registration Act 1995* (No 62).
87 *AB v Western Australia and Anor* [2011] HCA 42.
88 *AB v Western Australia and Anor* [2011] HCA 42, [35].
89 Dylan Stanford, 'The Normativity of Recognition: Non-Binary Gender Markers in Australian Law and Policy' <https://ro.uow.edu.au/cgi/viewcontent.cgi?article=4461&context=lhapapers> accessed 1 October 2024.
90 Stanford, 'The Normativity of Recognition'.
91 Gender Recognition Act 2004 (UK), s 2(1).
92 Gender Recognition Act 2004 (UK), s 2(1).
93 Gender Recognition Act 2004 (UK)

intrusive requirement of the South African Alteration Act, as it does not have an eligibility requirement for individuals to provide proof of gender reassignment surgery. The Gender Recognition Act[94] is strengthened by the provisions of the Equality Act 2010, which expressly includes gender reassignment as a prohibited ground for discrimination.[95] Furthermore, it provides that individuals who propose to undergo or have undergone gender reassignment surgery are protected from discrimination in various circumstances, including employment, education and access to services.[96] The nature of this protection is worth considering in the South African context, particularly in the adjudication of cases such as the case of *September vs Subramoney.*[97]

The key findings of this literature review highlight significant gaps in the South African legislative framework as compared to other international jurisdictions, namely, those of Canada, the United Kingdom and Australia.

6 JUSTIFICATIONS OF THE STUDY

The introduction to this chapter refers to the observation that '[i]t is the lawyers and the courts that have been presented with the medical *fait accompli'*[98] in cases involving transgender persons. The same may be said regarding the potential constitutional challenges that arise in the context of this study. The South African legal system is mostly reactive and does not conventionally seek to address significant gaps that remain in the practical application of its legislation, until expressly challenged in court.

The Alteration Act imposes strict requirements for the change of sex description which many transgender individuals may be unable to meet, especially in the South African socio-economic climate where high levels of unemployment, discrimination in the workplace and limited access to essential services contribute to the lack of resources to access the necessary medical procedures. These strict requirements effectively and potentially infringe on the constitutional rights of transgender and gender non-

94 Gender Recognition Act 2004 (UK)
95 Equality Act 2010 (UK), s 7.
96 Equality Act 2010 (UK), s 7.
97 *September v Subramoney NO and Others* (EC10/2016) [2019] ZAEQC 4; [2019] 4 All SA 927 (WCC) (23 September 2019).
98 Dhai, 'Gender Reassignment Surgery' 50.

conforming individuals. This dissertation seeks to critically assess whether the existing laws provide adequate protection of the rights of transgender and gender non-conforming individuals.

By providing a comparative analysis of the South African legal framework with those of Canada, Australia and the United Kingdom, this dissertation aims to identify best practices that could inform potential pathways of reform by critically analysing how the selected jurisdictions dispense with similar matters pertaining to the protection of transgender and gender non-conforming individuals. Given the permanent and irreversible nature of gender reassignment procedures, it is critical to continually assess whether the current regulations and guidelines in South Africa are in keeping with international standards and recommended best practices, whilst observing the uniqueness and context-specific needs of the South African context.

This dissertation further analyses how the intersection of the legal framework, socio-economic conditions, cultural biases and limitations in access to healthcare affect and impact the rights of transgender and gender non-conforming individuals in South Africa. It aims to generate valuable insights that can inform legislative reform and strengthen the protection of human rights for transgender and gender non-conforming individuals in South Africa. Additionally, it argues for targeted legislative reform, coupled with investment in education and training, to safeguard the public purse from further avoidable claims based on medical negligence and discrimination resulting grounded in ignorance.

7 SCOPE AND LIMITATIONS OF STUDY

This study is comprised primarily of doctrinal and jurisprudential analysis that will be supplemented by secondary empirical sources and policy frameworks rather original than fieldwork with transgender communities.

This study acknowledges the limited availability and accessibility of sources, scholarly and empirical data on transgender rights and the rights of transgender persons to access healthcare services in South Africa. This limitation results in a reliance on

information drawn from small number of clinical audits and empirical surveys, coupled with reports from advocacy groups and non-governmental organisations, which in themselves cannot fully capture the full extent and experiences of transgender and gender-diverse individuals across various geographic and social demographics.

Additionally, the study faces the risk of over-generalisation of findings when addressing the research objectives. In mitigation of these limitations, the study intentionally triangulates diverse sources, including multi-provincial empirical research on access to healthcare, doctrinal and constitutional analysis and international best-practices and guidelines. The absence of comprehensive empirical data should be interpreted as a significant gap in research and policy.

8 METHODOLOGY AND THEORETICAL FRAMEWORK

To achieve the aims and objectives of this study and to effectively answer the research questions, this research will employ a qualitative desktop analysis and review of relevant literature, policies, and guidelines, online or in print. These sources will provide the context and background information that underpins the regulatory framework governing the legal position of transgender individuals, including gender reassignment and gender-affirming procedures in South Africa.

The analysis will include a brief overview of the medical procedures involved in gender reassignment surgeries with the aim of emphasising the relative permanence of the procedures and need for strict regulatory control to protect the human rights of transgendered individuals. The roles and ethical expectations of the various medical healthcare providers and regulatory bodies involved in the provision of gender-affirming medical procedures and processes will also be canvassed.

As stated earlier, the research will include an analysis of comparative jurisdictions, specifically, Canada, the United Kingdom and Australia. Canada is progressive in its protection of transgender and gender non-conforming individuals, having assented to

Bill C-16[99] in 2017, which legislates the inclusion of 'gender identity and expression' as an express, prohibited ground of discrimination under the Canadian Human Rights Act.[100] Whilst placing an emphasis on informed consent, many of the Canadian provinces/territories cover gender-affirming surgeries under their provincial health systems.[101] In the United Kingdom, besides the Gender Recognition Act of 2004 that provides for the issuing of 'Gender-Recognition Certificates' based on 'self-identification', Gender Dysphoria Clinics have been established, including medical practitioners classified as gender dysphoria specialists.[102] Australia, on the other hand, displays a more fragmented approach regarding the recognition of 'self-identification' without the requirement of surgery, because some states have opted for a more stringent approach than those that recognise self-identification, as is currently the position in South Africa.

The selected jurisdictions will be juxtaposed with South Africa in order to comparatively analyse how the different legislative approaches protect the rights of transgender and or gender non-conforming individuals while also seeking to identify aspects adaptable to or encouraging legislative reform in the South African context.

9 CHAPTER FRAMEWORK

Chapter one of the dissertation will provide an introductory overview of this paper, setting out the problem statement, research objectives and the research question. The chapter also explains the research methodology and possible limitations of the study.

Chapter two that addresses clinical issues relating to gender reassignment. It will commence with an analysis of the development of the definition of terms utilised in

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99 Bill C-16, An Act to amend the Canadian Human Rights Act and the Criminal Code <https://www.parl.ca/documentviewer/en/42-1/bill/c-16/royal-assent> accessed 1 September 2024.

100 Canadian Human Rights Act, RSC 1985, c H-6.

101 Community Based Research Centre, 'Gender Affirming Care Services in Canada by Territory/Province' <https://www.cbrc.net/gender_affirming_care_services_in_canada_by_province_territory> accessed 1 October 2024.

102 Interim Gender Dysphoria Protocol and Service Guideline (2013/14) <https://www.gires.org.uk/interim-nhs-england-gender-dysphoria-protocol-and-guideline-201314/> accessed 1 October 2024.

transgenderism and gender-affirming healthcare, such as ‘gender’, ‘sex’ and ‘gender dysphoria’. The chapter will also discuss gender reassignment procedures and surgical options available to transgender patients. The chapter will also turn to the issue of the de-transitioning of transgender individuals who have decided to reverse the gender transition or reassignment process. The chapter will briefly consider the differences between private healthcare and public health care gender-affirming services, with more emphasis on the services offered in the public health care system.

Chapter three is dedicated to a legal analysis of the current legal framework governing gender reassignment surgeries and gender-affirming healthcare. It will assess the ethical obligations imposed on healthcare providers and their respective regulatory bodies, evaluating the adequacy of existing legislation and identifying any potential loopholes in legislative framework. The chapter will furthermore explore the concepts of informed consent and full disclosure concerning the medical procedures discussed in chapter two, while also examining the legal implications and the potential for medical negligence.

Chapter four will centre on the fundamental rights relevant to transgender individuals with reference to pertinent constitutional court cases. The focus of the chapter is on the range of potential infringements of their rights in the context of the existing clinical context in South Africa.

Chapter five that provides a legal comparative overview of the regulation of gender reassignment, commences with a brief synthesis of discussions from the preceding chapters, offering a practical overview of the current legislative situation in South Africa. This chapter will next consider the legal position regarding gender reassignment in Canada, the United Kingdom and Australia. By drawing on comparisons and best practices found in these jurisdictions, the chapter concludes with recommendations that may assist in closing the legal gaps identified in South Africa, identified in the preceding chapters.

Chapter six, the final chapter, will present the conclusions drawn from the study and provide recommendations based on the findings.

CHAPTER TWO: CLINICAL AND MEDICAL ASPECTS OF GENDER REASSIGNMENT

1 INTRODUCTION

The previous chapter provided the foundation for this study, explaining the background and purpose of this research, while outlining the research objectives and questions in this study. Chapter two seeks to interrogate the origins and evolution of gender dysphoria, gender identity, gender incongruence, and the various terminologies used in the transgenderism and transsexualism discourse. It will further provide an exposé of clinical issues relating to gender reassignment and gender-affirming healthcare, contrasting the private health- against public health- care systems and their respective provisions. The aim of this chapter is to provide context of the realities of transgender and gender non-conforming individuals and to provide a basis for further discussion throughout this dissertation.

The analysis of the clinical and medical aspects will consist of an assessment of leading scholarly literature as well as key classificatory and guideline documents that shape transgender discourse and definitions. These will include, among others, the various chronological editions of the Diagnostic and Statistical Manual of Mental Disorders (DSM), successive version of the World Health Organisation's International Classification of Diseases (ICD) and Related Health Problems (ICD), as well as the World Professionals Association of Transgender Health (WPATH) Standards of Care.

Given that South African clinical practice is largely informed by these international instruments, it is noted that the DSM and the ICD are considered diagnostic manuals, whereas the WPATH Standards of Care (SOC) provide clinical guidelines for care. South Africa generally follows international guidelines with minor variations to provide for the local context. The extent of this alignment will be illustrated through a detailed analysis of the South African HIV Clinicians Society (SAHCS)'s gender-affirming healthcare guidelines.[103]

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[103] Anastacia Tomson, Christine McLachlan, Camilla Wattrus and others, *Gender-Affirming Healthcare Guideline for South Africa — Expanded Version: October 2021* (Southern African HIV Clinicians Society 2021) <https://www.spotlightnsp.co.za/wp-content/uploads/2024/05/sahcs-guidelines.pdf> accessed 1 August 2025.

2 DEVELOPMENT OF TRANSGENDER HEALTHCARE TERMINOLOGY

Historically, the development of research on sex, sexuality and gender appeared in and around the 1900's when a German-Jewish doctor by the name of Magnus Hirschfeld recognised and coined the term 'transvestite' in his seminal work, titled '*Die Tansvestiten',*[104] to denote people whose 'inner identity did not match their biological sex'[105] and later settling on the word 'transgender'[106] Prior to this work, the term was used to describe men wearing women's clothes.[107]

Subsequently, various American medical literary works began pioneering the term 'transexual' between the 1940's[108] and 1950's, up to the 1960's[109] with Harry Benjamin, a German-American physician,[110] using the term 'transexual' to distinguish between individuals who wanted (gender-reassignment) surgery from those who did not.[111] Similarly, the use of the term 'transgenderism' started to appear in medical discourse around the 1950s, for example in the work of John F Oliven, who used the term in his book, *Sexual Hygiene and Pathology: A Manual for the Physician and the Professionals*',[112] to indicate 'an urge for gender ('sex') change.'[113] This handbook

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104 United States Holocaust Memorial Museum, 'Magnus Hirschfeld' (Holocaust Encyclopedia, 17 December 2021) <https://encyclopedia.ushmm.org/content/en/article/magnus-hirschfeld-2> accessed 1 September 2025.

105 The Weimar Project, 'About the term "Transvestite"' (The Weimar Project, nd) <https://theconversation.com/whats-in-a-word-the-challenges-of-transgender-38633> accessed 1 September 2025.

106 The Weimar Project, 'About the term "Transvestite"'.

107 The Weimar Project, 'About the term "Transvestite"'.

108 David O Cauldwell, 'Psychopathia Transexualis' (1949) *Sexology* 16, 274–80, cited by Kelsey Mumford, Lin Fraser and Gail Knudson, 'What the Past Suggests About When a Diagnostic Label is Oppressive' (2023) 25(6) *AMA Journal of Ethics* E446, DOI: 10.1001/amajethics.2023.446.

109 Harry Benjamin, *The Transsexual Phenomenon* (The Julian Press, New York 1966), cited in Alison Li, 'Harry Benjamin and the Birth of Transgender Medicine' (2023) 195(48) *Canadian Medical Association Journal* E1665–E1667, DOI: 10.1503/cmaj.231436.

110 Alison Li, 'Harry Benjamin and the Birth of Transgender Medicine' (2023) 195(48) *Canadian Medical Association Journal* E1665–E1667, DOI: 10.1503/cmaj.231436.

111 Liliana Rodrigues, Nuno Santos Carneiro and Conceição Nogueira, 'History of Scientific, Medical and Psychological Approaches to Transsexualities and Their Critical Approach' (2021) 30(2) *Saúde e Sociedade* <https://doi.org/10.1590/S0104-12902021200768> accessed 1 September 2025.

112 John F Oliven, *Sexual Hygiene and Pathology* (2nd edn, J B Lippincott Co 1965) 514, cited in K J Rawson and Cristan Williams, *Transgender: The Rhetorical Landscape of a Term* (University of Michigan Press 2014).

113 Oliven, Sexual Hygiene and Pathology (2nd edn, J B Lippincott Co 1965) 514.

was considered a sort of encyclopaedia containing information on sexual education and parental attributes, with a large coverage of sexual topics.[114]

In 1966, Harry Benjamin, mentioned above, published '*The Transsexual Phenomenon'*[115] wherein he developed a Sex Orientation Scale of three groups, differentiating between the Transvestite, Transexual and the True Transexual—see table below (Table 2.3-1).[116]

Benjamin differentiated between 'transvestism'—an individual who wears the clothes of the opposite sex without presenting a strong desire to permanently convert into the opposite sex. In his observation, transvestism, in the long term, may progress to transsexualism,[117] and 'transsexualism:—described as an individual who strongly identifies with the gender of the opposite sex and would typically wish to undergo surgical or hormonal treatments to attain congruence between their gender identity and their physical bodies.[118]

114 Oliven, Sexual Hygiene and Pathology: A Manual for the Physician and the Professions (2nd edn, J B Lippincott Company 1965), cited in (1965) 37 Yale Journal of Biology and Medicine 54–55.

115 Harry Benjamin, *The Transsexual Phenomenon* (1st published 1966, electronic edn, Symposium Publishing, Düsseldorf 1999) <https://transreads.org/wp-content/uploads/2019/04/2019-04-07_5ca961529c262_HarryBenjamin-TheTranssexualPhenomenon1copy.pdf> accessed 1 September 2025.

116 Benjamin, *The Transsexual Phenomenon* 19.

117 Benjamin, *The Transsexual Phenomenon* 68.

118 Benjamin, *The Transsexual Phenomenon* 68.

Table 1. Sex Orientation Scale (S.O.S.)
Sex and Gender Role Disorientation and Indecision (Males)

	Group 1			Group 2	Group 3	
	Type I	Type II	Type III	Type IV	Type V	Type VI
Profile	TRANSVESTITE	TRANSVESTITE	TRANSVESTITE	TRANSSEXUAL	TRUE TRANSSEXUAL	TRUE TRANSSEXUAL
"GENDER FEELING"	Pseudo Masculine	Fetishistic Masculine	True Masculine (but with less conviction.)	Nonsurgical Undecided. Wavering between TV and TS.	Moderate intensity Feminine. ("Trapped in a male body".)	High intensity Feminine. Total psycho-sexual inversion.
DRESSING HABITS AND SOCIAL LIFE	Lives as man. Could get occasional "kick" out of "dressing." Not truly TV. Normal male life.	Lives as man. "Dresses" periodically or part of the time. "Dresses" underneath male clothes.	"Dresses" constantly or as often as possible. May live and be accepted as woman. May "dress" underneath male clothes, if no other chance.	"Dresses" as often as possible with insufficient relief of his gender discomfort. May live as a man or a woman; sometimes alternating.	Lives and works as woman if possible. Insufficient relief from "dressing."	May live and work as woman. "Dressing" gives insufficient relief. Gender discomfort intense.
SEX OBJECT CHOICE AND SEX LIFE	Hetero-, bi-, or homosexual. "Dressing" and "sexchange" may occur in masturbation fantasies mainly. May enjoy TV literature only.	Heterosexual. Rarely bisexual. Masturbation with fetish. Guilt feelings. "Purges" and relapses.	Heterosexual, except when "dressed." "Dressing" gives sexual satisfaction with relief of gender discomfort. May "purge" and relapse.	Libido often low. Asexual or auto-erotic. Could be bisexual. Could also be married and have children.	Libido low. Asexual, auto-erotic, or passive homosexual activity. May have been married and have children.	Intensely desires relations with normal male as "female," if young. Later, libido low. May have been married and have children, by using fantasies in intercourse.
KINSEY SCALE*	0-6	0-2	0-2	1-4	4-6	6
CONVERSION OPERATION	Not considered in reality.	Rejected.	Actually rejected, but idea can be attractive.	Attractive, but not requested or attraction not admitted.	Requested. Usually indicated.	Urgently requested and usually attained. Indicated.
ESTROGEN MEDICATION	Not interested. Not indicated.	Rarely interested. Occasionally usefull to reduce libido.	Attractive as an experiment. Can be helpful emotionally.	Needed for comfort and emotional ballance.	Needed as substitute for or preliminary to operation.	Required for partial relief.
PSYCHOTHERAPY	Not wanted. Unnecessary.	May be successfull. (In a favorable environment.)	If attempted usually is not successful as to cure.	Only as guidance; otherwise refused or unsuccessful.	Rejected. Useless as to cure. Permissive psychological guidance.	Psychological guidance or psychotherapy for symptomatic relief only.
REMARKS	Interest in "dressing" only sporadic.	May imitate double (masculine and feminine) personality with male and female names.	May assume double personality. Trend toward transsexualism.	Social life dependant upon circumstances.	Operation hoped for and worked for. Often attained.	Despises his male sex organs. Danger of suicide or self-mutilation, if too long frustrated.

*See explanation in the adjoining text.
Type 0: normal sex orientation and identification, heterosexual or homosexual. The idea of "dressing" or "sex change" foreign and unpleasant. Vast majority of all people.

Subsequent to the above period, the Diagnostic and Statistical Manual of Mental Disorders (DSM), considered an authoritative guide for the diagnosing of mental health conditions, formulated various definitions and mutations of terminology. In 1968, for the first time, the word 'transvestism' was included in the DSM-II,[119] having been previously omitted from the DSM-I.[120] However, the term was included under the category of Personality Disorders and Certain Other Non-Psychotic Mental Disorders,[121] and specifically under 'Sexual Deviations:'[122]

> 'This category is for individuals whose sexual interests are directed primarily toward objects other than people of the opposite sex, toward sexual acts not usually associated with coitus, or toward coitus performed under bizarre circumstances as in necrophilia, pedophilia, sexual sadism, and fetishism. Even though many find their practices distasteful, they remain unable to substitute normal sexual behavior for them. This diagnosis is not appropriate for individuals who perform deviant sexual acts because normal sexual objects are not available to them.'

119 American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (2nd edn, APA 1968).
120 American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (1st edn, APA 1952).
121 American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (2nd edn, APA 1968) 41.
122 American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (2nd edn, APA 1968) 44.

In 1975, the World Health Organisation's adopted its ninth version of the International Classification of Diseases[123] which first provided the diagnosis of transsexualism[124] under codes 302.50 to 302.53,[125] yet still recognising transsexualism under the category of sexual deviation and disorders.[126] The WHO' definition of transsexualism in this ninth edition reads as follows:[127]

> 'A desire to live and be accepted as a member of the opposite sex, usually accompanied by a sense of discomfort with one's anatomic sex and a wish to have surgery and hormonal treatment to make one's body as congruent as possible with one's preferred sex.'

This conceptualisation informed the first version of the World Professional Association for Transgender Health (WPATH) Standards of Care, published in 1979, described Gender Dysphoria clinically as 'a disturbance of gender identity in which the individual experiences discomfort or distress arising from a discrepancy between their anatomical sex and their gender identity'.[128]

WPATH was formally known as the Harry Benjamin International Gender Dysphoria Association (HBIGDA),[129] a name changed adopted by the organisation in 2006. The HBIGDA is the institutional author for the first version of the Standards of Care, introducing gender dysphoria in clinical treatment terminology.

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123 World Health Organization, *International Classification of Diseases: 9th Revision* (ICD-9) (WHO 1977).

124 World Health Organization, *Manual of the International Statistical Classification of Diseases, Injuries and Causes of Death* (9th rev, WHO 1977).

125 Find-A-Code, 'ICD-9 Diagnosis Codes – Group 30' (Find-A-Code, nd) <https://www.findacode.com/icd-9/icd9-diagnosis-codes-30-group.html> accessed 1 September 2025.

126 Kelsey Mumford, Lin Fraser and Gail Knudson, 'What the Past Suggests About When a Diagnostic Label Is Oppressive' (2023) 25(6) AMA Journal of Ethics E446–E451, DOI: 10.1001/amajethics.2023.446.

127 World Health Organization, *International Classification of Diseases: 9th Revision* (ICD-9) (WHO 1977) 302, 302.5.

128 Harry Benjamin International Gender Dysphoria Association, *The Standards of Care for Gender Identity Disorders* (1st edn, HBIGDA 1979).

129 Mumford, Lin Fraser and Gail Knudson, 'What the Past Suggests About When a Diagnostic Label Is Oppressive' (2023) 25(6) AMA Journal of Ethics E446–E451, DOI: 10.1001/amajethics.2023.446.

A year later, in 1980, The DSM-III[130] formally included 'Transsexualism' as psychiatric diagnosis under the umbrella of Psychosexual Disorders and specifically as Gender Identity Disorders,[131] stating the following:

> 'The essential features of this heterogeneous disorder are a persistent sense of discomfort and inappropriateness about one's anatomic sex and a persistent wish to be rid of one's genitals and to live as a member of the other sex. The diagnosis is made only if the disturbance has been continuous (not limited to periods of stress) for at least two years, is not due to another mental disorder, such as Schizophrenia, and is not associated with physical intersex or genetic abnormality'.

Individuals with this disorder usually complain that they are uncomfortable wearing the clothes of their own anatomic sex; which discomfort would frequently lead to cross-dressing (dressing in clothes of the other sex). Often, they choose to engage in activities that would culturally tend to be associated with the other sex. These individuals often find their genitals repugnant, which may lead to persistent requests for sex reassignment by surgical or hormonal means.

To varying degrees, their behaviour, dress, and mannerisms would simulate those of the other sex. With cross-dressing, hormonal treatment, and electrolysis, a few males with the disorder would appear relatively indistinguishable from members of the other sex. However, the anatomic sex of most males and females with the disorder would be quite apparent to the alert observer.

The diagnostic criteria for Transsexualism in DSM-III were the following:[132]

i. A sense of discomfort and inappropriateness about one's anatomic sex.
ii. Wish to be rid of one's own genitals and to live as a member of the other sex.
iii. The disturbance has been continuous (not limited to periods of stress for at least two years.
iv. Absence of physical intersex or genetic abnormality.
v. Not due to another mental disorder such as Schizophrenia.

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130 American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (3rd edn, APA 1980).

131 American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (3rd edn, APA 1980) 261.

132 American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (3rd edn, APA 1980) 263–264.

At the time, the ICD-10—a global classification system developed by the World Health Organisation (WHO) providing standardised codes for diseases, conditions, and health-related problems—provided a standardisation of 'transsexualism',[133] changing the 'dichotomy of male and female' and allowed for a gender spectrum, also introducing the label 'genderqueer.'[134] The subsequent and 1994 edition of the DSM, namely the DSM-IV[135], replaced the term transsexualism with 'Gender Identity Disorder'.[136] 'Gender Identity Disorder' was described as being 'characterized by strong and persistent cross-gender identification accompanied by persistent discomfort with one's assigned sex'.[137]

From the 1990's we notice a move towards the de-pathologisation of terminology and language. The term 'transsexual' was gradually replaced with the term 'transgender' as a more inclusive and non-pathologising term. This shift is evidenced in the WHO's ICD-11 (2019),[138] which replaced transsexualism and gender identity disorders with the term 'gender incongruence'.[139] The WPATH SOC version 8[140] refers to Gender-Affirming Care, a mindful term that affirms the gender identity of all patients.

Notwithstanding the development of the terminology described above, the DSM-V[141] and more importantly, its 2022 Text Revision version, still classify Gender Dysphoria

133 Mumford and others, 'What the Past Suggests About When a Diagnostic Label Is Oppressive' E446–E451.

134 American Psychiatric Association, 'History and Epidemiology' (APA, November 2017) <https://www.psychiatry.org/psychiatrists/diversity/education/transgender-and-gender-nonconforming-patients/history-and-epidemiology> accessed 10 September 2025.

135 American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (4th edn, APA 1994).

136 Mumford and others, 'What the Past Suggests About When a Diagnostic Label Is Oppressive' E446–E451.

137 American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (4th edn, APA 1994) 493.

138 World Health Organization, *International Classification of Diseases for Mortality and Morbidity Statistics* (11th rev, WHO 2019) <https://icd.who.int/> accessed 1 October 2025.

139 Mumford and others, 'What the Past Suggests About When a Diagnostic Label Is Oppressive' E446–E451

140 World Professional Association for Transgender Health, 'Standards of Care for the Health of Transgender and Gender Diverse People, Version 8' (2022) 23(Suppl 1) International Journal of Transgender Health S1.

141 American Psychiatric Association, *Highlights of Changes from DSM-IV-TR to DSM-5* (APA 2013) <https://www.psychiatry.org/File%20Library/Psychiatrists/Practice/DSM/APA_DSM_Changes_from_DSM-IV-TR_-to_DSM-5.pdf> accessed 1 September 2025.

under 'mental disorders',[142] requiring clinical distress and emphasising gender-incongruence as opposed to the DSM-IV's reference to cross-gender identification.[143] This fifth iteration of the DSM (the current version) stands in contrast with the current WHO's 2019 edition of the ICD (ICD-11) which classifies gender incongruence as a sexual health condition rather than a mental disorder.[144]

3 DEFINING KEY CONCEPTS: GENDER, SEX, GENDER IDENTITY AND GENDER DYSPHORIA

3.1 Sex

From an Obstetrics and Gynaecology perspective, the consideration of sex and determination of whether a person is born male or female is a purely biological one that focuses on the normal development of genetic sex determined by chromosomal arrangement, specifically the XX-chromosomes (female) and the XY-chromosomes (male).[145] In the *Corbett v Corbett*[146] matter, the court formulated the *Ormrod Test* which is the legal test of biological sex as being the congruence of the chromosomes, gonads and genitalia, without taking into account the aspects relating the psychology of gender identity. Biological sex develops through sexual differentiation, a process in which the gonads, genitalia, and secondary sex characteristics form. These secondary traits are shaped by hormones: oestrogen drives breast development and the onset of menstruation, while testosterone promotes growth of the penis and testes and causes the voice to deepen.[147]

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142 American Psychiatric Association, *Highlights of Changes from DSM-IV-TR to DSM-5* (APA 2013) <https://www.psychiatry.org/File%20Library/Psychiatrists/Practice/DSM/APA_DSM_Changes_from_DSM-IV-TR_-to_DSM-5.pdf> accessed 1 September 2025.

143 American Psychiatric Association, *Highlights of Changes from DSM-IV-TR to DSM-5* (APA 2013) <https://www.psychiatry.org/File%20Library/Psychiatrists/Practice/DSM/APA_DSM_Changes_from_DSM-IV-TR_-to_DSM-5.pdf> accessed 1 September 2025.

144 Rebeca Robles and others, 'Validity of Categories Related to Gender Identity in ICD-11 and DSM-5 Among Transgender Individuals Who Seek Gender-Affirming Medical Procedures' (2022) 22(1) International Journal of Clinical and Health Psychology 100281, DOI: 10.1016/j.ijchp.2021.100281.

145 John Dewhurst, 'Normal and Abnormal Development of the Genital Organs' in CR Whitfield (ed), *Dewhurst's Textbook of Obstetrics and Gynaecology for Postgraduates* (4th edn, 1986), cited in Anika Dhai, 'Gender Reassignment Surgery: Medical Issues and Legal Consequences' (LLM dissertation, University of Natal 2000) 7.

146 *Corbett v Corbett* [1971] P 83.

147 ScienceDirect, 'Secondary Sex Characteristic' (ScienceDirect, nd) <https://www.sciencedirect.com/topics/veterinary-science-and-veterinary-medicine/secondary-sex-characteristic> accessed 1 September 2025.

3.2 Gender and Gender Identity

Unlike biological sex, Gender and Gender Identity speak to the psychological aspects of being either male or female, and is broader in its inclusion of behavioural, manneristical, hormonal and structural factors influenced by environmental and sociological factors.[148] Gender is also used to reference the social construct of roles and norms deemed appropriate for individuals based on their assigned sex.[149]

The concept of gender identity largely refers to an individual's concept of Self as either male, female or something in the alternative.[150] This concept of Self can be the same or contra an individual's biological sex, i.e congruent or incongruent with their physical sex.[151] By extension, therefore, gender incongruence according to the WHO's ICD-11[152] is:

> 'a marked and persistent incongruence between an individuals' experienced gender and their assigned sex, which often leads to a desire to transition – thorough hormone treatment, surgery, or other health care services – to make the individual's body align, as much as desired and possible, with the experienced gender.'

3.3 Sexuality and Sexual Orientation

Sexual Orientation refers to patterns of sustained sexual attraction and behaviour influenced by pre-natal and postnatal factors.[153] These patterns refer to emotional, romantic and sexual attractions (attraction on more than one level) to either, men or women, or both men and women.[154] Sexual Orientation is usually grouped into three categories, specifically heterosexual (attraction on more than one level to individuals of the opposite sex), homosexual (attraction on more than one level to individuals of

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148 Anika Dhai, 'Gender Reassignment Surgery: Medical Issues and Legal Consequences' (LLM dissertation, University of Natal 2000) 6.

149 Michelle R Kaufman and others, 'Differentiating Sex and Gender in Health Research to Achieve Gender Equity' (2023) 101 Bulletin of the World Health Organization 666, 666–671, DOI: 10.2471/BLT.22.289310

150 Charles E Roselli, 'Neurobiology of Gender Identity and Sexual Orientation' (2018) 30(7) Journal of Neuroendocrinology e12562, 1, DOI: 10.1111/jne.12562.

151 American Psychological Association, *Answers to Your Questions About Transgender People, Gender Identity, and Gender Expression* (APA, Washington DC 2011) <http://www.apa.org/topics/lgbt/transgender.aspx> accessed 9 September 2025.

152 World Health Organization, 'Gender Incongruence and Transgender Health in the ICD' (Frequently Asked Questions, WHO 2025) <https://www.who.int/standards/classifications/frequently-asked-questions/gender-incongruence-and-transgender-health-in-the-icd> accessed 10 September 2025.

153 Anika Dhai, 'Gender Reassignment Surgery: Medical Issues and Legal Consequences' (LLM dissertation, University of Natal 2000) 12.

154 Roselli, 'Neurobiology of Gender Identity and Sexual Orientation' 5.

the same sex as oneself) and bisexual (attraction on more than one level to individuals of both sexes).[155]

Sexuality is the broader term, encompassing but not limited to sexual orientation, sexual identity and sexual behaviour.[156]

3.4 Transsexualism

Transexual individuals identify with a gender different from the sex they were assigned at birth. The ICD-10[157] defined transsexualism as:

> 'a desire to live and be accepted as a member of the opposite sex, usually accompanied by a sense of discomfort with, or inappropriateness of, one's anatomic sex, and a wish to have surgery and hormonal treatment to make one's body as congruent as possible with ones preferred sex.'

Worded differently, transsexualism can be defined as a form of Gender Dysphoria Syndrome where psychological gender conflicts with the biological sex.[158] With research and development and over time, the correct term has evolved from Gender Identity Disorder—as described in the Diagnostic and Statistical Manual IV (DSM-IV)[159]—to Gender Dysphoria in the DSM-V.[160]

3.5 Gender Dysphoria

The text revision of the 2013 DSM-V, known as the DSMV-TR,[161] defines Gender Dysphoria as 'a marked incongruence between one's experienced/expressed gender and their assigned gender, lasting at least six months.'

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155 American Psychological Association, *Answers to Your Questions: For a Better Understanding of Sexual Orientation and Homosexuality* (APA, Washington DC 2008) <http://www.apa.org/topics/lgbt/orientation.pdf> accessed 9 September 2025.

156 World Health Organization, *Defining Sexual Health: Report of a Technical Consultation on Sexual Health, 28–31 January 2002, Geneva* (WHO 2006).

157 World Health Organization, International Statistical Classification of Diseases and Related Health Problems. 10th Revision (ICD-10) (WHO 1992) F64.0.

158 Dhai, 'Gender Reassignment Surgery: Medical Issues and Legal Consequences' 12

159 American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders: DSM-5-TR* (5th text rev, APA 2022).

160 American Psychiatric Association, 'Gender Dysphoria' (APA 2013) <https://www.psychiatry.org/file%20library/psychiatrists/practice/dsm/apa_dsm-5-gender-dysphoria.pdf> accessed 10 September 2025.

161 World Health Organization, 'Gender Incongruence and Transgender Health in the ICD' (Frequently Asked Questions, WHO 2025) <https://www.who.int/standards/classifications/frequently-asked-questions/gender-incongruence-and-transgender-health-in-the-icd> accessed 10 September 2025.

Gender Dysphoria manifests in ways that may include a strong desire to be treated as the other gender or a strong desire to rid oneself of an unwanted sex characteristic (for example, breasts, penis, etc).[162] Gender Dysphoria is different to Gender Incongruence in that Gender Dysphoria requires or involves significant distress or impairment, unlike with Gender Incongruence.[163]

4 CLINICAL PATHWAYS: GENDER-AFFIRMING CARE

Clinical pathways are defined as structured evidence-based plans or frameworks of care that provide standardised guidelines for healthcare providers or the healthcare process.[164] In considering the gender-affirming clinical pathways, this study's focus will be on the South African HIV Clinicians Society Gender-Affirming Healthcare Guidelines for South Africa (SAHCS GAHC Guidelines or SAHCS Guidelines) of 2021,[165] including the WPATH Standards of Care Version Eight (SoC-8)[166] as the most recent version of the Standards of Care (in contrast with its preceding WPATH Standards of Care Version Seven (SoC-7)). Although the WPATH Standards of Care guidelines are not mandated in South Africa, the guidelines constitute internationally recognised guidelines for best practices in the provision of gender-affirming healthcare.

4.1 South African HIV Clinicians Society Gender-Affirming Healthcare Guidelines for South Africa (SAHCS GAHC)

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162 American Psychiatric Association, 'Gender Dysphoria' (APA, 2013) <https://www.psychiatry.org/file%20library/psychiatrists/practice/dsm/apa_dsm-5-gender-dysphoria.pdf> accessed 10 September 2025.

163 World Health Organization, 'Gender Incongruence and Transgender Health in the ICD' (Frequently Asked Questions, WHO 2025) <https://www.who.int/standards/classifications/frequently-asked-questions/gender-incongruence-and-transgender-health-in-the-icd> accessed 10 September 2025.

164 Leigh Kinsman and others, 'What Is a Clinical Pathway? Development of a Definition to Inform the Debate' (2010) 8 BMC Medicine 31, DOI: 10.1186/1741-7015-8-31; Melanie Muller and others, 'An Introduction to Gender Affirming Healthcare: What the Family Physician Needs to Know' (2023) 65(1) South African Family Practice a5770, DOI: 10.4102/safp.v65i1.5770.

165 Southern African HIV Clinicians Society, 'Gender-Affirming Healthcare Guideline for South Africa – Expanded Version: October 2021' (SAHCS 2021) 60.

166 Eli Coleman and others, 'Standards of Care for the Health of Transgender and Gender Diverse People, Version 8' (2022) 23(Suppl 1) International Journal of Transgender Health S1–S259, DOI: 10.1080/26895269.2022.2100644

The purpose of the guidelines is to provide evidence-informed best practice recommendations to enable South African healthcare providers, as well as other psychosocial and allied healthcare professional to offer quality affirming healthcare to transgender and gender-diverse individuals.[167]

When considering gender-affirming healthcare, it is imperative to take into consideration the clinical pathways and the aligned clinical indicators as outlined in the SAHCS GAHC. The discussion below expounds on and interrogates the prescribed clinical pathways that specify the sequence from initial consultation to post-operative care, as well as the clinical indicators detailed in the guidelines serving to define roles for healthcare providers at the various stages of gender-affirming care provision.

4.2 Clinical Pathways

i. Initial Consultation and Assessment:[168]

The initial consultation and assessment phase requires a comprehensive detailing of the client's gender identity, preferred name and pronouns. In this phase the care provider must document details of the client's mental health provider to enable liaison pertaining to surgery and pre-surgical psychological assessments.

This phase includes documenting the details of, most often a general practitioner, responsible for prescribing the hormone therapy, taking thorough notes on previous medical procedures, surgeries and complications. Extensive discussions must be had with the client on the options available regarding fertility preservation, to ensure informed decision making. Further discussions will include information on subsequent procedures that follow to make any changes to their legal name and gender markers with the Department of Home Affairs, including information which local home affairs offices will accommodate, while also encouraging clients to join local support groups.

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167 Anastacia Tomson, Christine MacLachlan, Camilla Wattrus and others, 'Southern African HIV Clinicians' Society Gender-Affirming Healthcare Guideline for South Africa' (2021) 22(1) *South African Journal of HIV Medicine* a1299, DOI:10.4102/sajhivmed.v22il.1299 <https://pmc.ncbi.nlm.nih.gov/articles/PMC8517808/> accessed 1 September 2025.

168 Southern African HIV Clinicians Society, 'Gender-Affirming Healthcare Guideline for South Africa – Expanded Version: October 2021' (SAHCS 2021) 60–61.

The caregiver must be cognisant of the fact that some clients may present with severe gender dysphoria regarding psychical examinations, and as such, it is critical to ask for permission when doing physical examinations and allow for alternatives such as pictures and diagrams in the event that consent for physical examination is not given.

In practice, transgender and gender diverse individuals report actively avoiding primary-care facilities after experiencing initial encounters characterised by misgendering, prejudice and breaches in patient confidentiality, with health care professionals often talking about the patients' gender in a derogatory manner.[169] Consequently, initial consultations seem more exclusionary regarding the provision of access the gender-affirming pathways. This undermines the very purpose of the SAHCS framework and the right to access to healthcare services guaranteed under section 27 of the Constitution.[170]

ii. Mental Health Assessment and Multidisciplinary Team:[171]

Notwithstanding the WPATH SoC-7 guideline recommending that there be two independent psychological evaluations, the SAHCS GAHC requires only one referral letter from a Mental Health Practitioner who is familiar with Gender-Affirming Healthcare. Where psychological issues are identified, a psychologist or psychiatrist with knowledge on transgender care should manage these issues to ensure appropriate and affirming support. The SAHCS encourages the use of a multidisciplinary team that should comprise of primary health care providers, surgeons and mental health practitioners. This multi-disciplinary approach facilitates shared decision-making, ensuring better client support.

While the removal of the requirement that there be two independent psychological evaluations to a 'single referral', for instance, sought to eliminate gatekeeping, empirical evidence[172] indicates that the requirement for mental-health assessments

169 Denise Zambezi and Frans Viljoen, 'Access to Healthcare Services for Transgender People in South Africa: Assessing Healthcare Experiences and Human Rights' (2024) 25(4) *International Journal of Transgender Health* 791–803, DOI: 10.1080/26895269.2023.2273364.

170 Constitution of the Republic of South Africa, 1996, s 27(a).

171 Southern African HIV Clinicians Society, 'Gender-Affirming Healthcare Guideline for South Africa – Expanded Version: October 2021' (SAHCS 2021) 60–61.

172 Zambezi and Viljoen, 'Access to Healthcare Services for Transgender People in South Africa' 791–803.

creates further barriers in accessing gender-affirming care instead of affirming safeguards, by effectively requiring that transgender individuals first 'present as mentally ill.'[173] The South African Society of Psychiatrists prescribe that it is up to the medical practitioner to objectively assess dysphoria and decide if the transgender individual qualifies for gender-affirming surgery, effectively creating an unequal power dynamic.[174] When mental-health assessments are conducted by clinicians who are inadequately trained or trained in a pathologised framework, it may result in biases and discrimination, further re-enforcing gatekeeping and marginalisation, thereby undermining the imperatives set by the guidelines and the commitments of the Constitution.[175]

iii. Informed Consent:[176]

Informed consent is critical and must be thoroughly documented. The informed consent requirement ideally comprises of the client together with the multi-disciplinary team of professionals, deciding on suitable care and surgical options, with concrete and comprehensive understanding of the possible risks, complications, surgical limitations and possible outcomes. The shared decision making ensures that the client is empowered to make autonomous decisions regarding their healthcare processes and procedures, further ensuring that there is informed consent on their part.

The right to informed consent intersects with multiple constitutional rights, among others the rights to dignity,[177] privacy,[178] access to information,[179] access to healthcare services[180] and the right to bodily autonomy,[181] to name a few. Empirical data[182] shows that there is a significant gap between the informed consent model on

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173 Zambezi and Viljoen, 'Access to Healthcare Services for Transgender People in South Africa' 798.

174 Zambezi and Viljoen, 'Access to Healthcare Services for Transgender People in South Africa' 798.

175 Southern African HIV Clinicians Society, 'Gender-Affirming Healthcare Guideline for South Africa – Expanded Version: October 2021' (SAHCS 2021) 60–61.

176 SAHCS Guideline (Expanded 2021) (n 113) 60–61.

177 Constitution of the Republic of South Africa, 1996, s 10.

178 Constitution of the Republic of South Africa, 1996, s 14.

179 Constitution of the Republic of South Africa, 1996, s 32.

180 Constitution of the Republic of South Africa, 1996, s 27.

181 Constitution of the Republic of South Africa, 1996, s 12(2).

182 Lynn Bust and others, 'Gender-Affirming Care in South Africa: A Cross-Sectional Survey of Transgender and Gender-Diverse People in the Eastern and Western Cape Provinces, South Africa' (2026) South African Medical Journal 47 <https://samajournals.co.za/index.php/samj/article/view/3253> accessed 14 March 2026.

paper and informed consent as experienced by transgender individuals, with studies evidencing that transgender individuals experienced stigma, discrimination and repeated violations of privacy.[183] This aspect, coupled with inadequately trained medical professionals[184] and the imparting of partial or paternalistic information consequently result in transgender individuals resorting to self-medicating and accessing alternative and hormonal treatment from the black market, without the necessary prescriptions.[185] This disposition highlights how structural barriers and the attitudes of the healthcare providers impact the informed consent model, affecting autonomous decision-making, while further re-enforcing the nuances of gatekeeping.

iv. Transition Pathways:[186]

Hormone therapy is the common starting point in gender-affirming care and is generally recommended before gender-affirming surgery can take place. In accordance with the informed consent requirement, clients are at liberty to defer or decline hormone therapy whether due to personal preferences or other identified medical contraindications.

Surgical referrals may be made subsequent to psychiatric evaluation and after obtaining informed consent, understanding that surgical interventions may vary per client and also according to their personal goals and clinical assessments. The SAHCS guidelines also make provision for adolescents and parental or legal guardian involvement in the decision-making processes. Since other authors have dealt with gender-affirming surgeries involving adolescents in South Africa already, this study will not address the unique position of adolescents in this context.[187]

The SAHCS guidelines recognise surgery as gender-affirming rather than cosmetic with both global and local guidelines recognising surgery as a clinical necessity.[188]

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183 Millicent Maoto and Burt Davis, 'How Transwomen Meet Their Healthcare Needs' (2024) African Journal of Primary Health Care and Family Medicine <https://phcfm.org/index.php/phcfm/article/view/4598/7301> accessed 14 March 2026.

184 Southern African HIV Clinicians Society, 'Gender-Affirming Healthcare Guideline for South Africa – Expanded Version: October 2021' (SAHCS 2021) 4–5.

185 Maoto and Davis, 'How Transwomen Meet Their Healthcare Needs'.

186 Southern African HIV Clinicians Society, 'Gender-Affirming Healthcare Guideline for South Africa – Expanded Version: October 2021' (SAHCS 2021) 60.

187 Frans Mashilo Mahlobogwane, *The Legal Position Regarding the Best Interests of the Child in Gender Reassignment Decisions in South Africa*.

188 Bust and others, 'Gender-Affirming Care in South Africa'.

This recognition does not translate into actual service provision or access to said gender-affirming surgery by transgendered individuals. Notably and sadly, waiting lists for gender-affirming surgery are on average 15 to 20 years to come to fruition in the public sector,[189] which further reduces the guidelines to an aspirational blueprint, rather than a readily attainable/achievable reality or realistic entry point to care.

v. Pre-Operative Considerations:[190]

The SAHCS GAHC guidelines comprise of detailed counselling on different surgical options available to clients, outlined in Table 11 and Table 12 in the guidelines,[191] and require that comprehensive pre-operation counselling is carried out. The verification of the client's hormone therapy status prior to any medical and/or surgical history is important.

Fertility preservation options must be reaffirmed at this stage, and the client must be provided with psychological support prior to surgery as well as clear explanations regarding the surgical pathway to ensure an that there is an informed surgical process.

vi. Surgery and Perioperative Management:[192]

As noted above, in terms of this care pathway, surgery is recognised as gender-affirming surgery rather than cosmetic surgery. The SAHCS GAHC guidelines require that the surgeon be affirming of their client's gender identity and provide unbiased, comprehensive information regarding the procedures and outcomes. The client must be provided with realistic counselling in relation to the waiting times and financial implications, particularly in the public health sector where constraints may lead to significant delays if surgery is offered at all. Furthermore, the client must be provided with post-surgery access to mental health support and community services in order to facilitate recovery and social integration.

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189 Bust and others, 'Gender-Affirming Care in South Africa' 51.

190 Southern African HIV Clinicians Society, 'Gender-Affirming Healthcare Guideline for South Africa – Expanded Version: October 2021' (SAHCS 2021) 60–62.

191 Southern African HIV Clinicians Society, 'Gender-Affirming Healthcare Guideline for South Africa – Expanded Version: October 2021' (SAHCS 2021) 61–62.

192 Southern African HIV Clinicians Society, 'Gender-Affirming Healthcare Guideline for South Africa – Expanded Version: October 2021' (SAHCS 2021) 59–60.

vii. Training and Institutional Support:[193]

To successfully achieve the relevant clinical pathways, the SAHC GAHC guidelines recommend that healthcare workers and support staff be trained on the principles and practice of the gender-affirming healthcare. The various types of facilities, whether it be healthcare institutions, assisted living and other shelters, should have policies in place to prevent discrimination and harassment based on gender identity, with provision for ongoing professional development and in-service training of personnel in order to improve the quality of care.

The SAHCS GAHC framework and core principles can be summarised as encompassing three main or essential aspects: that the framework follows an informed consent model which prioritises client autonomy and involvement in the decision-making process; advocacy for the integration of gender-affirming care into primary healthcare services; whilst also placing emphasis on an affirming, non-pathologising approach that seeks to respect gender identity and expression.[194]

The complementary relationship between clinical pathways and the clinical indicators for care is important, seeing that clinical pathways define the process and sequence of interventions for specific patients and contexts, thereby serving as an operational road map,[195] while clinical indicators on the other hand, measure the care, before, during and after delivery, serving as a tool for monitoring and evaluation.[196]

The following provides a synopsis on the clinical indicators for care in terms SAHCS GAHC guideline provisions:

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193 Southern African HIV Clinicians Society, 'Gender-Affirming Healthcare Guideline for South Africa – Expanded Version: October 2021' (SAHCS 2021) 63

194 Anastacia Tomson and others, 'Southern African HIV Clinicians' Society Gender-Affirming Healthcare Guideline for South Africa' (2021) 22(1) South African Journal of HIV Medicine 1299, DOI: 10.4102/sajhivmed.v22i1.1299 <https://pmc.ncbi.nlm.nih.gov/articles/PMC8517808/> accessed 1 September 2025.

195 Thomas Rotter and others, 'Clinical Pathways as a Quality Strategy' in Reinhard Busse, Niek Klazinga, Dimitra Panteli and Wilm Quentin (eds), *Improving Healthcare Quality in Europe: Characteristics, Effectiveness and Implementation of Different Strategies* (Health Policy Series No 53, European Observatory on Health Systems and Policies/WHO Regional Office for Europe, Copenhagen 2019) ch 12 <https://www.ncbi.nlm.nih.gov/books/NBK549262/> accessed 1 September 2025

196 Australian Medical Association, 'Position Statement on Clinical Indicators' (10 May 2012) <https://www.ama.com.au/sites/default/files/2021-09/AMA%20Position%20Statement%20on%20Clinical%20Indicators_V2%20(1).pdf> accessed 1 September 2025.

4.3 Clinical Indicators

i. Initial Assessment and Decision to Initiate Care[197]

The foundational clinical indicator when initiating gender-affirming care is confirmation of persistent gender dysphoria or incongruence indicated by the client, as well as the client's readiness and their capacity to give informed consent. There must be a comprehensive mental health assessment conducted to rule out any unmanaged psychiatric condition which may hinder or interfere with the provision of care. In addition to a mental health assessment, there ought to be a thorough evaluation of existing medical co-morbidities or any prior complications that may affect the safety of proceeding with hormone therapy or surgical procedures. In as far as required documentation is concerned, practitioners must ensure that they receive written informed consent for all interventions.

ii. Mental Health Referral and Psychological Support[198]

These indicators include the presence of psychological distress and co-occurring mental health disorders that require management both before and after gender-affirming interventions.

iii. Hormone Therapy Initiation and Monitoring[199]

The decision to initiate hormone therapy is guided by indicators that include persistent gender incongruence and the informed consent to do so. Clinical monitoring indicators include hormone levels, metabolic status, cardiovascular risk factors, as well as ongoing mental health evaluations.

iv. Surgical Indicators[200]

The need for surgical interventions is indicated when, notwithstanding hormone therapy, the client presents with persistent gender dysphoria or an expressed

197 Southern African HIV Clinicians Society, 'Gender-Affirming Healthcare Guideline for South Africa – Expanded Version: October 2021' (SAHCS 2021) 60, 63

198 Southern African HIV Clinicians Society, 'Gender-Affirming Healthcare Guideline for South Africa – Expanded Version: October 2021' (SAHCS 2021) 59–67.

199 Southern African HIV Clinicians Society, 'Gender-Affirming Healthcare Guideline for South Africa – Expanded Version: October 2021' (SAHCS 2021) 60.

200 Southern African HIV Clinicians Society, 'Gender-Affirming Healthcare Guideline for South Africa – Expanded Version: October 2021' (SAHCS 2021) 59–61.

preference for surgery. It is required that there be extensive psychological assessment and medical assessment to confirm medical suitability based on physical health status and absence of contraindications. In addition, considerations of timing are crucial in determining suitable interventions.

v. Institutional and Social Care Indicators[201]

These indicators include the potential risks of discrimination, non-affirming environments as well as the need for continuous training of staff.

Clinical indicators ought to function as objective protections for quality rather than become additional barriers to access to care. However, factors such as confirmation of 'persistent gender dysphoria,' 'the evaluation of existing co-morbidities' and the 'absence of contraindications,' coupled with the gaps in knowledge and expertise of the healthcare provider,[202] may result in indicators being applied in a hostile manner that may testify to a healthcare provider's ignorance, prejudices and biases rather than genuine clinical concern.[203] These factors may exacerbate historical gatekeeping practices and turn clinical indicators into discriminatory barriers.

4.4 Key Contrasts and Similarities between the SOC-7, SAHCS GAHC and SOC-8

The obvious similarities between all the SAHCS GAHC guidelines, including both version 7 and 8 of the Standards of Care, include the employment of a client-centred approach which seeks to respect the autonomy of transgender and gender diverse individuals, requiring that the client be involved in the decision-making process. All three of the guidelines and versions of the standards of care advocate for a multi-disciplinary team,[204] including medical providers, mental health professionals and other related professionals familiar with gender-affirming healthcare.[205]

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201 Southern African HIV Clinicians Society, 'Gender-Affirming Healthcare Guideline for South Africa – Expanded Version: October 2021' (SAHCS 2021) 63–65.

202 Southern African HIV Clinicians Society, 'Gender-Affirming Healthcare Guideline for South Africa – Expanded Version: October 2021' (SAHCS 2021) 4–5.

203 Bust and others, 'Gender-Affirming Care in South Africa' 47.

204 World Professional Association for Transgender Health, *Standards of Care for the Health of Transgender and Gender Diverse People, Version 7* (WPATH 2012) 47.

205 World Professional Association for Transgender Health, *Standards of Care for the Health of Transgender and Gender Diverse People, Version 8* (WPATH 2022) App D, 258; World Professional Association for Transgender Health, *Standards of Care for the Health of*

The guidelines equally emphasise the continuous competency training and education of care providers as well as the recommendation for inclusive policies that support TGD (transgender diverse) individuals' rights and dignity.[206] In addition, all three guidelines recognise gender as non-binary and take cognisance of gender-diverse identities.[207]

As mentioned above, the SAHCS utilised the SoC-7 as a basis for developing the SAHCS GAHC guidelines, adapted to the South African context, whilst also considering the relevant legal frameworks and social aspects.[208] The SoC-7 and SoC-8 provide a global and generalised framework. With the SoC-8, there were very specific points of departure from the SoC-7 which required multiple layers of approval, necessitating that there be a recommendation from two independent psychological evaluations prior to gender-affirming surgery.[209] The SAHCS GAHC guidelines on the other hand, recognise one referral letter from a mental health professional who is familiar with the gender-affirming healthcare as being sufficient for gender-affirming surgery,[210] offering a less restrictive process that is contrary to the 'gatekeeping' requirements for which the SOC-7 was criticised. The SoC-8 aligns with the less restrictive requirements as set out in the SAHCS GAHC guidelines.

While there is a move to dismantle gatekeeping practices, the evident barriers in accessing gender-affirming care, [211] the inadequate training of medical professionals[212] and limited facilities suggests that the SAHCS guidelines have not yet

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Transgender and Gender Diverse People, Version 7 (WPATH 2012) 59; Southern African HIV Clinicians Society, 'Gender-Affirming Healthcare Guideline for South Africa – Expanded Version: October 2021' (SAHCS 2021) 59.

206 Southern African HIV Clinicians Society, *Gender-Affirming Healthcare Guideline for South Africa* (SAHCS 2021) 63–66.

207 World Professional Association for Transgender Health, *Standards of Care for the Health of Transgender and Gender Diverse People, Version 7* (WPATH 2012) 58; Southern African HIV Clinicians Society, *Gender-Affirming Healthcare Guideline for South Africa* (SAHCS 2021) 5.

208 Southern African HIV Clinicians Society, Gender-Affirming Healthcare Guideline for South Africa (SAHCS 2021) 59.

209 World Professional Association for Transgender Health, *Standards of Care for the Health of Transgender and Gender Diverse People, Version 7* (WPATH 2012) 27.

210 Southern African HIV Clinicians Society, *Gender-Affirming Healthcare Guideline for South Africa* (SAHCS 2021) 60

211 Frans Mashilo Mahlobogwane, 'Barriers to Gender-Affirming Health Care in Children and Adolescents in South Africa' (2025) 46 Obiter 317–322.

212 Southern African HIV Clinicians Society, *Gender-Affirming Healthcare Guideline for South Africa* (SAHCS 2021).

practically addressed the pathologising approaches seen in the public sector at large. As such the guidelines represent only a normative benchmark against which the failures in implementation and legislative compliances with the constitutional human rights framework ought to be measured.

4.5 Clinical Pathways in Practice

The existence of detailed, evidence-based guidelines as the ones provided by the South African HIV Clinicians Society does not automatically translate into a concurrent lived experience by South African transgender and gender-diverse individuals in keeping with said guidelines.[213] There is an evident disjuncture between the theory and practical application of the guidelines.[214]

Zambezi and Viljoen[215] conducted an empirical study with 43 transgender respondents aged between 23 and 45 years, 86% of whom were black in race, and the majority trans-women.[216] They found that while the Constitution[217] guarantees access to healthcare services, 100% of the transgender respondents experiences societal stigma and most of them reported healthcare discrimination.[218] The study further evidences that the actual clinical pathways for gender-affirming healthcare are critically undermined by lack of resources, geographical inequalities and pathologising and gatekeeping medical models, with participants noting that in certain instances healthcare workers did not know the difference between gender identity and sexual orientation.[219]

This disjuncture raises significant doctrinal questions whether the South African legislative system and specifically, the state, are effectively discharging their obligations to take reasonable legislative steps to realise the right to access to

213 Bust and others, 'Gender-Affirming Care in South Africa'.
214 Bust and others, 'Gender-Affirming Care in South Africa'.
215 Zambezi and Viljoen, 'Access to Healthcare Services for Transgender People in South Africa' 794.
216 Zambezi and Viljoen, 'Access to Healthcare Services for Transgender People in South Africa' 801.
217 Constitution of the Republic of South Africa, 1996.
218 Zambezi and Viljoen, 'Access to Healthcare Services for Transgender People in South Africa' 794.
219 Zambezi and Viljoen, 'Access to Healthcare Services for Transgender People in South Africa' 801.

healthcare services by transgender and gender diverse individuals. Essentially, this leads to questions regarding the adequacy of the legal framework relevant to the provision of gender-affirming healthcare in South Africa.

4.6 Surgical and Non-Surgical Procedures

The guidelines discussed above and utilised in the provision of gender-affirming healthcare emphasise the need for a client-centred approach. The guidelines acknowledge the broad spectrum of clinical pathways available to transgendered and gender-nonconforming individuals, and the personal extent to which they may wish to affirm their identities, whether by surgical or non-surgical modalities.

It is crucial to note that clinical and psychological treatment is non-linear, and an individual's overall treatment may require a combination of surgical and non-surgical interventions.[220]

4.6.1 Non-Surgical Procedures

A fundamental and perhaps foundational non-surgical option for gender-affirming healthcare is care that focuses on the mental health support of the transgender and gender non-conforming individuals, including essential psychosocial therapy and counselling, aimed at improving the quality of life and aiding the individual in affirming their gender identity to their loved ones and to society.[221]

There are various non-surgical interventions aimed at aligning the physical aspects of gender identity. The most common of these include Hormone Replacement Therapy (HRT), which employs Testosterone or Estrogen to either induce masculine/masculinising or feminine/feminising physical attributes.[222] The introduction of these hormones may expedite hair growth, stimulate the growth of glandular and fat

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220 Danyon Anderson and others, 'Gender Dysphoria and Its Non-Surgical and Surgical Treatments' (2022) 10(3) *Health Psychology Research* 38358, DOI: 10.52965/001c.38358 <https://pmc.ncbi.nlm.nih.gov/articles/PMC9501960/> accessed 1 September 2025.

221 Anderson and others, 'Gender Dysphoria and Its Non-Surgical and Surgical Treatments'.

222 Beverly Fischer, 'What Are the Different Types of Gender Affirmation Procedures?' (25 June 2022) <https://www.beverlyfischer.net/blog/what-are-the-different-types-of-gender-affirmation-procedures/> accessed 1 September 2025.

tissue resulting in breast formation or growth, as well as cause significant changes to the voice. Puberty blockers may also be used for younger TGD persons.

Estrogen-based therapy is used to feminise physical attributes. With multiple modes of intake, whether by patches or injection for instance, this type of therapy blocks testosterone production, increasing estrogen for breast growth and fat redistribution, in addition to decreasing muscle mass/strength, softening of skin; and a decrease in sexual desire, sperm production and testicular volume, amongst others.[223] Testosterone-based therapy increases the levels of testosterone, leading to stimulated hair growth and voice augmentation (deepening), in addition to contributing to the masculinising attributes of oily skin, scalp hair loss, increased muscle mass/strength, menstrual suppression or the complete cessation of menstruation, as well as clitoral enlargement, amongst others.[224] Hormone or puberty blockers, used mostly in cases pertaining to adolescence, essentially prevent the body from producing its own testosterone or estrogen. Notably, the choice of treatment via gender-afforming hormone therapy causes partly irreversible changes, as a result, it is crucial that there be pre-treatment screening and laboratory testing for medical history and contraindications.[225]

4.6.2 Surgical Procedures

There is a wide range of feminising and masculinising surgical interventions that is available to TGD persons, as well as other procedures that are not specific to TGD persons, such as a mammoplasty (breast implants) or orchiectomy (removal of testicles).[226] For the purposes of this study, I will discuss three primary procedures, without extensively detailing the medical procedures and technicalities involved.

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223 Johns Hopkins Medicine, 'Gender-Affirming Hormone Therapy (GAHT)' (Johns Hopkins Medicine 2024) <https://www.hopkinsmedicine.org/health/treatment-tests-and-therapies/gender-affirming-hormone-therapy-gaht> accessed 1 September 2025.

224 Johns Hopkins Medicine, 'Gender-Affirming Hormone Therapy (GAHT)'.

225 Gesine Meyer and others, 'Hormonal Gender Reassignment Treatment for Gender Dysphoria' (2020) 117 *Deutsches Ärzteblatt International* 726 <https://pmc.ncbi.nlm.nih.gov/articles/PMC7871443/> accessed 1 September 2025.

226 UCSF Gender Affirming Health Program, Department of Family and Community Medicine, University of California San Francisco, *Guidelines for the Primary and Gender-Affirming Care of Transgender and Gender Nonbinary People* (MB Deutsch ed, 2nd edn, 17 June 2016) <https://transcare.ucsf.edu/guidelines> accessed 1 September 2025.

4.6.2.1 Phalloplasty

A phalloplasty is a genital masculinising surgical procedure performed on transgender men who desire fully formed external male genitalia. Its purpose is creating a 'neophallus' or new penis using tissue grafts,[227] or either the free flap or pedicled flap of skin taken from radial forearm or the anterior lateral thigh (otherwise known as the donor site) without severing it from its blood supply.[228] This procedure is usually combined with a scrotoplasty which is the creation of a scrotum and urethral lengthening to facilitate and allow for standing urination.

The scrotoplasty is an associated procedure which may be performed with or without testicular implants, with the urethral hookup (connecting two ends of the urethra) performed by utilising cheek or vaginal mucosa. This procedure may also include an erectile implant (penile prosthesis) to allow for erections after the initial phalloplasty procedure.[229]

The objective of this procedure is to replicate the appearance of male genitalia, as well as the function of male genitalia, as far as possible, in order to improve gender congruence in transgender males.[230]

It should be noted that this procedure is not without risks and complications, some of which include flap loss (this is the death of the tissue in the neophallus, due to compromised blood flow or technical errors), corona flattering (the flattening of the coronal ridge at the base of the glans penis),[231] urinary complications and incontinence, infection, wound healing complications, pelvic bleeding/pain, bladder and rectal injury, lack of sensation and prolonged need for surgical drainage in the

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227 Anderson and others, 'Gender Dysphoria and Its Non-Surgical and Surgical Treatments.'

228 Curtis Crane, 'Phalloplasty and Metoidioplasty' in MB Deutsch (ed), *Guidelines for the Primary and Gender-Affirming Care of Transgender and Gender Nonbinary People* (UCSF Gender Affirming Health Program, Department of Family and Community Medicine, University of California San Francisco, 2nd edn, 17 June 2016) <https://transcare.ucsf.edu/guidelines/phalloplasty> accessed 1 September 2025.

229 Crane, 'Phalloplasty and Metoidioplasty'.

230 Anderson and others, 'Gender Dysphoria and Its Non-Surgical and Surgical Treatments'.

231 Isabel Cylinder and others, 'Partial Flap Loss in Gender-Affirming Phalloplasty' (2022) 38(4) Journal of Reconstructive Microsurgery 276, DOI: 10.1055/s-0041-1732428 <https://pubmed.ncbi.nlm.nih.gov/34284503/> accessed 1 September 2025.

event of pelvic or groin hematomas, for example. Further risks include decreased mobility, as well as a consistent need for further procedures.[232]

4.6.2.2 Metoidioplasty

The purpose of the metoidioplasty, which is also a masculinising genital procedure for transgender males who desire to construct male genitalia but do not want the extensive surgery and possibly the risks of complications associated with a phalloplasty.[233] A metoidioplasty, which is the Greek term for 'towards male genitalia',[234] entails the use of hormones to enlarge the clitoris by way of testosterone induced hypertrophy, which is then repositioned to create a small neophallus.[235]

This procedure can enable standing urination and provide an extent of erectile function as it utilises the native clitoral tissue, maintaining its sensation.[236] Unlike the phalloplasty, this procedure does not use skin grafting and a scrotum can be created from the labia majora, whilst other surgeons use tissue expanders to create the scrotum.[237]

The complications are similar to those of the phalloplasty, with the exception of the flap loss and corona flattening. While wound deterioration, infection and urethral stricture and fistula are possible, similar to that in a phalloplasty, the incidences are much lower in the case of metoidioplasty.[238] The metoidioplasty is generally less invasive with fewer complications.[239]

4.6.2.3 Vaginoplasty

A vaginoplasty is a genital feminisation surgery available to transgender women who desire to have a natural-appearing vulva with or without penetrative vaginal

232 Crane, 'Phalloplasty and Metoidioplasty'.
233 Anderson and others, 'Gender Dysphoria and Its Non-Surgical and Surgical Treatments'.
234 Crane, 'Phalloplasty and Metoidioplasty'
235 Anderson and others, 'Gender Dysphoria and Its Non-Surgical and Surgical Treatments'.
236 Anderson and others, 'Gender Dysphoria and Its Non-Surgical and Surgical Treatments'.
237 Crane, 'Phalloplasty and Metoidioplasty'.
238 Crane, 'Phalloplasty and Metoidioplasty'.
239 Anderson and others, 'Gender Dysphoria and Its Non-Surgical and Surgical Treatments'.

function.[240] Generally speaking, the procedure entails the inversion of the penis and penile skin to line the neovaginal canal. The extent of the surgery will be dependent on the individual's preference, as penetrative ability will require a full vaginoplasty which will include the creation of a neovagina and vulva construction, while individuals who desire only the natural appearing vulva without penetrative ability or function may opt for only orchiectomy (removal of testicles), together with a penectomy (removal of the penis), urethroplasty (reconstruction of the urethra) or valvuloplasty with clitorolabioplasty—the latter the construction of the clitoris (clitoroplasty) and labia (labiaplasty).[241]

The complications associated with these procedures include bleeding, discharge, the narrowing or closing of the vaginal opening (introital stenosis), urinary incontinence, rectovaginal fistula, wound healing disorders and infections, to name a few.[242]

4.7 Social Transitioning

Social transitioning is a method or process employed by TGD persons in aligning their gender-incongruence. It involves changes to their social presentations and expressions as well as their role in society in alignment with their gender expression. Social transitioning does not involve medical, or legal changes and may simply present as name and pronoun changes, or changes to the appearance and modification of dress-style and grooming habits.[243]

Social transitioning is seen to improve overall well-being of TGD persons, reducing symptoms of mental health such as anxiety, depression and suicidality as well as substance abuse.[244] Allowing the expression of gender identities, changes in

240 Anderson and others, 'Gender Dysphoria and Its Non-Surgical and Surgical Treatments'.
241 Anderson and others, 'Gender Dysphoria and Its Non-Surgical and Surgical Treatments'.
242 Anderson and others, 'Gender Dysphoria and Its Non-Surgical and Surgical Treatments'; Crane, 'Phalloplasty and Metoidioplasty'.
243 Jack L Turban and others, 'Social Transition for Transgender and Gender Diverse Youth, K-12 Harassment, and Adult Mental Health Outcomes' (2021) 69(6) Journal of Adolescent Health 991, DOI: 10.1016/j.jadohealth.2021.06.001 <https://pmc.ncbi.nlm.nih.gov/articles/PMC8612964/> accessed 1 September 2025
244 Turban and others, 'Social Transition for Transgender and Gender Diverse Youth'.

pronouns, clothing and gender roles in alignment with the individuals' identity decreases gender dysphoria and in turn improves self-esteem and quality of life.[245]

4.8 Empirical Findings

In a study titled *Gender-affirming care in South Africa: A cross-sectional survey of transgender and gender-diverse people in the Eastern and Western Cape provinces*, *South Africa*,[246] a cross-sectional quantitative survey was conducted involving 150 respondents who were surveyed with the objectives to describe their access to and need for social, legal and medical transition, inclusive of psychosocial care, hormone therapy and surgery.[247] Of the 150 respondents who self-identified as transgender, gender-diverse and intersex people, 74% (111) were assigned male at birth, 26% (39) assigned female at birth and 6.7% (10) were intersex.[248] Sixty-eight and a half per cent (76) of the individuals assigned male at birth identified as transgender women, 56.4% (22) of the individuals assigned female at birth identified as transgender men, with the remailing 34% (51) identifying as gender-diverse individuals.[249]

In relation to the surgical and non-surgical procedures as described above, the study found the following:[250]

i. **Social transition:** Ninety-nine per cent of the respondents had completed social transitioning with the remaining 1% not wanting to;

ii. **Non-medical gender-affirming practice (packing and breast binding):**[251] Seven per cent of the respondents had engaged in non-medical gender-affirming practices, 8% were in the process of doing so, while 85% had not yet accessed non-medical gender-affirming practices but wished to do so;

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245 Turban and others, 'Social Transition for Transgender and Gender Diverse Youth' ; 'What We Know' Project, Cornell University, 'What Does the Scholarly Research Say About the Effect of Gender Transition on Transgender Well-Being?' (*'What We Know' Project*, 2018) <https://whatweknow.inequality.cornell.edu/topics/lgbt-equality/what-does-the-scholarly-research-say-about-the-well-being-of-transgender-people> accessed 1 September 2025.

246 Bust and others, 'Gender-Affirming Care in South Africa' 46–53.

247 Bust and others, 'Gender-Affirming Care in South Africa' 46.

248 Bust and others, 'Gender-Affirming Care in South Africa' 47.

249 Bust and others, 'Gender-Affirming Care in South Africa' 47.

250 Bust and others, 'Gender-Affirming Care in South Africa' 49.

251 Bust and others, 'Gender-Affirming Care in South Africa' 46.

iii. **Hormone therapy:** Twenty-one per cent of the respondents had undergone hormone therapy. Of the 79% who had not done so, 32% wanted to access hormone therapy, while the remaining 47% did not want to;

iv. **Gender-affirming surgery:** Only 3% of the respondents who were in the process of gender-affirming were attempting to access surgery, while 67% had not but wanted to have surgery, with the remaining 30% not wanting surgery.

This study clearly highlights the significant unmet desires to access the various forms of gender-affirming care, despite the successes and statistics associated with social transitioning.

5 PROVISION OF GENDER-AFFIRMING HEALTHCARE IN SOUTH AFRICA: PUBLIC VS PRIVATE

Section 27 of the South African Constitution guarantees everyone the right to access to healthcare services, sufficient food and water and social security.[252]

> Section 27(1)(a) specifically reads:
> 'Everyone has the right to have access to
> (a) Health care services, including reproductive health care'
>
> Section 27(2) further provides that:
> 'The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.'

On 20 May 2024, the Presidency of the Republic of south Africa released a statement reflecting that 84% of the South African population make use of public health facilities, with the remaining 16% having accesses to private healthcare facilities or having private medical scheme cover.[253] This wide gap should be considered against the background of the total number of hospitals reported in 2018 standing at 813, of which 49.7% belong to the public sector (404 hospitals), whilst the remaining 50.3% fall within the domain of the private sector (409 hospitals).[254]

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252 Constitution of the Republic of South Africa, 1996, s 27.

253 Cyril Ramaphosa, 'From the Desk of the President: One Step Closer to Affordable Quality Health Care for All' (*The Presidency*, 20 May 2024) <https://www.thepresidency.gov.za/node/8149> accessed 1 September 2025.

254 Victor Ngobeni, Marthinus C Breitenbach and Goodness C Aye, *Efficiency of Provincial Public Healthcare in South Africa* (Economic Research Southern Africa Working Paper 810, February 2020) 3 <https://econrsa.org/wp-content/uploads/2022/06/working_paper_810.pdf> accessed 1 September 2025.

Of the approximately 404 public hospitals in South Africa, only seven are known to offer or provide gender-affirming healthcare, namely Charlotte Maxeke Hospital in Johannesburg (Parktown), Chris Hani Baragwanath Hospital in Johannesburg (Soweto), Greys Hospital in Pietermaritzburg (Northern Park), Groote Schuur Hospital in Cape Town (Observatory), Helen Joseph Hospital in Johannesburg (Auckland Park), Steve Biko Academic Hospital in Pretoria (Capital Park), and Universitas Academic Hospital in Bloemfontein.[255] This in effect means that of the nine provinces in South Africa, five provinces (Mpumalanga, Northern Cape, Limpopo, Eastern Cape and North West) are without gender-affirming health care services. In addition, of these seven hospitals listed above, only three hospitals offer the necessary comprehensive endocrinology, psychiatric and surgical services at the same facility, specifically the Chris Hani Baragwanath Hospital, the Steve Biko Academic Hospital and the Groote Schuur Hospital.[256] The location of these hospitals means that many TGD persons in rural or remote areas are completely excluded from gender-affirming health care services or are geographically disadvantaged. This regrettable position forces them to travel extremely long distances if they wish to 'access' adequate healthcare services (or gender-affirming healthcare) as envisaged by section 27 of the Constitution.[257]

South Africa is home to a population of approximately 62 million people,[258] not considering the undocumented individuals that reside within it and access its public healthcare services. A national report released on 20 October 2021[259] estimated South Africa's transgender population at about 179,327 people, representing roughly 0.30% of the total population. Of this group, 87,214 are trans women, 28,065 are trans men, and 66,076 identify as gender non-conforming. Importantly, five provinces

255 Frans Mashilo Mahlobogwane, 'Barriers to Gender-Affirming Health Care in Children and Adolescents in South Africa' (2025) 46 *Obiter* 312.

256 Mahlobogwane, 'Barriers to Gender-Affirming Health Care in Children and Adolescents in South Africa' 312.

257 Constitution of the Republic of South Africa, 1996, s 27.

258 Statista, 'Private Healthcare in South Africa' (*Statista.* 2025) <https://www.statista.com/topics/11421/private-healthcare-in-south-africa/> accessed 1 September 2025.

259 Ndumiso Tshuma and others, *Population Size Estimation of Transgender People in South Africa* (Best Health Solutions, prepared for Beyond Zero/SANAC, 20 October 2021) <https://bhekisisa.org/wp-content/uploads/2022/11/TG-PSE-Draft-Report-v-0_district-level-final-editable-version-17April2022-1.pdf> accessed 1 September 2025.

without gender-affirming healthcare services account for 75,645 individuals (42.18% of the total), while the remaining four provinces that do provide such services cover 105,710 individuals (58.94%)[260] of the total TGD population.

The study by Bust and others[261] reveals that of 150 respondents only 8% (12 respondents) were able to access health care through the private sector, with the larger proportion of respondents accessing care through public or non-governmental organisation facilities.[262]

Considering the studies mentioned above, and taking into account the lack of resources and adequate training for service providers, including the waiting period for gender-affirming care in South Africa, specifically gender transition surgical interventions standing at approximately 15 to 20 years, it is clear that TGD persons find themselves in a dire situation.[263] Hospitals such as the Groote Schuur Hospital in Cape Town are only able to carry out four gender-affirming surgeries per year, while the hospital receives between six and eight new patients a month.[264] In 2021, the hospital already had a waiting list of over 300 patients.[265]

The Medical Scheme Act[266] makes it mandatory for all Medical Aid Schemes to cover the costs related to a list of certain conditions' diagnosis, treatment and care, including life-threatening emergency medical conditions, such as heart-attacks, strokes, among others, This list of 271 conditions are covered under what is known as Prescribed Minimum Benefits (PMB), divided into 15 broad categories. Covered under the PMBs are 26 chronic conditions, which include among others HIV/AIDS, diabetes, and

260 Tshuma and others, *Population Size Estimation of Transgender People in South Africa.*
261 Bust and others, 'Gender-Affirming Care in South Africa' 46–53.
262 Bust and others, 'Gender-Affirming Care in South Africa' 50.
263 Megan M Campbell and others, 'Experiences of Gender Incongruence and the Relationship Between Social Exclusion, Psychological Distress, and Dysfunction Among South African Transgender Adults: A Field-Study for ICD-11' (2018) 30 Annals of Clinical Psychiatry 169 <https://doi.org/10.1177/104012371803000301> accessed 1 September 2025.
264 'Trans Woman Needs Funds for Gender-Affirmation Surgery in Thailand' *Independent Online Weekend Argus*, (14 July 2024) <https://iol.co.za/weekend-argus/news/2024-07-14-trans-woman-needs-funds-for-gender-affirmation-surgery-in-thailand/> accessed 1 September 2025.
265 South African National AIDS Council, 'In-Depth: The Incredibly Long Wait for Gender-Affirming Surgery for Those Who Cannot Pay' (SANAC, 16 September 2021) <https://www.sanac.org.za/in-depth-the-incredibly-long-wait-for-gender-affirming-surgery-for-those-who-cant-pay/> accessed 1 September 2025.
266 Medical Schemes Act 131 of 1998.

schizophrenia.[267] Regrettably, the Council for Medical Schemes ruled that gender-affirming surgery is not a Prescribed Minimum Benefit, as was explained by the then (2021) Acting General Manager of Stakeholder Relations for the Council for Medical Schemes (CMS), Mmatsie Mpshane, representing the Council:[268]

> 'It was established that the surgery was not [a] predominant and prevailing level of care across the South African public health sector. This implies that it is not Prescribed Minimum Benefit (PMB) level of care and funding therefor is subject to scheme rules, varying across schemes and dependent on [a] member's benefit option or plan type. The CMS does encourage schemes to consider funding these types of procedures as part of its yearly rule registration and approval process.'

In the event that TGD persons are fortunate enough to afford private healthcare where there are shorter waiting periods and better accessibility to treatment, they are confronted with refusals by medical aid schemes to cover gender-affirming care or surgical interventions as these are considered or classified as cosmetic or 'elective' surgery and hence unnecessary or not life threatening.[269] Consequently, this leaves the necessary surgical interventions in the hands of the individuals to finance themselves.

6 CONCLUSION

This chapter highlights the progression of gender-affirming terminology from the initially pathologised language to the more inclusive and non-pathologising terminology.[270] The chapter further observes the noticeable ethical shifts from the gatekeeping model to the informed consent model in providing gender-affirming care, allowing patients to actively participate in the care that is provided, in collaboration with a proposed multi-disciplinary team of professionals. [271]

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267 Council for Medical Schemes, 'Prescribed Minimum Benefits (PMBs)' (Council for Medical Schemes) <https://www.medicalschemes.co.za/resources/pmb/> accessed 1 September 2025.

268 Tiyese Jeranji, 'In-Depth: The Incredibly Long Wait for Gender-Affirming Surgery for Those Who Can't Pay' (South African National AIDS Council, 15 September 2021) <https://sanac.org.za/in-depth-the-incredibly-long-wait-for-gender-affirming-surgery-for-those-who-cant-pay/> accessed 1 September 2025.

269 Mahlobogwane, 'Barriers to Gender-Affirming Health Care in Children and Adolescents in South Africa' (2025) 46 Obiter 322.

270 Mumford and others, 'What the Past Suggests About When a Diagnostic Label Is Oppressive' E446–E451.

271 World Professional Association for Transgender Health, *Standards of Care for the Health of Transgender and Gender Diverse People, Version* 7 (WPATH 2012) 27; Southern African HIV Clinicians Society, *Gender-Affirming Healthcare Guideline for South Africa* (SAHCS 2021) 60

South Africa has made significant strides in the recognition and protection of the rights of TGD persons, especially in contrast to other African countries. This is evident in the SAHCS Guidelines that preceded the WPATH Standards of Care 8, which requires a less restrictive process contrary to the gatekeeping model of the WPATH Standards of Care 7.[272] Together, the SAHC Guidelines and the WPATH Standards of Care 7 and 8, articulate a client-centred, de-pathologised model of gender-affirming care. However, evidence[273] highlights that without binding status, training and resources, even the most articulate and progressive clinical pathways remain largely theoretical for many, if not most, transgender and gender-diverse individuals.

Empirical evidence also shows that there are significant disparities between the law, the guidelines and the lived experiences of TGD persons when accessing healthcare.[274] While the Constitution[275] guarantees the right to access to healthcare services[276] and prohibits unfair discrimination,[277] the application of existing healthcare frameworks, including assessments, often reproduces and reinforces the imbalances and inequalities that the Constitution seeks to remedy, resulting in further trauma and internalised transphobia.[278] This is further highlighted by the socio-economic and geographic barriers of TGD persons to access the necessary gender-affirming health care services, limiting their access and exacerbating poor health outcomes for the majority of these persons in general.[279]

Most facilities experience extreme backlogs and limited funding, which impacts staffing and surgical capacity.[280] The long waiting periods and geographic disadvantages

272 World Professional Association for Transgender Health, *Standards of Care for the Health of Transgender and Gender Diverse People, Version 7* (WPATH 2012) 27.
273 Bust and others, 'Gender-Affirming Care in South Africa'.
274 Zambezi and Viljoen, 'Access to Healthcare Services for Transgender People in South Africa' 791–803.
275 Constitution of the Republic of South Africa, 1996.
276 Constitution of the Republic of South Africa, 1996, s 27.
277 Constitution of the Republic of South Africa, 1996, s 9.
278 Zambezi and Viljoen, 'Access to Healthcare Services for Transgender People in South Africa' 791–803.
279 Bust and others, 'Gender-Affirming Care in South Africa' 52.
280 Don Wilson and others, 'Transgender Issues in South Africa, with Particular Reference to the Groote Schuur Hospital Transgender Unit' (2014) 104(6) *South African Medical Journal* 449, 451.

render access to health care as envisaged by the Constitution[281] largely unrealised in practice. Further exacerbated by the reality that even if TGD persons can afford private health care, outside of the non-binding guidelines, the existing legislative prescripts do not recognise gender-affirming care as necessary or as deserving of mandatory coverage by private medical schemes,[282] notwithstanding an estimate that TGD persons unable to access gender-affirming care have a between 42% to 45% suicide probability rate.[283] It is my submission that this express exclusion is tantamount to unfair discrimination and therefore contrary to the protections envisaged by sections 9 and 10 of the Bill of Rights.[284]

The next chapter will provide an analysis of the legal and ethical frameworks governing gender-affirming healthcare in South Africa.

281 Constitution of the Republic of South Africa, 1996.
282 Jeranji, 'In-Depth: The Incredibly Long Wait for Gender-Affirming Surgery for Those Who Cannot Pay'.
283 Jeranji, 'In-Depth: The Incredibly Long Wait for Gender-Affirming Surgery for Those Who Cannot Pay'.
284 Constitution of the Republic of South Africa, 1996, ss 9–10.

CHAPTER THREE: LEGAL AND ETHICAL FRAMEWORKS GOVERNING GENDER-AFFIRMING HEALTHCARE

1 INTRODUCTION

This chapter examines the legal framework and ethical guidelines that regulate the provision of gender-affirming healthcare. The chapter will also interrogate the Alteration of Sex Description and Sex Status Act[285] which sets out the circumstances under which individuals can apply to have their sex description formally and legally changed in South Africa.[286] It will further dissect the guidelines and obligations set for healthcare providers, with specific reference to gender-affirming healthcare, issues relating to informed consent and information disclosure.

This chapter further scrutinises legal disputes pertaining to the provision of gender-affirming health surgery and related medical negligence claims, with a specific focus on the Steve Biko Academic Hospital. The chapter concludes by evaluating the challenges that exist in transgender healthcare, law and practice, and proposes possible reforms.

2 SOUTH AFRICAN LEGAL FRAMEWORK: THE ALTERATION OF SEX DESCRIPTION AND SEX STATUS ACT 49 OF 2003

2.1 Historic Context and Purpose of the Alteration of Sex Description and Sex Status Act 49 of 2003

Prior to 2003 and the enactment of the Alteration of Sex Description and Sex Status Act[287] ('the Alteration Act'), there were only two preceding key legislative enactments that made provision for the legal alteration of an individual's sex description. These were the two Births and Deaths Registration Acts of 1963 and 1992 respectively.

The 1963 Births and Deaths Registration Act[288] provided as follows:

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285 Alteration of Sex Description and Sex Status Act 49 of 2003.
286 Alteration of Sex Description and Sex Status Act 49 of 2003, s 2(1).
287 Alteration of Sex Description and Sex Status Act 49 of 2003.
288 Births and Deaths Registration Act 81 of 1963.

> 'The Secretary for the Interior may, on the recommendations of the Secretary for Health alter, in the birth register of any person who has undergone a change of sex, the description of the sex of such person, and may for the purpose call for such medical reports and institute such investigations as he may deem necessary.'[289]

The above provision entitled individuals who had undergone gender reassignment or intersexed individuals to make application to have their sex description in the birth register changed to reflect the post-operative sex.[290]

The 1992 Births and Deaths Registration Act,[291] on the other hand, provided that:

> 'A person who was in the process of undergoing a change of sex before commencement of this Act, may on completion of the said process apply in terms of section 7B of the Births, Marriages and Deaths Registration Act, 1963, for the alteration of the sex description in his or her birth register.'[292]

This provision entailed that individuals who had commenced gender re-assignment surgery post the 1992 enactment would not be entitled to make an application to have their sex altered in the births and deaths register.[293] Individuals who had not undergone gender reassignment surgery but had opted for non-surgical treatment, such as hormone therapy, would not qualify to legally alter their sex.

The 1992 Act repealed the 1963 Act but still did not provide a clear framework for gender recognition. The Alteration Act is the first statute to create a legislative mechanism for legal gender recognition, by allowing transsexual and intersex persons who have undergone gender reassignment treatment to amend their names and gender markets on official identity documents.[294] Section 2(1) of this Act specifically states that:

> 'Any person whose sexual characteristics have been altered by surgical or medical treatment or by evolvement through natural development resulting in gender reassignment, or any person who is intersexed may apply to the Director-General of the National Department of Home Affairs for the alteration of the sex description on his or her birth register.'[295]

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289 Births and Deaths Registration Act 81 of 1963, s 7B.
290 South African Human Rights Commission, *Submission on the Alteration of Sex Description and Sex Status Bill* (SAHRC 2003) 2.
291 Births and Deaths Registration Act 51 of 1992.
292 Births and Deaths Registration Act 51 of 1992, s 33(3).
293 SAHRC, *Submission on the Alteration of Sex Description and Sex Status Bill* 2.
294 Alteration of Sex Description and Sex Status Act 49 of 2003, s 2(1).
295 Alteration of Sex Description and Sex Status Act 49 of 2003, s 2(1).

Section 27A of the Alteration Act amended the Births and Deaths Registration Act of 1992 by inserting the following provision:

> 'If the Director-General grants an application or a magistrate issues an order in terms of section 2 of the Alteration of Sex Description and Sex Status Act, 2003, the Director-General shall alter the sex description on the birth register of the person concerned.' [296]
> An alteration so recorded shall be dated and after the recording of the said alteration the person concerned shall be entitled to be issued with an amended birth certificate.'[297]

Unlike the wording of the aforementioned legislative enactments, the wording of the Alteration Act can be interpreted to extend its application to TGD persons who are undergoing hormone therapy, in other words, making provision for individuals who desire less invasive intervention to alter their sex descriptions, in the interests of gender congruence.

Section 2(2) sets out, inter alia, the procedural requirements for an application for the alteration of sex description:

> 'An applicant contemplated in section (1) must-
> (a) be accompanied by the birth certificate of the applicant;[298]
> (b) in the case of a person whose sexual characteristics have been altered by surgical or medical treatment resulting in gender reassignment be accompanied by reports stating the nature and results of any procedures carried out and any treatment applied prepared by the medical practitioners who carried out the procedures and applied the treatment or by a medical practitioner with experience in the carrying out of such procedures and the applicant of such treatment;[299]
> (c) In every case in which sexual characteristics have been altered resulting in gender reassignment, be accompanied by a report, prepared by a medical practitioner other than the one contemplated in paragraph (b) who has medically examined the applicant in order to establish his or her sexual characteristics.[300]

The Alteration Act is often described as a progressive legislative enactment which seeks to ensure the recognition of transgender, gender-diverse and gender non-conforming individuals and also addresses issues of discrimination, in line with Constitutional imperatives.[301]

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296 Alteration of Sex Description and Sex Status Act 49 of 2003, s 27A(1).
297 Alteration of Sex Description and Sex Status Act 49 of 2003, s 27A(2).
298 Alteration of Sex Description and Sex Status Act 49 of 2003, s 2(2)(a).
299 Alteration of Sex Description and Sex Status Act 49 of 2003, s 2(2)(b).
300 Alteration of Sex Description and Sex Status Act 49 of 2003, s 2(2)(c).
301 Sylvie Namwase and Adrian Jjuuko (eds), *Protecting the Human Rights of Sexual Minorities in Contemporary Africa* (Pretoria University Law Press 2017).

The Alteration Act enables gender recognition without the requirement for surgery, focusing instead on medical interventions. Binary understandings of sex and gender in the Act may, however, limit its intended inclusivity and accessibility, as will be canvassed in the sections below.

2.2 Criticisms and Critiques

The heading of this section that refers to criticisms and critiques has intentionally been selected for the reason that whilst criticism usually emphasises faults or shortcomings, often with a negative or judgmental tone, critiques present a more balanced, constructive analyses that consider both strengths and weaknesses with the aim of improvement. It is for this reason that this discussion opens with the statement that the Alteration Act is considered a very progressive legislative mechanism for recognition of the rights of TGD persons. Despite this, however, some gaps and challenges in the Alteration Act remain, which this chapter seeks to address. [302]

At the fore of the criticism is the requirement of the Act[303] that an applicant who desires to change their gender-markers must have undergone 'surgical or medical treatment.'[304] This minimum requirement can be considered unattainable and challenging, considering current statistics relating to access to gender-affirming care, as canvassed in Chapter Two of this dissertation. To reiterate, there are only seven public hospitals in South Africa that are known to provide gender-affirming healthcare, of which only three of offer comprehensive endocrinology, psychiatric and surgical services at the same facility.[305] Despite the positive provision that permits individuals on hormone therapy to apply to amend their gender markers in South Africa, many transsexual people do not have access to gender-affirming health care procedures or hormone replacement therapy,[306] causing this requirement to entrench socio-economic and geographic barriers and to perpetuate existing social inequalities.

302 Alteration of Sex Description and Sex Status Act 49 of 2003.
303 Alteration of Sex Description and Sex Status Act 49 of 2003, s 2.
304 Alteration of Sex Description and Sex Status Act 49 of 2003, s 2(1).
305 Frans Mashilo Mahlobogwane, 'Barriers to Gender-Affirming Health Care in Children and Adolescents in South Africa' (2025) 46 *Obiter* 312.
306 Namwase and Jjuuko (eds), *Protecting the Human Rights of Sexual Minorities in Contemporary Africa*.

To exemplify, in an empirical South African study involving 150 respondents, 67% of the respondents who desired to have access to gender-affirming surgery were unable to access this, owing to scarce services, long public-sector waiting lists, prohibitive private-sector costs, and other systemic barriers including discrimination and limited clinical knowledge by healthcare providers.[307] Additionally, 30% of the respondents did not want to undergo gender-affirming surgery, while 99% of the respondents had successfully undergone social transitioning.[308]

The need for medical and surgical interventions deepens the pathologisation of gender and medical discourse. Gender DynamiX[309] rightfully notes that these

> 'requirements serve to maintain structural and systemic violence perpetrated against trans and gender diverse persons by forcing them to access medical or surgical care in order to fit a homogenising cisnormative perception of gender defined by the State.'[310]

TGD persons are required to 'express their gender within a very restrictive medicalised binary imagining.'[311] Moreover, the Alteration Act can be interpreted as excluding TGD persons who have been actively living their preferred gender without medical intervention, thereby discriminating against persons whose sustained gender incongruence is worsened by identity documents that do not reflect their expressed gender.[312]

Additionally, the lack of correct documentation has led to further discrimination and discriminatory service provision by health service providers.[313] My submission is that there is inadequate implementation and a general lack of compliance with the

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307 Bust and others, 'Gender-Affirming Care in South Africa' 51.

308 Bust and others, 'Gender-Affirming Care in South Africa' 49.

309 GenderDynamiX (gender advocacy group in South Africa) <https://www.genderdynamix.org.za/> accessed 1 September 2025.

310 Liberty Matthyse and others, *Keeping the Promise of Dignity and Freedom for All: A Position Paper on Legal Gender Recognition in South Africa* (Gender DynamiX & Legal Resources Centre 2020) 57 <https://lrc.org.za/wp-content/uploads/Position-paper-on-legal-gender-recognition.pdf> accessed 1 September 2025.

311 Matthyse and others, *Keeping the Promise of Dignity and Freedom for All* 21.

312 Namwase and Jjuuko (eds), *Protecting the Human Rights of Sexual Minorities in Contemporary Africa*.

313 Namwase and Jjuuko (eds), *Protecting the Human Rights of Sexual Minorities in Contemporary Africa* 144.

Alteration Act.[314] Gender DynamiX, who is monitoring lack of compliance with the Act, has assessed 49 known applications lodged and pending with the Department of Home Affairs (DHA). They observed that 40% of the applications have been pending for between 18 to 24 months with the DHA, due to the DHA incorrectly or wrongfully insisting on proof of surgical gender reassignment, which, as discussed above, is not a requirement of the Alteration Act.[315] Implementation challenges persist due to lack of additional guidelines, sensitivity training and monitoring mechanisms, which undermines the potential and effectiveness of the Alteration Act.[316]

Matthyse and others from Gender DynamiX and the Legal Resources Centre observe that:[317]

> 'rather than alleviate the burdens of trans and gender diverse people in South Africa, since its inception the Act has suffered from a lack of accompanying directives and regulations, a narrow interpretation and discriminatory implementation period and given this, trans and gender diverse people in South Africa regularly experience human rights violations on account of their gender identity not being legally recognized in practice by the Department of Home Affairs.'

Beyond its the pathologising medical framing[318] and narrow gender categories, and aside from persistent challenges in implementation and compliance, a more fundamental criticism of the Alteration Act becomes apparent, specifically, its incompatibility with constitutional values.[319] The Act[320] is criticised for its failure in realising substantive equality, human dignity and freedom as envisioned by the Constitution of the Republic of South Africa.[321]

Although the Alteration Act theoretically provides for the recognition of gender-diversity and self-determined gender, it fails to engage substantively with equality, or the lived experiences and the documented human rights violations faced by TGD persons. The Act's highly pathologising, context-insensitive and incompatibility with the socio-

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314 Namwase and Jjuuko (eds), *Protecting the Human Rights of Sexual Minorities in Contemporary Africa* 145.
315 Namwase and Jjuuko (eds), *Protecting the Human Rights of Sexual Minorities in Contemporary Africa* 145.
316 Matthyse and others, *Keeping the Promise of Dignity and Freedom for All* 21.
317 Matthyse and others, *Keeping the Promise of Dignity and Freedom for All* 14.
318 Matthyse and others, *Keeping the Promise of Dignity and Freedom for All* 57.
319 Matthyse and others, *Keeping the Promise of Dignity and Freedom for All* 34.
320 Alteration of Sex Description and Sex Status Act 49 of 2003.
321 Matthyse and others, *Keeping the Promise of Dignity and Freedom for All* 34.

economic and political climate of South Africa, is increasingly viewed as outdated and misaligned with international standards on human rights.[322]

To summarise and starting with the Act's mandatory medical requirements:

- The Act requires proof of medical or surgical intervention before a person's sex description can be legally altered.
- This pathologises transgender identity by framing it as contingent on invasive medical procedures, rather than recognising self-identification.
- Example: A transgender person who socially transitions but cannot afford surgery is denied legal recognition, reinforcing exclusion and inequality.

As far as the everyday lived realities of trans persons:

- Transgender and gender-diverse individuals face discrimination in routine tasks, such as opening bank accounts, applying for grants, or travelling, because their identity documents do not reflect their lived gender.
- The Act's rigid framework furthermore ignores cultural and social realities, exposing individuals to harassment, accusations of fraud, and even detention

2.3 HPCSA Guidelines and Obligations for Healthcare Providers

2.3.1 Overview of the HPCSA

The Health Professionals Council of South Africa (HPCSA) is a creature of statute, established in terms of section 2 of the Health Professions Act 56 of 1974 for the purposes to inter alia:

> 'promote and regulate interprofessional liaison between health professions in the interests of the public;[323] assist in the promotion of health of the population of the Republic;[324] advise the Minister on any matter falling within the scope of the Act in order to support the universal norms and values of health professionals, with greater emphasis on professional practice, democracy, transparency, equity, accessibility and community involvement;[325] and to ensure that persons registered in terms of the Act behave towards users of health services in a manner that respects their

322 Matthyse and others, *Keeping the Promise of Dignity and Freedom for All* 10.
323 Health Professions Act 56 of 1974, s 3(b).
324 Health Professions Act 56 of 1974, s 3(e).
325 Health Professions Act 56 of 1974, s 3(h).

> constitutional rights to human dignity, bodily and psychological integrity and equality, and that disciplinary action is taken against persons who fail to act accordingly.'[326]

In other words, the HPCSA is responsible for registering health professionals, setting standards for professional conduct and ethical practice, investigating complaints against registered practitioners, imposing sanctions for professional misconduct, and most importantly, protecting the public 'against' the professionals.[327]

The HPSCA is essentially a representative council comprising of and overseeing 12 professional boards, each responsible for regulating a specific group of health professions under the Health Professions Act.[328] There are currently 370,000 registered practitioners registered with the HPCSA,[329] who come from multi-disciplinary sectors, including the professional, government, community, military, academic and legal sectors.[330]

Section 1 of the Health Professions Act[331] defines a Health Practitioner and Health Profession, as follows:

> 'Health Practitioner' means any person, including a student, registered with the council in a profession registrable in terms of this Act;[332]
> ''Health Profession' means any profession for which a professional board has been established in terms of section 15 and includes any category or group of persons provided for by such a board'[333]

As stated above, out of the currently twelve existing professional boards established in terms of section 15,[334] the core team of health practitioners involved in gender-reassignment surgeries would include a surgeon (plastic, urological, gynaecological surgeon, or surgeon relevant to the procedure), a mental health care provider (psychologist, psychiatrist, social worker, as the case may dictate), as well as a primary care provider and an endocrinologist (where hormone therapy is

326 Health Professions Act 56 of 1974, s 3(o).
327 Health Professions Act 56 of 1974, s 3.
328 Health Professional Act 56 of 1974, s5(1)(a).
329 HPCSA. National Report 2025/2025 <https://nationalgovernment.co.za/units/view/106/health-professions-council-of-south-africa-hpcsa?utm_source=copilot.com> accessed 15 April 2026.
330 Hea lth Professional Act 56 of 1974, s5(1)(a) – (i).
331 Health Professional Act 56 of 1974, s1.
332 Health Professional Act 56 of 1974, s1.
333 Health Professional Act 56 of 1974, s1.
334 GN 6320 GG 52871 of 13 June 2025 'Health Professions Act: Community Representatives on Council and Professional Boards of the Health Professions Council of South Africa'.

prescribed).[335] All of these health care professionals fall within the ambit of the Health Professionals Act.[336]

2.3.2 Core Values and Ethical Duties

The HPSCA, which originally had 12 booklets, expanded between 2021 and 2023 its booklet series and now have a total of 16 booklets prescribing guidelines for registered healthcare professional to ensure ethical and professional practice, in the interests of protecting the public.[337] Booklets 1[338] and 2[339] provide the General Ethical Guidelines for the Health Care Professions[340] and the Ethical and Professional Rules (Government Gazette R717/2006),[341] which may be regarded as the key starting point governing the conduct of health care practitioners.

Section 2 of Booklet 1 sets out the 13 'Core Ethical Values and Standards for Good Practice' which form the foundation for all professional conduct, which briefly are:

> 'respect for persons and their autonomy; beneficence; non-maleficence; human rights and justice; dignity, worth and equality for all; integrity and trustworthiness; confidentiality and privacy; accountability and responsibility; collaboration and partnership; competence and scholarship; professional comportment; fidelity to professional standards, and lastly, ubuntu and compassion.'[342]

In principle, this ethical framework is sufficient as a basis for respectful, non-discriminatory gender-affirming healthcare for transgender and gender-diverse people. The central difficulty lies in the extent to which these values are

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335 South African HIV Clinicians Society (SAHCS), *Gender-Affirming Healthcare Guideline* (SAHCS 2021) 60.

336 Health Professions Act 56 of 1974.

337 Health Professions Council of South Africa, 'Regulations' (HPCSA) <https://www.hpcsa.co.za/page/regulations> accessed 1 September 2025.

338 Health Professions Council of South Africa, *Booklet 1: General Ethical Guidelines for the Health Care Professions* (12th edn, HPCSA 2022) <https://www.hpcsa.co.za/Conduct/Ethics> accessed 1 September 2025.

339 Health Professions Council of South Africa, *Booklet 2: Ethical and Professional Rules of the Health Professions Council of South Africa* (12th edn, HPCSA 2022) <https://www.hpcsa.co.za/Conduct/Ethics> accessed 1 September 2025.

340 HPCSA, *Booklet 1: General Ethical Guidelines for the Health Care Professions* (12th edn, HPCSA 2022).

341 HPCSA, *Booklet 2: Ethical and Professional Rules of the Health Professions Council of South Africa* (HPCSA 2008).

342 HPCSA, *Booklet 1: General Ethical Guidelines* (2022) 2, paras 2.3.1–2.3.13.

operationalised and realised within routine clinical interactions and encounters with TGD patients.

The application of these core values in gender-affirming care is found in that healthcare professional (HCP):

(i) ought to act in the best interests of the TGD individual (beneficence),
(ii) have respect for the TGD persons' autonomy in making healthcare decisions,
(iii) ensure that they cause no harm through discriminatory provision of care or complete denial of care (non-maleficence), and
(iv) is required to uphold dignity and equality regardless of the gender identity.

Importantly, the healthcare professional ought to maintain confidentiality regarding the transgender status of the patient and demonstrate a level of competence in providing gender-affirming care. However, empirical evidence shows that TGD persons report actively avoiding public health facilities, owing to prior experiences and to receiving care from clinicians who lack basic training in gender-affirming medicine.[343] This raises the question whether the constitutional and ethical commitments to dignity,[344] autonomy[345] and non-discrimination[346] are in fact being honoured in clinical practice.

Section 5 of booklet 1 sets out the ethical duties which serve to emphasise and give effect to the aforementioned core ethical values.[347] Section 5.1.5 under 'Duties to Patients', specifically states that healthcare professionals should

> 'make sure their personal beliefs do not prejudice their patients' health care. Beliefs that might prejudice care relate to patients' race, culture ethnicity, social status lifestyle, perceived economic wealth, age, gender, disability, communicable disease status, sexual orientation, religious or spiritual beliefs or any other conditions of vulnerability.'[348]

343 Zambezi and Viljoen, 'Access to Healthcare Services for Transgender People in South Africa' 801.
344 Constitution of the Republic of South Africa, 1996, s 10.
345 Constitution of the Republic of South Africa, 1996, s 12.
346 Constitution of the Republic of South Africa, 1996, s 9.
347 HPCSA, *Booklet 1: General Ethical Guidelines* (2022) 5-6 para 5.
348 HPCSA, *Booklet 1: General Ethical Guidelines* (2022) 5 para 5.1.5.

The guidelines explicitly require that healthcare professionals refrain from prejudicial behaviours towards their patients based on their gender identity or sexual orientation. The guidelines further require that if a healthcare professional feels that their beliefs might affect the treatment they provide, they must inform their patients and advise them of their right to see another healthcare professional.[349] In the context of gender-affirming healthcare, such conduct of prejudice due to personal beliefs, re-enforces the heteronormative and cisnormative practices that this study critiques.

With reference to the HPCSA ethical obligations and in the context of the rights and treatment of TGD persons, transgression of these core values and ethical obligations would be considered professional misconduct. Misconduct includes refusal to render services,[350] persistently misgendering TGD persons as this may directly cause psychological harm and constitute a violation of dignity under,[351] gatekeeping, attempts at conversion therapy or even inadequate or improperly obtain consent (extensively dealt with in Booklet 4),[352] to identify a few,[353] with due regard for 'gender' as a protected characteristic.

Without embarking on an isolated expedition, it is important to note that although nurses, work hand in hand with 'health care professionals,' they do not fall under the ambit of the Health Professions Act.[354] Nurses are instead registered under the South African Nursing Council established in terms of the Nursing Act 33 of 2005. Nurses are subject to the Code of Ethics for Nursing Practitioners in South Africa[355] which embodies the same fundamental ethical principles of respect for autonomy, beneficence, non-maleficence, dignity, equality and confidentiality that underpin the

349 HPCSA, *Booklet 1: General Ethical Guidelines* (2022) 5 para 5.1.6.
350 HPCSA, *Booklet 1: General Ethical Guidelines* (2022) 5 para 5.1.5.
351 HPCSA, *Booklet 1: General Ethical Guidelines* (2022) 5 para 5.2.1 - 5.2.2
352 Health Professions Council of South Africa, *Booklet 4: Seeking Patients' Informed Consent — The Ethical Considerations* (HPCSA September 2016) <https://aestheticdoctors.co.za/wp-content/uploads/2023/02/Booklet-4-Seeking-patientsinformed-consent-The-ethical-considerations.pdf> accessed 1 September 2025.
353 HPCSA, *Booklet 1: General Ethical Guidelines* (2022) 5 para 5.2.1 - 5.2.7.
354 Health Professions Act 56 of 1974, s 1.
355 South African Nursing Council, *Code of Ethics for Nursing Practitioners in South Africa* (SANC April 2021) <https://www.sanc.co.za/wp-content/uploads/2021/04/Code-of-Ethics-for-Nursing-in-South-Africa.pdf> accessed 1 September 2025.

HPCSA framework.[356] Given that nurses are in most instances the first point of reference in accessing healthcare, the reports of misgendering, stigma and breaches of confidentiality[357] in nursing interactions demonstrates a gap, not so much in the formal ethical standards but the failure in implementation, training, institutional support and accountability mechanisms required to ensure that these values inform day-to-day practice.

3 GATEKEEPING, INFORMED CONSENT AND INFORMATION DISCLOSURE IN GENDER-AFFIRMING HEALTHCARE

3.1 Gatekeeping

The Harry Benjamin International Gender Dysphoria Association (now WPATH)[358] has been at the forefront of providing guidelines for the initiation of gender-affirming healthcare,[359] from the initial 1979 version to the 7th version of the Standards of Care. Evident from these are a significant measure of gatekeeping of gender-affirming care, or a so-called 'gate-keeping model.'[360] Medical gatekeeping can be defined as the prior approval of referrals to specialists by a primary care physician.[361]

Tomson explains that assessment of whether or not a patient would have access to gender-affirming healthcare was based primarily on the (1) 'success' of a Real-Life Experience,' where a patient is able to live in their affirmed gender role and 'prosper in the preferred gender,' before being eligible to access certain treatments, and (2) the period for which a patient is meant to undergo or has undergone mental health counselling or 'psychotherapy.' Highlighting gatekeeping practices, such as the

356 South African Nursing Council, *Code of Ethics for Nursing Practitioners in South Africa* (SANC April 2021) 3 <https://www.sanc.co.za/wp-content/uploads/2021/04/Code-of-Ethics-for-Nursing-in-South-Africa.pdf> accessed 1 September 2025.

357 Zambezi and Viljoen, 'Access to Healthcare Services for Transgender People in South Africa' 801.

358 Kelsey Mumford, Lin Fraser and Gail Knudson, 'What the Past Suggests About When a Diagnostic Label Is Oppressive' (2023) 25(6) *AMA Journal of Ethics* E446.

359 A Tomson, 'Gender-Affirming Care in the Context of Medical Ethics' (2018) 108(5) *South African Medical Journal* 382.

360 Tomson, 'Gender-Affirming Care in the Context of Medical Ethics' 25.

361 T G Ferris and others, 'Leaving Gatekeeping Behind — Effects of Opening Access to Specialists for Adults in a Health Maintenance Organization' (2001) 344 *New England Journal of Medicine* 233.

requirement for multiple healthcare providers' approval, the arbitrary waiting periods as well as the 'readiness' in terms of which the transgender patient must satisfy various conditions imposed by the earlier versions of the SOC's, to access gender-affirming hormone therapy for instance.[362]

Tomson further relies on the principles of bioethics, laid down originally by Beauchamp and Childress in their seminal work,[363] Principles of Bioethics, which are recognised globally. These core principles are respect for autonomy, non-maleficence, beneficence and justice.[364] For Tomson, gatekeeping violates all four of these ethical principles or pillars:

> 'If the healthcare provider makes the assessment of whether or not a patient should be allowed access to gender affirming care – this is a blatant violation of the principle of respect of autonomy.'[365]
> 'Furthermore, it can be argued that since access to medical transition improves outcomes (particularly suicide risk) for transgender patients, limiting access to these interventions can be seen as harmful in and of itself, and as such, is a violation of the principle of non-maleficence'[366]
> […]
> 'Recognizing that gatekeeping is cited as a barrier to accessing care, and that the inability to access care is in fact deleterious to transgender patients, it becomes difficult to reconcile such a practice with the principle of beneficence.'[367]

Commenting on the position that the gatekeeping model empowers the healthcare provider or clinician to assess whether or not a patient will have access to care based on the successes of the real-life experience and/or a period of psychotherapy, Tomson asserts:

> 'By refusing to prejudice a patient's right to access care based on such factors as race, social class, finances or genetics, we respect and maintain the integrity of the principle of justice.'[368]

362 Tomson, 'Gender-Affirming Care in the Context of Medical Ethics' 27.
363 Beauchamp TL and JF Childress (2019). Principles of Biomedical Ethics (8th ed, New York: Oxford University Press.
364 Tomson, 'Gender-Affirming Care in the Context of Medical Ethics' 24.
365 Tomson, 'Gender-Affirming Care in the Context of Medical Ethics' 26.
366 Tomson, 'Gender-Affirming Care in the Context of Medical Ethics' 26.
367 Tomson, 'Gender-Affirming Care in the Context of Medical Ethics' 26.
368 Tomson, 'Gender-Affirming Care in the Context of Medical Ethics' 27.

It stands to reason that the approach and common 'gatekeeping practices' are not in keeping with the four pillars of medical ethics and ought therefore, to be regarded as intrinsically unethical.[369]

3.2 Informed Consent

The informed consent model preserves the pillars of medical ethics and enables patients to make informed, personalised decisions about their own treatment and care with full understanding of the risks involved. More importantly, the informed consent model eliminates unnecessary barriers in accessing GAHC.[370]

Booklet 4: 'Seeking Patients' Informed Consent: Ethical Considerations' of the HPCSA Guidelines, revised in 2021,[371] outlines the principles to which health care practitioners must adhere when obtaining informed consent for investigations, treatment, screening, or research, [372] citing that:

> 'The right to an informed consent flows from the South African Constitution, the National Health Act, various other statutes, the common law and the HPCSA's ethical rules and guidelines. Healthcare practitioners are expected to be aware of all the laws in this regard.'

Section 13 of Booklet 4[373] stipulates that some statutes require a particular form of consent to be obtained for specific procedures. Further, consent must at all material times be express and not implied.[374] These statutes include the Sterilisation Act 44 of 1998, Choice on Termination of Pregnancy Act 92 of 1996 and the National Health Act 61 of 2003, with specific reference to the removal of organs from deceased people.

It is noted that the SAHCS GAHC Guidelines endorse the informed consent model, expressing that the informed consent model ('ICM') eliminates unnecessary barriers to access of gender-affirming healthcare, in that clinicians who prescribe gender-

369 Tomson, 'Gender-Affirming Care in the Context of Medical Ethics' 27.
370 Tomson, 'Gender-Affirming Care in the Context of Medical Ethics' 27.
371 Health Professions Council of South Africa, *Booklet 4: Seeking Patients' Informed Consent – The Ethical Considerations* (9th edn, HPCSA 2022) <https://www.hpcsa.co.za/Conduct/Ethics> accessed 10 September 2025.
372 HPCSA, *Booklet 4: Seeking Patients' Informed Consent* (2022) 1.
373 HPCSA, *Booklet 4: Seeking Patients' Informed Consent* (2022) 11.
374 HPCSA, *Booklet 4: Seeking Patients' Informed Consent* (2022) 11.

affirming hormone therapy to TGD client would not require referral letters from mental health practitioners (MHP). The model treats the TGD client and the healthcare professionals as co-contributors, where the healthcare professional brings clinical expertise, while the patient brings their own value, beliefs and goals.[375]

The SAHCS Guidelines advocate for the informed consent model as best practice to ensure gender-affirming healthcare that is respectful of clients, accessible and patient centered.[376]

4 MEDICAL NEGLIGENCE: TRANSGENDER CASES

South Africa has a high rate of medico-legal claims lodged for medical negligence against the state, particularly from 2020 to 2023, having had to pay out an amount estimated at 68 billion rand[377] in a total of 3 522 claims.[378] Albeit that a majority of these claims pertain to birth injury claims like cerebral palsy, which constitutes approximately 50% of all medico-legal claims[379] many cases of negligence facing transgender patients in the South African public health system that remain unreported due to various socio-economic[380] and socio-political factors.

Medical negligence, in this context, may manifest in many forms, including delays or refusal to provide hormone therapy or surgeries without medical justification, discriminatory treatment, failure to ensure access to essential medicines such as

375 Tomson and others, *SAHCS Gender-Affirming Healthcare Guideline* (Expanded 2021) 24.
376 Tomson and others, *SAHCS Gender-Affirming Healthcare Guideline* (Expanded 2021).
377 Thabo Molelekwa, 'South Africa's Medical Negligence Crisis' *Think Global Health* (3 October 2024) <https://www.thinkglobalhealth.org/article/south-africas-medical-negligence-crisis> accessed 20 September 2025.
378 Democratic Alliance, 'R23.6 Billion Paid in Medical-Legal Claims from 2020 to Date – a Red Herring for NHI' (DA, 12 March 2024) <https://www.da.org.za/2024/03/r23-6-billion-paid-in-medical-legal-claims-from-2020-to-date-a-red-herring-for-nhi> accessed 20 September 2025.
379 DSC Attorneys, '4 Most Common Types of Medical Malpractice in South Africa' (DSC Attorneys, 2 September 2021) <https://www.dsclaw.co.za/articles/4-most-common-types-of-medical-malpractice-in-south-africa/> accessed 20 September 2025.
380 Commission for Gender Equality, *Submission to the Office of the High Commissioner for Human Rights on Intersex Persons* (CGE November 2024) 5 <https://www.cge.org.za> accessed 10 September 2025.

hormone therapy treatment,[381] absence of valid informed consent for procedures, and coercing TGD clients into treatment without adequate counselling.[382]

The Commission for Gender Equality in its report on Combating Discrimination, Violence and Harmful Practices Against Intersex Persons,[383] records that it has received complaints from state institutions, which it grouped into three main categories. The first concerns intersex surgeries performed without adequate consultation or counselling and consent, including cases where procedures were carried out without the individuals 'full consent or adherence to established procedures.'[384] Other complaint categories were related to adverse post-surgery side effects and inadequate access to healthcare, while the third category concerned delays in surgery, including prolonged waiting periods and repeated postponements being made without adequate communication.[385]

The Commission notes further that the root cause of intersex violations stem from 'normalising' interventions that seek to 'fix individuals, due to social pressures to conform to binary sex norms, which causes irreversible physical and psychological harm, often without informed consent, thereby violating the bodily autonomy of the patient'.

It can be argued that cases of medical negligence relating to transgender, gender diverse and intersex individuals are largely seen in the form of complaints to the Commission for Gender Equality or in the form of matters brought before the Equality Court.

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381 Madeleine Muller and others, 'An Introduction to Gender Affirming Healthcare: What the Family Physician Needs to Know' (2023) 65(1) *South African Family Practice* a5770.

382 Commission for Gender Equality, *Submission to the Office of the High Commissioner for Human Rights on Intersex Persons* (CGE November 2024) <https://www.cge.org.za> accessed 10 September 2025.

383 Commission for Gender Equality, *Submission to the Office of the High Commissioner for Human Rights on Intersex Persons* (CGE November 2024) <https://www.cge.org.za> accessed 10 September 2025.

384 Commission for Gender Equality, *Submission to the Office of the High Commissioner for Human Rights on Intersex Persons* (CGE November 2024) 4 <https://www.cge.org.za> accessed 10 September 2025.

385 Commission for Gender Equality, *Submission to the Office of the High Commissioner for Human Rights on Intersex Persons* (CGE November 2024) 4 <https://www.cge.org.za> accessed 10 September 2025.

4.1 The Steve Biko Case

The case of *Wiggil v the Steve Biko Academic Hospital and Gauteng Department of Health*[386] is a landmark case involving medical negligence in relation to gender-affirming care, specifically, informed consent (or lack-thereof).

The facts are as follows: Shaun Wiggil was a 47-year-old transgender man who underwent gender reassignment surgery in 2016, including a mastectomy, hysterectomy and phalloplasty construction. The phalloplasty was performed using skin flaps from his left arm and left leg. Following the phalloplasty procedure, Wiggil developed complications which resulted in him experiencing severe swelling, pain and loss of sensation in both his legs and feet. It is alleged that despite his complaints, hospital personnel ignored his symptoms for several hours. Subsequently, the hospital attempted two further procedures in an attempt relieve the pressure, but these were unsuccessful, ultimately resulting in an above-the-knee amputation of Wiggil's left leg.

In 2019 Wiggil instituted legal action, claiming an amount of R3 million in damages alleging that he did not receive adequate information of the risks, including potential inadequacy of the post-operative care. Advancing that if he had been adequately informed of the risks and likelihood of substandard post-operative care, he would not have proceeded with the operation at the time.

While the case of Wiggil highlights the consequences of inadequate gender-affirming care and its post-operative management, further exposing the gaps in legal jurisprudence, its impact is minimised as outcome of the remains unreported. Notwithstanding that the facts of the Wiggle case are drawn from news coverage and commentary, analysis of such cases requires the foundation of the *Castell v De Greef* case of 1994,[387] wherein the court developed the concept of informed consent, citing that informed consent requires that:

386 MedicalBrief, 'R3 m Suit over Botched Gender Reassignment Op at JHB Hospital' *MedicalBrief* (2 October 2019) <https://www.medicalbrief.co.za/r3m-suit-over-botched-gender-reassignment-op-at-jhb-hospital/> accessed 10 September 2025.

387 *Castell v De Greef* 1994 (4) SA 408 (C).

(a) the consenting party must have had knowledge and been aware of the nature and extent of the harm or risk;
(b) the consenting party must have appreciated and understood the nature and extend of the harm or risk;
(c) the consenting party must have consented to the harm or assumed the risk;
(d) the consent must be comprehensive; that is extended to the entire transaction, inclusive of its consequences.[388]

For the purposes of this analysis, we must highlight that if the court in *Castell*[389] held that informed consent relates to the entire transaction, Wiggil would have had to be informed of not only the generic surgical risks but also the operational and institution-specific risks, such as the constraints and limited capacity in staffing, that could potentially affect post-operative monitoring and evaluation. Essentially, the question arising was whether the relevant hospital, realistically and practically, could provide the required level of care in respect of such a high-risk procedure.

Ozah[390] correctly notes that comprehensive consent implies ongoing disclosure and cannot be considered a once-off event.[391] This highlights the gaps between theoretical prescripts like informed consent, which align with constitutional rights, and the reality and lived experience in practice. Practically speaking, can the patient be said to have been properly 'informed' of the entire transaction, where the capacities linked to post-operative care cannot be guaranteed in a public hospital?

It is noted that other cases exist, for instance the case of *Mokoena v the Department of Correctional Services*[392] in which the systemic denial of the provision of gender-affirming healthcare is observed. In this case,[393] the Department of Correctional

388 *Castell v De Greef* 1994 (4) SA 408 (C) 425.
389 *Castell v De Greef* 1994 (4) SA 408 (C).
390 Karabo Ozah, 'Informed Consent and Access to Gender-Affirming Treatment for Children in South Africa' (2023) 56 *De Jure* 569.
391 Karabo Ozah, 'Informed consent and access to gender-affirming treatment for children in South Africa' (2023) 56 De Jure 569
392 *Mokoena v Head of Johannesburg Correctional Centre and Others* (2024/070075) [2025] ZAGPJHC 1178 (10 November 2025).
393 *Mokoena v Head of Johannesburg Correctional Centre and Others* (2024/070075) [2025] ZAGPJHC 1178 (10 November 2025).

Services refused to provide hormone replacement therapy to despite a diagnosis of gender-dysphoria, citing the medication to be ‘cosmetic’, ‘specialised’ and beyond its obligations.[394] Such matter may, arguably, amount to negligence arising from breach of the duty of care that doctors owe patients in terms of the Health Professional Act[395] and the common law. Instead, these matters are often brought before the Equality Court to be adjudicated primarily as infringements of constitutional rights and discrimination, rather than as delictual claims for medical negligence. These cases will be discussed in detail in the next chapter addressing the Constitutional and Human Rights of Transgender Individuals.

5 CHALLENGES AND REFORM IN TRANSGENDER HEALTHCARE, LAW AND PRACTICE

The Alteration of Sex Description and Sex Status Act[396] remains the only South African statute that expressly recognises transgender and gender diverse persons and that provides a direct legal mechanism for gender affirmation. This study posits that is that the Alteration Act continues to be problematic in that since its enactment in 2003, it has neither been reviewed nor supplemented with regulations or guidelines that prevent the medicalisation and continued pathologisation of gender, reflect societal developments and an evolving understanding of TGD persons or the barriers to gender-affirming healthcare.

Considering the above, it can be argued that the Alteration Act should be amended and heed to the imperative in section 39(2) of the Constitution[397] which requires that:

> ‘… when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights’.

The Alteration Act specifically prescribes a discriminatory, medicalised model of gender recognition which not only systemically perpetuates gender-incongruence but deepens constitutional misalignment.

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394 *Mokoena v Head of Johannesburg Correctional Centre and Others* (2024/070075) [2025] ZAGPJHC 1178 (10 November 2025).
395 Health Professions Act 56 of 1974.
396 Alteration of Sex Description and Sex Status Act 49 of 2003.
397 Constitution of the Republic of South Africa, 1996, Chap 2.

Unlike the Alteration Act, the Termination of Pregnancy Act, ('Termination of Pregnancy Act') albeit regulating another sensitive context, namely the termination of pregnancies, recognises the values of human dignity, equality, security of the person and human rights which can be seen in parts of its preamble, which reads:

> 'Recognising the values of human dignity, the achievement of equality, security of the person, non-racialism and non-sexism, and the advancement of human rights and freedoms which underlie a democratic South Africa; Recognising that the Constitution protects the right of persons to make decisions concerning reproduction and to security in and control over their bodies […].'

The Termination of Pregnancy Act is emphasised, firstly, because it relates to the respect for bodily autonomy, secondly, the HPCSA Ethics Booklet 4[398] on informed consent specifically requires that healthcare practitioners consult specific legislative enactments and common laws when seeking informed consent from patients.[399] The common law requirements concerning informed consent for medical treatment and interventions codified in sections 6 and 7 of the National Health Act, apply in this context, apply in the context. My submission is that informed consent in the context of the termination of pregnancies vis-à-vis gender-affirming health care services requires a very sensitive and elevated level of consideration, almost a special kind of consent.[400] Most importantly, and unlike the Alteration Act which has no released guidelines or regulations, the National Department of Health has published National Clinical Guidelines for the Implementation of Choice on the Termination of Pregnancy Act,[401] whose objectives include to:

> 'ensure that every individual who seeks a termination of pregnancy can access the service without undue delay and should not have to wait more than seven days from the first request to access services,' and to 'Promote multi sectoral collaboration and shared accountability related to the provision of termination of pregnancy within the context of sexual and reproductive health and rights (SRH&R) services'[402]

398 HPCSA, *Booklet 4: Seeking Patients' Informed Consent* (2022).
399 HPCSA, *Booklet 4: Seeking Patients' Informed Consent* (2022), para 2.2, 1.
400 HPCSA, *Booklet 4: Seeking Patients' Informed Consent* (2022) 11.
401 National Department of Health, *National Clinical Guideline for Implementation of the Choice on Termination of Pregnancy Act* (1st edn, National Department of Health 2019) <https://www.knowledgehub.org.za> accessed 25 September 2025.
402 National Department of Health, *National Clinical Guideline for Implementation of the Choice on Termination of Pregnancy Act* (1st edn, National Department of Health 2019), 2 <https://www.knowledgehub.org.za> accessed 25 September 2025.

In context, both the Termination of Pregnancy Act and the Alteration Act relate to bodily autonomy-centred care. The statutory and policy emphasis on 'urgency' in the Termination of Pregnancy Act, including the turnaround time prescribed for access to care, stands in unadulterated contrast to the absence of a comparable urgency framework in gender-affirming care or access thereto. Highlighting that despite evidence of serious mental distress and dysphoria, access to gender-affirming care is left under-resourced and unregulated with no equivalent national clinical or implementation guidelines.

It is critical to note that The Termination of Pregnancy Act, including the related National Guidelines, further prescribe in section 10[403] of the Act, with reference to section 2,[404] (Circumstances in which and conditions under which pregnancy may be terminated) that:

> 'Any person who –
> (a) Is not a medical practitioner or a registered midwife who has completed the prescribed training course and who performs a termination of pregnancy referred to in section 2(1)(a);
> (b) is not a medical practice and who performs the termination of pregnancy referred to in section 2(1)(b) or (c); or
> (c) prevents the lawful termination of a pregnancy or obstructs access to a facility for the termination of pregnancy,
> Shall be guilty of an offence and liable on conviction to a fine or imprisonment of a period not exceeding 10 years.

Reference should be had to the National Integrated Sexual and Reproductive Health and Rights Policy,[405] which *'creates the conditions under which South Africans are able to enjoy quality SRH (Sexual and Reproductive Health) across their lifespan.*'[406] Policy Objective Three stipulates the requirement to: '[e]nsure access to respectful and non-judgmental SRHR services for priority groups' [407]

403 Choice on Termination of Pregnancy Act 92 of 1996, s 10.
404 Choice on Termination of Pregnancy Act 92 of 1996, s 2.
405 National Department of Health, *National Integrated Sexual and Reproductive Health and Rights Policy* (National Department of Health 2019).
406 National Department of Health, *National Integrated Sexual and Reproductive Health and Rights Policy* 3.
407 National Department of Health, *National Integrated Sexual and Reproductive Health and Rights Policy* 4.

The policy identifies priority groups, which include, inter-alia, transgender and gender non-conforming people (LGBTQI+ people).[408] With this in mind, it is submitted that the nature and extent of medical intervention necessary for the application of the Alteration Act necessitates and justifies the need for specific guidelines and a specialised legislative enactment that regulates gender-affirming healthcare, as is the case with the Termination of Pregnancy Act.

While the SAHCS GAHC Guidelines provide evidence based, rights-orientated clinical standards for gender-affirming care, they are professional-society guidelines and do not form part of the authoritative Department of Health Guidelines integrated into the National Integrated SRHR Policy. This Policy is expressly described as 'the superior policy reference for all issues relating to SRHR'.[409]

6 CONCLUSION

This chapter outlines the legislative framework governing the recognition of TGD persons, and examines the ethical duties and responsibilities owed to TGD individuals by healthcare practitioners in accessing healthcare, with reference to the HPCSA (and briefly the SANAC) ethical guidelines. It further highlights systematic flaws and incongruencies, by comparing and contrasting specialised legislation such as the Termination of Pregnancy Act, with its related extensive guidelines, to the Alteration Act which requires surgical or medical treatment[410] as a pre-requisite for an application for the change of sex description in the birth register. These discrepancies further entrench the pathologisation of gender that international best practices have sought to move away from.[411]

This Chapter further accentuates that the Alteration Act is the only statute that makes specific reference to TGD Individuals, providing a legislative framework for recognising gender affirmation, serving as a premise for the discussion on the need for access to

408 National Department of Health, *National Integrated Sexual and Reproductive Health and Rights Policy* 20.
409 National Department of Health, *National Integrated Sexual and Reproductive Health and Rights Policy* 2.
410 Alteration of Sex Description and Sex Status Act 49 of 2003, s 2(1).
411 Tomson and others, *SAHCS Gender-Affirming Healthcare Guideline* (Expanded 2021).

adequate gender-affirming healthcare. It also notes that healthcare professionals are regulated and informed by their respective statutory frameworks and regulatory bodies, in particular the HPCSA and SANC.

The HPCSA Guidelines are well aligned with the SAHCS Guidelines which make express reference to the ethical obligations prescribed by the HPCSA, citing specifically:

> 'we acknowledge and embrace the ethical duties imposed on us by the South African Health Professions Act and associated general ethical rules for the health professionals.' [412]

This alignment is seen in respect of patient autonomy and dignity, informed consent and non-discrimination, which form an integral part of the core values of the HPCSA. The problem is not the absence of ethical norms and values but the gap that exists between the norms and the under-resourced, heteronormative and cisnormative practices that TGD persons experience and continue to encounter.

Despite the existence of progressive guidelines such as those of the SAHCS GAHC[413] which align with international standards, empirical studies and data suggest that access to gender-affirming healthcare in South Africa remains an obstacle, and difficult, with long waiting periods and unreasonable delays in accessing gender-affirming healthcare. It is submitted that amendment or alignment of the Alteration Act with international best practices and standards will alleviate the unreasonable delays and systemic barriers to gender-affirming healthcare and would further assist to ease procedural and administrative obstacles at the Department of Home Affairs.

This chapter has concluded that the legislative framework and ethical guidelines that govern gender affirmation and the provision of gender-affirming healthcare is inadequate. Advocating that if the Alteration Act seeks to prescribe a requirement for medical intervention and evidence of altered sex characteristics, there ought to be legislation that facilitates the process of access to said interventions, with applicable

412 Tomson and others, *SAHCS Gender-Affirming Healthcare Guideline* (Expanded 2021).
413 Tomson and others, *SAHCS Gender-Affirming Healthcare Guideline* (Expanded 2021).

prescribed timelines and possible sanctions, as in the case of the Termination of Pregnancy Act.

The next chapter will address the constitutional and human rights of TGD persons in South Africa.

CHAPTER FOUR: CONSTITUTIONAL AND HUMAN RIGHTS OF TRANSGENDER INDIVIDUALS

1 INTRODUCTION

The South African Constitution[414] is revered for being among the most progressive Constitutions in the world and is said to be based on best practice, inclusivity and participation.[415] International scholars and lawyers refer to it as the 'most admirable constitution in the history of the world' and the lodestar of Africa.[416] Kende writes that what makes the South African Constitution the best is that, inter alia, its drafters studied global constitutions and international human rights law extensively, holding a number of conferences, authoring numerous papers, after which they selected what was believed to be the best approach for the South African context, noting, in addition, that the Constitution[417] embodies progressive features such as socio-economic rights and a strong political participation, which is less commonly seen in other influential Constitutions.[418]

This chapter will unpack constitutional provisions in so far as they serve to advance and protect the rights of TGD persons in South Africa. It considers adjunct legislative enactments, specifically, the Promotion of Equality and Prevention of Unfair Discrimination Act,[419] which is a direct result of a Constitutional Mandate in terms of section 9(4)[420] which provided that [n]ational legislation must be enacted to prevent and prohibit unfair discrimination.'

This chapter further evaluates landmark cases that constitute a direct or indirect challenge to constitutional provisions and rights.

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414 The Constitution of the Republic of South Africa, 1996.

415 Ryland Fisher, 'A Progressive Constitution' *Business Media Mags* (17 October 2014) <https://businessmediamags.co.za/xtrending/a-progressive-constitution/> accessed 25 September 2025.

416 Mark Kende, *Comparative Constitutional Law: South African Cases and Materials in a Global Context* (Carolina Academic Press 2015) Front Matter <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2627397> accessed 25 September 2025.

417 The Constitution of the Republic of South Africa, 1996.

418 Kende, *Comparative Constitutional Law* Preface.

419 Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

420 The Constitution of the Republic of South Africa, 1996, s9(4).

2 CONSTITUTIONAL PROTECTIONS FOR TRANSGENDER INDIVIDUALS

2.1 The Bill of Rights[421]

Chapter Two of the Constitution of the Republic of South Africa[422] contains the Bill of Rights, specifically in sections 7 to 37. Defined as the cornerstone of South Africa's democracy, which enshrines the rights of all people in South Africa, the Bill of Rights affirms the democratic values of among others, equality and freedom.[423] In addition to the provisions being binding to natural and juristic persons,[424] section 8(1) of the Bill of Rights specifically reads:

> 'the Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.'[425]

For the purposes of this dissertation and specific reference to TGD persons, the following constitutionally guaranteed rights will be considered:

2.1.1 Section 9(3) – Right to equality

While section 9 protects individuals against unfair discrimination on multiple grounds, it is only section 9(3) in the entire Bill of Rights that makes explicit reference to Sex, Gender and Sexual Orientation, and reads as follows:

> 'the state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, color, sexual orientation, age, disability, religion, conscious, belief, culture, language and birth' [my emphasis].

2.1.2 Section 10 – Right to human dignity

421 The Constitution of the Republic of South Africa, 1996, chap 2.
422 The Constitution of the Republic of South Africa, 1996.
423 The Constitution of the Republic of South Africa, 1996, s7(1).
424 The Constitution of the Republic of South Africa, 1996, s8(2).
425 The Constitution of the Republic of South Africa, 1996, s8(1).

This section provides that ‘everyone has inherent dignity and the right to have their dignity respected and protected.’ ‘Human dignity’ can be defined as a recognition or cognisance that human beings possess intrinsic worth or value, simply by being human[426] and without consideration of/for other factors or characteristics such as gender, religion etc.

In her thesis, Rachel Sloth-Nielsen,[427] refers to a German Federal Constitutional Court judgement[428] which considered the constitutionality of a limitation affecting a gender diverse individual, or alternatively, a person who does not identify as either male or female. This individual argued that due to the inability to be registered in the German ‘natal register’ as either male or female, that the recognition of only the binary male and female genders constituted a dignity infringement of non-binary individuals.[429] The court recognised that failure to recognise a third gender infringed on the claimant’s rights to personality and dignity as guaranteed and protected by the German Basic Law.[430]

South African courts have declared, for example in the case of *September v Subramoney NO and Others*, that ‘respect for human dignity thus requires the recognition of and respect for the unique identity and expression of each individual.’[431]

426 The Center for Bioethics & Human Dignity, 'Human Dignity' (CBHD) <https://www.cbhd.org/issues/human-dignity> accessed 25 September 2025.

427 Rachel Sloth-Nielsen, 'Recognition of a Third Gender under South African Constitutional Law' (LLD thesis, University of Cape Town 2020).

428 1 BvR 2019/16 (German Federal Constitutional Court, 10 October 2017) BVerfGE (2017) <https://www.bverfg.de/e/rs20171010_1bvr201916en.html> accessed 25 September 2025.

429 Sloth-Nielsen, 'Recognition of a Third Gender under South African Constitutional Law' 47–50.

430 1 BvR 2019/16 (2017) cited in Sloth-Nielsen, 'Recognition of a Third Gender under South African Constitutional Law' 47–50.

431 *September v Subramoney NO and Others* (EC10/2016) [2019] ZAEQC 4; [2019] 4 All SA 927 (WCC) [119].

2.1.3 Section 11 - Right to life

The right to life is closely linked with the right to dignity as identified in the case of *S v Makwanyane.*[432] Owing to entrenched cisgendered, patriarchal and pathologised systems and institutional policies, there is a continued denial of the rights of TGD persons and of their freedom to exercise their constitutional rights, with attempts at self-actualisation culminating in the brutal murders of transgendered men and women, such as transwoman and human rights activist Nare Mphela.[433]

2.1.4 Section 12 - Right to freedom and security of the person

The provisions of this section read as follows:

> '12(1) Everyone has the right to freedom and security of the person, which includes the right— (a) not to be deprived of freedom arbitrarily or without just cause; (b) not to be detained without trial; (c) to be free from all forms of violence from either public or private sources; (d) not to be tortured in any way; and (e) not to be treated or punished in a cruel, inhuman or degrading way'
>
> '12(2) Everyone has the right to bodily and psychological integrity, which includes the right— (a) to make decisions concerning reproduction; (b) to security in and control over their body; and (c) not to be subjected to medical or scientific experiments without their informed consent.'

The violations of section 12(1)(c) and (d) is unfortunately largely seen in the 'corrective' rape and sexual violence and perpetuated against members of the LGBTQIA+, more specifically black lesbians or female born individuals with masculine presentation.[434] Section 12(2) serves, among others, to address matters of informed consent and access to gender-affirming healthcare services as canvassed in the previous chapter.

In addition, this dissertation has earlier argued that the requirement in the Alteration Act of medical intervention as a pre-requisite for legal gender recognition, violates the

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432 *S v Makwanyane and Another* 1995 (3) SA 391 (CC).

433 Siyanda B Shabalala, Floretta Boonzaier and Skye Chirape, 'Challenging Ciscentric Feminist Margins: A South African Study on GBV in the Lives of Black Trans Women' (2023) 65 *Psychology in Society* (PINS) 50–80 <https://doi.org/10.57157/pins2023vol65iss1a6126>.

434 R Koraan and A Geduld, '"Corrective Rape" of Lesbians in the Era of Transformative Constitutionalism in South Africa' (2015) 18(5) PELJ 2071 <http://dx.doi.org/10.4314/pelj.v18i5.23> accessed 1 September 2025.

right to bodily and psychological integrity of TGD persons. Making gender-affirming procedures conditional for recognition under the Alteration Act constitutes a glaring disregard for the recognition of protection of TGD persons' rights to bodily autonomy or psychological integrity.[435]

2.1.5 Section 14 - Right to privacy

Section 14 provides that everyone has a right to privacy as espoused in the following wording in section 14(d): '[e]veryone has the right to privacy, which includes the right not to have the privacy of their communications infringed.'

TGD persons are often required to divulge intimate details of their lives, whether in facilitation of explaining their 'lived experience,' accessing gender-affirming healthcare[436] or complying with the requirement of the Alteration Act for medical reports in an application to change their gender markers.[437]

2.1.6 Section 16 - Right to freedom of expression

Given that this study discusses the concept of gender expression and gender identity, it is important to contextually take note of section 16, which provides that:

> '(1) Everyone has the right to freedom of expression, which includes— (a) freedom of the press and other media; (b) freedom to receive or impart information or ideas; (c) freedom of artistic creativity; and (d) academic freedom and freedom of scientific research.'

The case of September[438] illustrates how the term 'freedom of expression' includes a TGD persons right to develop and express their gender identity. The denial to allow the expression of gender identity is a clear infringement on the right to freedom of expression.[439]

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435 Matthyse and others, *Keeping the Promise of Dignity and Freedom for All* 35.
436 Matthyse and others, *Keeping the Promise of Dignity and Freedom for All* 40.
437 Alteration of Sex Description and Sex Status Act 49 of 2003, s 2(2).
438 *September v Subramoney NO and Others* (EC10/2016) [2019] ZAEQC 4; [2019] 4 All SA 927 (WCC).
439 *September v Subramoney NO and Others* (EC10/2016) [2019] ZAEQC 4; [2019] 4 All SA 927 (WCC) paras 113–114.

Further to the above, the right to freedom of expression specifically excludes, inter alia, advocacy of hatred based on race, ethnicity, gender or religion, constituting incitement to cause harm.[440]

2.1.7 Section 27 - Right to health care, food, water and social security

This section is critical to this study and the access to healthcare services and gender-affirming health care specifically. The section provides that:

> *'*27(1)(a) Everyone has the right to have access to health care services, including reproductive health care;'
> '27(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.'
> '27(3) No one may be refused emergency medical treatment.'

Muller[441] explains the gap between this right as a legal provision and its implementation, noting that while the Constitution is considered progressive in offering such protections for TGD persons, there is a glaring gap between the constitutional rights and the lived experiences and realities of TGD persons in accessing gender-affirming healthcare. Systematic flaws riddled with discrimination, invisibilities and homophobia make realising this right challenging, in practice.[442]

2.1.8 Section 33 - Right to just administrative action

This section guarantees the right to just administrative action and procedural fairness, enabling persons affected by administrative decisions to challenge decisions that affect their rights. The section reads as follows:

> '33(1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair'
> '33(3) National legislation must be enacted to give effect to these rights, and must— (a) provide for the review of administrative action by a court or, where

440 Constitution of the Republic of South Africa, 1996, s 16(2)(c).
441 Alexandra Müller, 'Health for All? Sexual Orientation, Gender Identity, and the Implementation of the Right to Access to Health Care in South Africa' (2016) 18 *Health and Human Rights Journal* 195 <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5395001/>.
442 Müller, 'Health for All?' 204.

> appropriate, an independent and impartial tribunal; (b) impose a duty on the state to give effect to the rights in subsections (1) and (2) […]'

The lack of standardised guidelines and regulations guiding the operationalisation of the Alteration Act limits the realisation and implementation of this right, as TGD persons are faced with unreasonable delays and obstacles in achieving gender affirmation or legal gender recognition.[443] Matthyse and others correctly note that the existing procedural deficiencies and inconsistencies, referred to earlier in this dissertation, undermine the right to just administrative action guaranteed by section 33.[444]

It is important to also note that section 33(3)[445] mandated the development and enactment of the Promotion of Administrative Justice Act (PAJA)[446] whose purpose is to facilitate the ability of citizens to access their constitutional rights to just and fair administrative action.[447] Administrative Action is defined as:

> 'any decision taken, or any failure to take a decision, by- (a) an organ of state, when- (i) exercising a power in terms of the Constitution or a provincial constitution; or (ii) exercising a public power or performing a public function in terms of any legislation; or (b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person and which has a direct, external legal effect.'

Notwithstanding the enactment of PAJA, the lack of regulatory guidelines in the implementation or application of the Alteration Act make the provisions of PAJA less accessible and further undermine the right to administrative justice.

2.1.9 Section 35 - Rights of arrested, detained persons

Section 35(2)(e) provides that:

> 'everyone who is detained, including every sentenced prisoner, has the right to conditions of detention that are consistent with human dignity, including at

443 Matthyse and others, *Keeping the Promise of Dignity and Freedom for All* 68–69.
444 Constitution of the Republic of South Africa, 1996.
445 Constitution of the Republic of South Africa, 1996.
446 Promotion of Equality and Prevention of Unfair Discrimination Act 3 of 2000.
447 Promotion of Equality and Prevention of Unfair Discrimination Act 3 of 2000.

least exercise and the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment'.

Section 35[448] introduces an additional complexity in that transgender persons incarcerated in correctional facilities are the target of continued harassment, discrimination and brutality due to their gender expressions. The 'heterogenous' nature of correctional facilities entails that TGD persons constitute a vulnerable group who is at a larger risk of exposure to 'trauma, custodial violence and harm.'[449] TGD persons also belong to other vulnerable groups in correctional facilities who are different from the heteronormative norms and expectations of existing systems[450]

Section 35, read together with section 9[451], provides the basis upon which incarcerated TGD persons may approach courts to make rulings based on the institutional misgendering, denial of treatment, violence and discrimination, canvassed in the cases below.

3 THE PROMOTION OF EQUALITY AND PREVENTION OF UNFAIR DISCRIMINATION ACT

As indicated above, the Bill of Rights, specifically section 9(3)[452] that protects equality of persons, prohibits unfair discrimination on multiple grounds, including among others gender, sex and sexual orientation. Section 9(4)[453] instructs the enactment of national legislature to ensure the protection of the right to equality and prohibition of discrimination. As a result of this constitutional imperative, the Promotion of Equality and Prevention of Unfair Discrimination Act[454] (PEPUDA) was enacted.

The object of PEPUDA is, inter alia, to promote equality, protect human dignity, promote the values of non-racialism and non-sexism and to prevent unfair

448 Constitution of the Republic of South Africa, 1996, s 35.
449 Marie-Claire Van Hout, 'Navigating the Complexities of (Trans)Gender Equality Rights within the Parameters of Reasonable Accommodation and Security Tensions in South African Prisons: The Judgement of *September v Subramoney*' (2022) 3 *Forensic Science International: Mind and Law* 100077, 1.
450 Van Hout, 'Navigating the Complexities of (Trans)Gender Equality Rights' 4.
451 Constitution of the Republic of South Africa, 1996, s 9.
452 Constitution of the Republic of South Africa, 1996.
453 Constitution of the Republic of South Africa, 1996.
454 Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

discrimination and prohibit the advocacy of hatred based on gender (this study's focal point).[455] The explicit mention of gender in this Act provides a foundational basis for the protection of TGD persons against discrimination and harassment.

PEPUDA mandates all persons/institutions operating or exercising public power, or directly or indirectly contracting with the State, to promote equality, to develop and adopt plans, codes and regulatory mechanisms to achieve this, while ensuring their enforcement and monitoring of said plans.[456] These persons and entities bear a responsibility to report to the monitoring bodies, [457] such as the South African Human Rights Commission and the Commission on Gender Equality.

The South African cases discussed below, illustrate the application of PEPUDA in challenging unfair discrimination against TGD individuals. Section 39 of the Constitution of South Africa (1996) provides guidance on how the Bill of Rights should be interpreted and applied. It requires that when courts, tribunals, or other organs of state interpret the Bill of Rights, they *must:* (1) promote the values that underlie an open and democratic society based on human dignity, equality, and freedom; (2) consider international law and (3) *may* consider foreign law. This section essentially ensures that the rights in the Bill of Rights are interpreted in a way that promotes human dignity, equality, and freedom, and that South Africa *aligns with international human rights standards*. It is for this reason that before the South African cases are discussed below, cognisance must be had to the relevant international human rights instruments that provide the context for the protection of the rights of TGP persons on an international level.

4 INTERNATIONAL HUMAN RIGHTS FRAMEWORK

The international human rights framework comprises of various, interconnected and multi-layered universal declarations, binding treaties, international standards and regionally specific mechanisms, designed to, amongst others, protect and the rights

455 Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, s2.
456 Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, s26.
457 Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, s26.

of TGD persons through the recognition of principles of universality, equality and non-discrimination.

4.1 Universal Declaration on Human Rights (UDHR)

Adopted by the United Nations General Assembly on 10 December 1948, the UDHR is considered a foundational international document, considered to be or provide a common standard for all peoples and all nations[458] in recognising that 'all human beings are born free and equal in dignity and rights.'[459] It is considered the basis for further treaties and conventions such as the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.[460]

Article 2[461] of the UDHR confirms that:

> 'Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.'

This article (Article 2, above) emphasises the international entitlement to rights by 'all human beings,'[462] without distinction or preclusion. Similar to the Constitution of South Africa,[463] the UDHR further recognises the right to equality without discrimination,[464] the right not to be subjected to torture, cruel inhuman treatment[465] and the right to an adequate standard of living, including medical care.[466]

While the UDHR does not specifically state TGD persons, it is implied that the phrase, 'or other status', is the umbrella term under which they may be assumed to be

458 United Nations General Assembly, Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR) <https://www.un.org/en/about-us/universal-declaration-of-human-rights> accessed 1 November 2025.
459 UDHR art 1.
460 UDHR art 1.
461 UDHR art 2.
462 UDHR art 1.
463 Constitution of the Republic of South Africa, 1996.
464 UDHR art 7.
465 UDHR art 5.
466 UDHR art 25.

included.[467] It is my submission that while the UDHR provides a universal framework advocating for dignity and equality, it lacks sufficient or explicit recognition of gender expression or identity and may for this reason be criticised as being too general.[468]

4.2 International Covenant on Civil and Political Rights (ICCPR)

The purpose of the ICCPR is to recognise and ensure protection of the inherent dignity, equal and inalienable rights of all members of the human family, understanding that these are the foundation of freedom, justice and peace in the world.[469]

Article 2(1) of the ICCPR[470] prescribes that that:

> 'Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.'

The ICCPR obligates non-discrimination and equality[471] and, as is the case with the UDHR above, there is no specific reference to gender or gender identity. As such, it is again assumed that TGD persons fall under the category 'or other status'[472]

Article 17[473] of the ICCPR reads:

> '(1) No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
> (2) Everyone has the right to the protection of the law against such interferences or attacks.'

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467 Centre for Human Rights, University of Pretoria, *A Guide to LGBTIQ-Rights in the UN and Africa* (27 September 2022) <https://www.chr.up.ac.za/images/researchunits/sogie/documents/A_Guide_to_LGBTIQ_Rights_in_the_UN_and_Africa_V3_27.09.2022_1.pdf> accessed 1 November 2025.

468 Frans Mashilo Mahlobogwane, 'The Legal Position Regarding the Best Interests of the Child in Gender Reassignment Decisions in South Africa' (Doctor of Laws thesis, University of South Africa 2023) 184–185.

469 United Nations General Assembly, *International Covenant on Civil and Political Rights* (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

470 United Nations General Assembly, International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 2(1).

471 ICCPR art 2(1)

472 Centre for Human Rights, University of Pretoria, *A Guide to LGBTIQ-Rights in the UN and Africa* (27 September 2022).

473 ICCPR art 7(1) and (2).

It is argued that this right is similar to the right to privacy and echoes the same values as guaranteed by the right to privacy in the South African Constitution. In addition to the this, the ICCPR provides that 'everyone shall have the right to recognition everywhere as a person before the law.[474] Considering the lack of reference to gender or TGD persons in this international human rights instrument, it advanced that article 16 may be interpreted as a basis for legal gender recognition, if cognisance is had to the right to freedom of expression and thought provided for by article 18,[475] which states:

> '(1) Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice, and teaching (2) No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.'

Article 18 can be said to extend to gender expression and affirming one's gender identity as a core personal belief or manifestation of one's own belief, which one should not be denied.

The persistent lack of specificity or explicit reference to gender identity and expressed as a protected ground and the assumptions made regarding the broad 'other status' subjects the ICCPR to potential inconsistencies in interpretation and enforcements regarding TGD persons and their rights.

4.3 International Covenant on Economic, Social and Cultural Rights (ICESR)

The ICESCR[476] seeks to that each State Party create conditions where everyone can enjoy freedoms, without fear, by securing rights related to work, education, health, social security and cultural participations, among others.[477]

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474 ICCPR art 16.
475 ICCPR art 18.
476 United Nations General Assembly, International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR).
477 ICESCR arts 6–15.

As with the other instruments, article 2(2)[478] of the ICESCR prescribes that:

> 'The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.'

As the ICESCR does not specifically make any reference to gender or expressly provides for TGD persons, the inclusion is again implied by interpretation. It is important to note, in isolation, that 12 prescribes that:

> 'The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.'

The importance of this provision in relation to TGD persons is that it is broad enough to recognise the impact of gender incongruence on physical and mental health.

4.4 Convention Against Torture (CAT)

The CAT[479] has as its object, the prohibition of torture and cruel, inhuman, or degrading treatment or punishment internationally, with the aim of promoting universal respect for human rights.[480] Accordingly, and for the purposes of this dissertation, it is noted that article 1 provides in the definition of 'torture' any act by which sever pain or suffering, whether physical or mental, is intentionally inflicted on a person for any reason based on discrimination of any kind.[481]

This definition of torture provides an essential argument for TGD persons who may suffer severe pain and suffering, both physically and mentally, as a result of stigma-perpetuated discrimination, violence and corrective rape, which are indirectly condoned or remain unaddressed. The Convention addresses torture specifically committed 'by or at the instigation of or with the consent or acquiescence of a public

478 ICESCR art 2(2).
479 United Nations General Assembly, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 (CAT).
480 CAT.
481 CAT art 1.

official or other person acting in an official capacity.'[482] Clearly, the withholding of medication or hormone replacement treatment to incarcerated TGD persons who have been diagnosed with gender dysphoria may potentially qualify as torture as defined by the Convention, specifically if done intentionally for or with discriminatory intent.

Articles 10, 11, 12 and 13 impose obligations about on State Parties to ensure that education and training of personnel, reviewing practices, ensure reporting and investigation, and protect victims and complainants. Article 10 and 11 specifically requires that:

> 'Each State Party must ensure that education and information about the prohibition of torture are fully included in the training of law enforcement personnel (civil and military), medical personnel, public officials, and others involved in custody, interrogation, or treatment of individuals arrested, detained, or imprisoned.'[483]
>
> 'Each State Party must keep under systematic review interrogation rules, instructions, methods, and practices, and arrangements for custody and treatment of persons under any form of arrest, detention, or imprisonment.'[484]

To supplement Article 1 of the Convention, Article 16 provides as follows:

> 'each state party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article I, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity…'[485]

The Convention further provides the duties that are outlined in Articles 10, 11, 12 and 13, specifically addressing torture apply to 'cruel, inhuman and degrading treatment.'

Although the CAT places obligations on State Parties mandating training, investigation and review, it does not prescribe any fines, penalties or legal sanctions on State Parties for non-compliance with its articles. Oversight is exercised through the Committee against Torture, which periodically reviews reports submitted by State Parties and assess compliance. However, the absence of binding enforcement measures weakens the Committee's authority to compel compliance. Non-compliance

482 CAT art 1.
483 CAT art 10(1).
484 CAT art 11(1).
485 CAT art 16(1).

will essentially or potentially affect the State's international relations and standing.[486] As such, the consequences for non-compliance are largely reputational.

In response to these structural limitations, the Operational Protocol to the Convention against Torture and other Cruel, Inhumane or Degrading Treatment or Punishment[487] was adopted in December 2002 to establish a system of regular visitations by independent national and international bodies to locations where persons were being deprived of their liberties and or subjected to torture or other cruel, inhuman or degrading treatment or punishment. These protocols and its system aim to prevent such treatment and strengthen protections of affected persons.[488] This protocol represents a shift from reactive accountability to more proactive prevention, supporting practical effectiveness of international anti-torture frameworks.

4.5 African Charter on Human and Peoples' Rights

The African Charter on Human and People's Rights (ACHPR) is the principle human rights instrument of the African Union, adopted in June 1981. It serves to guarantee civil, political, economic, social and cultural rights of all Africans.[489] The Charter recognises in its preamble that fundamental human rights stem from the attributes of human being, which justified their international protection.

As in the case of the UDHR, the ACHPR guarantees rights and freedoms without discrimination, which can be observed in Article 2:

> 'Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present charter without distinction of any kind such as race, ethnic group, color, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status'[490]

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486 CAT art 4.

487 United Nations General Assembly, Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 18 December 2002, entered into force 22 June 2006) 2375 UNTS 237 (OPCAT).

488 OPCAT.

489 African Union, African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) 1520 UNTS 217; 21 ILM 58 (ACHPR) <https://au.int/sites/default/files/treaties/36390-treaty-0011_-_african_charter_on_human_and_peoples_rights_e.pdf> accessed 10 November 2025.

490 ACHPR art 2.

There is no specific mention or explicit recognition of gender or gender identity as such, and as is the case with the Covenants and Declarations above, it may be assumed that 'or other status' is deemed to be broad and flexible enough to include the category TGD persons. This conclusion is bolstered by the use of 'every individual' as being equal before the law[491] and entitled to equal protection of the law.[492]

Similar to the South African Constitution and Universal Declaration of Human Rights, the ACHPR protects the rights to equality and non-discrimination,[493] right to dignity and freedom from cruel treatment,[494] rights to privacy and security,[495] the right to freedom of expression and association,[496] as well as the right to health[497]

It is important to note that the ACHPR makes repeated mention of cultural, traditional values and morals, for instance, it provides that:

> 'The promotion and protection of morals and traditional values recognized by the community shall be the duty of the state'[498]
>
> 'The family shall be the natural unit and basis of society, it shall be protected by the state which shall take care of its physical health and moral.'[499]
>
> 'The state shall have the duty to assist the family which is the custodian of morals and traditional values recognized by the community.'[500]

Given the conventional history of African communities and their stance towards sexual orientation and gender diversity, vis-à-vis that which is considered to be 'un-African'[501] or contra-morality, places a duty on States to promote and protect morals and traditional values. This intersection between traditional morals and values and the protection of the rights under the Charter may be seen to be

491 ACHPR art 3(1).
492 ACHPR art 3(2).
493 ACHPR art 2.
494 ACHPR art 5.
495 ACHPR art 6.
496 ACHPR art 10 and 11.
497 ACHPR art 16.
498 ACHPR art 17(3).
499 ACHPR art 18(1).
500 ACHPR art 18(2).
501 Kenne Mwikya, 'Unnatural and Un-African: Contesting Queer Phobia by Africa's Political Leadership' (2014) *Feminist Africa* No 19 (Pan Africanism and Feminism).

counter-intuitive, in that the obligation to protect so-called African values may perpetuate discrimination, stigma, violence and challenges for TGP in accessing adequate health care, including mental health care services.

Progressively, however, on the 55th Ordinary Session, the African Commission on Human and Peoples' Rights (the African Commission) adopted Resolution 275 on Protection against Violence and other Human Rights Violations against Persons on the Basis of their Real or Imputed Sexual Orientation or Gender Identity (2014).[502] This resolution is significant in that it (for the first time) explicitly recognises and includes sexual orientation and gender identity as the basis of targeted discrimination, violence and other human rights violations.[503]

The resolution further condemns 'systematic attacks by State and non-state actors against persons on the basis of their imputed or real sexual orientation or gender identity,' urging member states to enact and effectively apply appropriate laws prohibiting and punishing 'all forms of violence including those targeting persons on the basis of their imputed or real sexual orientation or gender identities, ensuring proper investigation and diligent prosecution of perpetrators, and establishing judicial procedures responsive to the needs of victims.'[504]

While the resolution is progressive in inclusively reaffirming human rights, it does not force any changes to be made on the existing ACHPR, which still contains the duty on the state to promote morals and traditional values.[505]

4.6 The Yogyakarta Principles / Yogyakarta Principles +10

502 African Commission on Human and Peoples' Rights, Resolution on Protection against Violence and Other Human Rights Violations against Persons on the Basis of Their Real or Imputed Sexual Orientation or Gender Identity ACHPR/Res.275(LV)2014 (adopted at the 55th Ordinary Session, Luanda, Angola, 28 April – 12 May 2014) <https://www.achpr.org/sessions/resolutions?id=287> accessed 10 November 2025

503 ACHPR, Resolution on Protection against Violence and Other Human Rights Violations against Persons on the Basis of Their Real or Imputed Sexual Orientation or Gender Identity ACHPR/Res.275(LV)2014 (2014).

504 ACHPR, Resolution on Protection against Violence and Other Human Rights Violations against Persons on the Basis of Their Real or Imputed Sexual Orientation or Gender Identity ACHPR/Res.275(LV)2014 (2014).

505 ACHPR art 17(3).

The Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity are a set of principles that seek to clarify how current and existing international human rights law applies to sexual orientation and gender identity (SOGI). Developed by the International Commission of Jurists and the International Service for Human Rights, the purpose of the Yoyakarta Principles is to clarify how the existing international human rights law applies to sexual orientation and gender identity (SOGI) and State obligations under the existing international human rights law, with the aim to promote and protect all human rights for all persons equally, and without discrimination.[506]

While the 2006/7 Yogyakarta Principles established a framework for addressing human rights in relation to SOGI,[507] the YP + 10 explicitly recognised developments in international law and should be read and interpreted in conjunction with the 2006/7 version and its original 29 principles.[508] For the purposes of this study, my focus will be on the YP +10, specifically, which include Principles 30 (right to state protection), 31 (right to legal recognition) and 32 (right to bodily and mental integrity). Principle 30 provides that

> 'Everyone, regardless of sexual orientation, gender identity, gender expression or sex characteristics, has the right to state protection from violence, discrimination and other harm, whether by government officials or by any other individual or group.'

These principles require that the state develop, implement and public information programmes to promote human rights and eliminate prejudices on grounds of sexual orientation, gender identity, gender expression and sex characteristics[509] and importantly, that the state ensure sensitivity training for judicial and law enforcement officers on issues relating to sexual orientation, gender identity, gender expression and sex characteristics.[510]

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506 International Commission of Jurists (ICJ) and International Service for Human Rights (ISHR), *The Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity* (March 2007) <https://yogyakartaprinciples.org/principles-en/> accessed 15 November 2025.

507 ICJ and ISHR, *Yogyakarta Principles plus 10* (2017) 6.

508 ICJ and ISHR, *Yogyakarta Principles plus 10* (2017) 4.

509 ICJ and ISHR, *Yogyakarta Principles plus 10* (2017) Principles 30(E).

510 ICJ and ISHR, *Yogyakarta Principles plus 10* (2017) Principle 30(F).

Principle 31, in addition to the obligation on the state to ensure access to quick and accessible mechanisms for legal gender recognition, provides that:

> 'Everyone has the right to legal gender recognition without reference to, or requiring assignment or disclosure of, sex, gender, sexual orientation, gender identity, gender expression or sex characteristics. Everyone has the right to obtain identity documents, including birth certificates, regardless of sexual orientation, gender identity, gender expression or sex characteristics. Everyone has the right to change gendered information in such drug documents the wild gendered information is included in them.'[511]

Principle 31 is significant in that it emphasises and recognises legal recognition that seeks to affirm a person's right to self-defined and self-determined gender identity. This recognition is crucial for the dignity, autonomy and equality of TGD persons.

The Yogyakarta Principles oblige states to vigorously investigate human rights violations[512] and to ensure access to effective complaints procedures and remedies.[513] However, it does not prescribe any sanctions for non-compliance, enforcement and sanctions for non-compliance are solely dependent on international and domestic human rights enforcement mechanisms.[514]

5 LANDMARK COURT JUDGMENTS IMPACTING TRANSGENDER RIGHTS IN SOUTH AFRICA

Building on the preceding discussions and themes of this dissertation, consideration will next be given to the judicial decisions below. These decisions have significantly shaped, transformed and clarified legal prescripts, providing precedence for future legal challenges and the adjudication thereof.

5.1 *Minister of Home Affairs v Fourie* (2005)[515]

511 ICJ and ISHR, *Yogyakarta Principles plus 10* (2017) Principles 31.
512 ICJ and ISHR, *Yogyakarta Principles plus 10* (2017) Principles 30(I).
513 ICJ and ISHR, *Yogyakarta Principles plus 10* (2017) Principles 30(J).
514 ICJ and ISHR, *Yogyakarta Principles plus 10* (2017).
515 *Minister of Home Affairs v Fourie* (CCT 60/04) [2005] ZACC 19.

Although an older judgment, the case of *Minister of Home Affairs v Fourie*[516] is of critical significance in that it brought a constitutional challenge of the common law and Marriage Act,[517] arguing that the failure of the Marriage Act[518] to allow same-sex couples to marry constituted unfair discrimination, violating their rights to equality[519], dignity[520] and freedom[521] guaranteed under the Bill of Rights.[522]

Four applicants who were in same sex relationships, sought to marry under South African law. However, the Marriage Act[523] limited marriage exclusively to opposite-sex couples, discriminating unfairly against them on the basis of their sexual orientation. The applicants advanced the argument that the limitation violated their constitutional rights and sought a declaration that the common law and the Marriage Act were inconsistent with the Constitution in as far as it did not allow same-sex marriages.[524]

The Constitutional Court, affirming the precedent from the Supreme Court of Appeal, held that the exclusion of same-sex couples from marriage constituted unfair discrimination and was inconsistent with sections 9 and 10 of the Constitution. The court declared the common law and section 30(1) of the Marriage Act to be invalid to the extent that it did not allow same sex couples to marry. The court further suspended the declaration of invalidity for a period to allow parliament to amend the Marriage Act.[525]

Justice Albie Sachs made the following important observation on the exclusion of same-sex couples from the benefit and responsibilities of marriage:

> 'It reinforces the wounding notion that they are to be treated as biological oddities, failed or lapsed human beings who do not fit into normal society, and, as such, do not qualify for the full moral concern and respect that our constitution seeks to secure for everyone.'[526]

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516 *Minister of Home Affairs v Fourie* (CCT 60/04) [2005] ZACC 19.
517 Marriage Act 25 of 1961.
518 Marriage Act 25 of 1961, s 30(1).
519 Constitution of the Republic of South Africa, 1996, s 9.
520 Constitution of the Republic of South Africa, 1996, s 10.
521 Constitution of the Republic of South Africa, 1996, s 12
522 *Minister of Home Affairs v Fourie* (CCT 60/04) [2005] ZACC 19 para 45.
523 Marriage Act 25 of 1961, s 30(1).
524 *Minister of Home Affairs v Fourie* (CCT 60/04) [2005] ZACC 19 para 44.
525 *Minister of Home Affairs v Fourie* (CCT 60/04) [2005] ZACC 19 paras 24–28.
526 *Minister of Home Affairs v Fourie* (CCT 60/04) [2005] ZACC 19 para 71.

Although this case addressed the issue of same sex marriage and not transgender rights, it is significant in that it affirms and establishes the constitutional protections of the right to dignity equality and freedom from discrimination based on sexual orientation, which can be construed to apply broadly to the LGBTQI+ persons.

More significantly is that the Constitutional Court gave Parliament 12 months to enact legislation that would correct the defect of the Marriages Act and provide legal recognition of same-sex couples with the same status, benefits, and responsibilities as heterosexual couples.[527] This led to the enactment of the Civil Union Act[528], which came into effect on 30 November 2006, and which allows same-sex and opposite-sex couples to enter into a civil union which they can define as either a marriage or civil partnership.[529]

5.2 *Lallu v Van Stadden* (2011)[530]

This matter was brought before the Equality Court in the district of Roodepoort. The facts are the following: the complainant (Lallu) and the respondent (Van Stadden) were neighbours in a townhouse complex in Rockport for approximately five years. The respondent's garden overlooked the back garden and kitchen of the unit occupied by the complainant and his family, resulting in regular interactions between the households.[531]

The complainant described himself as transsexual identifying as a trans woman. This status and his sexual orientation formed the alleged basis of verbal abuse and derogatory comments, public humiliation of the complainant and his family by the respondent and generally the creation of a hostile environment. In 2009, the respondent allegedly initiated and circulated a petition calling for the eviction of the complainant and her family from the complex. A second petition with the same agenda was circulated in 2011. Without affording the complainant's family an opportunity to

527 *Minister of Home Affairs v Fourie* (CCT 60/04) [2005] ZACC 19, order para 2(d).
528 Civil Union Act 17 of 2006.
529 Civil Union Act 17 of 2006.
530 *Lallu v Van Stadden* Roodeport Equality Court Case no 3 of 2011.
531 *Lallu v Van Stadden* Roodeport Equality Court Case no 3 of 2011 paras 3–7.

view or respond to the petition, the Body Corporate of the Complex issued the complainant and his family a warming which was then followed by a notice to vacate the premisses by 29 February 2012, ultimately leading to the complainant and his family leaving due to the hostile environment perpetuated by the respondent and the actions that followed.

The complainant approached the court to seek patrimonial and non-patrimonial damages incurred in the form of counselling and moving costs, including damages suffered as a result of for pain and suffering. The respondent merely denied all the allegations and claimed that it was actually the complainant who would unprovoked regularly swear at her and her family. The court found the version of the respondent to be largely improbable and implausible and found her credibility questionable.

The Court applied PEPUDA,[532] stating that the utterances of the respondent in calling the complainant names, constituted hate speech in accordance with section 10(1) of PEPUDA which reads:

> '(1) Subject to the proviso in section 12, no person may publish, propagate, advocate or communicate words based on one or more of the prohibited grounds, against any person, that could reasonably be construed to demonstrate a clear intention to be harmful or to incite harm and to promote or propagate hatred'[533]

Further, the court held that the conduct of the respondent constituted harassment, which is prohibited in terms of section 11[534] and defined in section 1 as:

> '…unwanted conduct which is persistent or serious and demeans, humiliates or creates a hostile or intimidating environment or is calculated to induce submission by actual or threatened adverse consequences and which is related to- (a) sex, gender or sexual orientation, or (b) a person's membership or presumed membership of a group identified by one or more of the prohibited grounds or a characteristic associated with such group;' [535]

The Court ordered the respondent to pay the complainant a sum of R27 300.00 in damages, a portion of which was general damages for infringement of dignity.[536]

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532 Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.
533 Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, s10(1).
534 Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 s11.
535 Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, s1.
536 *Lallu v Van Stadden Roodeport Equality Court* Case no 3 of 2011 para 82.

In its application of PEPUDA, this case enforces constitutional and statutory protections against unfair discrimination and hate speech. The case also affirms that verbal abuse and hate speech, as well as actions targeting persons by virtue of their sexual orientation or gender identity, constitute harassment and discrimination. This case is important for creating precedence and recognition of the rights of TGD persons.

5.3 *Mphela v Manamela and Others* (2021)[537]

This case relates to a complainant by the name of Nare Philemon Mphela, a transgender woman, who was at the time a Grade 12 student at the Raselete Secondary School in Ga-Matlala, Limpopo Province. Nare identified as a trans woman and wore a female school uniform as a form of her gender expression. The respondent, Kgano Francis Manamela, was Nare's teacher, as well as the Principal of the Raselete Secondary School Principal, affiliated with the Limpopo Department of Education (cited as the second respondent).

Nare was a victim of relentless discrimination instigated and perpetuated by the school principal, Mr Manamela. In 2013 specifically, the principal instructed a group of students to accost Nare in the bathroom, touch and feel her genitals and report their findings to him, directly and aggressively infringing on Nare's bodily integrity and dignity. The principal was alleged to have continually verbally insulted Nare. On one occasion, the principal was reported to refuse Nare to answer a question in class, stating that 'you are gay, and I don't talk to people like you.' This was followed by a series of horrible behaviour, harassment and hate speech towards Nare. Furthermore, the principal used corporal punishment on Nare, despite the ban on corporal punishment in South Africa.[538] Despite repeated requests, the Limpopo Department of Education neglected and/or refused to intervene in order to protect Nare. It was only with the help of a LGBTI community group, known as OUT, that Nare was referred to the Limpopo branch of the South African Human Rights Commission.

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537 *Mphela v Manamela and Others* (EC 10/2016) [2021] ZAEQC 4 (23 September 2021).

538 C Collison, 'Victory for Transgender Learner in Limpopo — a Long Time Coming?' *Daily Maverick* (24 March 2017) <https://www.dailymaverick.co.za/article/2017-03-24-victory-for-transgender-learner-in-limpopo-a-long-time-coming/> accessed 15 November 2025.

Significantly, this matter was the first of its kind to be heard in the Seshego Equality Court and in fact the first matter to ever be heard on the basis of PEPUDA in Limpopo. The Equality Court found that the conduct of the principal was tantamount to unfair discrimination on the basis of gender identity, prohibited by section 6,[539] harassment in terms of section 11[540] and hate speech in terms of section 10[541] of PEPUDA. The principal was consequently ordered to pay R40 000.00 in damages to Nare, whilst the Limpopo Department of Education was ordered to pay R60 000.00.

The case of Nare Mphela is sad, because although it marks a groundbreaking, landmark case as the first transgender case to be heard in the Equality Court in South Africa, leading to a judgment that confirmed the recognition of gender identity as a protected ground under PEPUDA, Nare Phillemon Mphela was brutally murdered three years after the court victory in January 2020. The circumstances surrounding her death point to a violent, targeted killing.[542]

This case is conceptually important in that it affirms the recognition of gender expression as a protected interest, which institutions (academic institutions in the case of Nare) must recognise and to which they must adapt their practices. This, in turn, will hopefully assist in providing a normative foundation for further discussion in cases dealing with gender-affirmation within institutional structures.

5.4 *September v Subramoney NO and Others* (2019)[543]

The matter of Jade September addresses the issue of human rights in the context of incarcerated TDG persons. Jade September is a trans woman, born anatomically male, who identifies as a woman and expresses her gender identity by wearing female underwear, makeup, long braids and utilising female pronouns.

539 Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, s6.
540 Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, s11.
541 Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, s10.
542 Iranti, 'Nare Mphela: A Life of Courage Remembered' (20 November 2025) <https://www.iranti.org.za/nare-mphela-a-life-of-courage-remembered> accessed 15 November 2025.
543 *September v Subramoney NO and Others* (EC10/2016) [2019] ZAEQC 4; [2019] 4 All SA 927 (WCC).

Convicted and sentenced in May 2013, she was incarcerated at Pollsmoor Admission Centre ('Pollsmoor') and then moved to Helderstroom Maximum Correctional Centre ('Helderstroom'). At both centres of incarceration, she was allowed to express her gender identity and allowed to wear her hair long with a bit of makeup.[544] She was then temporarily moved to Brandvlei Correctional Centre where her makeup and female underwear were confiscated on arrival and she was referred to as a man.[545] On returning to Helderstroom, she was denied the allowance to express her gender identity as had initially been the case, and was placed in segregation as a disciplinary measure for asserting her gender identity.[546]

It was argued that the respondent officials, including Mr Subramoney who was the head of Helderstroom at the time, refused to allow her to express her gender identity and further failed to accommodate her constitutionally protected rights.[547] Ms. September further argued that this failure constituted unfair discrimination and harassment in terms of PEPUDA, violating her constitutional rights, including her right to dignity and equality. [548]

The Court recognised that the rights to dignity, equality and freedom of expression apply equally to all persons, including incarcerated and transgender persons.[549] The Court specifically stated that:

> 'The Constitution guarantees that all detained persons must be detained consistently with human dignity. To imprison her contrary to her right to dignity violates s10 and s35 (2)(e) of the Constitution.'[550]

The respondent advanced argument to the effect that they were concerned over safety and resource limitations, and that this justified their denial of the applicant's rights. The court rejected this argument, stating that reasonable accommodations can be made

544 *September v Subramoney* (EC10/2016) para 21.
545 *September v Subramoney* (EC10/2016) para 22.
546 *September v Subramoney* (EC10/2016) para 31.
547 *September v Subramoney* (EC10/2016) para 161.
548 *September v Subramoney* (EC10/2016) para 2.
549 *September v Subramoney* (EC10/2016) para 158.
550 *September v Subramoney* (EC10/2016) para 158.

without undue burden on their resources or exposing the applicant and other inmates to an increased safety risk.[551]

The court further held that the denial to allow Ms September to express her gender identity constituted unfair discrimination in terms of section 8 of PEPUDA and was therefore unlawful and unconstitutional.[552] The court then ordered prison officials to allow September and others to express their gender identity (wearing female underwear, keeping their hair long) and that they be addressed by their female pronouns. In addition, the Department of Correctional Services was ordered to introduce transgender sensitivity training and to develop Standard Operating Procedures for incarcerated LGBTIQ+ persons.[553]

A significant aspect of this judgment is its reliance on the Yogyakarta Principles. The court noted that although there is no international treaty pertaining exclusively to the rights of sex and gender minorities, the Yogyakarta Principles provide significant guidance.[554] The court made specific reference to principles 6, 9, 19 and 32 of the Yogyakarta Principles, which contain the following provisions, as espoused by the court:[555]

> **'Principle 6** includes: 'the choice to disclose or not to disclose information relating to one's sexual orientation or gender identity, as well as decisions and choices regarding both one's own body and consensual sexual and other relation with others.' That includes the obligation on the state to 'repeal any law that prohibits or criminalises the expression of gender identity, including through dress, speech or mannerisms, or that denies to individuals the opportunity to change their bodies as a means of expressing their gender identity'[556]
>
> **'Principle 9** pertains to the right to humane treatment and dignity while in detention and obligates the state to, inter alia: '(a) ensure that placement in detention avoids further marginalising persons on the basis of sexual orientation or gender identity or subjecting them to risk of violence, ill-treatment or physical, mental or sexual abuse; … (c) ensure, to the extent possible, that all prisoners participate in decisions regarding the place of detention appropriate to their sexual orientation and gender identity; (d) put protective measures in place for all prisoners vulnerable to violence or abuse on the basis of their sexual orientation, gender identity or gender expression and ensure, so far as is reasonably practicable, that such protective measures involve no greater restriction of their right than is experienced by the general prison population; …(g) undertake programmes of training and awareness-

551 *September v Subramoney* (EC10/2016) para 161.
552 *September v Subramoney* (EC10/2016) para 164.
553 *September v Subramoney* (EC10/2016) para 164 (8).
554 *September v Subramoney* (EC10/2016) paras 95–100.
555 *September v Subramoney* (EC10/2016) paras 98 - 100.
556 *September v Subramoney* (EC10/2016) para 98.

> raising for prison personnel and all other officials in the public and private sector who are engaged in detention facilities, regarding international human rights standards and principles of equality and non-discrimination, including in relation to sexual orientation and gender identity.'[557]
>
> **'Principle 19** pertains to the right to freedom of opinion and expression: 'everyone has the right to freedom of opinion and expression, regardless of sexual orientation or gender identity. This includes the expression of identity or personhood through speech, deportment, dress, bodily characteristics, choice of name, or any other means, as well as the freedom to seek, receive and impart information and ideas of all kinds, including with regard to human rights, sexual orientation and gender identity, through any medium and regardless of frontiers.'[558]
>
> **'Principle 32** addresses bodily integrity, affirming that: 'everyone has the right to bodily and mental integrity, autonomy and self-determination irrespective of sexual orientation, gender identity, gender expression or sex characteristics.'[559]

The court found that even non-binding sources, including reports by international bodies, are important sources of international law, and therefore important aids in interpreting the Constitution.[560]

Additionally, the court considered the Department of Correctional Services' Standing Order on Personal Hygiene[561] which distinguished between underpants for males and panties for women, ordering that these terms be struck off and replaced with the more gender inclusive term, 'gender appropriate underwear.'[562]

This matter emphasises the recognition of gender identity rights, specifically those of incarcerated TGD persons. This case sets a precedent for future transgender inmates and the treatment of incarcerated TGD persons.

It is, however, critical to acknowledge that the request for gender-affirming surgery was denied on the basis that section 12(2) of the Correctional Services Act,[563] which excludes the entitlement of gender-affirming surgery or 'cosmetic medical treatment' at the expense of the State. Consequently, while this case provides doctrinal value, it retained and complied with section 12(2),[564] effectively missing an opportunity to

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557 *September v Subramoney* (EC10/2016) para 98.
558 *September v Subramoney* (EC10/2016) para 99.
559 *September v Subramoney* (EC10/2016) para 100.
560 *September v Subramoney* (EC10/2016) para 126.
561 Department of Correctional Services, Standing Order on Personal Hygiene, clause 2.3(a) and (b).
562 *September v Subramoney* (EC10/2016) para 164(4).
563 Correctional Services Act 111 of 1998.
564 Correctional Service Act 11 of 1998.

develop the common law, as is permitted by the Constitution,[565] by not extending the concept or definition of 'adequate healthcare' to include gender-affirming surgery. Notably, this opportunity was missed, notwithstanding any consideration of relevant and appropriate international guidelines.

This stresses the earlier points posited, that guidelines without legal status remain blueprints with no consequential impact in the event of non-compliance. Additionally, uncertainty is created in that, on the one hand the court recognises gender-identity as fundamental to dignity, while on the other hand, treats gender-affirmation and 'congruence' as merely 'cosmetic.'

5.5 *Mokoena v Department of Correctional Services* (2025)[566]

Similar to the case of September, this judgment related to an incarcerated applicant, Nthabiseng Mokoena, a transgender woman, who is currently serving a life sentence at the Johannesburg Central Corrections Centre. Ms Mokoena was also refused to express her gender identity. This case is significant as it also deals with inmates diagnosed with gender dysphoria and their right to adequate medical treatment in terms of section 35(2) of the Constitution,[567] specifically access to gender-affirming healthcare.

The facts of this case are as follows: the applicant, Ms Mokoena, alleged harassment and unfair discrimination by the Department of Correctional Services ('DCS'), citing the Department's refusal to allow her to express her gender identity and to use her chosen pronouns. Furthermore, she was refused access to gender-affirming hormone therapy, following her diagnosis of gender dysphoria. As such, Ms Mokoena sought relief under PEPUDA, section 35 of the Constitution,[568] as well as in terms of section 12 (Health care) of the Correctional Services Act.[569]

565 Constitution of the Republic of South Africa, 1996, s 39(2).
566 *Mokoena v Head of Johannesburg Correctional Centre and Others* (2024/070075) [2025] ZAGPJHC 1178 (10 November 2025).
567 Constitution of the Republic of South Africa, 1996, s 35(2).
568 Constitution of the Republic of South Africa, 1996.
569 Correctional Services Act 111 of 1998.

In March of 2012, Mokoena was diagnosed with gender dysphoria.[570] This diagnosis was confirmed by multiple experts and led her to begin self-medicating with oral contraceptives to stimulate oestrogen effects.[571] Mokoena specifically sought the following:

> '(a) orders declaring that the DCS' failure or refusal to allow her to express her gender by not allowing her to wear feminising clothing, cosmetics and toiletries at all times throughout the prison; the misgendering of her in the failure to relate to her as a woman or using the 'she/her' pronoun and the bullying which she contends for constitutes unfair gender discrimination under section 8 of PEPUDA and harassment; (b) that the relevant State respondents be ordered to assist her with changing her gender marker in terms of section 2 of the Alternation of Sex Description Act No. 49 of 2003 and to assist her with changing her forenames in terms of section 24 of the Births and Deaths Registration Act No. 51 of 1992. (c) that the DCS accommodate her in a single cell, alternatively with transgender persons; and (d) that the State respondents be ordered to provide her with adequate health care in the form of gender-affirming hormonal therapy at State expense.'[572]

The key argument of the DCS was that their refusal to provide gender-affirming healthcare in the form of hormone therapy did not constitute unfair discrimination as this type of treatment fell outside the remit of their statutory obligations in the provision of adequate healthcare services.[573] The DCS maintained that the alleged discrimination was fair and justifiable under PEPUDA.[574] While the DCS acknowledged the diagnosis of gender dysphoria and that hormone therapy is the standard form of treatment, it denied that withholding this treatment constituted unfair discrimination.[575]

In its ruling, the court recognised that incarcerated persons living with gender dysphoria require access to gender-affirming care, including hormone therapy. The court further emphasised that when the state takes away the autonomy of an individual by imprisonment, it has an obligation to safeguard the physical welfare of such prisoner.'[576]

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570 *Mokoena v Head of Johannesburg Correctional Centre and Others* (2024/070075) para 24.
571 *Mokoena v Head of Johannesburg Correctional Centre and Others* (2024/070075) paras 25–26.
572 *Mokoena v Head of Johannesburg Correctional Centre and Others* (2024/070075) para 36.
573 *Mokoena v Head of Johannesburg Correctional Centre and Others* (2024/070075) para 102.
574 *Mokoena v Head of Johannesburg Correctional Centre and Others* (2024/070075) para 62.
575 *Mokoena v Head of Johannesburg Correctional Centre and Others* (2024/070075) para 103.
576 *Mokoena v Head of Johannesburg Correctional Centre and Others* (2024/070075) para 146.

The court held that the denial to allow access to hormone treatment and the refusal to allow gender expression constituted unfair discrimination and harassment under PEPUDA. It emphasised that section 35(2)(e) of the Constitution[577] guarantees that:

> 'everyone who is detained, including every sentenced prisoner, has the right to conditions of detention that are consistent with human dignity, including at least exercise and the provision at State expense, of adequate medical treatment.'[578]

The DCS was ordered to provide the gender-affirming treatment and to accommodate the gender identity of the applicant, [579] allowing her 'to wear the clothing, accessories, cosmetics and toiletries that express her gender.'[580]

As happened in the case of September,[581] the court recommended that the officials be sensitised about LGBTQIA+ persons and that the DCS implement Standard Operating Procedures to ensure LGBTQIA+ inmates are treated equally and with dignity.[582]

This judgment is significant in that not only does it deal with incarcerated TGD persons, but it recognises and clarifies their right to receive medically necessary gender-affirming health care in South African prisons.[583]

The *Mokoena* case[584] offers significant doctrinal development. It implicitly re-affirms that gender-affirming healthcare is necessary rather than elective or 'cosmetic.' This judgment aligns the concept of 'adequate healthcare' with the constitutional promises of the rights to dignity[585] and equality,[586] while drawing on international standards in its reasoning. Although this case[587] does not explicitly cite the Yogyakarta Principles,[588] the court's findings align with the Yogyakarta Principles.

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577 Constitution of the Republic of South Africa, 1996.
578 *Mokoena v Head of Johannesburg Correctional Centre and Others* (2024/070075) para 106.
579 *Mokoena v Head of Johannesburg Correctional Centre and Others* (2024/070075) para 148.
580 *Mokoena v Head of Johannesburg Correctional Centre and Others* (2024/070075) para 151.
581 *September v Subramoney* (EC10/2016)
582 *Mokoena v Head of Johannesburg Correctional Centre and Others* (2024/070075) paras 69–70.
583 *Mokoena v Head of Johannesburg Correctional Centre and Others* (2024/070075) para 148.
584 *Mokoena v Head of Johannesburg Correctional Centre and Others* (2024/070075).
585 Constitution of the Republic of South Africa, 1996, s 10.
586 Constitution of the Republic of South Africa, 1996, s 9.
587 *Mokoena v Head of Johannesburg Correctional Centre and Others* (2024/070075).
588 International Commission of Jurists (ICJ) and International Service for Human Rights (ISHR), *The Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity* (March 2007) <https://yogyakartaprinciples.org/principles-en/> accessed 15 November 2025.

This case establishes that prescribed gender-affirming hormone therapy forms part of the state's obligation to provide 'adequate healthcare,' and healthcare services,[589] albeit in the context of incarceration. This further accentuates that treating or characterising gender-affirming healthcare or specifically hormone therapy as cosmetic is inconsistent with constitutional rights.

6 CONCLUSION

This chapter has canvassed the various national and international human right instruments that apply to TDG persons, showing how national legislation evolved to remain consistent with, rather than contrary, to Constitutional values and the guaranteed rights of the Bill of Rights. It further illustrated how—in order to address the shortcoming of the African Charter on Human Rights in its lack of gender recognition—the African Commission passed the Resolution on Protection against Violence based on Sexual Orientation or Gender Identity.[590]

The case of the *Minister of Home Affairs v Fourie*[591] reveals how, in addressing the discriminatory provisions of the Marriage Act,[592] the Constitutional Court suspended the invalidity and afforded the legislature an opportunity to address the invalidity, resulting in the promulgation of new inclusive legislation.[593] Similarly, the case of *September v Subramoney*[594] illustrates how the court instructed that the terminology in the DCS's Standing Order on Personal Hygiene[595] be changed to move towards a more gender neutral and non-discriminatory approach, by referring to 'gender appropriate underwear.'

589 *Mokoena v Head of Johannesburg Correctional Centre and Others (2024/070075)* paras 106–110.
590 ACHPR, Resolution on Protection against Violence and Other Human Rights Violations against Persons on the Basis of Their Real or Imputed Sexual Orientation or Gender Identity ACHPR/Res.275(LV)2014 (2014).
591 *Minister of Home Affairs v Fourie* (CCT 60/04) [2005] ZACC 19.
592 Marriage Act 25 of 1961.
593 Civil Union Act 17 of 2006.
594 *September v Subramoney* (EC10/2016).
595 Department of Correctional Services, Standing Order on Personal Hygiene, clause 2.3(a) and (b).

Furthermore, the significance of the cases of *Mphela*[596] and *September*[597] respectively provide confirmation that gender identity is central to personhood and dignity, and consequently that any framework that denies medically indicated treatment as necessary for the realisation of gender identity, risks being unconstitutional. Although the cases of *Mphela*,[598] *September*[599] and *Mokoena*[600] related to the academic and correctional services context, the scope of their application is transferable to the context of public hospitals and other institutions, where gender-affirming care is unduly withheld or denied, especially where clinical guidelines and expert consensus support the necessity of the treatment.

While this chapter highlights doctrinal fragmentations in case law, it serves to emphasise that in order to ensure the protection of gender rights, precise terminology ought to be utilised. Crucially, the adoption of specific legislative instruments is required to curtail further constitutional challenges arising from discriminatory legislation itself or by discriminatory institutional practices. Provincial health departments and other governmental institutions need to develop policies and protocols for gender-affirmation that support the decisions in cases such as *Mokoena*.[601]

In conclusion, it is noted that the absence of more documented cases of constitutional challenges, in this context, may be directly linked to socio-political and socio-economic barriers in accessing justice, rather than the absence of such cases.

The next chapter will provide a comparative legal analysis of gender-affirming legislation and regulation.

596 *Mphela v Manamela and Others* (EC 10/2016) [2021] ZAEQC 4 (23 September 2021).
597 *September v Subramoney NO and Others* (EC10/2016).
598 *Mphela v Manamela and Others* (EC 10/2016).
599 *September v Subramoney* (EC10/2016).
600 *Mokoena v Head of Johannesburg Correctional Centre and Others* (2024/070075).
601 *Mokoena v Head of Johannesburg Correctional Centre and Others* (2024/070075).

CHAPTER FIVE: COMPARATIVE LEGAL ANALYSIS OF SOUTH AFRICA, CANADA, THE UNITED KINGDOM AND AUSTRALIA

1 INTRODUCTION

This purpose of this chapter is to provide a comparative overview of the gender-affirming legislation and regulations in Canada, the United Kingdom and Australia. Canada, the UK, and Australia were selected as comparative jurisdictions because they share a common law heritage, operate publicly funded healthcare systems, and have established rights-based frameworks that directly shape transgender health care regulation.

Their diverse approaches to service delivery and policy implementation provide a robust basis for evaluating regulatory models, while their global influence and legal comparability make them particularly relevant for informing South African debates on gender-affirming healthcare. With this premise, each jurisdiction has developed different approaches to legal gender recognition, which provides a broad comparative overview. This chapter also interrogates the differences and similarities of these jurisdictions in an attempt to source a best practice model that may be adopted or applicable in the South African context.

2 SYNTHESIS OF SOUTH AFRICAN LEGAL AND CLINICAL ISSUES

The previous chapter canvassed relevant human rights considerations relevant to gender-affirming health care in South Africa. As stated previously, the Constitution of South Africa[602] guarantees the rights to equality,[603] dignity[604] and access to healthcare.[605] Section 9 provides the prohibited grounds of discrimination. These include the grounds of sex, gender and sexual orientation, which the courts and commentators interpret as being inclusive of TGD persons.[606] PEPUDA was

602 The Constitution of the Republic of South Africa, 1996,
603 The Constitution of the Republic of South Africa, 1996, s9.
604 The Constitution of the Republic of South Africa, 1996, s10.
605 The Constitution of the Republic of South Africa, 1996, s27.
606 Zambezi D and Viljoen F, 'Access to healthcare services for transgender people in South Africa: Assessing healthcare experiences and human rights' (2024) University of Pretoria, Centre for

subsequently enacted to give effect and practical application of the protection against discrimination.[607]

The Constitution[608] and PEPUDA[609] provide mechanism for the protection of the rights of TGD persons while the Alteration Act is the only legal mechanism that provides for legal gender recognition, providing for changes to gender markers on birth records and identity documents. This Act, however, still requires proof of medical intervention as a pre-requisite for considering an application for such changes. In addition, South African's Department of Home Affairs only recognises two sex options, which are the binary M (Male) and F (Female), failing to provide any recognition for intersex or trans persons.[610] Despite international principles such as the Yogyakarta Principles Plus 10,[611] specifically Principle 31 which affirms the right to legal gender recognition without compulsory medicalisation,[612] South Africa continues to reply on a regressive pathologising legislative framework.[613]

There is clear incongruency between, on the one hand, the protection of TGD person's rights, on the other hand, the restrictive legal gender recognition framework. This is evident from the recent Equality Court judgements of *September*[614] and *Mokoena*[615] which recognise discrimination on the basis of gender identity and expression as well as the rights to access to gender-affirmation healthcare as part of the constitutional rights to adequate medical treatment.[616]

Human Rights (UPSpace) <https://repository.up.ac.za/server/api/core/bitstreams/9b93c37f-ee78-4f11-908b-ede876bd13d7/content> accessed 15 November 2025.

607 Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000

608 The Constitution of the Republic of South Africa, 1996, s9.

609 Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

610 Alteration of Sex Description and Sex Status Act 49 of 2003, s2(2)(a)-(c).

611 International Commission of Jurists (ICJ) and International Service for Human Rights (ISHR), *The* Yogyakarta *Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity* (March 2007) <https://yogyakartaprinciples.org/principles-en/> accessed 15 November 2025

612 ICJ & ISHR, *Yogyakarta Principles plus 10* (2017) Principles 31

613 Act 49 of 2003.

614 September *v Subramoney NO and Others* (EC10/2016) [2019] ZAEQC 4; [2019] 4 All SA 927 (WCC)

615 Mokoena v Head of Johannesburg Correctional Centre and Others (2024/070075) [2025] ZAGPJHC 1178 (10 November 2025)

616 The Constitution of the Republic of South Africa, 1996, s27

This pathologising purview of the Alteration Act results in undue pressure and strain on clinical practice, resulting in extensive waiting periods,[617] to satisfy its criterion for a recognition or change to gender markers. Conversely. a lack of training of medical professionals deepens systemic discrimination and related stigma in providing gender-affirming healthcare.[618]

3 GENDER-AFFIRMING LEGISLATION: CANADA, UNITED KINGDOM AND AUSTRALIA

This section turns to the three comparable jurisdictions.

3.1 Canada

3.1.1 Protection of Rights

The Canadian Charter of Rights and Freedoms ('Canadian Charter')[619] is the cornerstone of Canada's human rights and applies to all governments (federal, provincial and territorial), protecting various categories of rights,[620] including, fundamental freedoms,[621] democratic rights,[622] mobility rights.[623] legal rights[624] and equality rights.[625] The Canadian Charter has constitutional status and any federal or provincial law that is inconsistent with it, has no force or effect to the extent of its inconsistency.[626]

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617 South African National AIDS Council, 'In-depth: The incredibly long wait for gender-affirming surgery for those who can't pay' (SANAC, 16 September 2021) <https://www.sanac.org.za/in-depth-the-incredibly-long-wait-for-gender-affirming-surgery-for-those-who-cant-pay/> accessed 1 September 2025.

618 Madeleine Muller, Elma de Vries, Anastacia Tomson and Christine McLachlan, 'An introduction to gender affirming healthcare: What the family physician needs to know' (2023) 65(1) *South African Family Practice* a5770, DOI: 10.4102/safp.v65i1.5770.

619 Constitution Act, 1982, Part I: *Canadian Charter of Rights and Freedoms*, being Schedule B to the Canada Act 1982 (UK), 1982, c 11, s 15 (entered into force 17 April 1982).

620 *Constitution* Act, 1982, Part I: *Canadian Charter of Rights and Freedoms*, being Schedule B to the Canada Act 1982 (UK), 1982, c 11 (entered into force 17 April 1982) (the Charter).

621 *Canadian* Charter (1982), s2

622 Canadian Charter (1982), s3 - 5

623 Canadian Charter (1982), s 6

624 Canadian Charter (1982), s 7 - 14

625 Canadian Charter (1982), s15

626 Ontario Justice Education Network (OJEN), *In Brief: Canadian Charter of Rights and Freedoms* (PDF, OJEN, 2013) <https://ojen.ca/wp-content/uploads/In-Brief_Canadian-Charter-of-Rights-and-Freedoms.pdf> accessed 20 November 2025.

The Equality Rights are entrenched in section 15 of the Canadian Charter[627], which states that:

> 'Every individual is equal before and under the law and has the right to equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.'[628]

Although section 15(1)[629] does not explicitly list sexual orientation as a protected ground, the case of *Haig and Birch v Canada*[630] was interpreted to include this form of discrimination under section 15(1) of the Charter.

In this matter of *Haig and Birch v Canada,*[631] Joshua Birch, a homosexual captain of the Canadian Armed Forces was subject to policy directives that denied homosexuals eligibility for promotions. Birch applied for a declaration that the absence of sexual orientation from the list of prohibited grounds of discrimination in the then section 3 of the Canadian Human Rights Act[632] was discriminatory and contrary to the guarantee of equal benefit of the law as guaranteed by section 15 of the Charter.[633] The trial judge granted an order, declaring section 3 inoperative,[634] further finding that sexual orientation constitutes an analogous ground of discrimination under section 15(1) of the Charter. In 1996, sexual orientation was added to the list of prohibited grounds of discrimination in the Canadian Human Rights Act,[635] following the Supreme Court of Canada's confirmation that sexual orientation was an analogous ground in the case of *Egan v Canada.*[636]

The inclusion of sexual orientation as a prohibited ground for unfair discrimination did not provide recognition for other sexual minorities, such as TGD individuals.[637] Bill C-

627 Canadian Charter (1982), s15
628 Canadian Charter (1982), s15(1)
629 Canadian Charter (1982), s15(1)
630 Haig and Birch v Canada and Others (1992) 57 OAC 272 (Ont CA).
631 Haig and Birch v Canada and Others (1992) 57 OAC 272 (Ont CA).
632 Canadian *Human Rights Act, RSC 1985, c H-6.*
633 Canadian Charter (1982), s15(1)
634 Haig and Birch v Canada and Others (1992) 57 OAC 272 (Ont CA).
635 Canadian *Human Rights Act, RSC 1985, c H-6.*
636 Egan v Canada, (1995) 2 S.C.R 513; Julian Walker, *Legislative Summary of Bill C-16: An Act to amend the Canadian Human Rights Act and the Criminal Code* (Library of Parliament, Publication No 42-1-C16-E, 21 October 2016).
637 Walker, *Legislative Summary of Bill C-16*.4-5.

16, assented to in June 2017, amended both the Canadian Human Rights Act[638] and the Criminal Code,[639] with the key purpose of providing federal protection to transgender individuals.

Bill C-16 created a list of prohibited grounds of discrimination in the Canadian Human Rights Act[640] and also included the terms 'gender identity' and 'gender expression' as protected characteristics[641] in the Criminal Code,[642] specifically, to protect individuals from against hate propaganda, among others, as a consequence of their gender identity or their gender expression.[643]

Bill C-16 effectively added 'gender identity or expression' to sections 2 and 3 of the Canadian Human Rights Act,[644] providing explicit federal protection against discrimination for TGD persons in areas of federal jurisdiction.[645] In addition, Clause 3 of Bill C-16 included a reference to 'gender identity or expression' to the Canadian Criminal Code,[646] by inserting 'gender identity or expression' into the definition of an 'identifiable group' in section 318(4):

> 'in this section, identifiable group means any section of the public distinguished by colour, race, religion, national or ethnic origin, age, sex, sexual orientation, gender identity or expression, or mental or physical disability' [647]

This development provides TGD persons with express recognition and protection under section 319 which reads:

> 'everyone who, by communicating statements in any public place, incites hatred against any indefinable group where such incitement is likely to lead to a breach of peace is guilty of (a) an indictable offence and is liable to imprisonment for a term exceeding two years; or (b) an offence punishable on summary conviction'[648]

638 *Canadian Human Rights Act, RSC 1985, c H-6.*
639 *Criminal Code*, RSC 1985, c C-46.
640 *Canadian Human Rights Act*, RSC 1985, c H-6.
641 Walker, *Legislative Summary of Bill C-16*.4-5.
642 Criminal *Code*, RSC 1985, c C-46.
643 Julian Walker, *Legislative Summary of Bill C-16: An Act to amend the Canadian Human Rights Act and the Criminal Code* (Library of Parliament, Publication No 42-1-C16-E, 21 October 2016) 1.
644 *Canadian Human Rights Act*, RSC 1985, c H-6, s2 – 3.
645 Walker, *Legislative Summary of Bill C-16* 5.
646 Criminal *Code*, RSC 1985, c C-46.
647 Criminal *Code*, RSC 1985, c C-46, s318(4).
648 Criminal *Code*, RSC 1985, c C-46, 319(1)(a)-(b).

In essence, the amendments effected by Bill C-16 ensured that crimes against persons based on gender identity or expression would be punishable by law under sections 318 to 320 of the Criminal Code.[649]

Clause 4 of Bill C-16 further made amendments to section 718.2 of the Criminal Code, to the effect that:[650]

> 'A court that imposes a sentence shall take into consideration the following principles: (a) a sentence should be increased or reduced to account for any relevant aggravated or mitigating circumstances related to the offence or the offender and without limiting the generality of the foregoing, (i) evidence that the offence was motivated by bias, prejudice or hate based on race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation. Or gender identity or expression, or any other similar factor shall be deemed to be aggravating circumstances'[651]

This amendment enhances the legal ramifications and penalties available for offences against TGD persons.

It is critical to note that although Bill C-16[652] made significant amendments to the Canadian Human Rights Act and the Criminal Code, its protection primarily exist within federal jurisdiction and may not afford protection to TGD persons in other provinces and territories within Canada. In 2016 Walker explicitly reported that:

> 'most Canadian provinces and territories now list 'gender identity,' and some have included 'gender expression,' among the prohibited grounds of discrimination under their human rights laws. The exceptions are New Brunswick, Nunavut and Yukon. The human rights laws in the Northwest Territories, Saskatchewan and Manitoba prohibit discrimination based on 'gender identity,' while the human rights laws in British Columbia, Alberta, Ontario, Quebec, Prince Edward Island, Nova Scotia, and Newfoundland and Labrador prohibit discrimination based on both 'gender identity and 'gender expression.'[653]

It is worth noting that 'gender identity or expression' have been implicitly included under other grounds such as sex by way of policy and court decision.[654] By May of 2018, all territories, provinces and federal jurisdictions included 'gender identity' as a

649 Criminal *Code*, RSC 1985, c C-46.
650 Criminal *Code*, RSC 1985, c C-46, 718.2.
651 Criminal *Code*, RSC 1985, c C-46, 718.2(a)(i).
652 Bill C-16 (2016).
653 Walker, *Legislative Summary of Bill C-16* 4.
654 Walker, *Legislative Summary of Bill C-16* 4.

protected characteristic.[655] While the same cannot be conclusively said about 'gender expression,' as of mid-2025,[656] other jurisdictions such as Manitoba have proposed changes to include 'gender expression,' by passing Bill 43 - Human Rights Amendment Act, adding 'gender expression' as a protected characteristic.[657] The variance in jurisdictions within Canada unfortunately creates enforcement challenges that may limit or delay the effectiveness or efficient realisation of the protection of the rights of TGD persons.

3.1.2 Legal Gender Recognition

Canada recognises social transitioning, legal transitioning and medical transitioning, as well as a combination of any of these.[658] With the exception of Nanavut,[659] at a Federal, Provincial and Territorial level, Canada recognises a third gender category 'X' which affords non-binary or TGD persons who do not identify with 'M' (male) or 'F' (female) an alternative to be reflected on federal identity documents, birth certificates, driver's licences and health or service cards.[660]

At both federal level and in Ontario, the administrative process of changing gender markers requires a birth certificate, and that applicants submit their application forms together with a letter of support signed by a doctor or a psychologist authorised to practice in Canada (medical license number must be provided). This letter must confirm that the doctor has treated and evaluated the TGD person, and further

655 Alberta Civil Liberties Research Centre (ACLRC), *Prohibited Grounds of Discrimination in Canada: Comparative Chart of Rights in Federal, Provincial and Territorial Legislation* (Final version, current to May 2018) <https://www.aclrc.com/wp-content/uploads/FinalHumanRightsChart2.pdf> accessed 20 November 2025.

656 Lambert S, 'Tories call for changes to Manitoba bill adding gender expression to human rights code' *CBC News* (19 March 2025) <https://www.cbc.ca/news/canada/manitoba/manitoba-gender-expression-1.7487048> accessed 20 November 2025.

657 Manitoba Legislature, *Bill 43 – The Human Rights Code Amendment Act* (1st Session, 43rd Legislature, Manitoba, 2024) <https://bills.mb.ca/bill-43> accessed 20 November 2025.

658 Public Health Agency of Canada, *How to access gender-affirming care: Options* (Canada.ca, 26 September 2024) <https://www.canada.ca/en/public-health/services/sexual-health/how-to-access-gender-affirming-care/options.html> accessed 20 November 2025.

659 Nanavut is the largest and northernmost territory, established in 1999, with its capital in Iqaluit. It is predominantly Inuit, operates under a consensus-style parliamentary government, and covers about one-fifth of Canada's landmass.

660 Immigration, Refugees and Citizenship Canada (IRCC), 'How do I change the sex or gender identifier on my application or document?' *Canada.ca – IRCC Help Centre* <https://ircc.canada.ca/english/helpcentre/answer.asp?qnum=1253&top=32> accessed 20 November 2025.

confirming gender incongruence and that amendment is appropriate. This application must include all previous birth certificates. An application for a name change can be made simultaneously with an application to change gender markers.[661]

3.1.3 Barriers to Accessing GAHC

As is the case in South Africa, Canadian TGD Persons are subject to long waiting times for assessment for hormone therapy and surgery.[662] Additionally, specialised gender-affirming healthcare is concentrated in urban areas, creating barriers for TGD persons in rural or remote areas. Given this barrier in accessing gender-affirming healthcare, TGD persons often seek gender-affirming healthcare and assistance from incompetent providers and unauthorised facilities, resulting in potential cases of medical malpractice.[663]

Systematic discrimination remains an embedded process, informing attitudes and environments.[664] In addition a recurring issue and perhaps one that execrates the barriers to access to gender-affirming healthcare is found in the lack of medical practitioners or clinicians qualified or trained in the provision of gender-affirming healthcare. Anecdotal evidence suggests that only around one-third of medical schools in Canada and the United States provide education on gender identity sensitivity, hormone treatment and medical or surgical transitioning,[665] with many institutions failing to provide guidelines and best practices on educational programs for sex and gender, including the underinvesting in education, training and data

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661 Ontario Women's Justice Network (OWJN), *Making Gender and Name Changes on Identity Documents: A Legal Resource for Two-Spirit, Nonbinary and Trans Communities* (2020) <https://owjn.org/gender-name-change/> accessed 20 November 2025

662 Jennifer L Bhatla and others, 'The Experience of Youth on the Waitlist for Gender-Affirming Care in Manitoba' (2023) 29 *Paediatrics & Child Health* 440–445 https://doi.org/10.1093/pch/pxad087

663 Department of Justice Canada, *A Qualitative Look at Serious Legal Problems: Trans, Two-Spirit, and Non-Binary People in Canada* (2022) J4-108/2022E-PDF < https://www.justice.gc.ca/eng/rp-pr/jr/qlslpttnpc-rqpjgptbnc/pdf/RSD_2022_Trans_2spirit_non_binary_qualitative_report_EN2.pdf> accessed 20 November 2025.

664 Comeau D, Johnson C and Bouhamdani N, 'Review of Current 2SLGBTQIA+ Inequities in the Canadian Health Care System' (2023) 11 *Frontiers in Public Health* 1183284 <https://doi.org/10.3389/fpubh.2023.1183284> 7.

665 Comeau, Johnson and Bouhamdani (2023) *Front Public Health* 5.

collection.[666] In Canada, the multi-layered system of governance results in fragmented legal and policy frameworks.

3.2 United Kingdom

3.2.1 Protection of Rights

In the United Kingdom ('UK'), the rights of TGD persons are protected under the Equality Act of 2010 ('UK Equality Act), which seeks to clarify the existing laws that prohibit discrimination and harassment,[667] providing a list of protected characteristics, namely: age; disability; gender reassignment; race; religion and belief; sex and sexual orientation. Specific to our focus is the protected characteristic of 'gender reassignment in cases where a person is:

> 'proposing to undergo, is undergoing or has undergone a process (or part of a process) for the purpose of reassigning the person's sex by changing physiological or other attributes of sex'.[668]

The UK Equality Act provides further that reference to a transexual person is a reference to a person who has the protected characteristic of gender reassignment.[669] Additionally, it protects TGD persons from unfair discrimination, harassment, and victimisation in various areas, including employment, education and the provision of goods and services.[670]

3.2.2 Legal Gender Recognition

The landmark case of *Goodwin v United Kingdom*[671] is credited for promulgation of the Gender Recognition Act 2004 ('the Gender Act') in the UK.[672] The facts of the case are as follows: a UK national, male born, underwent gender reassignment surgery and

666 Comeau, Johnson and Bouhamdani (2023) *Front Public Health* 2, 5, 6.
667 Equality Act 2010 (UK).
668 Equality Acri of 2010 (UK), s7(1).
669 Equality Act 2010 (UK), s 7(2).
670 Equality Act 2010 (UK), Part 1.
671 *Christine* Goodwin *v United Kingdom* (2002) 35 EHRR 18, App No 28957/95.
672 Gender Recognition Act (UK) 2004.

lived as a female by the name of Christine Goodwin. Given that she was still legally registered as being male, she suffered numerous discriminatory and humiliating experiences.[673] For example, she was refused entitlement to her state retirement pension at the age of 60 (the age of retirement for females) because she was not yet 65 (the age of retirement for males). As a trans woman, she was also barred from exercising her right to marry the man she was in a relationship with at the time.[674]

Goodwin brought an application before the European Court of Human Rights (ECtHR), alleging violations of various Articles in the European Convention on Human Rights,[675] specifically Article 8 (rights to respect for private and family life),[676] Article 12 (right to marry)[677] Article 13 (right to an effective remedy),[678] and Article 14 (prohibition of discrimination).[679] The UK argued that there was no accepted common European approach regarding transsexuality and as such, the lack of the legal recognition could not have violated Article 8.[680]

The ECtHR rejected the argument that there was no accepted common European approach and emphasised that 'clear and uncontested evidence of a continuing international trend in favour not only of increased social acceptance of transsexuals but of legal recognition of the new sexual identity of post-operative transsexuals' exists.[681] The court decided to assess the merits of the case and interpreted the ECHR 'in light of present-day conditions.'[682] By so doing, the court implied that the failure to provide legal recognition for the applicant, leading to the discriminatory and humiliating experiences, was incompatible with the ECHR. It thus required the UK Government to implement measures to secure the rights (for example the right to marry) of the applicant and other transsexuals.[683]

673 Christine *Goodwin* (2002) 35 EHRR 18, para 60.
674 Christine Goodwin (2002) 35 EHRR 18, para 62.
675 Council of Europe, *Convention for the Protection of Human Rights and Fundamental Freedoms* (European Convention on Human Rights, opened for signature 4 November 1950, entered into force 3 September 1953) ETS No 005.
676 ECHR (1950), art 8.
677 ECHR (1950), art 12.
678 ECHR (1950), art 13.
679 ECHR (1950), art 14.
680 Christine *Goodwin* (2002) 35 EHRR 18, para 64 - 65.
681 Christine Goodwin (2002) 35 EHRR 18, para 85.
682 Christine *Goodwin* (2002) 35 EHRR 18, para 75.
683 Christine *Goodwin* (2002) 35 EHRR 18, para 120.

The Court furthermore held that there was also violations of the applicant's right to respect for private life under Article 8 of the Convention and of her right to marry under Article 12.[684]

In 2004, the Gender Act was enacted for the purposes of establishing the legal framework in terms of which TGD persons can obtain a Gender Recognition Certificate or ('GRC'). The GRC provides official and legal recognition of the TGD persons acquired gender. The Gender Recognition Act ('Gender Act')[685] provides that:

> 'A person of either gender who is aged at least 18 may make an application for a gender recognition certificate on the basis of (a) living in the other gender. Or (b) having changed gender under the law of a country or territory outside the United Kingdom.'[686]

This Act further sets the following conditions that the Gender Recognition Panel[687] must satisfy itself of in order to grant a GRC:

> '[T]he Panel must grant the application if satisfied that the applicant –
> (a) has or has gender dysphoria,
> (b) has lived in the acquired gender throughout the period of two years ending with the date on which the application is made;
> (c) intends to continue to live in the acquired gender until death. And
> *(d)* complies with the requirements imposed by and under section 3.'[688]

The Gender Recognition Panel comprises of eligible persons appointed by the Lord Chancellor, which include legal professionals and medical professionals.[689] The panel will consider and determine the applications in private, without calling a hearing unless it is deemed necessary, and cast a deciding vote and provide reasons for their decisions.[690]

Interestingly, while there is progress in relation to ensuring the protection of the rights of TGD persons, a recent challenge arose before the Supreme Court of the UK,

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684 Christine *Goodwin* (2002) 35 EHRR 18, para 120.
685 Gender Recognition Act (UK) 2004.
686 Gender Recognition Act (UK) 2004, s1.
687 Gender Recognition Act (UK) 2004, schedule 1.
688 Gender Recognition Act (UK) 2004, s2(1)(a) – (d).
689 Gender Recognition Act (UK) 2004, schedule 1(1).
690 Gender Recognition Act (UK) 2004, schedule 1(6).

instituted by *For Women Scotland (Ltd)* against the Scottish Ministers[691] regarding the definition of 'sex' as contained in the Equality Act. The appellants challenged the ruling by a lower court which decided that a trans man or woman with a Gender Recognition Certificate is legally defined as a male or female.[692]

The appellant brought the appeal with the aim of challenging and overturning the decision of a lower court. The appellant sought interpretation on whether 'sex' in the Equality Act 2010 refers to biological sex, arguing that the Gender Recognition Act did not amend the definition of 'man' or 'woman' that was contained in its predecessor, the Sex and Discrimination Act of 1975.[693] Others argued that 'sex' in the Equality Act 2010 should be construed as referring to biological sex, arguing that trans women and those with a GRC are protected by the 'gender reassignment' protected characteristic and to interpret 'sex' more broadly would produce irrational results.[694] This decision results in the exclusion of non-biological females from women only spaces.[695]

A statement released on 16 April 2025, by the Equality and Human Rights Commission, an independent equality regulator which intervened to assist the Court assess the legal and practical consequences of this case, confirmed that the Supreme Court ruled that a Gender Recognition Certificate does not alter a person's legal sex for the purposes of the Equality Act 2010.[696]

3.2.3 Barriers to Accessing GAHC

With the focus on adult services, one of the major barriers to accessing gender-affirmation healthcare is the long waiting period of approximately five to eight years for

691 *For Women Scotland Ltd v The Scottish Ministers* [2023] UKSC 31.
692 *For Women Scotland* [2023].
693 *For Women Scotland* [2023], para 265.
694 *For Women Scotland* [2023], para 31.
695 *For Women Scotland Ltd v The Scottish Ministers* [2023] UKSC 31.
696 Public Health Scotland, 'NHS Gender Identity Clinics: Waiting Times for First Outpatient Consultation. April *2023* to March 2024. An Official Statistics in Development Release for Scotland' (5 November 2024) <https://www.publichealthscotland.scot/publications/nhs-gender-identity-clinics-waiting-times-for-first-outpatient-consultation/nhs-gender-identity-clinics-waiting-times-for-first-outpatient-consultation-5-november-2024/> accessed 25 November 2025.

a first appointment (depending on the clinic). Persons, for instance in south-west England, wait over eight years.[697]

In an attempt to resolve issues of waiting periods as a barrier to accessing to gender-affirming healthcare, the Health and Social Care Secretary launched a wellbeing pilot which would offer clinical and emotional support to adults waiting for gender-affirming healthcare services, providing support and information, as well as digital mental health and community-based services before the appointments as an interim measure.[698]

In the UK, unlike South Africa, Canada and Australia, the National Health Services protocols and structures that regulate access to funding, prevent general practitioners from initiating treatment without express approval of a specialised Gender Identity Clinic. Further to this, only a gender specialist (usually a psychiatrist or endocrinologist) may administer gender-affirming healthcare.[699]

3.3 Australia

3.3.1 Protection of Rights

At a federal level, the Sex Discrimination Act 1984 (amended in 2013)[700] provides the prohibited grounds of discrimination, which include

> 'to eliminate, so far as is possible, discrimination against persons on the ground of sex, sexual orientation, gender identity, intersex status, marital or relationship status…'[701]

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697 Department of Health and Social Care, NHS England and Wes Streeting MP, 'Support for adults facing staggering waits for gender services' (GOV.UK, 15 September 2025) <https://www.gov.uk/government/news/support-for-adults-facing-staggering-waits-for-gender-services> accessed 25 November 205.

698 DHSC, NHS England & Streeting, 'Support for adults facing staggering waits for gender services' (2025).

699 UK Government, *New Government Restrictions on the Use of Puberty-Suppressing Hormones (Puberty Blockers): Information for Prescribers and* Pharmacists*/Dispensing Doctors* (Department of Health and Social Care / NHS England, 3 June 2024) <https://www.gov.uk/government/news/new-restrictions-on-puberty-blockers> accessed 25 November 2025.

700 Australia, *Sex Discrimination Act 1984* (Cth).

701 Australia, *Sex Discrimination Act 1984* (Cth) s 3(b).

The Act provides protection in various areas, including discrimination at work[702] and in education.[703] Although the Act provides protection from discrimination on grounds of 'gender identity' and 'intersex status,' it does not provide definitions for these terms, leaving them subject to interpretation.

Victoria, South Australia[704] and Western Australia[705] are governed by the Equal Opportunity Act 1984, which prohibits discrimination on the grounds of sex, sexual orientation, gender identity or intersex status.[706] Queensland, New South Wales, Tasmania and the Northern Territory rely on the Anti-Discrimination Act[707]— which provides protection of discrimination on transgender grounds. In terms of this Act,[708] a transgender person is defined as a person who:

> '(a) identifies as a member of the opposite sex by living, or seeking to live, as a member of the opposite sex, or;
> (b) has identified as a member of the opposite sex by living as a member of the opposite sex, or;
> (c) being of indeterminate sex, identifies as a member of a particular sex by living as a member of that sex and includes a reference to the person being thought of as a transgender person, whether the person is, or was, in fact a transgender person.'[709]

The Anti-Discrimination Act[710] goes as far as to prescribe exceptions where discrimination on grounds of transgender is not unlawful, specifically in sport[711] and superannuation.[712]

Of importance is the 'Equality Before the Law Bench Book,'[713] a practical guide for judicial officers to ensure that the legal system disseminates equal judgment, considers diversity and highlights misconceptions in section 9 on gender diverse persons and people born with diverse sex characteristics. It also identifies socio-

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702 Australia, *Sex Discrimination Act 1984* (Cth) s14.
703 Australia, *Sex Discrimination Act 1984* (Cth) s 21.
704 Equal *Opportunity Act 1984* (SA).
705 Equal *Opportunity Act 1984* (WA).
706 Equal *Opportunity Act 1984*, Part 3.
707 Anti-*Discrimination Act 1977* (NSW) No 48.
708 Anti-*Discrimination Act 1977* (NSW) No 48.
709 Anti-*Discrimination Act 1977* (NSW) No 48, s38A(a) – (c).
710 *Anti-Discrimination Act 1977* (NSW) No 48
711 *Anti-Discrimination Act 1977* (NSW) No 48, s38P.
712 *Anti-Discrimination Act 1977* (NSW) No 48, s38Q.
713 Judicial Commission of New South Wales, *Equality before the Law Bench Book* (APR 25 – EQBB 26, Judicial Commission of NSW 2025) 430 <https://example.com/equality-benchbook> accessed 25 November 2025

economic factors, common misconceptions and other aspects in issues which may impact their access or interaction with the justice system.[714]

3.3.2 Legal Gender Recognition

The case of *AB v Western Australia*; *AH v Western Australia HCA 42*[715] concerns two trans men who identified and lived as male. They had each undergone gender-affirming reassignment procedures, specifically testosterone therapy and a bilateral mastectomy. However, both trans men retained their internal female reproductive organs and other female genital characteristics.[716]

In terms of the Gender Reassignment Act 2000 (WA), a Gender Reassignment Board, could issue gender recognition certificate if it was satisfied that the person:[717]

(i) Believes that his or her true gender is the gender to which the person has been reassigned; and
(ii) Has adopted the lifestyle and has the gender characteristics of a person of the gender to which the person has been reassigned; and
(iii) Has received proper counselling

The Board, in this case, refused to issue certificates, citing that the fact AB and AH (the appellants) had retained their female reproductive systems was inconsistent with being male in accordance with section 15(1)(b)(ii),[718] stating further that there would be adverse social and legal consequences, should the appellants be issued recognition certificates while they each still had a childbearing capacity.[719] The Court of Appeal accepted this finding and ruled that the AB and AH did not possess the genital and reproductive characteristics of a male and retained the external genital characteristics and internal reproductive organs of a female.[720]

714 Judicial Commission of NSW, *Equality before the Law Bench Book* (2025) 9102.
715 *AB v Western Australia* HCA 42.
716 *AB v Western Australia* HCA 42 para 11.
717 Gender Reassignment Act 2000 (WA) s15(1)(b).
718 Gender Reassignment Act 2000 (WA).
719 *AB v Western Australia* HCA 42 para 12.
720 *AB v Western Australia* HCA 42 para 19.

The High Court in this matter rejected the Court of Appeal's interpretation, and held that the Act[721] should be given a fair and liberal interpretation.[722] Consequently, the High Court found that the phrase 'physical characteristics by virtue of which a person is identifies as male or female' refers to social recognition based on a person's appearance and behaviour in their daily lives.[723] Since the appellants had both adopted a male lifestyle and presented as male, they satisfied the legal requirements.[724]

The case of *AB v Western Australia*[725] is significant in that it provided critical interpretation of 'gender characteristics' and 'gender identity' in the context of gender reassignment laws of Australia. The case also affirms legal gender recognition with a focus on a person's presentation rather than strict anatomical and biological assessments.[726]

The case of *AB*[727] contributed to the jurisprudential climate pertaining to gender recognition, observed in the adoption of the Australian Government's *Guidelines on the Recognition of Sex and Gender*.[728] These guidelines expressly acknowledge that persons can be recognised as a gender different from the sex they were assigned at birth or at infancy, or as a gender not exclusively male or female.[729] The Australian Government's approach is to collect information on gender rather than on sex, giving individuals the options to select M (Male), F (female) or X (Indeterminate/Intersex/Unspecified).[730]

The guidelines define gender, as follows:

> 'Gender is part of a person's personal and social identity. It refers to the way a person feels, presents and is recognised within the community. A person's gender may be

721 Gender Reassignment Act 2000 (WA).
722 *AB v Western Australia* HCA 42 para 23-24.
723 *AB v Western Australia* HCA 42 para 34 -36.
724 *AB v Western Australia* HCA 42 para 42.
725 *AB v Western Australia* HCA 42 para 19.
726 *AB v Western Australia* HCA 42 para 22 and 34-39.
727 *AB v Western Australia* HCA 42.
728 Australian *Government*, Attorney-General's Department, *Australian Government Guidelines on the Recognition of Sex and Gender* (1 July 2013, last updated 18 November 2015) <https://www.ag.gov.au/rights-and-protections/human-rights-and-anti-discrimination/australian-government-guidelines-recognition-sex-and-gender> 25 November 2025
729 AGD, *Australian Government Guidelines on the Recognition of Sex and Gender* (2013) 3.
730 AGD, *Australian* Government Guidelines on the Recognition of Sex and Gender (2013) 4-5.

> reflected in outward social markers, including their name, outward appearance, mannerisms and dress.'

Should a TGD person wish to amend or correct their sex and or gender information, any one of the following will be considered sufficient evidence of their sex and/or gender:

> '(a)a statement from a Registered Medical Practitioner or a Registered Psychologist which specifies their gender;
> (b) a valid Australian Government travel document, such as a valid passport, which specifies their gender, or
> (c) a state or territory birth certificate, which specifies their gender. A document from a state or territory Registrar of Birth Death and Marriages recognising a change of sex and/or gender will also be seen as sufficient evidence.'[731]

It is important to emphasise that sex reassignment surgery and/or hormone therapy are not pre-requisites for the recognition of a change of gender in Australian Government records, as a letter from a treating medical practitioner is sufficient.[732] The guidelines further regulate that departments and agencies must respond to the request for correction within 30 days and, on request by the individual, thereby creating clear timelines for an administrative response. Although the guidelines do not prescribe sanctions for non-compliance, they provide the mechanism for complaints on issues of discrimination and breach of privacy.[733]

Further to the above, the Guidelines on the Recognition of Sex and Gender[734] apply to all Government departments. This ensures consistent classifications, standards for sex and gender change as well as data sharing, given that the Australian Government is 'primarily concerned with a person's identity and social footprint.'[735] A 'social footprint' is defined as:[736]

> '…evidence of a person's identity operating in the community. …it can be established using credentials or other information such as (changes of names, details of education/qualifications, electoral registry entries, employment history, and interactions with organizations such as Australia Post, banks, financial institutions and State and Territory public authorities) which establishes a person's use of an identity in Australia over time'

731 AGD, *Australian Government Guidelines on the Recognition of Sex and Gender* (2013) 5.
732 AGD, Australian *Government Guidelines on the Recognition of Sex and Gender* (2013) 5.
733 AGD, Australian *Government Guidelines on the Recognition of Sex and Gender* (2013) 7-8.
734 AGD, Australian *Government Guidelines on the Recognition of Sex and Gender* (2013) 3.
735 AGD, Australian *Government Guidelines on the Recognition of Sex and Gender* (2013) 3.
736 AGD, Australian *Government Guidelines on the Recognition of Sex and Gender* (2013) 10.

This definition ensures recognition for TGD persons who only wish to transition socially, without medical intervention.

In 2024, the Parliament of Western Australian assented to the Births, Deaths and Marriages Registration Amendment (Sex of Gender Changes) Act[737] which introduced/inserted 'Part 5A' titled 'Changes of registration of sex or gender and issue of acknowledgement documents.' This Act[738] introduces a comprehensive framework for legal gender recognition, explicitly recognising 'sex or gender,' providing a broader scope than biological sex.

The Act further abolished the Gender Reassignment Board, allowing for a non-judicial, paper-based pathway to legal gender recognition (change to sex or gender). This reduces costs, delay and stigma,[739] removing any requirement that a person undergo gender-affirming surgery in order to change their sex or gender.[740] The Act[741] further sets regulatory limits on how many times within specified periods, persons may change their sex or gender. Section 36ZE[742] specifically limits changes of registered sex or gender to once every 12 month and to a maximum of three changes in a lifetime.

Following major statutory reforms, culminating in Queensland's 2024[743] changes, all major states and territories in Australian have now abolished compulsory surgery as a prerequisite for amending sex or gender markers on birth registers.

3.3.3 Barriers to Accessing GAHC

737 Births, Deaths and Marriages Registration Amendment (Sex of Gender Changes) Act 2024.
738 Births, Deaths and Marriages Registration Amendment (Sex of Gender Changes) Act 2024.
739 Births, Deaths and Marriages Registration Amendment (Sex or Gender Changes) Bill 2024, Explanatory Memorandum (Western Australia) <https://www8.austlii.edu.au/au/legis/wa/bill_em/bdamraogcb2024646.pdf> accessed 15 March 2026.
740 Births, Deaths and Marriages Registration Amendment (Sex or Gender Changes) Bill 2024, Explanatory Memorandum (Western Australia) <https://www8.austlii.edu.au/au/legis/wa/bill_em/bdamraogcb2024646.pdf> accessed 15 March 2026.
741 Births, Deaths and Marriages Registration Amendment (Sex of Gender Changes) Act 2024 s36ZE
742 Births, Deaths and Marriages Registration Amendment (Sex of Gender Changes) Act 2024 s36ZE.
743 Equaldex, 'Entry #9993: Right to change legal gender in Australia?' <https://www.equaldex.com/log/9993> accessed 17 March 2026.

Empirical research by authors Sifris and Gerber[744] identifies several, significant barriers to accessing gender-affirming healthcare in Australia. The authors highlight the lack of trained professionals with a widespread lack of adequate education and training of healthcare professionals, resulting in lack of confidence among healthcare professional in providing gender-affirming care.[745] The cost of gender-affirming surgery is a major barrier as gender-affirming surgery is not covered by Medicare.[746]

Grand and Russel[747] identify key barriers, with specific reference to Tasmania in Australia. They note that treatment is not readily available in rural areas and mostly concentrated in capital cities or interstate, which places financial and geographic barriers on TGD persons seeking gender-affirming healthcare.[748] The consequence of this is long waiting periods for care. In addition to this, where access is possible, it is met with discrimination and gatekeeping caused by clinicians' personal views on gender binarism and heteronormativity, further exacerbating the barriers to access to gender-affirming healthcare.[749]

A 2024 survey by the Australian Department of Health and Aged Care,[750] with 2570 respondents (individuals and organisations) from different demographics,[751] highlights that the barriers to access to gender-affirming healthcare included lack of knowledge among General Practitioners regarding gender-affirming treatment and challenges with specific procedures, with emphasis on 'permanent contraception and/or

744 R Sifris and P Gerber, 'Sexual and reproductive health care for trans and gender diverse people: Imagining a human rights-based approach' [2023] 48(3) Alternative Law Journal 159 - 165.

745 R Sifris and P Gerber, 'Sexual and reproductive health care for trans and gender diverse people: Imagining a human rights-based approach' [2023] 48(3) Alternative Law Journal 160.

746 R Sifris and P Gerber, 'Sexual and reproductive health care for trans and gender diverse people: Imagining a human rights-based approach' [2023] 48(3) Alternative Law Journal 160.

747 Grant R, Russell A, Dane S and Dunn I, 'Navigating Access to Medical Gender Affirmation in Tasmania, Australia: An Exploratory Study' (2023) 25(4) *International Journal of Transgender Health* 804–815 https://doi.org/10.1080/26895269.2023.2276179.

748 Grant *and others*, 'Navigating Access to Medical Gender Affirmation' (2023) *Int J Transgend Health* 811 -812.

749 Grant *and others*, 'Navigating Access to Medical Gender Affirmation' (2023) *Int J Transgend Health* 812.

750 B Jenkinson and others, #EndGenderBias Survey Detailed Report (National Women's Health Advisory Council 2024) <https://www.health.gov.au/sites/default/files/2025-01/endgenderbias-survey-results-detailed-report_0.pdf> accessed 15 March 2026

751 B Jenkinson and others, #EndGenderBias Survey Detailed Report (National Women's Health Advisory Council 2024) 63 <https://www.health.gov.au/sites/default/files/2025-01/endgenderbias-survey-results-detailed-report_0.pdf> accessed 15 March 2026

hysterectomy.'[752] These we emphasised, together with the exclusion of gender-affirming surgeries from Medicare cover, long wating periods and the unavailability of gender-affirmation treatments. Geographic limitations pose another obstacle where gender-affirming surgery is not available in specific states.[753]

Intriguingly, it is reported that many medical practitioners view trans-health as a specialised niche area, and as such they do not consider it significant enough to familiarise themselves with the field, citing also that they do not have trans-patients.[754] The reality that the barriers to gender-affirming healthcare in Australia are not merely logistical challenges, but systemic failures that violate the human rights of TGD individuals, necessitating extensive training and comprehensive reforms in policies and legal frameworks.[755]

4 COMPARATIVE ANALYSIS AND BEST PRACTICES

There are key aspects of differences and similarities between South Africa and the above comparative jurisdictions. What can be observed is that Canada and Australia employ a very administrative, minimal barrier approach to gender recognition, which does not require surgical intervention, allowing for a non-surgical, self-determination of gender. Both these jurisdictions at large explicitly specify and recognise gender identity and gender expression as protected grounds of discrimination and further provide for a non-binary gender marker option 'X.' Conversely, the UK requires a diagnosis of gender dysphoria and two years lived experience[756] and South Africa

752 B Jenkinson and others, #EndGenderBias Survey Detailed Report (National Women's Health Advisory Council 2024) 55 <https://www.health.gov.au/sites/default/files/2025-01/endgenderbias-survey-results-detailed-report_0.pdf> accessed 15 March 2026

753 B Jenkinson and others, #EndGenderBias Survey Detailed Report (National Women's Health Advisory Council 2024) <https://www.health.gov.au/sites/default/files/2025-01/endgenderbias-survey-results-detailed-report_0.pdf> accessed 15 March 2026

754 Liotta M, 'Healthcare Barriers a "Peak Risk" for Transgender People' *newsGP* (The Royal Australian College of General Practitioners, 7 April 2021) <https://www1.racgp.org.au/newsgp/clinical/barriers-to-accessing-care-peak-risk-times-for-tra> accessed 25 November 2025.

755 R Sifris and P Gerber, 'Sexual and reproductive health care for trans and gender diverse people: Imagining a human rights-based approach' [2023] 48(3) Alternative Law Journal 159 - 165.

756 Department of Health and Social Care, NHS England and Wes Streeting MP, 'Support for adults facing staggering waits for gender services' (GOV.UK, 15 September 2025) <https://www.gov.uk/government/news/support-for-adults-facing-staggering-waits-for-gender-services> accessed 25 November 205.

requires proof of medical or surgical intervention,[757] consequently retaining their reliance on a medicalised and pathologised mechanism to legal recognition.

All four jurisdictions can be said to protect TGD persons against discrimination and hate crimes, with varying degrees of protection. However, only Canada and Australia specifically legislate for gender identity and expression as provide for explicit grounds of protection or as prohibited characteristics. Canada provides extensive protection, with Bill C-16 amending the Canadian Criminal Code to ensure criminal sanctions where these protections are breached.[758]

South Africa relies on the broad constitutional protection of equality and the interpretation of 'gender, sex and sexual orientation' and the enforcement and application of PEPUDA.[759] in jurisprudence and in case law. The United Kingdom, on the other hand, has made strides with a strong protection against discrimination based on gender reassignment.[760] Albeit, there have been recent legal challenges resulting in the retention of the definition of 'sex' to mean 'biological sex' and the exclusion of non-biological females from women only-spaces.[761]

Whilst, for the purposes of this dissertation, no analysis of the different health care systems and medical health insurances was provided, it is observed that a common barrier to accessing adult gender-affirming healthcare across all four jurisdictions is that most GAHC facilities are concentrated in urban areas and have extensive delays and extended waiting periods in access to treatment and care.

5 POLICY RECOMMENDATIONS AND LEGISLATIVE REFORMS FOR SOUTH AFRICA

757 Alteration of Sex Description and Sex Status Act 49 of 2003, s2.
758 Walker, *Legislative Summary of Bill C-16*.4-5.
759 Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000,
760 Equality Act 2010 (UK), s 7(2).
761 *For Women* Scotland Ltd *v The Scottish Ministers* [2023] UKSC 31.

In the adjudication of legal matters[762] reference is made to the internationally recognised Yohyakarta Principles Plus 10[763] which advocate for legal recognition of gender based on a self-defined gender identity and reduced mandatory medicalisation of the process of recognition.[764] South Africa would benefit from an approach of either amending the Alteration Act to include provisions that allow a change in gender markers (with the options of a third gender-marker) by way of a non-pathologised and non-medicalised process, such as a declaration at the Department of Home Affairs that does not require proof of medical intervention.

Taking from the Canadian model Bill C-16,[765] PEPUDA could be amended to include gender identity, gender expression and sex characteristics as protected grounds of discrimination, setting out further criminal sanctions for contravention of these grounds. This would be easier than making an amendment to the Constitution,[766] while giving effect to the duty to develop the common law and legislation.

Australia provides extensive guidelines in the 'The Australian Government Guidelines on the Recognition of Sex and Gender',[767] with updates such as the Standard for Sex, Gender, Variations of Sex Characteristics and Sexual Orientation Variables.[768] South Africa could consider an integrated informed-consent clinical model where guidelines are consolidated and used to develop binding national policy.

6 CONCLUSION

Despite strong constitutional protections against discrimination, guarantees of equality and the enactment of PEPUDA, significant gaps remain in the protection of the rights

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762 *September v Subramoney* (EC10/2016) para 95 - 100.

763 International Commission of Jurists (ICJ) and International Service for Human Rights (ISHR), *The Yogyakarta* Principles *on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity* (March 2007) <https://yogyakartaprinciples.org/principles-en/> accessed 15 November 2025

764 ICJ & ISHR, Yogyakarta *Principles plus 10* (2017) Principles 30.

765 Walker, *Legislative Summary of Bill C-16*.

766 The Constitution of the Republic of South Africa, 1996

767 AGD, *Australian Government Guidelines on the Recognition of Sex and Gender* (2013)

768 Australian Bureau of Statistics, *Standard for Sex, Gender, Variations of Sex Characteristics and Sexual Orientation Variables 2020* (latest release) <https://www.abs.gov.au/statistics/standards/standard-sex-gender-variations-sex-characteristics-and-sexual-orientation-variables/latest-release> accessed 25 November 2025.

of TGD persons and their access to gender-affirming health care in South Africa. In contrast, the developments and recent reforms observed in Canada and Australia offer a more progressive framework which South Africa can adapt to develop a legislative framework that not only protects and advances the rights of TGD persons but avoids deepening further barriers and reproducing the restrictive mechanisms of the Alteration Act.

This chapter compared the legislative frameworks to gender-affirming health care and access to gender-affirming health care services, including legal recognition of self-defining gender status in Canada, the United Kingdom and Australia as jurisdictions that conform largely to the same human rights conventions as South Africa. Canada and Australia both have a multi-layered political system which affords researchers an opportunity to assess how certain provinces, states or territories develop regulations and observe the variances in application in other areas.

This chapter also addressed the legal gender recognition in each of these jurisdictions, assessing the mechanisms used to protect the rights of TGD persons; the impact of language and the use of gender-affirming terminology in these frameworks, and finally highlighting the barriers that exist in accessing gender-affirming healthcare.

CHAPTER SIX: CONCLUSION AND RECOMMENDATIONS

1 INTRODUCTION

This dissertation undertook to critically examine the provision of gender-affirming health care services in South Africa. The Alteration of Sex Description and Sex Status Act,[769] as the sole statutory instrument governing and regulating legal gender recognition in South Africa, was critically interrogated. This study critically examined the criteria and procedural pre-requisites prescribed by the Act, including the surgical and medical evidentiary requirements imposed on applicants under the Act,[770] including analysing how these criteria and pre-requisites interact with existing clinical guidelines and healthcare practices in South Africa. Central to this exercise was to evaluate whether the Act,[771] in its current state, is adequate in the realising of the constitutionally guaranteed rights of TGD persons, including their constitutionally protected rights to equality, human dignity, bodily autonomy, privacy, and access to healthcare services.[772]

Beyond the domestic legislative framework, this dissertation juxtaposed the South African legislative framework against a broader comparative and international human rights context, benchmarking the Alteration Act and the clinical guidelines governing GAHC in South Africa against the legislative and regulatory frameworks operative in Canada, the United Kingdom and Australia. This comparative analysis reveals how the South African approach to legal gender recognition remains considerably behind these jurisdictions and international standards.

2 SUMMARY OF FINDINGS

2.1 Misalignment Between Constitutional Ideal and Legislative Reality

769 Alteration of Sex Description and Sex Status Act 49 of 2003.
770 Alteration of Sex Description and Sex Status Act 49 of 2003, s 2(2)(b).
771 Alteration of Sex Description and Sex Status Act 49 of 2003.
772 Constitution of the Republic of South Africa, 1996.

A core finding of this dissertation is that although South Africa is widely recognised as possessing one of the most transformative and rights-inclusive constitutions in the world,[773] a significant misalignment and tension between its constitutional commitments and its legislative enactments still remain with regard to the context of this study. The realising of the rights to equality, human dignity, privacy and access to adequate healthcare services, as enshrined in the Constitution and with specific reference to TGD persons, fall significantly short as a result of inadequate legislative enactments, specifically the Alteration of Sex Description and Sex Status Act.[774] The Act's pathologising model of legal gender recognition, prefaced on the requirement of proof of surgical or medical intervention, reduces what may be considered a constitutional entitlement to self-determination, to an exercise of medical gatekeeping. This renders the Act an outdated statutory instrument that, rather than propelling the realisation of rights, stands in stark contradiction with the values and rights the Constitution[775] seeks to protect.

Whilst the Constitution[776] and PEPUDA[777] provide strong protections against unfair discrimination and essentially establish a strong anti-discrimination framework that prohibits unfair discrimination practices on the grounds of sex, gender and sexual orientation, the Alteration Act reinforces the barriers this broad anti-discrimination framework seeks to demolish. By conditioning legal gender recognition on mandatory medical or surgical interventions and proof thereof—despite the depathologisation of transgender identities in the ICD-11[778] and the legal recognition of sex characteristics in the Yogyakarta Principles +10[779]—the Alteration Act perpetuates a model that is constitutionally indefensible and unjustifiable.

2.2 From Gatekeeping to Autonomy

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773 Makgala Masiteng, 'SA's Constitution Remains One of the Most Progressive in the World' *SABC News* (3 November 2024) <https://www.sabcnews.com/sabcnews/sas-constitution-remains-one-of-the-most-progressive-in-the-world/> accessed 13 November 2024.

774 Alteration of Sex Description and Sex Status Act 49 of 2003.

775 Constitution of the Republic of South Africa, 1996.

776 Constitution of the Republic of South Africa, 1996.

777 Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

778 World Health Organization, *International Classification of Diseases for Mortality and Morbidity Statistics* (11th rev, WHO 2019) <https://icd.who.int/> accessed 1 October 2025.

779 ICJ and ISHR, *Yogyakarta Principles plus 10* (2017) Principles 31.

This study also offered an extensive examination and breakdown of clinical pathways to gender-affirming care in South Africa, revealing that the South African HIV Clinicians Society GAHC Guidelines[780] provide the most advanced clinical framework currently operative in South Africa. These guidelines not only advocate for an informed consent model of care, but centred on the individual's agency, autonomy and right to self-determination, explicitly condemn practices that pathologise or stigmatise transgender and gender diverse identity. [781]

Reading the SAHCS GAHC Guidelines together with the Alteration Act exposes a significant contradiction in South Africa's regulatory framework. The SAHCS GAHC Guidelines advance an affirming, autonomy-centred clinical model of care, consistent with the objective of the ICD-11 and Yogyakarta Principles. In contrast, the Alteration Act constitutes a direct schism with these guidelines, enforcing and legally prioritising a medicalised and pathologised gateway to legal gender recognition. This is evidenced not only by the requirement for evidence of surgical or medical intervention, but also the lack of non-binary gender markers in favour of the heteronormative male and female, and its inherent failure to recognise intersex persons who may not wish to follow the binary approach to classification. The result of this schism is a clinical environment that has outpaced the law, leaving healthcare providers to operate within the confines of a progressive clinical framework that is undermined and contradicted by the existing regulating legislative framework.

2.3 Structural and Systemic Barries to Gender-Affirming Healthcare

Access to gender-affirming health care remains a largely unrealised constitutional promise in South Africa. As established in chapter two, only seven of the approximately 404 public hospitals in South Africa currently provide gender-affirming care.[782] These facilities are exclusively tertiary academic institutions concentrated in major metropolitan centres, making gender-affirming healthcare geographically inaccessible to TGD persons residing in rural, peri-urban and remote areas.

780 Anastacia Tomson and others, *SAHCS Gender-Affirming Healthcare Guideline* (Expanded edn, Southern African HIV Clinicians Society 2021).

781 Tomson and others, *SAHCS Gender-Affirming Healthcare Guideline.*

782 Frans Mashilo Mahlobogwane, 'Barriers to Gender-Affirming Health Care in Children and Adolescents in South Africa' (2025) 46 *Obiter* 312.

Additionally, the documented 15 to 20 year waiting lists for gender-affirming surgery in the public sector exposes the profound inadequacy of the existing service delivery model.[783]

The Alteration Act's structural barriers to gender-affirming healthcare are exacerbated by forcing TGD individuals to seek gender-affirming healthcare via an already strained public health system. The burden on these public health facilities can easily be alleviated by the removal of the requirement for proof of medical and surgical intervention from the legal gender recognition process. The rationale for the medical and surgical intervention remains a mystery, as it is completely irrational and unreasonable.

Further to the above, this dissertation examined, albeit to a limited extent due to the scope of the topic, the regulatory disconnect between the Health Professions Council of South Africa (HPCSA) and the South African Nursing Council (SANC), acknowledging that both regulatory bodies operate from a broadly aligned ethical baseline/foundation, supposedly embracing duties of non-discrimination, patience dignity and evidence-based care. Given that nurses are an integral and indispensable part of the multidisciplinary GAHC team, often serving as the primary point of patient contact, the separation of the governance structures, scope of practice regulations and professional accountability mechanisms creates fragmented oversight. This increases the risk of non-uniform training standards and accountability loopholes, with significant implications for gender-affirming healthcare delivery. The consequence of this is a multidisciplinary team model that is theoretically and structurally envisaged or assumed but inadequately regulated, leaving both providers and patients exposed to risks of inconsistent, uninformed, and potentially discriminatory care.

2.4 Inadequacy of the Existing Regulatory Framework

As the single legislative instrument that regulates legal gender recognition, the Alteration Act neither establishes a comprehensive legal gender recognition

[783] Mahlobogwane, 'Barriers to Gender-Affirming Health Care in Children and Adolescents in South Africa' 312.

mechanism, nor does it articulate the procedural directives, operational timelines, and regulatory sanctions that would apply in the event of non-compliance with the Act. What are required to give practical and enforceable effect to its provisions, significant legal revision of the Act is necessary. The Act does not provide for the recognition of non-binary gender markers and does not define or provide for the recognition of gender identity and expression, recognising only the binary descriptors of male and female.[784] In the absence of accompanying regulations, standard operating procedures and directives to this Act, including accountability mechanisms and sanctions, the Act invites inconsistent, discriminatory and constitutionally non-compliant implementation. Ironically, as the only enactment that seeks to advance the rights of TGD persons through legal gender recognition, the implementation of the Alteration Act simultaneously constitutes a serious source of potential human rights violations affecting TGD persons.

A comparison of the Alteration Act to the Termination of Pregnancy Act, provides a clear distinction between a legislative enactment with subsequent clinical guidelines[785] that provide clear mechanisms, timelines and sanctions for non-compliance, to ensure the protection of constitutional guarantees. The Alteration Act and its inadequacies have as an inevitable consequence a system where the constitutional rights of TGD persons exist in theory but remain largely unenforceable in practice. It is submitted that this legislative gap is not accidental but an actively perpetuated marginalisation of TGD persons in South Africa.

Recent case law development and judgments in the *September*,[786] *Mphela*,[787] *Lallu*[788] and *Mokoena*[789] matters depict the reactive nature of our legal system in protecting the rights of TGD persons, intervening to remedy violation only after its occurrence, rather

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784 Rachel Sloth-Nielsen, 'Recognition of a Third Gender under South African Constitutional Law' (LLD thesis, University of Cape Town 2020).

785 National Department of Health. National clinical guideline for implementation of the choice on termination of pregnancy act (first ed) (2019). https://www.health.gov.za/wp-content/uploads/2023/04/Termination-Pregnancy-Guideline_Final_2021.pdf?utm_source=copilot.com accessed 24 April 2026.

786 *September v Subramoney NO and Others* (EC10/2016) [2019] ZAEQC 4; [2019] 4 All SA 927 (WCC) [119].

787 *Mphela v Manamela and Others* (EC 10/2016) [2021] ZAEQC 4 (23 September 2021).

788 *Lallu v Van Stadden* Roodeport Equality Court Case no 3 of 2011.

789 *Mokoena v Head of Johannesburg Correctional Centre and Others* (2024/070075) [2025] ZAGPJHC 1178 (10 November 2025).

than preventing the occurrences through proactive and comprehensive legislative provisions. This pattern of litigation further underscores the inadequacy of the Alteration Act as a standalone legislative instrument. Many more potential cases will be averted by addressing in general the relevant socio-economic barriers and general barriers to access to justice that disproportionately affect marginalised communities.

This study has identified the urgent need to develop dedicated legislative provisions and enactments that anticipate and pre-empt potential legislative challenges in the context of gender-affirming healthcare. Legal precedent points to the need for alignment with the Constitution and the Bill of Rights,[790] requiring less reliance on the PEPUDA[791] as a primary instrument of the enforcement of rights.

2.5 International Comparative Analysis

The international comparative analysis undertaken in chapter five demonstrates how, notwithstanding the progressive South African constitutional framework and the advances represented by the SAHC GAHC guidelines, South Africa remains lacking in as far as producing comprehensive legal mechanisms for legal gender recognition and rights protections, as well as the implementation thereof.

Canada and Australia provide detailed models for gender affirmation that lower the barriers to legal gender recognition. These jurisdictions provide examples of evolving de-pathologised gender recognition frameworks. In contract, the United Kingdom showcases the potential challenges that may stem from a continued medicalised framework[792] and political resistance to reform.

3 LEGAL AND POLICY RECOMMENDATIONS

790 Constitution of the Republic of South Africa, 1996.
791 Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.
792 *For Women Scotland Ltd v The Scottish Ministers* [2023] UKSC 31.

This paper canvassed that the current legislation framework for legal gender recognition is in adequate and in order to cure the defects and inadequacies the following recommendations are made:

3.1 In fulfilment of constitutional imperatives, the legislature in South Africa should either completely amend and overhaul but ideally replace the Alteration Act with a legislative enactment that recognises self-determination and self-declaration, deviating completely from the existing pathologised and gatekeeping framework. The proposed enactment must be developed in alignment with the Yogyakarta Principle 31.[793]

3.2 The proposed enactment should be titled the 'Gender Affirmation and Recognition Act' and include sections on legal recognition which provide for the recognition of gender marker 'X' for non-binary recognition of TGD persons, including intersex persons. This Act should include the express inclusion of gender identity and gender expression as a protected ground against discrimination.

3.3 The proposed enactment should follow the framework of the Termination of Pregnancy Act and the National and Clinical Guidelines for Implementation of the Termination of Pregnancy Act,[794] ensuring that it provides National Gender-Affirming Care Clinical Guidelines, including relevant national policy and mechanisms for sanctions in the event of non-compliance.

3.4 As is the case with section 30 of Basic Conditions of Employment Act,[795] which mandates that an easy-to-read version of the Act be displayed at workplaces in locations where employees can read it, a similar mandatory requirement should be placed in the proposed enactment and accompanying national guidelines.

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793 ICJ and ISHR, *Yogyakarta Principles plus 10* (2017) Principle 31.

794 National Department of Health, Republic of South Africa, *National Clinical Guideline for Implementation of the Choice on Termination of Pregnancy Act* (1st edn, National Department of Health 2019) <https://www.knowledgehub.org.za> accessed 25 September 2025.

795 Act 75 of 1997, s 30.

3.5 It is proposed that there be a merger between the HPCSA and SANC as regulatory bodies, in order to standardise care, ethical responsibilities and to ensure mandatory and uniform training as proposed by/in the Yogyakarta Principles Plus 10 Principles 30 (D), (E), (F) and (H).

3.6 As in the case of the Canadian Bill C-16,[796] an enactment is proposed to effect amendments to PEPUDA[797] as national legislation enacted in terms of section 9(3) of the Constitution,[798] to expressly include gender identity and gender expression and sex characteristics as a prohibited ground of discrimination. The existing prohibited grounds of unfair discrimination that refers to "sex", "gender" and "sexual orientation" are inadequate to protect the right to gender identity. Changes to PEPUDA should also include criminal sanctions in the case of contravention of its provisions.

4 FINAL CONCLUSION

Considered in its entirety, this dissertation has sought to connect otherwise isolated discussions regarding gender identity and gender-affirming health care into a uniform focus, unpacking how progressive constitutional frameworks are rendered ineffective without complementary legislative enactments and directives. This study has dissected the regulation of gender, identity and healthcare, canvassing that South Africa has a sophisticated clinical guidance system which is undermined by the outdated, binary and medicalised model of legal gender recognition.

The study has further provided a holistic international comparative perspective, spotlighting Canada and Australia as examples of functional best practice options which demonstrate a clear legislative trajectory toward accessible, low-barrier, administrative self-identification models of legal gender recognition that explicitly protect gender identity and gender expression. In contrast, The United Kingdom's

796 Bill C-16 (2016).
797 Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.
798 Constitution of the Republic of South Africa, 1996, s 9(4).

gender recognition system illustrates the potential risks inherent in retaining a highly medicalised model of legal gender recognition.

Against this backdrop, South Africa should adopt a self-determination or self-identification based legal gender recognition legislation, informed by international standards such as the Yogyakarta Principles plus 10, local guidelines like the SAHCS GAHC Guidelines, including other position papers. The proposed legislative framework should further provide for the express protection of gender identity, gender expression and sex characteristics, thereby integrating law, medicine and practice efficiently.

This study does not only call for specialised legislation but suggests a blueprint on how it should operate. The frameworks adopted in the Termination of Pregnancy Act and its supplementing National Guidelines,[799] the Australian Government's Guidelines on the Recognition of Sex and Gender,[800] as well as Canadian Bill C-16[801] provide progressive and clear pointers for developing a world-class, transformative Gender Affirmation and Recognition Act in South Africa.

799 National Department of Health, *National Clinical Guideline for Implementation of the Choice on Termination of Pregnancy Act* (2019).

800 Attorney-General's Department, *Australian Government Guidelines on the Recognition of Sex and Gender* (2013).

801 Bill C-16 (2016).

BIBLIOGRAPHY

Books

American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (1st edn)

> American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (1st edn, APA 1952)

American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (2nd edn)

> American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (2nd edn, APA 1968)

American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (3rd edn)

> American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (3rd edn, APA 1980)

American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (4th edn)

> American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (4th edn, APA 1994)

American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders: DSM-5* (5th edn)

> American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders: DSM-5* (5th edn, American Psychiatric Association Publishing 2013)

American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders: DSM-5-TR* (5th text rev)

> American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders: DSM-5-TR* (5th text rev, APA 2022)

Benjamin, *The Transsexual Phenomenon*

> Benjamin H, *The Transsexual Phenomenon* (1st published 1966, Symposium Publishing, Düsseldorf 1999) <https://transreads.org/wp-content/uploads/2019/04/2019-04-07_5ca961529c262_HarryBenjamin-TheTranssexualPhenomenon1copy.pdf> accessed 1 September 2025

Currie and De Waal, *The Bill of Rights Handbook*

> Currie I and De Waal J, *The Bill of Rights Handbook* (6th edn, Juta 2013)

Kende, *Comparative Constitutional Law*

Kende M, *Comparative Constitutional Law: South African Cases and Materials in a Global Context* (Carolina Academic Press 2015) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2627397> accessed 25 September 2025

Matthyse and others, *Keeping the Promise of Dignity and Freedom for All*

Matthyse L and others, *Keeping the Promise of Dignity and Freedom for All: A Position Paper on Legal Gender Recognition in South Africa* (Gender DynamiX & Legal Resources Centre 2020) <https://lrc.org.za/wp-content/uploads/Position-paper-on-legal-gender-recognition.pdf> accessed 1 September 2025

Namwase and Jjuuko (eds), *Protecting the Human Rights of Sexual Minorities in Contemporary Africa*

Namwase S and Jjuuko A (eds), *Protecting the Human Rights of Sexual Minorities in Contemporary Africa* (Pretoria University Law Press 2017)

Oliven, *Sexual Hygiene and Pathology*

Oliven JF, *Sexual Hygiene and Pathology: A Manual for the Physician and the Professions* (2nd edn, J B Lippincott Company 1965)

Rawson and Williams, *Transgender: The Rhetorical Landscape of a Term*

Rawson KJ and Williams C, *Transgender: The Rhetorical Landscape of a Term* (University of Michigan Press 2014)

Walker, *Legislative Summary of Bill C-16*

Walker J, *Legislative Summary of Bill C-16: An Act to Amend the Canadian Human Rights Act and the Criminal Code* (Library of Parliament, Publication No 42-1-C16-E, 21 October 2016)

World Health Organization, *International Classification of Diseases: 9th Revision (ICD-9)*

World Health Organization, *International Classification of Diseases: 9th Revision (ICD-9)* (WHO 1977)

World Health Organization, *International Classification of Diseases for Mortality and Morbidity Statistics* (11th rev)

World Health Organization, *International Classification of Diseases for Mortality and Morbidity Statistics* (11th rev, WHO 2019) <https://icd.who.int/> accessed 1 October 2025

Journal Articles

Bhatla and others, 'The Experience of Youth on the Waitlist for Gender-Affirming Care in Manitoba'

Bhatla JL and others, 'The Experience of Youth on the Waitlist for Gender-Affirming Care in Manitoba' (2023) 29 *Paediatrics & Child Health* 440

Cameron, 'Sexual Orientation and the Constitution'

Cameron E, 'Sexual Orientation and the Constitution: A Test Case for Human Rights' (1993) 110 SALJ 450

Comeau, Johnson and Bouhamdani, 'Review of Current 2SLGBTQIA+ Inequities in the Canadian Health Care System'

Comeau D, Johnson C and Bouhamdani N, 'Review of Current 2SLGBTQIA+ Inequities in the Canadian Health Care System' (2023) 11 *Frontiers in Public Health* 1183284 <https://doi.org/10.3389/fpubh.2023.1183284>

Ferris and others, 'Leaving Gatekeeping Behind'

Ferris TG and others, 'Leaving Gatekeeping Behind — Effects of Opening Access to Specialists for Adults in a Health Maintenance Organization' (2001) 344 *New England Journal of Medicine* 233

Grant and others, 'Navigating Access to Medical Gender Affirmation in Tasmania'

Grant R and others, 'Navigating Access to Medical Gender Affirmation in Tasmania, Australia: An Exploratory Study' (2023) 25(4) *International Journal of Transgender Health* 804

Husakouskaya, 'Rethinking Gender and Human Rights'

Husakouskaya N, 'Rethinking Gender and Human Rights Through Transgender and Intersex Experiences in South Africa' (2013) 27 *Agenda* 10 <https://www.jstor.org/stable/43825096>

Koraan and Geduld, '"Corrective Rape" of Lesbians'

Koraan R and Geduld A, '"Corrective Rape" of Lesbians in the Era of Transformative Constitutionalism in South Africa' (2015) 18(5) PELJ 2071 <http://dx.doi.org/10.4314/pelj.v18i5.23> accessed 1 September 2025

Li, 'Harry Benjamin and the Birth of Transgender Medicine'

Li A, 'Harry Benjamin and the Birth of Transgender Medicine' (2023) 195(48) *Canadian Medical Association Journal* E1665, DOI: 10.1503/cmaj.231436

Mahlobogwane, 'Barriers to Gender-Affirming Health Care in Children and Adolescents in South Africa'

Mahlobogwane FM, 'Barriers to Gender-Affirming Health Care in Children and Adolescents in South Africa' (2025) 46 *Obiter* 312

Muller and others, 'An Introduction to Gender Affirming Healthcare'

Muller M and others, 'An Introduction to Gender Affirming Healthcare: What the Family Physician Needs to Know' (2023) 65(1) *South African Family Practice* a5770

Mumford, Fraser and Knudson, 'What the Past Suggests About When a Diagnostic Label Is Oppressive'

> Mumford K, Fraser L and Knudson G, 'What the Past Suggests About When a Diagnostic Label Is Oppressive' (2023) 25(6) *AMA Journal of Ethics* E446, DOI: 10.1001/amajethics.2023.446

Müller, 'Health for All?'

> Müller A, 'Health for All? Sexual Orientation, Gender Identity, and the Implementation of the Right to Access to Health Care in South Africa' (2016) 18 *Health and Human Rights Journal* 195 <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5395001/> accessed 25 September 2025

Mwikya, 'Unnatural and Un-African'

> Mwikya K, 'Unnatural and Un-African: Contesting Queer Phobia by Africa's Political Leadership' (2014) *Feminist Africa* No 19 (Pan Africanism and Feminism)

Ozah, 'Informed Consent and Access to Gender-Affirming Treatment for Children in South Africa'

> Ozah K, 'Informed Consent and Access to Gender-Affirming Treatment for Children in South Africa' (2023) 56 *De Jure* 569

Rodrigues, Carneiro and Nogueira, 'History of Scientific, Medical and Psychological Approaches to Transsexualities'

> Rodrigues L, Carneiro NS and Nogueira C, 'History of Scientific, Medical and Psychological Approaches to Transsexualities and Their Critical Approach' (2021) 30(2) *Saúde e Sociedade* <https://doi.org/10.1590/S0104-12902021200768> accessed 1 September 2025

Shabalala and Campbell, 'The Complexities of Trans Women's Access to Healthcare in South Africa'

> Shabalala SB and Campbell MM, 'The Complexities of Trans Women's Access to Healthcare in South Africa: Moving Health Systems Beyond the Gender Binary Towards Gender Equity' (2023) 22 *International Journal for Equity in Health* <https://doi.org/10.1186/s12939-023-02039-6> accessed 1 March 2024

Shabalala, Boonzaier and Chirape, 'Challenging Ciscentric Feminist Margins'

> Shabalala SB, Boonzaier F and Chirape S, 'Challenging Ciscentric Feminist Margins: A South African Study on GBV in the Lives of Black Trans Women' (2023) 65 *Psychology in Society* (PINS) 50 <https://doi.org/10.57157/pins2023vol65iss1a6126>

Sifris and Gerber, 'Sexual and Reproductive Health Care for Trans and Gender Diverse People'

Sifris R and Gerber P, 'Sexual and Reproductive Health Care for Trans and Gender Diverse People: Imagining a Human Rights-Based Approach' [2023] 48(3) *Alternative Law Journal* 159

Tomson, 'Gender-Affirming Care in the Context of Medical Ethics'

Tomson A, 'Gender-Affirming Care in the Context of Medical Ethics — Gatekeeping v Informed Consent' (2018) 108(5) *South African Medical Journal* 382 <https://doi.org/10.7196/SAMJ.2018.v108i5.13027> accessed 10 September 2025

Van Hout, 'Navigating the Complexities of (Trans)Gender Equality Rights'

Van Hout MC, 'Navigating the Complexities of (Trans)Gender Equality Rights within the Parameters of Reasonable Accommodation and Security Tensions in South African Prisons: The Judgement of *September v Subramoney*' (2022) 3 *Forensic Science International: Mind and Law* 100077

Zambezi and Viljoen, 'Access to Healthcare Services for Transgender People in South Africa'

Zambezi D and Viljoen F, 'Access to Healthcare Services for Transgender People in South Africa: Assessing Healthcare Experiences and Human Rights' (2024) University of Pretoria, Centre for Human Rights (UPSpace) <https://repository.up.ac.za/server/api/core/bitstreams/9b93c37f-ee78-4f11-908b-ede876bd13d7/content> accessed 15 November 2025

Case Law

Australia

AB v Western Australia (2011) 244 CLR 390; [2011] HCA 42

NSW Registrar of Births, Deaths and Marriages v Norrie [2014] HCA 11

Canada

Egan v Canada (1995) 2 SCR 513

Haig and Birch v Canada and Others (1992) 57 OAC 272 (Ont CA)

Germany

1 BvR 2019/16 (German Federal Constitutional Court, 10 October 2017) BVerfGE (2017) <https://www.bverfg.de/e/rs20171010_1bvr201916en.html> accessed 25 September 2025

South Africa

Castell v De Greef 1994 (4) SA 408 (C)

KOS and Others v Minister of Home Affairs and Others (2298/2017) [2017] ZAWCHC 90; [2017] 4 All SA 468 (WCC); 2017 (6) SA 588 (WCC)

Lallu v Van Stadden Roodeport Equality Court Case no 3 of 2011

Minister of Home Affairs v Fourie (CCT 60/04) [2005] ZACC 19

Mokoena v Head of Johannesburg Correctional Centre and Others (2024/070075) [2025] ZAGPJHC 1178 (10 November 2025)

Mphela v Manamela and Others (EC 10/2016) [2021] ZAEQC 4 (23 September 2021)

S v Makwanyane and Another 1995 (3) SA 391 (CC)

September v Subramoney NO and Others (EC10/2016) [2019] ZAEQC 4; [2019] 4 All SA 927 (WCC)

W v W 1976 2 SA 308 (W)

United Kingdom

Christine Goodwin v United Kingdom (2002) 35 EHRR 18, App No 28957/95

Corbett v Corbett [1971] P 83; [1970] 2 All ER 33

For Women Scotland Ltd v The Scottish Ministers [2023] UKSC 31

Legislation

Australia

Anti-Discrimination Act 1977 (NSW) No 48

Births, Deaths and Marriages Registration Act 1995 (NSW) No 62

Births, Deaths and Marriages Registration Amendment (Sex or Gender Changes) Act 2024 (WA)

Equal Opportunity Act 1984 (SA)

Equal Opportunity Act 1984 (WA)

Gender Reassignment Act 2000 (WA)

Sex Discrimination Act 1984 (Cth)

Canada

Bill C-16, *An Act to Amend the Canadian Human Rights Act and the Criminal Code* (2016)

Canadian Human Rights Act, RSC 1985, c H-6

Constitution Act, 1982, Part I: Canadian Charter of Rights and Freedoms, being Schedule B to the Canada Act 1982 (UK), 1982, c 11 (entered into force 17 April 1982)

Criminal Code, RSC 1985, c C-46

The Human Rights Code Amendment Act (Bill 43) (Manitoba, 2024)

South Africa

Alteration of Sex Description and Sex Status Act 49 of 2003

Births and Deaths Registration Act 81 of 1963

Births and Deaths Registration Act 51 of 1992

Choice on Termination of Pregnancy Act 92 of 1996

Civil Union Act 17 of 2006

Constitution of the Republic of South Africa, 1996

Correctional Services Act 111 of 1998

Health Professions Act 56 of 1974

Marriage Act 25 of 1961

National Health Act 61 of 2003

National Health Insurance Act 20 of 2023

Nursing Act 33 of 2005

Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000

United Kingdom

Equality Act 2010

Gender Recognition Act 2004

International Instruments

ACHPR

> African Union, African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) 1520 UNTS 217; 21 ILM 58 (ACHPR) <https://au.int/sites/default/files/treaties/36390-treaty-0011_-_african_charter_on_human_and_peoples_rights_e.pdf> accessed 10 November 2025

ACHPR, Resolution on Protection against Violence Based on Sexual Orientation or Gender Identity (2014)

> African Commission on Human and Peoples' Rights, Resolution on Protection against Violence and Other Human Rights Violations against Persons on the Basis of Their Real or Imputed Sexual Orientation or Gender Identity ACHPR/Res.275(LV)2014 (adopted at the 55th Ordinary Session, Luanda, Angola, 28 April – 12 May 2014) <https://www.achpr.org/sessions/resolutions?id=287> accessed 10 November 2025

CAT

> United Nations General Assembly, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 (CAT)

ECHR

Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, opened for signature 4 November 1950, entered into force 3 September 1953) ETS No 005

ICCPR

United Nations General Assembly, International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR)

ICESCR

United Nations General Assembly, International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR)

OPCAT

United Nations General Assembly, Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 18 December 2002, entered into force 22 June 2006) 2375 UNTS 237 (OPCAT)

UDHR

United Nations General Assembly, Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) <https://www.un.org/en/about-us/universal-declaration-of-human-rights> accessed 1 November 2025

ICJ & ISHR, *Yogyakarta Principles* (2007)

International Commission of Jurists and International Service for Human Rights, *The Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity* (March 2007) <https://yogyakartaprinciples.org/principles-en/> accessed 15 November 2025

ICJ & ISHR, *Yogyakarta Principles plus 10* (2017)

International Commission of Jurists and International Service for Human Rights, *The Yogyakarta Principles plus 10: Additional Principles and State Obligations* (10 November 2017) <https://yogyakartaprinciples.org/wp-content/uploads/2017/11/A5_yogyakartaWEB-2.pdf> accessed 15 November 2025

Theses and Dissertations

Dhai, 'Gender Reassignment Surgery: Medical Issues and Legal Consequences'

Dhai A, 'Gender Reassignment Surgery: Medical Issues and Legal Consequences' (LLM dissertation, University of Natal 2000)

Mahlobogwane, 'The Legal Position Regarding the Best Interests of the Child in Gender Reassignment Decisions in South Africa'

Mahlobogwane FM, 'The Legal Position Regarding the Best Interests of the Child in Gender Reassignment Decisions in South Africa' (Doctor of Laws thesis, University of South Africa 2023)

Sloth-Nielsen, 'Recognition of a Third Gender under South African Constitutional Law'

Sloth-Nielsen R, 'Recognition of a Third Gender under South African Constitutional Law' (LLD thesis, University of Cape Town 2020)

Discussion Papers and Institutional Documents

HPCSA, *Booklet 1: General Ethical Guidelines for the Health Care Professions* (12th edn, 2022)

Health Professions Council of South Africa, *Booklet 1: General Ethical Guidelines for the Health Care Professions* (12th edn, HPCSA 2022) <https://www.hpcsa.co.za/Conduct/Ethics> accessed 1 September 2025

HPCSA, *Booklet 2: Ethical and Professional Rules of the Health Professions Council of South Africa* (12th edn, 2022)

Health Professions Council of South Africa, *Booklet 2: Ethical and Professional Rules of the Health Professions Council of South Africa* (12th edn, HPCSA 2022) <https://www.hpcsa.co.za/Conduct/Ethics> accessed 1 September 2025

HPCSA, *Booklet 4: Seeking Patients' Informed Consent – The Ethical Considerations* (9th edn, 2022)

Health Professions Council of South Africa, *Booklet 4: Seeking Patients' Informed Consent – The Ethical Considerations* (9th edn, HPCSA 2022) <https://www.hpcsa.co.za/Conduct/Ethics> accessed 10 September 2025

SANAC, *Gender-Affirming Healthcare Guideline for South Africa* (2021)

South African HIV Clinicians Society (SAHCS), *Gender-Affirming Healthcare Guideline for South Africa – Expanded Version: October 2021* (Southern African HIV Clinicians Society 2021) <https://www.spotlightnsp.co.za/wp-content/uploads/2024/05/sahcs-guidelines.pdf> accessed 1 August 2025

South African Human Rights Commission, *Submission on Alteration of Sex Description and Sex Status Bill* (2003)

South African Human Rights Commission, *Submission on Alteration of Sex Description and Sex Status Bill* (Parliament, September 2003)

South African Law Reform Commission, *Discussion Paper 154: Project 141 Medico-Legal Claims* (2021)

South African Law Reform Commission, *Discussion Paper 154: Project 141 Medico-Legal Claims* (2021) [207] <https://www.justice.gov.za/salrc/dpapers/dp154-prj141-Medico-Legal-Claims.pdf> accessed 1 October 2024

SANC, *Code of Ethics for Nursing Practitioners in South Africa* (2021)

South African Nursing Council, *Code of Ethics for Nursing Practitioners in South Africa* (SANC April 2021) <https://www.sanc.co.za/wp-content/uploads/2021/04/Code-of-Ethics-for-Nursing-in-South-Africa.pdf> accessed 1 September 2025

Internet Sources

ACLRC, 'Prohibited Grounds of Discrimination in Canada'

Alberta Civil Liberties Research Centre (ACLRC), 'Prohibited Grounds of Discrimination in Canada: Comparative Chart of Rights in Federal, Provincial and Territorial Legislation' (Final version, current to May 2018) <https://www.aclrc.com/wp-content/uploads/FinalHumanRightsChart2.pdf> accessed 20 November 2025

American Psychiatric Association, 'Gender Dysphoria' (2013)

American Psychiatric Association, 'Gender Dysphoria' (APA 2013) <https://www.psychiatry.org/file%20library/psychiatrists/practice/dsm/apa_dsm-5-gender-dysphoria.pdf> accessed 10 September 2025

American Psychiatric Association, 'History and Epidemiology' (2017)

American Psychiatric Association, 'History and Epidemiology' in *A Guide for Working With Transgender and Gender Nonconforming Patients* (APA, November 2017) <https://www.psychiatry.org/psychiatrists/diversity/education/transgender-and-gender-nonconforming-patients/history-and-epidemiology> accessed 10 September 2025

American Psychiatric Association, 'What Is Gender Dysphoria?'

American Psychiatric Association, 'What Is Gender Dysphoria?' (APA) <https://www.psychiatry.org/patients-families/gender-dysphoria/what-is-gender-dysphoria> accessed 1 December 2023

American Psychological Association, 'Understanding What Is Sexual Orientation and Homosexuality'

American Psychological Association, 'Understanding What Is Sexual Orientation and Homosexuality' <https://www.apa.org/topics/lgbtq/orientation> accessed 1 October 2024

Attorney-General's Department, *Australian Government Guidelines on the Recognition of Sex and Gender* (2013)

> Australian Government, Attorney-General's Department, *Australian Government Guidelines on the Recognition of Sex and Gender* (1 July 2013, last updated 18 November 2015) <https://www.ag.gov.au/rights-and-protections/human-rights-and-anti-discrimination/australian-government-guidelines-recognition-sex-and-gender> accessed 25 November 2025

Centre for Human Rights, University of Pretoria, *A Guide to LGBTIQ-Rights in the UN and Africa* (2022)

> Centre for Human Rights, University of Pretoria, *A Guide to LGBTIQ-Rights in the UN and Africa* (27 September 2022) <https://www.chr.up.ac.za/images/researchunits/sogie/documents/A_Guide_to_LGBTIQ_Rights_in_the_UN_and_Africa_V3_27.09.2022_1.pdf> accessed 1 November 2025

Centre for Human Rights, 'SOGIESC Unit: Fact Sheet on Intersex Persons Rights'

> Centre for Human Rights, University of Pretoria, 'SOGIESC Unit: Fact Sheet on Intersex Persons Rights' <https://www.chr.up.ac.za/the-intersex-project/32-units/sogiesc/281-sogiesc-intersex-rights> accessed 1 September 2024

CGE, *Submission to the Office of the High Commissioner for Human Rights on Intersex Persons* (2024)

> Commission for Gender Equality, *Submission to the Office of the High Commissioner for Human Rights on Intersex Persons* (November 2024) <https://www.cge.org.za> accessed 10 September 2025

Collison, 'Victory for Transgender Learner in Limpopo'

> Collison C, 'Victory for Transgender Learner in Limpopo — a Long Time Coming?' *Daily Maverick* (24 March 2017) <https://www.dailymaverick.co.za/article/2017-03-24-victory-for-transgender-learner-in-limpopo-a-long-time-coming/> accessed 15 November 2025

Community Based Research Centre, 'Gender Affirming Care Services in Canada by Territory/Province'

> Community Based Research Centre, 'Gender Affirming Care Services in Canada by Territory/Province' <https://www.cbrc.net/gender_affirming_care_services_in_canada_by_province_territory> accessed 1 October 2024

Democratic Alliance, 'R23.6 Billion Paid in Medical-Legal Claims from 2020 to Date'

> Democratic Alliance, 'R23.6 Billion Paid in Medical-Legal Claims from 2020 to Date – a Red Herring for NHI' (DA, 12 March 2024) <https://www.da.org.za/2024/03/r23-6-billion-paid-in-medical-legal-claims-from-2020-to-date-a-red-herring-for-nhi> accessed 20 September 2025

Department of Health and Social Care, 'Support for Adults Facing Staggering Waits for Gender Services' (2025)

> Department of Health and Social Care, NHS England and Streeting W MP, 'Support for Adults Facing Staggering Waits for Gender Services' (GOV.UK, 15 September 2025) <https://www.gov.uk/government/news/support-for-adults-facing-staggering-waits-for-gender-services> accessed 25 November 2025

Department of Justice Canada, *A Qualitative Look at Serious Legal Problems: Trans, Two-Spirit, and Non-Binary People in Canada* (2022)

> Department of Justice Canada, *A Qualitative Look at Serious Legal Problems: Trans, Two-Spirit, and Non-Binary People in Canada* (2022) J4-108/2022E-PDF <https://www.justice.gc.ca/eng/rp-pr/jr/qll-vqv/qll-vqv.pdf> accessed 20 November 2025

Deyi, Khwesa and Theron, 'Briefing Paper — Alteration of Sex Description Act 49 of 2003'

> Deyi B, Khwesa S and Theron L and others, 'Briefing Paper — Alteration of Sex Description Act 49 of 2003' <https://www.transgendermap.com/wp-content/uploads/sites/7/2019/05/LRC-act49-2015-web.pdf> accessed 1 October 2023

DSC Attorneys, '4 Most Common Types of Medical Malpractice in South Africa' (2021)

> DSC Attorneys, '4 Most Common Types of Medical Malpractice in South Africa' (DSC Attorneys, 2 September 2021) <https://www.dsclaw.co.za/articles/4-most-common-types-of-medical-malpractice-in-south-africa/> accessed 20 September 2025

Fisher, 'A Progressive Constitution'

> Fisher R, 'A Progressive Constitution' *Business Media Mags* (17 October 2014) <https://businessmediamags.co.za/xtrending/a-progressive-constitution/> accessed 25 September 2025

HBIGDA, *Standards of Care for Gender Identity Disorders* (1st edn, 1979)

> Harry Benjamin International Gender Dysphoria Association, *The Standards of Care for Gender Identity Disorders* (1st edn, HBIGDA 1979)

IRCC, 'How Do I Change the Sex or Gender Identifier on My Application or Document?'

> Immigration, Refugees and Citizenship Canada (IRCC), 'How Do I Change the Sex or Gender Identifier on My Application or Document?' (Canada.ca – IRCC Help Centre) <https://ircc.canada.ca/english/helpcentre/answer.asp?qnum=1253&top=32> accessed 20 November 2025

Interim Gender Dysphoria Protocol and Service Guideline (2013/14)

Interim Gender Dysphoria Protocol and Service Guideline (2013/14) <https://www.gires.org.uk/interim-nhs-england-gender-dysphoria-protocol-and-guideline-201314/> accessed 1 October 2024

Iranti, 'Nare Mphela: A Life of Courage Remembered' (2025)

Iranti, 'Nare Mphela: A Life of Courage Remembered' (20 November 2025) <https://www.iranti.org.za/nare-mphela-a-life-of-courage-remembered> accessed 15 November 2025

Judicial Commission of NSW, *Equality before the Law Bench Book* (2025)

Judicial Commission of New South Wales, *Equality before the Law Bench Book* (APR 25 – EQBB 26, Judicial Commission of NSW 2025) <https://www.judcom.nsw.gov.au/publications/benchbks/equality/> accessed 25 November 2025

Lambert, 'Tories Call for Changes to Manitoba Bill'

Lambert S, 'Tories Call for Changes to Manitoba Bill Adding Gender Expression to Human Rights Code' *CBC News* (19 March 2025) <https://www.cbc.ca/news/canada/manitoba/manitoba-gender-expression-1.7487048> accessed 20 November 2025

Masiteng, 'SA’s Constitution Remains One of the Most Progressive in the World'

Masiteng M, 'SA’s Constitution Remains One of the Most Progressive in the World' *SABC News* (3 November 2024) <https://www.sabcnews.com/sabcnews/sas-constitution-remains-one-of-the-most-progressive-in-the-world/> accessed 13 November 2024

MedicalBrief, 'R3 m Suit over Botched Gender Reassignment Op at JHB Hospital' (2019)

MedicalBrief, 'R3 m Suit over Botched Gender Reassignment Op at JHB Hospital' *MedicalBrief* (2 October 2019) <https://www.medicalbrief.co.za/r3m-suit-over-botched-gender-reassignment-op-at-jhb-hospital/> accessed 10 September 2025

Molelekwa, 'South Africa’s Medical Negligence Crisis' (2024)

Molelekwa T, 'South Africa’s Medical Negligence Crisis' *Think Global Health* (3 October 2024) <https://www.thinkglobalhealth.org/article/south-africas-medical-negligence-crisis> accessed 20 September 2025

National Department of Health, *National Clinical Guideline for Implementation of the Choice on Termination of Pregnancy Act* (2019)

National Department of Health, Republic of South Africa, *National Clinical Guideline for Implementation of the Choice on Termination of Pregnancy Act*

(1st edn, National Department of Health 2019) <https://www.knowledgehub.org.za> accessed 25 September 2025

National Department of Health, *National Integrated Sexual and Reproductive Health and Rights Policy* (2019)

National Department of Health, Republic of South Africa, *National Integrated Sexual and Reproductive Health and Rights Policy* (National Department of Health 2019) <https://www.knowledgehub.org.za> accessed 25 September 2025

OJEN, *In Brief: Canadian Charter of Rights and Freedoms* (2013)

Ontario Justice Education Network (OJEN), *In Brief: Canadian Charter of Rights and Freedoms* (PDF, OJEN 2013) <https://ojen.ca/wp-content/uploads/In-Brief_Canadian-Charter-of-Rights-and-Freedoms.pdf> accessed 20 November 2025

OWJN, *Making Gender and Name Changes on Identity Documents* (2020)

Ontario Women's Justice Network (OWJN), *Making Gender and Name Changes on Identity Documents: A Legal Resource for Two-Spirit, Nonbinary and Trans Communities* (2020) <https://owjn.org/gender-name-change/> accessed 20 November 2025

Public Health Agency of Canada, 'How to Access Gender-Affirming Care: Options' (2024)

Public Health Agency of Canada, 'How to Access Gender-Affirming Care: Options' (Canada.ca, 26 September 2024) <https://www.canada.ca/en/public-health/services/sexual-health/how-to-access-gender-affirming-care/options.html> accessed 20 November 2025

Public Health Scotland, 'NHS Gender Identity Clinics: Waiting Times' (2024)

Public Health Scotland, 'NHS Gender Identity Clinics: Waiting Times for First Outpatient Consultation. April 2023 to March 2024. An Official Statistics in Development Release for Scotland' (5 November 2024) <https://www.publichealthscotland.scot/publications/nhs-gender-identity-clinics-waiting-times-for-first-outpatient-consultation/nhs-gender-identity-clinics-waiting-times-for-first-outpatient-consultation-5-november-2024/> accessed 25 November 2025

Rawson, 'What’s in a Word? The Challenges of "Transgender"'

Rawson KJ, 'What’s in a Word? The Challenges of “Transgender”' *The Conversation* (27 May 2015) <https://theconversation.com/whats-in-a-word-the-challenges-of-transgender-38633> accessed 1 September 2025

SANAC, 'In-Depth: The Incredibly Long Wait for Gender-Affirming Surgery' (2021)

South African National AIDS Council, 'In-Depth: The Incredibly Long Wait for Gender-Affirming Surgery for Those Who Can’t Pay' (SANAC, 16 September

2021) <https://www.sanac.org.za/in-depth-the-incredibly-long-wait-for-gender-affirming-surgery-for-those-who-cant-pay/> accessed 1 September 2025

The Center for Bioethics & Human Dignity, 'Human Dignity'

The Center for Bioethics & Human Dignity, 'Human Dignity' (CBHD) <https://www.cbhd.org/issues/human-dignity> accessed 25 September 2025

The Weimar Project, 'About the Term "Transvestite"'

The Weimar Project, 'About the Term "Transvestite"' (The Weimar Project, nd) <https://theconversation.com/whats-in-a-word-the-challenges-of-transgender-38633> accessed 1 September 2025

UK Government, *New Government Restrictions on the Use of Puberty-Suppressing Hormones (Puberty Blockers)* (2024)

UK Government, *New Government Restrictions on the Use of Puberty-Suppressing Hormones (Puberty Blockers): Information for Prescribers and Pharmacists/Dispensing Doctors* (Department of Health and Social Care/NHS England, 3 June 2024) <https://www.gov.uk/government/news/new-restrictions-on-puberty-blockers> accessed 25 November 2025

United States Holocaust Memorial Museum, 'Magnus Hirschfeld'

United States Holocaust Memorial Museum, 'Magnus Hirschfeld' (Holocaust Encyclopedia, 17 December 2021) <https://encyclopedia.ushmm.org/content/en/article/magnus-hirschfeld-2> accessed 1 September 2025

Youth Policy Committee Gender Working Group, 'Hate Crimes Against Members of the LGBTQIA+ Community in South Africa'

Youth Policy Committee Gender Working Group, 'Hate Crimes Against Members of the LGBTQIA+ Community in South Africa' <https://saiia.org.za/youth-blogs/hate-crimes-against-members-of-the-lgbtqia-community-in-south-africa/> accessed 1 October 2024

ETHICAL CLEARANCE

College of Law_RERC

NHREC Registration # : (if applicable)
Ref #: 6337
Name: Ms Thabang Monyela
Student #: 55556809
Staff #:

Date: 03/03/2025

Dear: Ms Thabang Monyela

Decision: Ethics Approval from 03/03/2025 to 03/03/2028

Researcher: Ms Thabang Monyela

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Supervisor: Professor Melodie Labuschaigne slabbmn@unisa.ac.za

Co-Supervisor: Mr Frans Mahlobogwane mahlofm@unisa.ac.za

LLM RESEARCH PROPOSAL : The legal framework relevant to the provision of gender-affirming health care in South Africa: a comparative analysis

Qualification: LLM

Thank you for the application for research ethics clearance by the College of Law_RERC for the above mentioned research study Ethics approval is granted for three years.

The **negligible risk application** was **reviewed** by College of Law_RERC on 03/03/2025 in compliance with the Unisa Policy on Research Ethics and the Standard Operating Procedure on Research Ethics Risk Assessment.

The proposed research may now commence with the provisions that:

1. The researcher(s) will ensure that the research project adheres to the values and principles expressed in the UNISA Policy on Research Ethics.
2. Any adverse circumstance arising in the undertaking of the research project that is relevant to the ethicality of the study should be communicated in writing to the College of Law_RERC .
3. The researcher(s) will conduct the study according to the methods and procedures set out in the approved application.
4. Any changes that can affect the study-related risks for the research participants, particularly in terms of assurances made with regards to the protection of participants' privacy and the confidentiality of the data, should be reported to the Committee in writing, accompanied by a progress report.

5. The researcher will ensure that the research project adheres to any applicable national legislation, professional codes of conduct, institutional guidelines and scientific standards relevant to the specific field of study. Adherence to the following South African legislation is important, if applicable: Protection of Personal Information Act, no 4 of 2013; Children's act no 38 of 2005 and the National Health Act, no 61 of 2003.

6. Only de-identified research data may be used for secondary research purposes in future on condition that the research objectives are similar to those of the original research. Secondary use of identifiable human research data requires additional ethics clearance.

7. No field work activities may continue after the expiry date (03/03/2028). Submission of a completed research ethics progress report will constitute an application for renewal, for Ethics Research Committee approval.

Additional Conditions

1. Disclosure of data to third parties is prohibited without explicit consent from Unisa.
2. De-identified data must be safely stored on password protected PCs.
3. Care should be taken by the researcher when publishing the results to protect the confidentiality and privacy of the university.
4. Adherence to the National Statement on Ethical Research and Publication practices, principle 7 referring to Social awareness, must be ensured: "Researchers and institutions must be sensitive to the potential impact of their research on society, marginal groups or individuals, and must consider these when weighing the benefits of the research against any harmful effects, with a view to minimising or avoiding the latter where possible." Unisa will not be liable for any failure to comply with this principle.

Note

The reference number 6337 should be clearly indicated on all forms of communication with the intended research participants, as well as with the Committee.

Kind regards,



Prof TO Magadze
Chair of College of Law_RERC
E-mail: magadto@unisa.ac.za



Prof Budeli-Nemakonde
Executive Dean / By delegation from the Executive Dean of College of Law_RERC
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