



# Legal Gender Recognition in Lesotho.

An analysis of law and policy in the context of international best practice



## About the People's Matrix Association

The People's Matrix Association (commonly known as Matrix), is the only known LGBTI organisation that exists in Lesotho. The registration of the Matrix marked 'official' recognition that sexual and gender minorities exist in Lesotho. Matrix's work includes advocating and lobbying for LGBTI human rights and implementing programming in partnership with other organisations with complementary objectives, such as human rights or public health-focused organisations.

## About Women and Law Southern Africa – Lesotho

Women and Law in Southern Africa Research and Education Trust - Lesotho is a local chapter of the regional Women and Law in Southern Africa Research and Education Trust (WLSA). WLSA's mission is to contribute to the socio-economic, political and legal advancement of women and children specifically in the WLSA countries through: Collaborative strategic and action research in the socio-legal field; Lobbying for legal reforms and policy changes on laws and practices that discriminate and disadvantage women; Improving legislation that protects women's legal rights; Enhancing justice sector capacity to interpret and enforce women's legal rights; Strengthening civil society's ability to advocate for women's legal rights; and increasing public awareness of women's legal rights.

## About the Southern Africa Litigation Centre

The Southern Africa Litigation Centre (SALC), established in 2005, aims to provide support to human rights and public-interest advocacy and litigation undertaken by domestic lawyers and human rights organisations in Southern Africa. SALC works in Angola, Botswana, Democratic Republic of Congo, Lesotho, Malawi, Mozambique, Namibia, Eswatini, Tanzania, Zambia and Zimbabwe.

# Authorship & Acknowledgement

This report was researched and written by Prof Alex Müller from the University of Cape Town, with legal input from the Southern Africa Litigation Centre (SALC). We want to thank all the individuals who gave their time to take part in the community consultations for this report. The research was made possible through the support of the Global Equality Fund.

## SOUTHERN AFRICA LITIGATION CENTRE

Second Floor, President Place  
1 Hood Avenue, Rosebank  
Johannesburg  
South Africa 2196

**e-mail:** [info@salc.org.za](mailto:info@salc.org.za)  
**tel:** +27 (0) 10 596 8538  
[www.southernafricalitigationcentre.org](http://www.southernafricalitigationcentre.org),  
**twitter:** @follow\_SALC

Electronic copies of this report can be found at: [www.southernafricalitigationcentre.org](http://www.southernafricalitigationcentre.org).



# Legal Gender Recognition **in Lesotho.**

An analysis of law and policy in the context of international best practice



# List of acronyms

<b>ACHPR</b>	African Commission for Human and Peoples' Rights
<b>AIDS</b>	Acquired Immunodeficiency Syndrome
<b>AMA</b>	American Medical Association
<b>APA</b>	American Psychiatric Association
<b>CEDAW</b>	Convention on the Elimination of All Forms of Discrimination against Women
<b>DSM</b>	Diagnostic and Statistical Manual of Mental Disorders
<b>HIV</b>	Human Immunodeficiency Virus
<b>HRC</b>	United Nations Human Rights Council
<b>ICCPR</b>	International Covenant on Civil and Political Rights
<b>ICD</b>	International Classification of Diseases
<b>ICESCR</b>	International Covenant on Economic, Social and Cultural Rights
<b>LEA</b>	Legal Environment Assessment
<b>LGBTI</b>	Lesbian, Gay, Bisexual, Transgender and Intersex
<b>MSM</b>	Men who have sex with men
<b>NGO</b>	Non-governmental organisation
<b>SDGs</b>	Sustainable Development Goals
<b>SOC</b>	Standards of Care
<b>SOGIE</b>	Sexual orientation and gender identity and expression
<b>STI</b>	Sexually transmitted infection
<b>UDHR</b>	Universal Declaration of Human Rights
<b>UN</b>	United Nations
<b>WHO</b>	World Health Organization
<b>WPATH</b>	World Professional Association for Transgender Health
<b>YP</b>	Yogyakarta Principles

# contents

List of acronyms	2
Understanding gender identity and gender affirmation	3
Introduction	5
What is legal gender recognition?	6
Why is legal gender recognition important?	6
The experiences of transgender and gender non-conforming people in Lesotho	7
Defining sex, gender and gender affirmation	9
Sex	9
Gender	9
Gender affirmation	10
From 'sex change' to gender affirmation: understanding the change in terminology	10
From pathology to self-determination	11
What is gender affirming care?	12
Social gender affirmation	13
Psychological gender affirmation	13
Medical gender affirmation	13
<i>Hormonal gender affirmation</i>	14
<i>Surgical gender affirmation</i>	14
<i>Voice and communication therapy</i>	15
Legal gender affirmation and recognition	15
The benefits of gender affirmation	15
Review of international principles around legal gender recognition and affirmation	16
The right to legal recognition (YP-31)	16
The right to privacy (YP-6)	17
The right to the highest attainable standard of health (YP-17)	17
The right to freedom of opinion and expression (YP-19)	18
Overview of relevant laws in Lesotho	18
The Constitution of 1993	18
<i>The right to dignity</i>	19
<i>The right to non-discrimination</i>	20
<i>Equality before the law</i>	20
<i>Freedom of movement</i>	20
<i>Freedom from inhuman and degrading treatment</i>	21
<i>Freedom from arbitrary search or entry</i>	21
<i>Right to respect for private and family life</i>	21

<i>Freedom of expression</i>	21
<i>Right to participate in government</i>	22
<i>Principles of State policy</i>	22
The Registration of Births and Deaths Act No. 22 of 1973	22
The National Identity Cards Act No. 9 of 2011	23
The Lesotho Passports and Travel Documents Act No. 5 of 2018	23
The Data Protection Act No. 5 of 2012	23
The Children's Protection and Welfare Act No. 7 of 2011	24
The Education Act No. 3 of 2010	24
The Sexual Offences Act No. 3 of 2003	24
<b>Conclusion</b>	24
<b>Recommendations</b>	25
Interpreting the National Identity Cards Act of 2011	25
Interpreting the Registration of Births and Deaths Act of 1973	25
Guidelines for the interpretation of the Registration of Births and Deaths Act of 1973	25
Recommendations for law and policy reform	26
<b>References</b>	26
Articles and reports	26
Laws and policies	28
Case law	28



# Understanding gender identity and gender affirmation: definitions and key concepts

<b>Cisgender</b>	Describes a person whose sense of personal identity and gender corresponds with the sex assigned to them at birth.
<b>Gender</b>	Gender refers to the socially constructed roles, behaviours, expressions, and identities of girls, women, boys, men, and gender diverse people. It influences how people perceive themselves and each other, how they act and interact, and the distribution of power and resources in society. Gender is usually conceptualized as a binary (girl/woman and boy/man), yet there is considerable diversity in how individuals and groups understand, experience, and express it <sup>1</sup>
<b>Gender affirmation</b>	The process in which transgender or gender diverse people have their gender affirmed or recognized.
<b>Gender affirming care, gender affirming healthcare</b>	Healthcare provided to support a transgender or gender diverse person's gender affirmation. This can include hormonal treatment, surgical interventions, as well as psychosocial support, hair removal and speech therapy.
<b>Gender affirming practices</b>	The steps taken by a transgender or gender diverse person to affirm their gender socially, psychologically, medically and/or legally. This includes their gender expression, any form of gender affirming healthcare they might use, and steps towards legal gender recognition.
<b>Gender expression</b>	The presentation of a person's gender through physical appearance and behaviour – including dress, hairstyles, accessories, cosmetics – and mannerisms, speech, behavioural patterns, names, and personal references <sup>2</sup> . A person's gender expression may or may not conform to that person's gender identity.
<b>Gender identity</b>	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 involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech, and mannerisms <sup>3</sup>
<b>Gender marker</b>	The code used on identity documents, passports, or other State-issued documents that signifies someone's sex assigned at birth. Usual options are (M) for male, (F) for female, or (X) for non-disclosed or non-binary.
<b>Gender non-conforming</b>	A person whose gender identity and/or gender expression does not conform to typical feminine or masculine identity or expression.
<b>Legal gender recognition</b>	The process through which transgender and gender non-conforming people are able to ensure that their official documents, such as identity documents, driver's licenses, and school certificates, reflect their actual gender identity rather than the sex assigned to them at birth.

<sup>1</sup> Canadian Institute of Health Research: Definitions of Sex and Gender.

<sup>2</sup> Yogyakarta Principles plus 10 (2017).

<sup>3</sup> Preamble, Yogyakarta Principles (2007).

<b>Sex</b>	Sex refers to a set of biological attributes in humans and animals. It is primarily associated with physical and physiological features including chromosomes, gene expression, hormone levels and function, and reproductive/sexual anatomy. Sex is usually categorized as female or male but there is variation in the biological attributes that comprise sex and how those attributes are expressed <sup>4</sup>
<b>Sex assigned at birth</b>	The assignment and classification of people as male, female, intersex, or another sex assigned at birth, often based on physical anatomy at birth and/or karyotyping.
<b>Sex change</b>	An outdated term for gender affirmation.
<b>Sex change operation</b>	An outdated term for gender affirming surgery.
<b>Transgender</b>	An umbrella term for people whose gender identity and/or expression is different from cultural expectations based on the sex they were assigned at birth. Being transgender does not imply any specific sexual orientation. Therefore, transgender people may identify as straight, gay, lesbian, bisexual, etc <sup>5</sup>
<b>Transgender man</b>	A person who identifies as a man but was assigned a female sex at birth.
<b>Transgender woman</b>	A person who identifies as a woman but was assigned a male sex at birth.
<b>Transitioning</b>	Undergoing the process of gender affirmation. Most often used in relation to medical gender affirmation.



<sup>4</sup> Canadian Institute of Health Research: Definitions of Sex and Gender.

<sup>5</sup> Glossary on Gender Identity and Sexual Orientation.



# Introduction

Legal gender recognition affects a person's recognition and protection before the law and ability to navigate through areas of daily life. It refers to transgender people's ability to obtain official identification documents that reflect their name and gender identity, through legal and administrative processes. These processes include changing names and gender markers on identification documents and administrative records, such as birth certificates, identity cards, passports, driver's licenses, and educational and employment records. Identification documents are increasingly required for many activities in daily life, including routine tasks such as collecting a parcel from the post office or buying bus or airplane tickets. A transgender person's ability to live in dignity, equality, and security is severely compromised if they do not have an identity document that matches their gender identity, and that instead lists their title, name, sex, and/or gender based on the sex assigned to them at birth.

This research brief provides information and guidance on the interpretation of the legal framework and the challenges faced by transgender and gender non-conforming people in obtaining legal gender recognition in Lesotho.

This brief is written to support engagements around legal gender recognition, between the government of Lesotho and organisations advocating for the rights of lesbian, gay, bisexual, transgender, and intersex (LGBTI) individuals in Lesotho. The brief aims to provide empirical evidence based on up-to-date international scientific understanding and best practices, on issues pertaining to legal gender recognition, including changing 'sex' or 'gender' markers on identity documents. To contextualise these issues, the brief explains the relationship between sex and gender, gender affirming practices and gender affirming healthcare, as well as international best practices related to the legal affirmation of sex or gender.

The brief is meant to assist the government of Lesotho to interpret its legal and policy framework in accordance with international standards and current understandings of gender identity and gender affirmation.

The brief was developed in consultation with organisations representing the interests of LGBTI persons and persons who identify as transgender, gender non-conforming, or gender diverse, who met for a consultative meeting in Maseru on 1 October 2019.

## Case study

In 2018, a transgender man approached the Lesotho Ministry of Home Affairs with the request to change the gender marker in his identity document from female to male, to be aligned with his gender identity. His current identity documents list his gender marker as 'female,' but this does not match his gender identity or his physical appearance. In his application, he explained that he is a man, and that he seeks to change the gender marker on his identity and travelling documents from female to male, so that his documents reflect his gender identity. The application was accompanied by letters from two medical professionals, who confirmed that the applicant was born with female sex characteristics, that he identified as a man and had undergone hormonal and surgical gender affirming treatment.

The Ministry of Home Affairs denied the application. In its response, it referred to the Registration of Births and Deaths Act of 1973, as well as the National Identity Cards Act of 2011, and pointed out that both Acts refer to sex, and not gender. It elaborated that under the Registration of Births and Deaths Act of 1973, it is mandated to amend details in the National Register for applicants who have undergone 'sex change operations' while the applicant had gender affirming surgery.

As we will show in our brief, a contemporary interpretation of the Registration of Births and Deaths Act of 1973 would mandate the government of Lesotho to amend the details of the applicant, so that his identity and travelling documents reflect his gender identity (a man).

## What is legal gender recognition?

Legal gender recognition is about a person's recognition and protection before the law and their ability to navigate through areas of daily life. It refers to transgender and gender non-conforming people's ability to obtain official identification documents that reflect their name and gender identity, through legal and administrative processes. These processes include changing name details and gender markers on identification documents and administrative records, such as birth certificates, identity cards, passports, driver's licenses, and educational and employment records.

Identification documents are increasingly required for many activities in daily life, including routine tasks such as collecting a parcel from the post office or buying bus or airplane tickets. A transgender person's ability to live in dignity, equality, and security is severely compromised if they do not have an identity document that matches their gender identity, and that instead lists their title, name, sex and/or gender based on the sex assigned to them at birth.

### Why is legal gender recognition important?

A recent analysis by the Legal Resources Centre in Cape Town, South Africa shows why it is important for transgender people to be able to change their gender markers and possess identity documents that match their gender identity. Transgender people whose gender does not fit the sex/gender listed in their identity documents are vulnerable to discrimination and stigmatization wherever they are required to show an identity document for verification of their identity. This can involve threats of violence, or mean that they face denials of travel, bank accounts and healthcare, and are often unable to fully participate in the civil and political life of their country. Often, identity verification is required at times when people are particularly vulnerable, including when faced with a medical emergency, when they are homeless, or when they are crossing borders. As the report states:

*"The mismatch between the physical appearance of transgender individuals and their identity documentation has numerous consequences on their ability to conduct day-to-day life. It was noted earlier that the gender mis-match between the identity documentation and the appearance of the individuals has resulted in accusations of fraud and refusals of, for example, bank services."*<sup>6</sup>

This has also been acknowledged by the Botswana High Court in *ND v Attorney General of Botswana and Others*,<sup>7</sup> when it noted with concern the ongoing distress and discomfort experienced by transgender persons when they are required to explain intimate details of their life to strangers whenever they seek to access routine services. The High Court of Botswana observed that the lack of legal recognition amounts to an invasion of the right to privacy, and that arbitrary interference or embarrassment and the intrusion of privacy faced by transgender persons may be avoided or minimised by the State by allowing them to change the gender marker on their identity documents.

The legal recognition of gender identity permits transgender people to align their identity documents with their expressed gender or gender identity and is an important step towards the realisation of the fundamental rights of transgender persons. To this end, legal gender recognition has been identified as a crucial step for achieving a number of Sustainable Development Goals (SDGs),<sup>8</sup> including gender equality, ensuring healthy lives and fulfilling the commitment to "leave no one behind"<sup>9</sup> Following the principle of self-determination, any person who wishes to access legal gender recognition should be able to do so.

<sup>6</sup> Legal Resources Centre and Gender Dynamix (2015).

<sup>7</sup> *ND v Attorney General MAHGB-000449-11* (unreported, delivered on 29 September 2017. ("ND"))

<sup>8</sup> United Nations (2015).

<sup>9</sup> UNDP & APTN (2017).

# The experiences of transgender and gender non-conforming people in Lesotho

The recent 'Are we doing alright?' study sheds light on the lived experiences of transgender and gender non-conforming people in Lesotho<sup>10</sup>. The study was conducted by the University of Cape Town in South Africa, in partnership with The People's Matrix Association in Lesotho. The study shows that transgender and gender non-conforming people in Lesotho often experience discrimination and violence because of their gender identity.

Of the 57 transgender and gender non-conforming people in the study, less than half (49%) were employed. Four in five (81%) said that they did not have sufficient funds to cover their everyday needs. One quarter (27%) had hidden health concerns from their healthcare provider because they were afraid to disclose their gender identity. Almost half said that because of their gender identity, they had been treated disrespectfully at a healthcare facility (48%), two in five (41%) said they had been insulted at a healthcare facility, and one third (36%) had been denied healthcare because of their gender identity. The Assessment of the HIV Legal and Policy Environment report of the United Nations Development Programme and the Lesotho Ministry of Law, Constitutional Affairs and Human Rights confirms these findings, and also states that:

*"MSM [men who have sex with men] and transgender women reported verbal and physical abuse on the basis of their sexual orientation or gender identity."<sup>11</sup>*

At the same time, the 'Are we doing alright?' study suggests that transgender and gender non-conforming people might be at higher risk of experiencing violence and mental ill-health, compared to the general population<sup>12</sup>. Three quarters (72%) had experienced

verbal harassment because of their gender identity, two in five (40%) had experienced physical violence and one in five (22%) had experienced sexual violence.<sup>13</sup>

The same study showed that mental health concerns were high among transgender and gender non-conforming people in Lesotho<sup>14</sup>. Between half and two-thirds showed signs of depression (67% among transgender women, 48% among transgender men and 60% among gender non-conforming people).<sup>15</sup> Between 20% and 60% showed signs of moderate or severe anxiety (20% among transgender women, 27% among transgender men and 60% among gender non-conforming people).<sup>16</sup> Many had attempted suicide: one in three transgender women (33%), one in six transgender men (16%) and three in five gender non-conforming people (60%).<sup>17</sup>

International research, as well as research from Lesotho, suggests that not being able to change one's gender marker has an impact on access to healthcare and mental health and wellbeing. The 'Are we doing alright' study showed that more than one in three transgender people in Lesotho (36%) had been denied access to healthcare.<sup>18</sup> This is, at least in part, linked to not being able to change one's gender marker in the identity documents, and thus not having an identity document that matches one's gender identity and gender expression.<sup>19</sup> Section 16 of the National Identity Cards Act of 2011 states that:

*"No person who is eligible to have an identity card shall access all services unless the person produces his or her identity card issued in accordance with this Act."*

This effectively means that transgender people, whose gender identity and expression is different from the sex assigned to them at birth and from what is recorded on their identity document, cannot access services without the risk of denial or discrimination (because they would immediately be outed as being transgender) or accusations of fraud (if it is believed that the identity document they are producing is not their own). A recent analysis by The Other Foundation confirms this:

<sup>10</sup> Müller, A., Daskilewicz, K. and the Southern and East African Research Collective on Health (2019).

<sup>11</sup> UNDP & Lesotho Ministry of Law, Constitutional Affairs and Human Rights (2016), page 61.

<sup>12</sup> Müller, A., Daskilewicz, K. and the Southern and East African Research Collective on Health (2019), page 38; recent research from Lesotho further emphasises that mental ill health and experiences of violence among LGBT people are a result of contexts of social exclusion and stigma [see Logie, C.H., Perez-Brumer, A., Mothopeng, T., Latif, M.,

Ranotsi, A. and Baral, S.D. (2020)].

<sup>13</sup> Müller, A., Daskilewicz, K. and the Southern and East African Research Collective on Health (2019), page 36-37.

<sup>14</sup> Id.

<sup>15</sup> Id., page 49.

<sup>16</sup> Id., page 51.

<sup>17</sup> Id., page 53.

<sup>18</sup> Id., page 35.

<sup>19</sup> The Other Foundation (2017).

*"The inability to obtain official documentation affects trans people's access to health services and creates potentially unsafe situations by 'outing' individuals in spaces where it is unsafe to do so. Similarly, this affects transgender people who wish to travel out of the country as their passports do not reflect their gender identity, enabling discrimination and increasing their vulnerability."<sup>20</sup>*

At a consultation with community organisations and transgender individuals in Maseru,<sup>21</sup> people shared examples of how having an identity document that does not reflect one's gender identity or gender expression poses significant barriers to participating in daily life:

One person told the story of a person who was not allowed to open a bank account because their identity document did not match their gender:

*"Last month we were in Thaba Bosiu and we had a case where someone was not able to open a bank account because of gender marker and looks."*

A transgender woman remembered how she could not travel internationally because her passport said she was male, while she identified as, and looked like, a woman:

*"I was crossing the border, and the officials at the border said to me 'Your identity says that you're a male, but you don't look like a male person. Why don't you change this?' Because in countries like Australia you can't travel looking like this, and then your gender marker is male. So that guy told me 'If you want to go to Australia, you won't go through at the boarding gates - because you're male but you look like a female.'"*

A transgender man explained that he and his female partner were not allowed to adopt a child, because according to his identity document, he was female, and the officials claimed that adoptions were only allowed for male-female couples:

*"I love kids, and I want to have one. I've tried so many ways that you can think of, spending a lot of money when it comes to the baby. It happened that late in 2015 we began to do the IVF process with my partner - and it was so stressful, because you spend a lot of money on that process, and apparently it failed, with the*

*pain that we went through, with every emotion that you can think of. Then I decided to go to the government for adoption's sake, then when we went there it was OK - they saw a male, and a female, up until we had to present our documents, then they said no, this is not acceptable. Then what we requested was - so what should we do in this case? Because we were already in the process, up until when you saw the documents, that this is a female and a female. Then they said no."*

Another transgender man remembered an instance when he could not book a bus ticket because the booking agent did not believe that he was using his own credit card:

*"I wanted to book a bus home, so I wanted to pay with my credit card, and the lady said no, I'm not going to help you pay with somebody else's card, you'd rather go draw money, and I said, 'how do you know it's not my card?' That was before I changed my credit card - it still said Miss then, so she didn't want to help me because she thought it was somebody else's credit card."*

A gender non-conforming person spoke about their gender identity being forcibly disclosed through their documents (which did not match their gender expression) when they went for a job interview:

*"I went for an interview. I passed at 90%, then I went to collect the offer, which I accepted. Later on, I was called to the office, they didn't tell me about the agenda of the meeting. When I entered the room, there were a lot of professional counsellors. They didn't tell me what they were going to talk about. But to my surprise, I learnt that they were going to talk about my gender identity. I didn't tell them who I am, they had my documents. I didn't say anything, I didn't even entertain the meeting. As soon as I found out the agenda of the meeting I said no, let me decline the offer - if you're going to crucify me about my gender identity. So - it was a challenge because I learnt that most of the people are unemployed, because of their gender identity. If you're not strong enough, if you don't know who you are and what you want, we're going to stay at home and be poor."*

<sup>20</sup> Id.

<sup>21</sup> Community consultation by the authors of the research brief, Maseru, 1 October 2019.

Another transgender man emphasised how not having an identity document that matches his gender identity denies him economic opportunities, because it opens the door to discrimination when his identity document discloses his gender identity:

*"I own my own company, and when you go to these private meetings – with the secretaries, with whoever, and you would have the potential to do a certain job, [...]. So when you are on those tenders striving to get money or to get a job, the only thing that will make you to fail is by the time they recognise that no, this person is not a male as we perceive, it's a female. [...] Some of our brothers and sisters are there at home, because they have the fear to come forward, they have the fear to fight and say 'no, this is me – and if you're not going to respect me, we are done.'"*

These examples show the manifold difficulties that transgender people in Lesotho experience when their gender identity and expression do not match their identity document. But besides impeding access to healthcare, travel, bank accounts, and other civic rights, not having an identity document that matches one's gender identity and gender expression also increases the risk of experiencing violence and mental health issues. This is explained further in the section 'The benefits of gender affirmation'. Because transgender and gender non-conforming people in Lesotho cannot change their gender marker in their identity documents, as the case study has shown, it is very likely that at least some of the mental health burden that has been described in the 'Are we doing alright?' study is due to this.<sup>22</sup>

In order to ensure that all people in Lesotho, including transgender people, have full access to all public services and can fully participate in civic life, they need to be able to change the sex/gender marker on their identity documents to match their gender identity and expression. The following section explains the current legislation and shows how, under Lesotho's current laws, a change of sex/gender marker would actually be possible if the law was interpreted in a constitutionally compliant manner.

## Defining sex, gender and gender affirmation

'Sex' and 'gender' are distinct. However, within the context of Lesotho, 'sex' and 'gender' have been used interchangeably. Thus, at times there are references to 'sex' when what is meant is 'gender'. This section explains these terms.

### Sex

A person's sex refers to a set of biological features that shape this person's body. It includes chromosomes (XX, XY and a range of other combinations), hormones (such as testosterone, oestrogen and progesterone), and parts of a body's sexual and reproductive anatomy (such as ovaries, vaginas, testicles, penis, etc.). Based on which of these biological features are part of a body, a sex is assigned: often male or female. Typically, male sex is associated with chromosomes that have XY, with more testosterone than oestrogen and progesterone, and with an anatomy that has testicles and a penis. Female sex is typically associated with a body that has a XX chromosomal makeup, that has more oestrogen and progesterone than testosterone, and that has a vagina, ovaries and a uterus, and breasts.

At the same time, the chromosomal or hormonal makeup of a body can also not clearly be on one of the two binary sides of female or male. There are many variations of biological features that show that sex characteristics are very diverse, and individuals with these characteristics are often described as 'intersex.'

### Gender

Whilst sex refers to the biological features of a body, gender in this context refers to someone's identity. This means it is a person's sense of self, of who they are. In the 1970s, gender was mostly thought to be binary (either woman or man) and linked to the sex of a body.<sup>23</sup> People assumed that persons with a penis and XY chromosomes (male sex) identify themselves as men (their gender). And that persons with breasts, vaginas, and XX chromosomes (female sex) identify themselves as women.

<sup>22</sup> Müller, A., Daskilewicz, K. and the Southern and East African Research Collective on Health (2019).

<sup>23</sup> Drescher, J. (2009); Drescher J., Cohen-Kettenis, P. and Winter, S. (2012).

By now, it is clear that gender is much more diverse than only woman or man, and that it is not necessarily linked to biological sex. This means that biological sex does not determine a person's gender. This also means that people can identify their gender as woman, as man, or as another gender. The term 'transgender' has developed into a broad category for people who experience a mismatch between the sex assigned to them at birth and their gender identity.<sup>24</sup>

There is a wide diversity in people's gender identity and gender expression. Gender identity is an innate characteristic, it is not a choice or a preference, and it cannot be altered or changed. Current research evidence shows that gender outside of the strict man/woman binary is simply a part of human gender diversity, it is not an illness, and it is not a medical condition in and of itself<sup>25</sup>

## Gender affirmation

Gender affirmation is the process in which transgender people have their gender affirmed or recognized.<sup>26</sup> This means that the biological sex that they were identified with at birth does not determine their gender, and that their body reflects their gender identity, rather than the sex they were assigned at birth. Gender affirmation contains four elements: social gender affirmation, psychological gender affirmation, medical gender affirmation and legal gender affirmation. These are explained in more detail in the section "What is gender affirming care?". Transgender people might choose to affirm their gender in one or more of these four areas.

## From 'sex change' to gender affirmation: understanding the change in terminology

Over the past 100 years, the way that medicine understands gender and gender diversity has changed significantly. In order to understand society's understanding of gender and gender diversity, which is also reflected in the law, it is necessary to outline these changes in medicine's understanding of gender and gender diversity.

The first recognition of gender that goes beyond the man/woman binary is evidenced in the work of Magnus Hirschfeld in the early 20th century. In his research, he said that there was a so-called 'third sex.' By this, he meant people whose gender identity does not match the sex assigned to them at birth (today, we would use the term transgender to refer to the people he described).<sup>27</sup> The German-American doctor Harry Benjamin was the first to start a healthcare service for gender affirmation in the 1950s.<sup>28</sup> During the middle of the 20th century, gender affirmation surgeries (then known as 'sex change operations') became more common, even though they did not necessarily challenge the perception of sex or gender as binary. The wider public also learned more about them, for example through books that were written by people who had transitioned.<sup>29</sup>

From the 1950s, some healthcare providers started to provide care to support people whose gender identity did not match the sex assigned to them at birth. These healthcare providers supported their patients to change their physical body through hormone therapy and surgery. The aim was to modify the body to match the person's gender. Initially, the clinical approaches focused a lot on 'sex change operations' or 'sex reassignment surgeries', to change the physical sex from male to female, or female to male, as completely as possible. This included the surgical removal or construction of breasts, as well as surgery to change genitals.

In South Africa, gender affirmation surgeries began to increase from the 1960s. For example, Dr Derk Crichton, a Durban-based gynaecologist, remembers that between 1969 and 1993 he performed 58 "gender reassignment surgeries" in Durban.<sup>30</sup> By 1970, the largest public hospital in Cape Town, Groote Schuur Hospital, offered healthcare services to "transgender patients."<sup>31</sup> In Pretoria, H.F. Verwoerd hospital also offered healthcare services related to 'sex change': although there is little information available, anecdotal evidence suggests that the hospital had a "Transsexual Clinic" since the late 1970s<sup>32</sup>

<sup>24</sup> Victor, C.J., Nel, J.A., Lynch, I., Mbatha, K. (2014). Spencer, S., Meer, T. and Müller, A. (2017).

<sup>25</sup> Suess, A., Espineira, K., Walters, P.C. (2014).

<sup>26</sup> The Lancet (2016).

<sup>27</sup> See Hirschfeld, M. (1910); Hill, D. B. (2005).

<sup>28</sup> Benjamin, H. (2006).

<sup>29</sup> See, for example, Jorgensen, C. (1967).

<sup>30</sup> Crichton, D. (1993).

<sup>31</sup> Wilson, D., de Villiers, A., Marais, A., Addinall, R., & Campbell, M.M. (2014).

<sup>32</sup> Theron, A. (1980), cited in: Camminga, B. (2016).

What was referred to as 'sex change' or 'sex reassignment' in the 1970s, is now called gender affirmation. The fundamental idea behind all three terms is the same: individuals whose gender identity does not match the sex assigned to them at birth can alter their physical body to match their gender identity. For example, a man whose sex was identified as 'female' when he was born, and whose body has female characteristics, might want to alter his body to look less conventionally feminine, by, for example, taking hormones that change his body to look more masculine.

Since the 1970s, the language used to describe people whose gender does not match the sex assigned to them at birth increasingly shifted. This was because people wanted to be seen in their own right, and not only as 'patients.' They started organisations to advocate for themselves and wanted medicine and doctors to have less of a say about their lives and their bodies. As a result, the language changed to the language we know and use today. Instead of 'sex change' we now say gender affirmation. Instead of 'transsexual' we say 'transgender'. This also shows an important change in our understanding of sex and gender: that the main issue at hand is gender (one's identity), and not sex (one's physical characteristics). This saw a shift away from language of 'transsexuals' towards 'transgender people', and an understanding that the issue at stake was not related to 'sex' but to 'gender'<sup>33</sup>

As the field of transgender health progressed, healthcare providers recognized that not every transgender person wanted or needed surgery<sup>34</sup> While many individuals did need both hormone therapy and surgery, others need only hormone therapy. In other words, gender affirming care became more individualised. This was important because it became clear that surgery was not the only option available to people whose gender did not match their sex assigned at birth. Today, the healthcare options available are much more comprehensive. These healthcare options are named gender affirming care, which reflects today's understanding of sex and gender. The terms 'gender affirming care' and 'gender affirming surgery' are, by now, well established internationally.

As medicine has evolved, the various ways in which bodies can be changed to affirm gender identities have evolved too. At least in Europe and North America, they have also become more accessible. The Lancet, one of the most widely read medical journals in the world, published a special issue on 'Transgender Health'.<sup>35</sup> In this issue, the articles summarised the current understanding of gender identity as distinct from physical sex, pointed to health disparities due to gender identity-related discrimination and stigma, and explained the contemporary terminology and aspects of gender affirmation.

## From pathology to self-determination

It is not only the terminology around sex and gender that has changed. The ways that healthcare providers and States interact with transgender people have also changed. In the 1980s, healthcare providers assumed that there was something wrong with transgender people, that they had a mental illness, and healthcare providers were thought to know best what to do. Today, we know that this is not true. Instead, healthcare providers trust that transgender people themselves know best what is good for them. This means that transgender people need to be the ones who decide if, when, and how to affirm their gender. This principle is called self-determination. It is also important for interpreting the Registration of Births and Deaths Act of 1973.

In the 1980s, gender diversity was regarded as a mental health condition. Doctors and other healthcare providers thought that people whose gender does not match the sex assigned to them at birth had a mental health condition, that there was something inherently pathological about their gender diversity. Today, this assumption has been proven wrong, and it is increasingly accepted that gender diversity is a natural variation and is not a mental illness (or any other illness). This is illustrated in the way that gender diversity has been represented in medical classifications.

Medical classifications are manuals in which doctors and other healthcare providers list the diseases they know, their symptoms, and their treatments.

<sup>33</sup> Camminga, B. (2016).

<sup>34</sup> World Professional Association for Transgender Health (2012).

<sup>35</sup> The Lancet (2016).

When something is included in a medical classification manual, it is meant to guide doctors on how to treat it. This, by definition, shows that it is regarded as an illness or a disease. There are two main medical classification manuals worldwide. The International Classification of Diseases (ICD) is published by the World Health Organization (WHO) and lists every medical condition that the WHO considers an illness.<sup>36</sup> The ICD is the basis on which healthcare providers treat patients, and on which healthcare systems develop treatment guidelines and allocate resources. In addition to the ICD, the Diagnostic and Statistical Manual of Mental Disorders (DSM) is a manual specifically for mental health conditions.<sup>37</sup> Published by the American Psychiatric Association, it lists the definitions and diagnostic criteria for all mental health concerns that are considered mental illnesses. It is the basis on which mental health professionals diagnose and treat mental illnesses. Thus, it is similar to the ICD, but focuses only and specifically on mental health.

In the past, both of these manuals included a diagnosis on 'transsexualism'. This reflected the understanding of medicine at the time, which has been detailed in the previous section. Transgender activists and academics have always pointed out that gender diversity in and of itself is not pathological, and that therefore it should not be considered an illness, and not have a diagnosis.<sup>38</sup> Many transgender people and healthcare providers have advocated for the removal of gender diversity-related diagnoses from diagnostic manuals.

In the ICD-11, published in 2019 and operational from 2022, the World Health Organization renamed the diagnosis related to gender diversity, moving it out of the section on mental health.<sup>39</sup> Instead of 'gender identity disorder', the diagnosis is now called 'gender incongruence', which aims to reflect the mismatch (the incongruence) between persons' gender identity and their sex characteristics. The 'gender incongruence' diagnosis has been moved to the section on sexual health. According to the WHO "[t]his [change] reflects evidence that trans-related and gender diverse identities are not conditions of mental ill health and classifying them as such can cause enormous stigma."<sup>40</sup>

The World Professional Association for Transgender Health (WPATH) emphasises that the self-determination of transgender people is important.<sup>41</sup> That is, that transgender people themselves should be the ones who make decisions about their bodies, about whether or not they want to use medical interventions to affirm their gender, and how and when they want to do it. It means that doctors should not decide this for transgender people. This principle of self-determination is important. It should guide States in how to provide healthcare for transgender people, but also in allowing transgender people to make other decisions for themselves – for example, changing their gender markers on identity documents.

## What is gender affirming care?

The applicant in the case study presented at the beginning of this research brief submitted a doctor's letter to certify that he had undergone gender affirming surgery. In the previous section, we showed that gender affirming surgery is the equivalent of so-called 'sex change operations'. Today, gender affirming care is more than only surgery.

Gender affirmation includes a range of social, psychological, behavioural or medical (including hormonal treatment or surgery) interventions designed to support and affirm an individual's gender identity.<sup>42</sup> It works towards alleviating the potential distress that transgender people experience through exploring and locating a gender identity that is suited to each individual.<sup>43</sup> Gender affirmation encompasses any, or all, of the following: social gender affirmation, psychological gender affirmation, legal gender affirmation and/or medical gender affirmation.<sup>44</sup>

The World Professional Association for Transgender Health has issued international guidelines for gender affirming care. These are called the Standards of Care (SOC) and are now in their seventh edition. In the seventh edition, the Standards of Care guidelines (SOC-7) outline the currently recognized treatment options for those seeking gender affirmation.

<sup>36</sup> World Health Organization (2019).

<sup>37</sup> American Psychiatric Association (2013).

<sup>38</sup> Suess, A., Espineira, K., Walters, P.C. (2014).

<sup>39</sup> World Health Organization (2019)

<sup>40</sup> World Health Organization (Europe) (2019).

<sup>41</sup> World Professional Association for Transgender Health (2012).

<sup>42</sup> Id.

<sup>43</sup> Coleman, E., Bockting, W., Botzer, M., Cohen-Kettenis, P.T., De Cuypere, G., Feldman, J., et al. (2012).

<sup>44</sup> The Lancet (2016).



These include:

*"changes in the gender expression and role (which may involve living part time or full time in another gender role, consistent with one's gender identity) [social gender affirmation]; hormone therapy to feminize or masculinize the body; surgery to change primary and/or secondary sex characteristics (e.g. breasts/chest, external and/or internal genitalia, facial features, body contouring); psychotherapy (individual, couple, family, or group) for purposes such as exploring gender identity, role and expression; addressing the negative impact of gender dysphoria and stigma on mental health; alleviating internalized transphobia enhancing social and peer support; improving body image; or promoting resilience."*<sup>45</sup>

Due to the individualised nature of each person's lived experience, transgender persons might choose to pursue all, some, or none of these pathways of care.<sup>46</sup> Regardless of what the specific care is, WPATH also stresses the following principles for healthcare providers, based on which all care should be provided:<sup>47</sup>

- Exhibit respect for patients with non-conforming gender identities (do not pathologise differences in gender identity or expression);
- Provide care (or refer to knowledgeable colleagues) that affirms patients' gender identities and reduces the distress of gender dysphoria, when present;
- Become knowledgeable about the healthcare needs of transsexual, transgender, and gender non-conforming people, including the benefits and risks of treatment options for gender dysphoria;
- Match the treatment approach to the specific needs of patients, particularly their goals for gender expression and need for relief from gender dysphoria;
- Facilitate access to appropriate care;
- Seek patients' informed consent before providing treatment;
- Offer continuity of care; and
- Be prepared to support and advocate for patients within their families and communities (schools, workplaces, and other settings).<sup>48</sup>

<sup>45</sup> Coleman, E., Bockting, W., Botzer, M., Cohen-Kettenis, P.T., De Cuypere, G., Feldman, J., et al. (2012).

<sup>46</sup> Spencer, S., et al. (2017).

<sup>47</sup> World Professional Association for Transgender Health (2012).

<sup>48</sup> Id.

Following the principle of self-determination, any person who wishes to access gender affirming care should be able to do so. It is important to remember that not all transgender people want to undergo gender affirming care, and that transgender people who do might not want to undergo all aspects of gender affirming care. For example, some transgender people will want to take hormones, but not have surgery. Others will want only surgery that removes breasts but not surgery that changes genitals. It should be each person's individual choice what care to use, and when.

The elements of gender affirmation include:<sup>49</sup>

## Social gender affirmation

Social gender affirmation refers to steps taken by transgender persons themselves to reflect their gender towards others. This can include changing their name, changing their pronouns (to 'he', 'she', or 'they'), and changing their gender presentation through clothing, speech patterns, mannerisms, etc.

The 'Are we doing alright?' study showed that between half and three-quarters of transgender people in Lesotho (54%-71%) were undertaking social gender affirmation, modifying their gender presentation by binding or tucking.<sup>50</sup>

## Psychological gender affirmation

This includes developing and affirming a sense of self in one's own gender, and to recognise and accept this. This process might be supported by gender affirming counselling or further mental health support – however, this is not necessary for all transgender persons, and is not a requirement for further medical gender affirmation.

## Medical gender affirmation

The WPATH Standards of Care (SOC-7) list a variety of medical interventions that can support gender affirmation. It is important to remember that not all transgender people will want or need all interventions. For some, hormonal gender affirmation is sufficient, while others might want one or more surgical interventions.

<sup>49</sup> The Lancet (2016).

<sup>50</sup> Binding is a technique to flatten one's breast or chest by using constrictive materials and clothing. Tucking is a technique to hide the bulge of male genitalia so that they are not conspicuous through clothing; Müller, A., Daskilewicz, K. & The Southern and East African Research Collective for Health (2019), page 58.

## Hormonal gender affirmation

Feminizing or masculinizing hormone therapy—the administration of hormones to induce feminizing or masculinizing changes—is a medically necessary intervention for many transgender and gender non-conforming individuals. The goal of hormone therapy is to initiate changes that will make the body more aligned to the individual's gender identity. Most of these changes occur within two years.

- Feminizing hormone therapy aims to support breast growth, a decrease in the erectile function, a decreased in the size of the testicles, and an increased percentage of body fat compared to muscle mass, with a shift in body shape towards more conventionally feminine-looking. For feminizing hormone therapy, oestrogen and progesterone is given, together with an androgen blocker, usually orally.
- Masculinizing hormone therapy aims to support the deepening of the voice, enlargement of the clitoris, increased growth of facial and body hair, cessation of menstruation, breast reduction, and a decreased percentage of body fat compared to muscle mass, with a shift in body shape towards more conventionally masculine-looking. For masculinizing hormone therapy, testosterone is given, usually by injection.

The 'Are we doing alright?' study showed that only 27% of transgender people in Lesotho currently have access to gender affirming hormone treatment.<sup>51</sup> Sixteen percent of transgender people in the study were using hormones. Often, people receive these hormones from pharmacies, at times without a prescription, because there are very few medical practitioners who are willing to prescribe hormones.<sup>52</sup> This means that people use hormones without the necessary medical supervision to minimise the risk of side-effects.

## Surgical gender affirmation

Surgery, and genital surgery in particular, is considered the last step of gender affirmation for transgender people.<sup>53</sup> Many transgender and gender non-conforming people might be happy with their gender affirmation through social and hormonal processes only. Gender affirming surgery is not a prerequisite for gender affirmation. For some transgender people, however,

surgical interventions are a medical necessity. Surgery can help people feel more at ease in the presence of sex partners or in their everyday life. In some settings, particularly where non-conforming gender expressions are stigmatized, surgery might reduce risk of harm through violence because it allows people to be less obviously gender non-conforming in public.

There are a range of gender affirming surgical options available, and people might opt to have all, or only some of them. Transgender persons can decide what is best suited for their needs. It is not necessary to undergo any medical intervention (hormonal or surgical) for gender affirmation. For some people, social gender affirmation is sufficient.

Feminising surgical interventions include:

- Breast/chest surgery: augmentation mammoplasty (build-up of breast tissue);
- Genital surgery: penectomy (removal of the penis), orchiectomy (removal of the testicles), vaginoplasty (creation of a vagina), clitoroplasty (creation of a clitoris), vulvoplasty (creation of a vulva);
- Non-genital, non-breast surgical interventions: facial feminization surgery, liposuction, lipofilling, voice surgery, thyroid cartilage reduction, gluteal augmentation (implants/lipofilling), hair reconstruction, and various aesthetic procedures.<sup>54</sup>

Masculinising surgical interventions include:

- Breast/chest surgery: subcutaneous mastectomy (removal of breasts), creation of a male chest;
- Genital surgery: hysterectomy/salpingo-oophorectomy (removal of uterus), phalloplasty (creation of a penis), vaginectomy (removal of the vagina), scrotoplasty (creation of testicles), and implantation of erection and/or testicular prostheses;
- Non-genital, non-breast surgical interventions: voice surgery (rare), liposuction, lipofilling, pectoral implants, and various aesthetic procedures<sup>55</sup>

In Lesotho, only 18% of transgender people have access to surgical gender affirmation,<sup>56</sup> but very few have had surgical gender affirmation, due to the high cost that such surgeries involve.<sup>57</sup>

<sup>51</sup> Müller, A., Daskilewicz, K. & The Southern and East African Research Collective for Health (2019), page 34.

<sup>52</sup> Community consultation, Maseru, 1 October 2019.

<sup>53</sup> World Professional Association for Transgender Health (2012).

<sup>54</sup> Id.

<sup>55</sup> Id.

<sup>56</sup> Müller, A., Daskilewicz, K. & The Southern and East African Research Collective for Health (2019).

<sup>57</sup> Community consultation, Maseru, 1 October 2019.

## Voice and communication therapy

Communication, both verbal and non-verbal, is an important aspect of human behaviour and of our gender expressions. Transgender and gender non-conforming people might want support to develop vocal characteristics (for example, voice pitch, intonation, and other aspects of speech) that are aligned to and reflect their gender identity. Similarly, some people might want support with non-verbal communication patterns, such as gestures, facial expressions and movements) for the same reason. Ideally, voice and communication therapy are available to support individuals who would like support.

## Legal gender affirmation and recognition

Whilst legal gender recognition is a crucial aspect of legal protection for transgender people on its own, it is also an important element of gender affirmation. According to The Lancet special edition on Transgender Health, legal gender recognition is the fourth element of gender affirmation.<sup>58</sup> Supporting this, the World Health Organization states that:

*"Legal gender recognition, represented through documents reflecting a person's gender identity, is important for protection, dignity and health. Many countries [...] impose a number of conditions on changing documents [...]. Human rights bodies conclude that [such] requirements run counter to respect for bodily integrity, self-determination and human dignity, and can cause and perpetuate discrimination against transgender people."<sup>59</sup>*

## The benefits of gender affirmation

Both the World Health Organization (WHO) and the American Psychiatric Association's (APA) diagnostic guidelines say that gender affirming care is important for the physical and mental wellbeing of transgender people who wish to transition.<sup>60</sup>

Despite the individualized nature of gender affirming care, it is a clinically recognized necessity for those who wish to align their body to their identified gender.<sup>61</sup> This necessity has been acknowledged by the WHO, APA, WPATH, and various health districts around the world. For example, the Royal College of Psychiatrists uses the SOC-7 to inform its United Kingdom standards of care,<sup>62</sup> and the American Medical Association (AMA) states that gender affirming care is neither cosmetic nor experimental and that:

*"if [transgender people do not have access to it, this] can result in clinically significant distress, dysfunction, debilitating depression, and for some people without access to appropriate medical care and treatment, suicidality and death."<sup>63</sup>*

The World Professional Association on Transgender Health, in the current Standards of Care 7 (SOC-7) and an expansive body of research,<sup>64</sup> as well as the American Psychiatric Association have recognized that the –

*"lack of access to care adversely impacts on the mental health of transgender and gender variant people, and both hormonal and surgical treatments have been shown to be efficacious in these individuals."<sup>65</sup>*

Currently, access to gender affirmation in Lesotho is very limited. Only one in four transgender people has access to gender affirming hormone treatment, and only one in six has access to gender affirming surgery.<sup>66</sup> Whilst transgender individuals affirm their gender through social affirmation, often with the support of LGBTI organisations, medical and legal affirmation is beyond reach for most. International research suggests that this is a contributor to the high levels of mental ill health among transgender people in Lesotho.

<sup>58</sup> The Lancet (2016).

<sup>59</sup> World Health Organization (Europe) (2019).

<sup>60</sup> Colizzi, M., Costa, R., Todarello, O. (2015). Spencer, S., et al. (2017).

<sup>61</sup> Id.

<sup>62</sup> Royal College of Psychiatrists (2013). Spencer, S., et al. (2017).

<sup>63</sup> American Medical Association, House of Delegates. (2008).

<sup>64</sup> See, for example, Smith, Y.L.S., Van Goozen, S.H.M., Kuiper, A.J., Cohen-Kettenis, P.T. (2005) and Newfield, E., Hart, S., Dibble, S., Kohler, L. (2006).

<sup>65</sup> Drescher, J. and Haller, E. (2012). Spencer, S., et al. (2017).

<sup>66</sup> Müller, A., Daskilewicz, K. & The Southern and East African Research Collective for Health (2019).

# Review of international principles around legal gender recognition and affirmation

This section reviews international guidance and accepted principles around legal gender recognition from a human rights perspective. These international principles are aids to the interpretation of domestic laws.

In 2006, a panel of international human rights experts published the Yogyakarta Principles (YP), a guidance document that addresses a broad range of international human rights standards and their application to issues of sexual orientation and gender identity.<sup>67</sup> In 2017, the panel published additional principles, which expand on the original document and reflect developments in international human rights law and practice.

These new Principles are called The Yogyakarta Principles plus 10.<sup>68</sup> The new document also contains 111 'additional State obligations', related to areas such as torture, asylum, privacy, health, and the protection of human rights defenders.

The Yogyakarta Principles and the Yogyakarta Principles plus 10 are instructive in defining legal and human rights principles for legislating and implementing legal gender recognition.

## The right to legal recognition (YP-31)

The clearest principle in relation to legal gender recognition is detailed in Yogyakarta Principle 31 (YP-31). It is worth quoting YP-31 in full, as it directly pertains to the legislative framework. Of particular interest is point YP31(c)(iii), which details that States shall not use any eligibility criteria such as medical interventions as prerequisites to change one's name, legal sex or gender.

**FIGURE 1: YOGYAKARTA PRINCIPLE 31 - THE RIGHT TO LEGAL RECOGNITION<sup>69</sup>**

Everyone has the right to legal recognition without reference to, or require 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 documents while gendered information is included in them.

## PRINCIPLE 31

### STATES SHALL:

- A. Ensure that official identity documents only include personal information that is relevant, reasonable and necessary as required by the law for a legitimate purpose, and thereby end the registration of the sex and gender of the person in identity documents such as birth certificates, identification cards passports and driver licences, and as part of their legal personality;**
- B. Ensure access to a quick, transparent and accessible mechanism to change names, including to gender-neutral names, based on the self-determination of the person;**
- C. While sex or gender continues to be registered:**
  - i. Ensure a quick, transparent, and accessible mechanism that legally recognises and affirms each person's self-defined gender identity;
  - ii. Make available a multiplicity of gender marker options;
  - iii. Ensure that no eligibility criteria, such as medical or psychological interventions, a psycho-medical diagnosis, minimum or maximum age, economic status, health, marital or parental status, or any other third party opinion, shall be a prerequisite to change one's name, legal sex or gender;
  - iv. Ensure that a person's criminal record, immigration status or other status is not used to prevent a change of name, legal sex or gender.

<sup>67</sup> Yogyakarta Principles (2006).

<sup>68</sup> Yogyakarta Principles Plus 10 (2017).

<sup>69</sup> Yogyakarta Principles Plus 10 (2017).

## The right to recognition before the law (YP-3)

The Yogyakarta Principle 3 asserts that:

*"Everyone has the right to recognition everywhere as a person before the law [...] Each person's self-defined sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom [...] No status, such as marriage or parenthood, may be invoked as such to prevent the legal recognition of a person's gender identity."*

In order to fulfil this right, the Yogyakarta Principles oblige States to, among other steps:

*"take all necessary legislative, administrative and other measures to ensure that procedures exist whereby all State-issued identity papers which indicate a person's gender/sex – including birth certificates, passports, electoral records and other documents – reflect the person's profound self-defined gender identity."*

## The right to privacy (YP-6)

A key component of respecting an individual's privacy means respecting their inherent dignity as a person.<sup>70</sup>

Denying legal gender recognition to a person who has affirmed their gender socially or medically has the consequence of forcing them to effectively disclose their transition whenever they have to use a form of identification that holds information about their legal gender. This is in violation of Yogyakarta Principle 6(f):

*"The right to privacy ordinarily includes the choice to disclose or not to disclose information relating to one's sexual orientation or gender identity."*

*"Ensure the right of all persons ordinarily to choose when, to whom and how to disclose information pertaining to their sexual orientation or gender identity, and protect all persons from arbitrary or unwanted disclosure, or threat of disclosure of such information by others." (YP6-F).*

Section 16 of the National Identity Cards Act of 2011 requires that anyone who seeks to access services in Lesotho has to provide an identity document. This forces transgender people to disclose their gender identity, because their identity document does not match their gender expression.

An interpretation of the Registration of Births and Deaths Act of 1973 that allows transgender people to change their sex/gender marker would ensure that the right to privacy of all people, including transgender people, will be protected.

## The right to the highest attainable standard of health (YP-17)

The Principles of State Policy provide that Lesotho shall adopt policies aimed at ensuring the highest attainable standard of physical and mental health for its citizens, including policies designed to, amongst others, create conditions which would assure to all, medical service and medical attention in the event of sickness, and to improve public health.<sup>71</sup>

Yogyakarta Principle 17 (YP-17) affirms international human rights commitments related to the highest attainable standard of health. It reiterates the International Covenant on Economic, Social and Cultural Rights,<sup>72</sup> and General Comment 14,<sup>73</sup> and clarifies that everyone has the right to the highest attainable standard of health without discrimination based on sexual orientation or gender identity:

*"Everyone has the right to the highest attainable standard of physical and mental health, without discrimination on the basis of sexual orientation or gender identity."*

Under the specific obligations, the YP-17 states the following, among others:

*"G. facilitate access by those seeking body modifications related to gender reassignment to competent, non-discriminatory treatment, care and support."*

<sup>70</sup> The HIV and AIDS Legal Environment Assessment report (2014).

<sup>71</sup> Section 27(1)(d) of the Constitution of Lesotho.

<sup>72</sup> International Covenant on Economic, Social and Cultural Rights, 1976, ratified by Lesotho in 1992.

<sup>73</sup> Committee on Economic, Social and Cultural Rights, General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12).

*K. Ensure access to the highest attainable standard of gender affirming healthcare, on the basis of an individual's free, prior and informed consent;*

*L. Ensure that gender affirming healthcare is provided by the public health system or, if not so provided, that the costs are covered or reimbursable under private and public health insurance schemes..."*

YP-17(g), (k) and (l) are directly relevant in the context of Lesotho, where gender affirming healthcare is currently not readily available.

By not changing the sex/gender marker of transgender people on identity documents, the government of Lesotho creates a situation where transgender people cannot access health services. One in three transgender people in Lesotho have been denied healthcare.<sup>74</sup> This is often because their identity documents do not match their gender identity and expression.

## The right to freedom of opinion and expression (YP-19)

Yogyakarta Principle 19 (YP-19) returns to social and legal gender affirmation through choice of one's name and interprets it through the frame of freedom of opinion and expression. It asserts that to choose one's name is a fundamental aspect of the right to freedom of expression.

YP-19:

*"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."*

YP-19(C):

*"take all necessary legislative, administrative and other measures to ensure the full enjoyment of the right to express identity or personhood, including through speech, deportment, dress, bodily characteristics, choice of name or any other means."*

<sup>74</sup> Müller, A., Daskilewicz, K., and the Southern and East African Research Collective for Health (2019).

# Overview of relevant laws in Lesotho

The following laws provide both the normative framework and legal basis for legal gender recognition in Lesotho:

- The Constitution of 1993, which is the supreme law of the country and requires that all other laws are interpreted in compliance with its provisions, including the bill of rights and the directives of State policy in the Constitution;
- The Registration of Births and Deaths Act No. 22 of 1973;
- The National Identity Cards Act No. 9 of 2011;
- The Lesotho Passports and Travel Documents Act No. 5 of 2018;
- The Data Protection Act No. 5 of 2012;
- The Children's Protection and Welfare Act No. 7 of 2011, which domesticates the provisions of the UN Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child;
- The Education Act No. 3 of 2010; and
- The Sexual Offences Act No. 3 of 2003.

The relevant sections of each of these laws are set out below. Read together, it is clear that there is no prohibition to legal gender recognition in Lesotho's laws. In fact, the legal framework clearly acknowledges transgender and gender non-conforming individuals' choice to change their gender marker on State-issued identity documents, and provides protection from discrimination for transgender and gender non-conforming persons.

## The Constitution of 1993

Chapter II of the Constitution provides for the protection of fundamental human rights and freedoms, subject to certain exceptions and derogation under section 21.

Section 4 of the Constitution confers rights and freedoms on every person in Lesotho, including the right to equal protection of the law and non-discrimination, freedom of movement, freedom from inhuman treatment, freedom of expression and the right to participate in government, irrespective of, among other grounds, sex, birth or other status. The High Court has confirmed that section 4 is a substantive and enforceable provision.<sup>75</sup>

<sup>75</sup> Lesotho Medical Association and Another v Minister of Health and Others (Const. CC No. 19/2019) [2020] LSHC 14 (24 June 2020).

The principle that fundamental rights are universally applicable to all persons in Lesotho was reaffirmed in *Ralekoala v Minister of Human Rights, Justice And Constitution Affairs and Others* where the Constitutional Court emphasised that “every person in Lesotho is entitled to fundamental human rights which include freedom from discrimination and the right to equality before the law and the equal protection of the law.”<sup>76</sup>

Fundamental human rights contained in the Lesotho Constitution are universal and apply to all persons regardless of their gender identity or expression, and are equally applicable to transgender persons. Legal gender recognition can help ensure that individuals are able to express themselves freely, and enjoy their daily lives in a dignified manner, without inhibiting their movement, education, access to services and privacy, and without risking discrimination, and cruel treatment. As such, the government of Lesotho should protect the rights of transgender persons and facilitate legal gender recognition.<sup>77</sup>

FUNDAMENTAL HUMAN RIGHT	SECTION IN CONSTITUTION
Freedom of movement	Section 7
Freedom from inhuman and degrading treatment	Section 8
Freedom from arbitrary search and entry	Section 10
Right to respect for private and family life	Section 11
Freedom of expression	Section 14
Freedom from discrimination	Section 18
Right to equality	Section 19
Right to participate in government	Section 20

### The right to dignity

The right to dignity has been described as the core human right onto which the rest of the human rights in Lesotho are anchored.<sup>78</sup> For example, in *Ralekoala v Minister of Human Rights, Justice and Constitution Affairs and Others*, the Constitutional Court tied the right to

dignity to the right to freedom from discrimination when it said that “unfair discrimination demeans people’s self-worth and human dignity. It denies people the equal enjoyment of rights and privileges to which they are entitled.”<sup>79</sup> The right to equal dignity and worth also respects and protects the choices persons make about their own identity.<sup>80</sup> A similar position was adopted in *Malebo v Mirror Newspaper and Others*,<sup>81</sup> where the High Court of Lesotho stated that all people are entitled to have their dignity respected.

The Botswana High Court in *ND v Attorney General of Botswana and Others*<sup>82</sup> took a significant step towards protecting the dignity of transgender people. In that case, the Court ordered the Registrar of Botswana to change the gender marker on the identity document of a transgender man from female to male. The Court interpreted the National Registration Act of Botswana in a manner that allows transgender persons to change their gender marker on their identity document. In reaching its decision, the Court emphasised that the State has a duty to uphold the fundamental human rights of every person and to promote tolerance, acceptance, and diversity within a constitutional democracy. Judge Nthomiwa went on to say that “the recognition of the Applicant’s gender identity lies at the heart of his fundamental right to dignity..Legal recognition of the Applicant’s gender identity is therefore part of the right to dignity and freedom to express himself in a manner he feels psychologically comfortable with”.

The nexus between human dignity and proper identification was also recognised by the Kenya High Court in *Republic v Kenya National Examination Council and Attorney General*. In allowing a change to the gender marker on the applicant’s certificate of secondary education, the Court emphasised that:

“Human dignity is that intangible element that makes a human being complete. It goes to the heart of human identity. Every human has a value. Human dignity can be violated through humiliation, degradation or dehumanisation. Each individual has

<sup>76</sup> *Ralekoala v Minister of Human Rights, Justice and Constitution Affairs and Others* [2012] LSHC 8 (30 March 2012) para. 52.

<sup>77</sup> See section 26 of the Constitution.

<sup>78</sup> *Fuma v Commander of Lesotho Defense Force and Others* Case No. 08/2011 [2013] LSHC, para 60.

<sup>79</sup> *Ralekoala v Minister of Human Rights, Justice and Constitution Affairs and Others* [2012] LSHC 8 (30 March 2012) para 73.

<sup>80</sup> *Id.*, para 80.

<sup>81</sup> *Malebo v Mirror Newspaper and Others* (CIY7T/600/03) [2005] LSHC 103 (09 May 2005), p. 35.

<sup>82</sup> *ND v Attorney General of Botswana and Others*, MAHGB-000449-11 (unreported, delivered on 29 September 2017).

inherent dignity, which our Constitution protects. Human dignity is the cornerstone of the other human rights enshrined in the Constitution."<sup>83</sup>

The Supreme Court of India in *National Legal Services Authority v Union of India and Others*<sup>84</sup> also observed that human dignity requires that States recognise the choices made by transgender individuals:

*"If democracy is based on the recognition of the individuality and dignity of man, as a fortiori we have to recognize the right of a human being to choose his sex/gender identity which is integral to his/her personality and is one of the most basic aspects of self-determination, dignity and freedom."*

### The right to non-discrimination

Discrimination is defined in section 18(3) of the Constitution as:

*"Affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status whereby persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description."*

Though Lesotho's Constitution does not expressly make mention of gender identity, section 4(1) read with section 18(3) refers to "sex" and "other status". Lesotho Courts have interpreted section 18(3) to mean that it does not contain an exhaustive list of factors and that the list may well grow as other vulnerable groups or classes needing protection emerge which were not foreseeable at the time the definition was crafted.<sup>85</sup>

Section 18 has received significant attention in the case of *Ralekoala v Minister of Human Rights, Justice and Constitutional Affairs and Others*<sup>86</sup> which dealt with the constitutionality of the Legal Practitioners Act. The Constitutional Court confirmed that section 18(3) does not contain an exhaustive list of factors, and that criteria which are not listed must be attributable to opinion and/or status.<sup>87</sup> Similarly in *Road Transport Board v Northern Venture Association*, it was held that "careful consideration of section 18 read as an entirety indicated that it proscribed differentiation for reasons attributable to status".<sup>88</sup>

### Equality before the law

Section 19 of the Constitution provides that "every person shall be entitled to equality before the law and to the equal protection of the law."

In *Lesotho National General Insurance v Nkuebe*<sup>89</sup> the Court explained the difference between sections 18 and 19 of the Constitution:

*"It is clear that there are significant differences between freedom from discrimination and the right to equality before the law. The expression 'discrimination' is carefully defined in section 18(3), but no meaning has been assigned to the phrases 'equality before the law' or 'equal protection of the law'. Moreover, it is apparent from section 18(3) that the equality provisions have a wider connotation than those relating to discrimination. While the two sections may overlap in some respects, they generally require different treatment."*

### Freedom of movement

Section 7(1) of the Constitution provides for the right to freedom of movement:

*"Every person shall be entitled to freedom of movement, that is to say, the right to move freely throughout Lesotho, the right to reside in any part of Lesotho, the right to enter Lesotho, the right to leave Lesotho and immunity from expulsion from Lesotho."*

<sup>83</sup> Republic v Kenya National Examination Council and Attorney General, Ex Parte AMI, JR Case No. 147 of 2013, [2014] eKLR, page 11.

<sup>84</sup> National Legal Services Authority v Union of India and Others, Writ Petition No. 400 of 2012 and No. 604 of 2013 (SC).

<sup>85</sup> Fuma v Commander, Lesotho Defence Force and Others (CONST/8/2011) [2013] LSHC 68 (10 October 2013)

<sup>86</sup> Ralekoala v Minister of Human Rights, Justice and Constitutional Affairs and Others (Constitutional Case 3/11 [2012] LSHC 8 (3 March 2012).

<sup>87</sup> Id., at para 55 and 56.

<sup>88</sup> Road Transport Board v Northern Venture Association, C of A (CIV) No. 10/05 (20 April 2005) at page 10.

<sup>89</sup> Lesotho National General Insurance v Nkuebe LAC (2000-2004) at page 799, para 11.



## Freedom from inhuman and degrading treatment

According to section 8(1) of the Constitution, "no person shall be subjected to torture or to inhuman or degrading punishment or other treatment".

In *Ex Parte Attorney General In re: Corporal Punishment by Organs of State*,<sup>90</sup> the Namibian Supreme Court defined "inhuman" and "degrading" in reference to the dictionary definition of the words:

*"According to the Oxford English Dictionary 'inhuman' means 'destitute of natural kindness or pity; brutal, unfeeling, cruel; savage, barbarous'. 'To degrade' means 'to lower in estimation, to bring into dishonour or contempt; to lower in character or quality; to debase:'"*

## Freedom from arbitrary search or entry

Section 10(1) of the Constitution provides that

*"every person shall be entitled to freedom from arbitrary search or entry, that is to say, he shall not (except with his own consent) be subjected to the search of his person or his property or the entry by others on his premises".*

## Right to respect for private and family life

Section 11(1) of the Constitution provides that "every person shall be entitled to respect for his private and family life and his home".

In the case of *Christine Goodman v United Kingdom*,<sup>91</sup> the applicant alleged that the failure of the government to allow changes on her birth certificate to reflect her self-identified gender violated, inter alia, her right to privacy. The European Court of Human Rights held that there had been a failure to respect the applicant's right to private life. The Court held that protection must be given to the personal sphere of each individual, including the right to establish details of their identity as individual human beings.<sup>92</sup> The Court noted that the refusal to grant legal gender recognition breached the right to privacy, in particular where a transgender person as a result suffered practical and actual detriment and humiliation on a daily basis.<sup>93</sup>

<sup>90</sup> *Ex Parte Attorney General In re: Corporal Punishment by Organs of State* [1991] NASC 2; 1991 (3) SA 76 (NmSc) (5 April 1991).

<sup>91</sup> *Christine Goodman v The United Kingdom* Application No. 28957/95, ECtHR, 2002.

<sup>92</sup> *Id.* at para 90.

<sup>93</sup> *Id.*

## Freedom of expression

Section 14(1) of the Constitution provides that:

*"every person shall be entitled to, and (except with his own consent) shall not be hindered in his enjoyment of, freedom of expression, including freedom to hold opinions without interference, freedom to receive ideas and information without interference, freedom to communicate ideas and information without interference (whether the communication be to the public generally or to any person or class of persons) and freedom from interference with his correspondence."*

Section 14(4) of the Constitution further provides that:

*"Any person who feels aggrieved by statements or ideas disseminated to the public in general by a medium of communication has the right to reply or to require a correction to be made using the same medium, under such conditions as the law may establish."*

The Indian Supreme Court explains:

*"personal autonomy includes both the negative right not to be subjected to interference by others and the positive right of individuals to make decisions about their life, to express themselves and to choose which activities to take part in. Self-determination of gender is an integral part of personal autonomy and self-expression and falls within the realm of personal liberty..."<sup>94</sup>*

In *Doe v Yunits*<sup>95</sup> the Superior Court of Massachusetts, upheld the right of a person to wear a school dress that matches her gender identity as part of protected speech and expression and observed as follows:

*"by dressing in clothing and accessories traditionally associated with the female gender, she is expressing her identification with the gender. In addition, plaintiff's ability to express herself and her gender identity through dress is important for her health and wellbeing. Therefore, plaintiff's expression is not merely a personal preference but a necessary symbol of her identity."<sup>96</sup>*

<sup>94</sup> *National Legal Services Authority v Union of India and Others* Writ Petition No. 400 of 2012 and No. 604 of 2013 (SC) at para 25.

<sup>95</sup> *Doe v Yunits* 2000 WL33162199 (Mass. Super Ct.).

<sup>96</sup> *Id.* at para 3.

## Right to participate in government

Section 20(1) of the Constitution provides that:

*"Every citizen of Lesotho shall enjoy the right -*

*(a) to take part in the conduct of public affairs, directly or through freely chosen representatives;*

*(b) to vote or to stand for election at periodic elections under this Constitution under a system of universal and equal suffrage and secret ballot;*

*(c) to have access, on general terms of equality, to the public service."*

### Principles of State policy

These principles form part of the public policy of Lesotho, and "shall guide the authorities and agencies of Lesotho, and other public authorities, in the performance of their functions with a view to achieving progressively, by legislation or otherwise, the full realisation of these principles".<sup>97</sup> The principles include the following:

*"26. Equality and justice*

*(1) Lesotho shall adopt policies aimed at promoting a society based on equality and justice for all its citizens regardless of race, colour, sex, language, religion, political or other opinion, national or social origin, property, **birth or other status.***

*(2) In particular, the State shall take appropriate measures in order to promote equality of opportunity for the **disadvantaged groups** in the society **to enable them to participate fully in all spheres of public life.***

*27. Protection of health*

*(1) Lesotho shall adopt policies aimed at ensuring the **highest attainable standard of physical and mental health** for its citizens, including policies designed to -*

*(d) create conditions which would **assure to all, medical service and medical attention in the event of sickness; ..."***

In line with this, Lesotho's National Health Strategic Plan 2017 – 2022, adopts the definition of health used by the WHO, which is that it refers to "a complete state of physical, mental and social wellbeing and not merely the absence of disease or infirmity."<sup>98</sup>

<sup>97</sup> Section 25 of the Constitution.

<sup>98</sup> Government of Lesotho, National Health Strategic Plan 2017-2022, December 2016, page 7. The plan also mentions transgender persons

*"28. Provision for education*

*Lesotho shall endeavour to make education **available to all...***

*29. Opportunity to work*

*(1) Lesotho shall endeavour to ensure that every person has the opportunity to gain his living by work which he freely chooses or accepts."*

## The Registration of Births and Deaths Act No. 22 of 1973

It is possible to change one's name and/or surname on the Births Register through an application to the Registrar.<sup>99</sup> In the case of a change of name, an inscription will be made on the Births Register, without erasing the original name. In the case of a change in surname, publication in the Government Gazette and a newspaper 30 days before the application is also required.

Section 22 of the Registration of Births and Deaths Act provides for a 'change of sex of child'<sup>100</sup> in the Register, and states that:

*"In the event of a child, after being registered, either by operation or otherwise, changing from a female to a male or from a male to a female, and such change is certified by a registered medical practitioner, the district registrar of the district in which the birth is registered shall, with the approval of the registrar and on the application of the parent or guardian of that child, alter the particulars of such child which appear in the births register."*

Importantly, the Act recognises that a change of sex can take place "by operation or otherwise". Since the terminology in the Act is outdated, it should be read to provide for gender affirmation, which can take place through surgical intervention or a range of other interventions and which do not necessarily involve a medical procedure. At the time of the enactment of the Registration of Births and Deaths Act, in 1973, countries such as Namibia, Eswatini and Uganda, similarly made provision for the possibility of a change of sex through operation or otherwise.

as falling within key populations at higher risk of HIV (page 21).

<sup>99</sup> Sections 16 and 17 of the Registration of Births and Deaths Act of 1973.

<sup>100</sup> The Registration of Births and Deaths Act defines a child as being under the age of 21 years or unmarried, while the Children's Protection of Welfare Act of 2011, which takes precedence over other laws relating to children, defines a child as under 18 years of age.

The Act makes provision for a self-determined decision about one's gender identity, by stating that "sex change" can happen "by operation or otherwise". Whilst the Act's provisions already allow for gender affirmation, and a change in gender-marker on the Births Register, section 22 should be interpreted more broadly to apply not only to children but also to adults, in line with their right to self-determination.

## The National Identity Cards Act No. 9 of 2011

Section 4(6)(f) of the National Identity Cards Act states that the National Identity Register shall include information about the 'gender' of eligible persons. The information on the Register is confidential, although insurance companies, banks and credit institutions can be granted access<sup>101</sup> and a person may request access to their own information on the Register.<sup>102</sup> A person who has been given access to their own information on the Register may request that the Director responsible for national identity cards "corrects inaccurate or outdated information",<sup>103</sup> provided that the person provides "credible evidence of the updated information"<sup>104</sup> The Act places a responsibility on the Director to ensure that the Register is "accurate and updated where necessary".<sup>105</sup>

Application for an identity card requires production of a birth certificate.<sup>106</sup> Identity cards are issued to Lesotho citizens and permanent residents once they are 16 years of age.<sup>107</sup> Section 12(1)(d) of the Act states that an identity card shall bear information on the 'sex' of the bearer. Every person who is issued with an identity card must inform the Director about a "change of circumstance affecting the information recorded" or an error.<sup>108</sup> Where there has been a change of circumstances requiring a change in the information recorded on the card, the Director shall cancel the old identity card.<sup>109</sup>

The Act does not define 'sex' and 'gender' and appears to use the terms interchangeably.

## The Lesotho Passports and Travel Documents Act No. 5 of 2018

The Lesotho Passports and Travel Documents Act of 2018 requires that information relating to a person's 'gender' be included in the passport.<sup>110</sup> As the most recent law relevant to this brief, the inclusion of 'gender' is significant. The previous Act referred to 'sex' and not 'gender',<sup>111</sup> indicating that a deliberate decision was made to use the term 'gender' in the new law. Application for an e-passport under the new Act requires production of an identity document if a person is over 16 years of age, and production of a birth certificate if a person is under 16 years of age.<sup>112</sup> Again this is a significant amendment as the previous Act required production of a birth certificate or affidavit as to birth.<sup>113</sup> This indicates a recognition that one's gender on your national identity card might not correspond with one's sex on the Births Register, and that the national identity card is recognised as the more accurate reflection of a person's gender.

## The Data Protection Act No. 5 of 2012

The Data Protection Act seeks to provide an individual (data subject) with more control over their personal information which is held by third parties (data controller). A data subject can request detail on the personal information held by a data controller.<sup>114</sup> The Act provides an individual with the right to challenge the correctness of their personal information held by the data controller, and the right to demand that the data controller corrects or deletes personal information that is "inaccurate, irrelevant, excessive, out of date, incomplete, misleading or obtained unlawfully".<sup>115</sup>

<sup>101</sup> Section 6(2)(c) of the National Identity Cards Act of 2011.

<sup>102</sup> Section 6(3) of the National Identity Cards Act of 2011.

<sup>103</sup> Section 6(5) of the National Identity Cards Act of 2011.

<sup>104</sup> Section 6(6) of the National Identity Cards Act of 2011.

<sup>105</sup> Section 8(1) of the National Identity Cards Act of 2011.

<sup>106</sup> Section 14(2)(a) of the National Identity Cards Act of 2011.

<sup>107</sup> Statement of Objects and Reasons of the National Identity Cards Act, para 3, Government Notice No. 21 of 2011.

<sup>108</sup> Section 8(3) of the National Identity Cards Act of 2011.

<sup>109</sup> Section 17(1)(c) of the National Identity Cards Act of 2011.

<sup>110</sup> Section 9(1)(i) of the Lesotho Passports and Travel Documents Act of 2018.

<sup>111</sup> Section 6(d) of the Lesotho Passports and Travel Documents Act of 1998.

<sup>112</sup> Section 10(2)(c) of the Lesotho Passports and Travel Documents Act of 2018.

<sup>113</sup> Section 9(2)(a) of the Lesotho Passports and Travel Documents Act of 1998.

<sup>114</sup> Section 26 of the Data Protection Act of 2012.

<sup>115</sup> Section 27(1) of the Data Protection Act of 2012.

The Act prohibits the processing of personal information on a person's health or sexual life, except in specific instances, such as for the proper treatment and care of the person, or for the purpose of insurance or medical aid.<sup>116</sup> A school can only process personal information relating to health or sexual life where it is "necessary to provide special support for pupils or making special arrangements in connection with their health or sexual life".<sup>117</sup> Even in instances where a data controller can process information about one's health or sexual life, such information must be treated as confidential.<sup>118</sup> The prohibition on processing personal information does not apply where the data subject consented to such processing or the information has deliberately been made public by the data subject.<sup>119</sup>

### The Children's Protection and Welfare Act No. 7 of 2011

The Children's Protection and Welfare Act defines a child as being under the age of 18 years. Section 6 of the Act provides that no child may be discriminated against, including on the basis of their gender, birth or other status. Section 11(1) of the Act entrenches every child's right to education.

Section 11(2) of the Act says that a child shall not be hindered in accessing medical treatment by reason of religion or other beliefs. From the age of 12, a child can consent to medical treatment, provided that the child understands the nature, risks and potential consequences of the treatment.<sup>120</sup> Parental consent is however required for a surgical operation,<sup>121</sup> although a parent, guardian or caregiver may not refuse such consent on the basis of religious, cultural or other beliefs.<sup>122</sup>

Where the Act provides for the requirements for adoption, it does not specify who is eligible to adopt children, and only requires that the person(s) applying for adoption have a sustainable livelihood and show good behaviour and integrity.<sup>123</sup>

### The Education Act No. 3 of 2010

Section 4(4) of the Education Act says that a "learner shall not be subjected to cruel, inhuman or degrading treatment".

### The Sexual Offences Act No. 3 of 2003

The Sexual Offences Act defines a penis and a vagina to include a surgically constructed penis or vagina respectively.

<sup>116</sup> Section 34(1) of the Data Protection Act of 2012.

<sup>117</sup> Section 34(1)(c) of the Data Protection Act of 2012.

<sup>118</sup> Section 34(3) of the Data Protection Act of 2012.

<sup>119</sup> Section 36(e) and (f) of the Data Protection Act of 2012.

<sup>120</sup> Section 232(1) of the Children's Protection and Welfare Act of 2011.

<sup>121</sup> Section 232(3) of the Children's Protection and Welfare Act of 2011.

<sup>122</sup> Section 232(7) of the Children's Protection and Welfare Act of 2011.

<sup>123</sup> Section 51 of the Children's Protection and Welfare Act of 2011.

## Conclusion

Legal gender recognition is a fundamental human right, and is essential to guarantee the dignity, privacy and wellbeing of transgender and gender non-conforming people. Legal gender recognition is also one of the elements of gender affirmation, as well as gender affirming healthcare.

The current legal framework of Lesotho allows for legal gender recognition although outdated terminology, inconsistencies and a lack of guidelines limit the ability of transgender persons to successfully apply for legal gender recognition on their identity documents. Importantly, the legal framework shows clearly that the laws in Lesotho have increasingly moved towards a recognition of gender as opposed to sex as the determining factor on identity documents. Acts such as the Registration of Births and Deaths Act and the Sexual Offences Act clearly indicate that the government accepts that persons can choose surgical or other methods of gender affirmation. Recent laws such as the National Passports and Travel Documents Act, the National Identity Cards Act, and the Children's Protection and Welfare Act, use 'gender' and not 'sex' as the relevant factor for identification. The Constitution, National Identity Cards Act, Registration of Births and Deaths Act, Lesotho Passports and Travel Documents Act, and the Data Protection Act, place a high premium on the confidentiality of a person's personal information and affirm the right of every person to keep their information confidential and to choose to change any identifying information that is inaccurate. Finally, the Constitution, Children's Protection and Welfare Act, and Education Act prohibit discrimination and cruel, inhuman and degrading treatment against any person, including on the basis of their gender, gender identity or gender expression.

## Recommendations

### Interpreting the National Identity Cards Act of 2011

- The terms 'sex' and 'gender' in the National Identity Cards Act of 2011 should be interpreted as being used interchangeably.

### Interpreting the Registration of Births and Deaths Act of 1973

- Section 22 of the Registration of Births and Deaths Act of 1973 should be interpreted to provide for a change of sex or gender in the Registry, as the National Identity Cards Act of 2011 uses the terms 'sex' and 'gender' interchangeably.
- The requirement that a 'sex change' has occurred, in section 22 of the Registration of Births and Deaths Act of 1973, should be interpreted to mean that gender affirmation has occurred. Gender affirmation encompasses one or more of the following:
  - Social gender affirmation;
  - Psychological affirmation;
  - Medical gender affirmation (hormonal and/or surgical); and
  - Legal gender affirmation.
- Given the shortage of healthcare providers who provide gender affirming care in Lesotho, and in line with the Yogyakarta Principles, the provision that gender affirmation be achieved in ways other than surgery ("by operation or otherwise") should be central in the application of section 22 of the Registration of Births and Deaths Act of 1973. The phrasing "or otherwise" in section 22 provides for the legal recognition of social, psychological and medical gender affirmation, and does not require gender affirmation to necessarily include gender affirming surgery.
- Given the shortage of healthcare providers who provide gender affirming care in Lesotho, and in line with the Yogyakarta Principles, the requirement for confirmation by a medical practitioner in order for a person to apply for a change of particulars related to sex or gender in the Births Register should be removed.
- The category of persons who can apply for a change of particulars related to sex or gender in the Births Register (under section 22 of the Registration of Births and Deaths Act of 1973) should be widened to include children as well as adults.

## Guidelines for the interpretation of the Registration of Births and Deaths Act of 1973

The Ministry of Home Affairs should issue guidelines or regulations for the change of sex/gender marker based on section 22 of the Registration of Births and Deaths Act of 1973. Currently the Registration of Births and Deaths Regulations of 1974 do not detail how section 22 ought to be interpreted. The regulations should:

- Be developed in consultation with organisations that represent the interests of lesbian, gay, bisexual, transgender and intersex persons in Lesotho;
- Be based on the principle of self-determination, in line with international best practice and the Yogyakarta Principles;
- Interpret the term 'sex change' in section 22 of the Registration of Births and Deaths Act of 1973 to mean gender affirmation;
- Interpret the phrase 'sex change by operation or otherwise' to mean gender affirmation through social, hormonal or surgical affirmation, and be clear that any one of those is sufficient to apply for a change of particulars;
- Require no other proof of gender affirmation as outlined in section 22 of the Registration of Births and Deaths Act of 1973, which states that 'such change is certified by a registered medical practitioner.' Thus, a letter by a registered medical practitioner that confirms that gender affirmation has taken place should be sufficient to apply for a change of sex/gender marker;
- Ensure that there are no limitations to the use of section 22 of the Registration of Births and Deaths Act of 1973 to change one's gender marker in the Births Register. Anyone should be allowed to apply for a change of sex/gender marker without discrimination on any grounds including marital or family status, age, or criminal record. Neither should there be a requirement for a mental health diagnosis, medical treatment, or family or community approval;
- The guidelines/regulations should be accessible, non-discriminatory, and consistent across various State-issued documents, and apply to both new and existing documents.

## Recommendations for law and policy reform

Further law and policy reform may be necessary to fulfil the constitutional rights of transgender persons in Lesotho, and such reforms should be undertaken in consultation with organisations that represent the interests of lesbian, gay, bisexual, transgender and intersex people in Lesotho.

- Consider whether it is necessary to gather sex or gender details on administrative records or identification documents and, where necessary, ensure that administrative gender categories reflect gender diversity, including, but not limited to, options of identifying as female, male, or non-binary.
- If identity verification processes are required, ensure these are based on human rights standards and do not discriminate or impose eligibility requirements for legal gender recognition.
- Gender affirming healthcare should be available to all persons who wish to access it, based on self-determination.
- Access to gender affirming healthcare should not be undermined through eligibility criteria including, but not limited to, criteria that discriminate on any grounds including marital or family status, age, or criminal record or that require a mental health diagnosis, medical treatment, or family or community approval.
- Gender affirming healthcare should follow the up-to-date international guidelines set out in the Standards of Care by the World Professional Association for Transgender Health.
- Gender affirming healthcare (except surgical interventions) should be available at primary care level to ensure that it is accessible to transgender and gender non-conforming people living in Lesotho.

# References

## Articles and reports

- American Medical Association House of Delegates (2008) Removing Financial Barriers to Care for Transgender Patients.
- American Psychiatric Association (2013) Diagnostic and Statistical Manual of Mental Disorders [Internet]. 5th ed. American Journal of Psychiatry.
- Bauer, G.R., Pyne, J., Francino, M.C., Hammond, R. (2013) "Suicidality among trans people in Ontario: Implications for social work and social justice" *Serv Soc.* 59(1):35.
- Benjamin, H. (2006) "Transsexualism and Transvestism as Psycho-Somatic and Somato-Psycho Syndromes" in S. Stryker & S. Whittle (eds.) *The Transgender Studies Reader*. New York: Routledge.
- Camminga, B. (2016) *Bodies over Borders and Borders over Bodies: The 'Gender Refugee' and the Imagined South Africa*. Doctoral dissertation, University of Cape Town.
- Coleman, E., Bockting, W., Botzer, M., Cohen-Kettenis, P.T., De Cuypere, G., Feldman, J., et al. (2012) "Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People" *Int J Transgenderism* 13(4):165–232.
- Colizzi, M., Costa, R., Todarello, O. (2015) "Dissociative symptoms in individuals with gender dysphoria: Is the elevated prevalence real?" *Psychiatry Res.* 226(1):173–80.
- Crichton, D. (1993) "Gender Reassignment Surgery for Male Primary Transsexuals" *South African Medical Journal*, 83, p. 347.
- Drescher, J. (2009) "Queer Diagnoses: Parallels and Contrasts in the History of Homosexuality, Gender Variance, and the Diagnostic and Statistical Manual" *Archives of Sexual Behavior* 39(2), pp. 427–460.
- Drescher, J., Cohen-Kettenis, P. and Winter, S. (2012) "Minding the body: Situating gender identity diagnoses in the ICD-11" *International Review of Psychiatry* 24(6), pp. 568–577.
- Drescher, J. and Haller, E. (2012) *American Psychiatry Association Position Statement on Access to Care for Transgender and Gender Variant Individuals*.
- Gergen, K.J. (2001) "Psychological science in a postmodern context" *American Psychologist* 56(10), pp. 803–813.
- Green, R., and Fleming, D. (1990) "Transsexual surgery follow-up: Status in the 1990s" *Annual Review of Sex Research* 1(1), 163–174.
- Hill, D.B. (2005) "Sexuality and gender in Hirschfeld's *Die Transvestiten*: a case of the 'elusive evidence of the ordinary'" *Journal of the History of Sexuality* 14(3), 316–332.
- Hirschfeld, M. (1910) *Die Transvestiten*. Berlin: Pulvermann
- Jorgensen, C. (1967) *Christine Jorgensen (A Personal Autobiography)*, Paul S. Eriksson, New York.
- Legal Resources Centre and Gender Dynamix (2015) *Briefing Paper: Alteration of Sex Description and Status Act 49 of 2003*.
- Logie, C.H., Perez-Brumer, A., Mothopeng, T., Latif, M., Ranotsi, A. and Baral, S.D. (2020) "Conceptualizing LGBT Stigma and Associated HIV Vulnerabilities Among LGBT Persons in Lesotho" *AIDS Behav.* May 2020 11:1–11.
- Müller, A., Daskilewicz, K. and the Southern and East African Research Collective on Health (2019) 'Are we doing alright? Realities of violence, mental health, and access to healthcare related to sexual orientation and gender identity and expression in Lesotho: Research report based on a community-led study in nine countries'. Amsterdam: COC Netherlands.
- Newfield, E., Hart, S., Dibble, S., Kohler, L. (2006) "Female-to-male transgender quality of life" *Qual Life Res* 15(9):1447–57.
- Royal College of Psychiatrists (2013) *Good practice guidelines for the assessment and treatment of adults with gender dysphoria*. London.
- Smith, Y.L.S., Van Goozen, S.H.M., Kuiper, A.J., Cohen-Kettenis, P.T. (2005) "Sex Reassignment: Outcomes and Predictors of Treatment for Adolescent and Adult Transsexuals" *Psychol Med.* 35:89–99.
- Spencer, S., Meer, T., and Müller, A. (2017) "The Care is the Best You Can Give at the Time': Health Care Professionals' Experiences in Providing Gender Affirming Care in South Africa." *PLoS One*, Vol. 12, No. 7, July 2017.
- Suess, A., Espineira, K., Walters, P.C. (2014)

- "Depathologization" *TSQ Transgender Stud Q.* 1(1-2):73-7.
- The Lancet (2016) *Transgender Health: Series from the Lancet journals*, <https://www.thelancet.com/series/transgender-health>
- The Lancet (2016) *Infographic: Transgender health and wellbeing*. Available at <https://www.thelancet.com/infographics/transgender-health>.
- The Other Foundation (2017) *Canaries in the Coalmine: An analysis of spaces for LGBTI activism in Lesotho*.
- Theron, A. (1980) "Criteria for the Evaluation of Male-to-Female Transsexual Patients" *South African Family Practice Journal*, 1(10), 5-7., cited in: B. Camminga (2016) *Bodies over Borders and Borders over Bodies: The 'Gender Refugee' and the Imagined South Africa*. Doctoral dissertation, University of Cape Town.
- UNDP & APTN (2017) *Legal Gender Recognition: A Multi-Country Legal and Policy Review in Asia*.
- UN Committee on Economic, Social and Cultural Rights (2000) *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12)*.
- UN Sustainable Development Goals, 2030 Agenda for Sustainable Development (2015).
- Victor, C.J., Nel, J.A., Lynch, I., Mbatha, K. (2014) "The Psychological Society of South Africa Sexual and Gender Diversity Position Statement: Contributing Towards a Just Society" *South African J Psychol.* 44(3):292-302.
- Wilson, D., de Villiers, A., Marais, A., Addinall, R., & Campbell, M.M. (2014) "Transgender issues in South Africa, with particular reference to the Groote Schuur Hospital Transgender Unit" *South African Medical Journal*, 104(6).
- World Health Organization (2019) *The ICD-10 classification of mental and behavioural disorders: clinical descriptions and diagnostic guidelines*. Geneva: World Health Organization.
- World Health Organization (Europe) (2019) *Brief on transgender health in the context of ICD-11*.
- World Professional Association for Transgender Health (2012) *Standards of Care for the Health of Transsexual, Transgender, and Gender-Nonconforming People*. World Professional Association for Transgender Health (WPATH).
- Yogyakarta Principles (2006) *The Yogyakarta Principles: Principles on the application of international human rights law in relation to sexual orientation and gender identity*.
- Yogyakarta Principles Plus 10 (2017) *The Yogyakarta Principles plus 10: Additional principles and State obligations on the application of international human rights law in relation to sexual orientation, gender identity, gender expression and sex characteristics to complement the Yogyakarta Principles*.



## Laws and policies

Children's Protection and Welfare Act No. 7 of 2011  
 Constitution of 1993  
 Data Protection Act No. 5 of 2012  
 Education Act No. 3 of 2010  
 Lesotho Passports and Travel Documents Act No. 5 of 2018  
 National Health Strategic Plan 2017 – 2022  
 National Identity Cards Act No. 9 of 2011  
 Registration of Births and Deaths Act No. 22 of 1973  
 Registration of Births and Deaths Regulations of 1974  
 Sexual Offences Act No. 3 of 2003

## Case law

*Christine Goodman v The United Kingdom* Application No. 28957/95, ECtHR, 2002.

*Doe v Yunits* 2000 WL33162199 (Mass. Super Ct.).

*Ex Parte Attorney General In re: Corporal Punishment by Organs of State* [1991] NASC 2; 1991 (3) SA 76 (NmSc) (5 April 1991).

*Fuma v The Commander, Lesotho Defence Force and Others* (CONST/8/2011) [2013] LSHC 68 (10 October 2013).

*Lesotho Medical Association and Another v Minister of Health and Others* (Const. CC No. 19/2019) [2020] LSHC 14 (24 June 2020).

*Lesotho National General Insurance v Nkuebe* LAC (2000-2004).

*Malebo v Mirror Newspaper and Others* (CIY7T/600/03) [2005] LSHC 103 (09 May 2005).

*National Legal Services Authority v Union of India and Others* Writ Petition No. 400 of 2012 and No. 604 of 2013 (SC).

*ND v Attorney General of Botswana and Others*, MAHGB-000449-11 (unreported, delivered on 29 September 2017).

*Ralekoala v Minister of Human Rights, Justice and Constitution Affairs and Others* [2012] LSHC 8 (30 March 2012).

*Republic v Kenya National Examination Council and Attorney General, Ex Parte AMI*, JR Case No. 147 of 2013, [2014] eKLR.

*Road Transport Board v Northern Venture Association, C of A* (CIV) No. 10/05 (20 April 2005).





