

Laws and Policies Affecting Transgender Persons in Southern Africa



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SALC BOOKLET

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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 initiatives undertaken by domestic lawyers in Southern Africa. SALC works in Angola, Botswana, the Democratic Republic of Congo, Lesotho, Malawi, Mozambique, Namibia, Swaziland, Zambia, and Zimbabwe. Its model is to work in conjunction with domestic lawyers in each jurisdiction who are litigating public interest cases involving human rights or the rule of law. SALC supports these lawyers in a variety of ways, as appropriate – including providing legal research and drafting, training and mentoring, and monetary support. SALC's objectives include the provision of training and the facilitation of legal networks within the region.

Authorship and Acknowledgement

This Report was researched and written by Usha Jugroop, consultant, and Tashwill Esterhuizen, LGBTI and Sex Workers' Rights Programme Lawyer at SALC – assisted by Tyler Walton and Brynne Guthrie, both interns at SALC. The sections on Angola and Mozambique were researched and written by Aquinaldo Mandlate, Regional Advocacy Programme Lawyer at SALC.

The booklet was reviewed and edited by Anneke Meerkotter, Litigation Director at SALC. Proofreading was done by Caroline James, Freedom of Expression Programme Lawyer at SALC and David Barraclough, with design by Limeblue Design. We gratefully acknowledge the assistance of Tshupo Kgositau, Chan Mubanga, Ricky Nathanson, Sheriff Mothopeng, Madame Jholerina Timbo and Arnaud de Villiers in terms of reviewing the document.

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Southern Africa Litigation Centre

Second Floor, President Place,
1 Hood Avenue, Rosebank,
Johannesburg, South Africa, 2196
e-mail: info@salc.org.za,
tel: +27 (0) 10 596 8538

<http://www.southernafricalitigationcentre.org>, twitter: [@follow_SALC](https://twitter.com/follow_SALC)

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Glossary of Terms

Bisexual

Bisexual people have a romantic and/or sexual attraction to people of the same and opposite sex – not necessarily at the same time, and not necessarily an equal amount of attraction for each gender.

Discrimination

The unjust or prejudicial treatment of different categories of people on various grounds, including race, age, social status, marital status, health status, sex, sexual orientation and gender (including gender identity, expression and presentation).

Gender

Social and cultural expressions shown through behaviours, mannerisms, dress and activities. Masculinity and femininity are the most commonly known genders. Socially constructed characteristics may vary according to the times and society or group to which one belongs.

Gender affirming treatment

Can include counselling and psychosocial support, hormone replacement treatment, gender affirming surgery (also known as sex reassignment surgery) – to bring one's physical characteristics in line with one's gender identity.

Gender identity

Refers to a person's innate, deeply felt psychological identification as a man, woman, or sometimes in between – which may or may not correspond to the person's body or sex assigned at birth. An internalised representation of gender roles and awareness from infancy, which is reinforced during adolescence.

Gender non-conforming

A person who does not conform to the binary male-female categories that society prescribes. Transgender people, for example, are gender non-conforming – but others who are not transgender might also fall into this category.

Heterosexual

A person attracted to people of the opposite gender, romantically and/or sexually, where the gender of the attracted person is the key to the attraction.

Homosexual

A person attracted to people of the same gender, romantically and/or sexually, where the gender of the attracted person is the key to the attraction.

Homophobia

Irrational fear of homosexual feelings, thoughts, behaviours, or people, and an undervaluing of homosexual identities – resulting in prejudice, discrimination and bias against homosexual individuals.

Human rights

Human rights are universal, fundamental, inalienable rights, which all human being are entitled to regardless of their race, gender, sexual orientation, gender identity, age, social class, national origin, occupation, talent, religion, or any other personal factor. All individuals are entitled to human rights – simply because they are human.

Inalienable rights

Rights that cannot be forfeited (given up), transferred or lost.

International human rights instruments

International human rights instruments are treaties and other international documents relevant to international human rights law and the protection of human rights in general.

Intersex

Being born with ambiguous sex characteristics (chromosomes, genitals and/or reproductive organs). Many variations exist; intersex is not one category, but includes many different ways someone might defy the medical definitions of “male” and “female”.

Lesbian

A sexual identity and orientation. A woman attracted to other women, romantically and/or sexually.

Men who have sex with men (MSM)

A sexual practice irrespective of sexual orientation or identity. An MSM can be a heterosexual, bisexual, homosexual or transgender man. This term is technical and is not necessarily an identity.

Sex

The biological, hormonal, and chromosomal characteristics referred to as male and female. While medical and scientific advances indicate that the concept of sex incorporates a wider spectrum of characteristics beyond the traditional qualifications of “male” or “female”, individuals are still legally defined as either “male” or “female”.

Sexual orientation

Pattern of romantic and/or sexual attraction to a person of the opposite gender, same gender, or more than one gender.

Transman

A transgender man or female-to-male (FTM) is assigned female biological characteristics at birth, but his gender identity is male. Always use male pronouns when referring to a transman.

Transphobia

Irrational fear of transgender feelings, thoughts, behaviours or people, and an undervaluing of transgender identities – resulting in prejudice, discrimination and bias against transgender individuals. Where transphobia includes homophobia, we speak of homophobia and transphobia.

Transwoman

A transgender woman, or male-to-female (MTF) is assigned male biological characteristics at birth, but her gender identity is female. Always use female pronouns when referring to a transwoman.

Transgender

An umbrella term which is often used to describe people whose gender expression or gender identity differs from their biological sex or their gender assigned at birth. The umbrella term is used to describe a wide range of identities and experiences – including transsexuals, FTM persons, MTF persons, transvestites, cross-dressers, two-spirits, gender-queers, and many more.

Transsexual

This refers to people who wish to undergo hormone replacement therapy and/or gender affirming surgery to align their bodies to their gender identity.

Women who have sex with women (WSW)

A sexual practice irrespective of sexual orientation or identity. A WSW can be a heterosexual, bisexual, homosexual or transgender woman. This term is technical and is not necessarily an identity.

Universality of rights

Human rights apply to all persons throughout the world and are not dependent on sexual orientation, gender identity, or any other characteristic.

Executive Summary

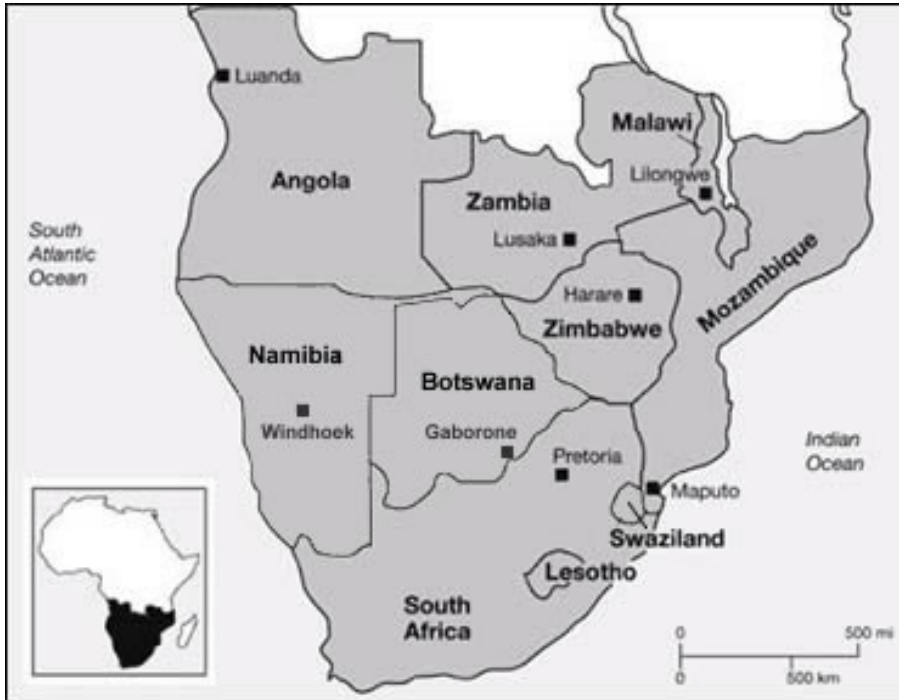
Transgender persons are human beings. Fundamental human rights are universal and apply to all persons – regardless of their gender identity. All persons are born as equal human beings and with inherent dignity. Like all human beings, transgender persons have the right not to be discriminated against, or harassed and abused. Their rights are protected under the national constitutions of their countries, and they are protected by regional and international human rights instruments which oblige their governments to protect all persons.

Unfortunately, many transgender persons continue to face harassment, societal stigma, emotional distress, and discrimination. Many are also unaware of their basic fundamental human rights and how they can go about asserting those rights.

It is against this backdrop that this booklet explores the laws and policies that could potentially affect the rights of transgender persons in ten Southern African countries: Angola, Botswana, Lesotho, Malawi, Mozambique, Namibia, South Africa, Swaziland, Zambia and Zimbabwe. The booklet focuses on laws and policies in four thematic areas: legal recognition, employment laws, sexual and reproductive health, and the unlawful application of laws and harassment of transgender persons by police officials during arbitrary arrests.

The aim of the booklet is to:

- Emphasise that transgender persons are human beings and that human rights apply universally and equally to all persons regardless of their gender identity, and that transgender persons are fully entitled to be protected and treated with dignity and respect.
- Provide transgender persons, human rights activists and human rights organisations, with an easy guide on the laws and policies in their own countries which may potentially affect their rights and interests.
- Provide transgender persons, human rights activists and human rights organisations, with a basis upon which they can assert their basic fundamental human rights.



Introduction

“Members of the gay, lesbian and transgender community, although no doubt a small minority, and unacceptable to some on religious or other grounds, form part of the rich diversity of any nation and are fully entitled in Botswana, as in any other progressive state, to the constitutional protection of their dignity.”

Botswana Court of Appeal in *Attorney General v Rammoge and Others*
(the LEGABIBO judgment)¹

Throughout Africa, transgender persons have to contend with pervasive negative experiences, such as societal stigma and discrimination. Many transgender men and women experience discrimination and harassment in their daily lives - at work, at home, while they are walking on the street, or when they use public facilities such as banks, restaurants, hospitals, police stations or airports – simply because they do not conform to gender identity norms. Moreover, transgender persons are perpetually exposed to the threat of violence against them due to their gender non-conformity.

For many transgender persons, having a gender identity that is not reflected by their identity document exposes them to humiliation and a risk of violence. This effectively denies them their legal rights and citizenship. This problem is highlighted when transgender persons are refused employment and banking transactions because they lack proper government identification. They are often required to explain intimate details of their lives and identity to strangers in order to access routine services. This causes a great deal of emotional distress, discomfort, and violates their dignity and privacy.

Transgender persons should not have to endure this kind of treatment. They are entitled to the protection of their dignity and national constitutions and regional and international instruments apply to them equally.

¹ *Attorney General v Rammoge and Others* CACGB-28-14, 16 March 2016, at para 60. Hereinafter referred to as the ‘LEGABIBO judgment’.

“Fundamental rights are to be enjoyed by every person. To deny a person his or her humanity is to deny such person human dignity – and the protection and upholding of personal dignity is one of the core objectives of Chapter 3 of the Constitution.”

The LEGABIBO judgment²

All persons – regardless of their gender identity and expression – are entitled to fundamental rights and freedoms and have the right not to be discriminated against, harassed or abused. All persons are born as equal human beings, with inherent dignity, and are entitled to be treated with respect. Once we accept that fundamental human rights apply to all persons, it is a basis upon which transgender persons can enforce and assert their rights.

The national constitutions of Angola, Botswana, Lesotho, Malawi, Mozambique, Namibia, South Africa, Swaziland, Zambia and Zimbabwe specifically recognise the right to be free from discrimination, and provide a framework within which transgender persons can assert their rights and oblige their governments to protect the rights and interests of all persons, including those belonging to the transgender community. In addition to this, regional and international instruments provide very useful avenues which allow transgender persons to enforce, interpret, protect and assert their rights. All of these countries have signed and ratified the African Charter on Human and Peoples’ Rights (“African Charter”).

² *Id.*

Understanding Terminology

For many people, the terms “gender” and “sex” are used interchangeably, and thus incorrectly. This idea has become so common that it is rarely questioned. We are born, assigned a sex, and sent out into the world. For many people, this is cause for little, if any, dissonance. Yet, biological sex and gender are different: gender is not inherently nor solely connected to one’s physical anatomy.

A person’s **gender** is socially constructed. Gender refers to the set of roles, activities, expectations and behaviours assigned to females and males by society. Our society recognises two basic gender roles: masculine (having the qualities attributed to males) and feminine (having the qualities attributed to females).

Biological or anatomical **sex** refers to the physical structure of one’s reproductive organs and is used to assign sex at birth. Biological sex is determined by chromosomes (XX for females, XY for males), hormones (oestrogen/progesterone for females, testosterone for males) and internal and external genitalia.

A person’s **gender identity** refers to one’s innermost concept of self as male or female or both or neither – it is how individuals perceive themselves and what they call themselves. One’s gender identity can be the same or different to the sex assigned at birth. Individuals are conscious of this between the ages of 18 months and 3 years. Most people develop a gender identity that matches their biological sex. For some, however, their gender identity is different from their biological or assigned sex.³ Some of these individuals choose to socially, hormonally and/or surgically, change their sex to more fully match their gender identity.

Gender expression refers to the ways in which people externally communicate their gender identity to others through behaviour, clothing, haircut, voice and other forms of presentation. Gender expression also works the other way as people assign gender to others based on their appearance, mannerisms, and other gendered characteristics. Sometimes, transgender people seek to match their physical expression with their gender identity, rather than their birth-assigned sex. Gender expression should not be viewed as an indication of sexual orientation.

Transgender is a term used to describe people whose birth-sex, gender identity, and gender expression do not all match. More narrowly defined, it refers to an individual whose gender identity does not match their assigned birth gender. For example, a person with a male birth-sex may identify as female, adopt a female role, and present as a girl or woman. She may be referred to as a transwoman or male-to-female transgender person. A person with female birth-sex may identify as male, adopt a male role, and present as male. He is also referred to as a transman or female-to-male transgender person. A transgender person can also have a gender identity which lies somewhere

³ Though a child is labelled male or female at birth, only his or her biological traits are apparent. As time progresses and the person grows up, he or she may become aware of a gender identity that is different from the birth-sex.

between male and female. A person can be born a man, but may feel inherently female, and feel unhappy about being classified as male. This consequently means that a transgender person's legal identification documents misrepresent the gender identity of the individual, since they reflect the gender assigned to them at birth – regardless of whether or not this is the felt experience of the individual.⁴

The disharmony between the official gender given at birth and the individual's inherent gender identity and the social stigma and discrimination that come with this incongruence, can lead to great emotional trauma. For example, when the official sex on identification documents places an individual in a role that is diametrically opposite to the individual's inherent gender identity, it can cause great discomfort and distress.

⁴ Gender Dynamics and Legal Resources Centre, *Alteration of Sex Description and Sex Status Act No. 49 of 2003*: Briefing Paper.

The Universal Application of Fundamental Human Rights

“As a society, once we recognise that persons who are gay, lesbian, bisexual, transgender or intersex are human beings ... we must accord them the human rights which are guaranteed by the Constitution to all persons, by virtue of their being human, in order to protect their dignity ...”

High Court of Kenya in *Eric Gitari v Non-Governmental Organisations Co-ordination Board and Others*⁵

States are obliged to protect and respect the rights of all people, including lesbian, gay, bisexual and transgender (LGBT) persons, including the rights to life; security of person and privacy; the right to be free from torture, arbitrary arrest and detention; the right to be free from discrimination; and the right to freedom of expression, association and peaceful assembly.

“Fundamental freedoms are enjoyed by every member of every class of society – the rich, the poor, the disadvantaged, citizens and non-citizens, and even criminals and social outcasts, subject only to the public interest and respect for the rights of and freedoms of others.”

The LEGABIBO judgment⁶

The first international human rights agreement was the **Universal Declaration of Human Rights** which was adopted by the United Nations General Assembly in 1948:

- **Article 1:** “All human beings are born free and equal in dignity and rights.”
- **Article 2:** “Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”
- **Article 7:** “All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.”

This was followed by the **International Covenant on Civil and Political Rights (ICCPR)**, which

⁵ Petition No 440 of 2013, [2015] eKLR, at para 104. At the time of writing, the judgment has been appealed.

⁶ The LEGABIBO judgment at para 58.

was adopted by the General Assembly as a treaty in 1966, and which was intended to give effect to the rights set out in the Universal Declaration:

Article 2(1): “Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

Article 2(2): “Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognised in the present Covenant.”

Article 2(3): “Each State Party to the present Covenant undertakes:

- (a) To ensure that any person whose rights or freedoms as herein recognised are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
- (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
- (c) To ensure that the competent authorities shall enforce such remedies when granted.”

The **African Charter on Human and People’s Rights (African Charter)**, which entered into force in 1986, is an important African human rights document. It sets out the fundamental human rights to which countries in Africa have ascribed:

Article 2: “Every individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.”

Article 3(1): “Every individual shall be equal before the law.”

Article 3(2): “Every individual shall be entitled to equal protection of the law.”

These human rights treaties emphasise that human rights apply to all people. This means that no person should be denied the exercise of their fundamental human rights because of discrimination. Every person has the right to be treated equally, and with dignity.

Human Right	African Charter on Human and People's Rights	International Covenant on Civil and Political Rights
Right to equality and non-discrimination	Articles 2, 3, 19	Articles 2 and 26
Right to life	Article 4	Article 6
Right to liberty and security of person	Article 6	Article 9
Right to privacy		Article 17
Right to be free from torture, cruel, inhuman and degrading treatment or punishment	Article 5	Article 7
Right to freedom of expression	Article 9	Article 19

None of the treaties specifically mention discrimination based on a person's gender identity or sexual orientation. However, they all offer protection against discrimination based on "sex" and "other status". These terms have been interpreted to include discrimination based on gender identity or sexual orientation – and protect the rights of transgender people.

Angola, Botswana, Lesotho, Malawi, Mozambique, Namibia, Swaziland, South Africa, Zambia and Zimbabwe, have all signed the African Charter and the ICCPR. This means that they have a legal obligation to protect transgender people from discrimination and to ensure their human rights.

Interpretation of Discrimination Based on "Other Status"

"In my mind the grounds listed in terms of section 15(3) are not exhaustive. A closer interrogation of the said grounds show one common feature – they outlaw discrimination on grounds that are offensive to human dignity and or on grounds that are irrational."

Industrial Court of Botswana in *Diau v Botswana Building Society*⁷

The list of prohibited grounds of discrimination in the ICCPR and other human rights treaties, is not a closed list, and that was why the drafters of these agreements had intentionally used the phrase "other status". This has been interpreted by UN human rights committees to include protection from discrimination based on gender identity and sexual orientation.

The UN Human Rights Committee held in 1994, that States had a duty to protect individuals from discrimination based on "sex" - which includes "sexual orientation".⁸ The United Nations

⁷ *Diau v Botswana Building Society* 2003 (2) BLR 409 (IC).

⁸ In *Toonen v Australia* (CCPR/C/50/D/488/1992), the United Nations Human Rights Committee held that reference to "sex" in

Committee on Economic, Social and Cultural Rights, in defining the same right to non-discrimination in the International Covenant on Economic, Social and Cultural Rights (ICESCR), stated that “a flexible approach to the ground of ‘other status’ is thus needed in order to capture other forms of differential treatment that cannot be reasonably and objectively justified, and are of a comparable nature to the expressly recognised grounds in Article 2 (of the ICESCR).”⁹ The Committee on Economic, Social and Cultural Rights recognised several other prohibited grounds in a non-exhaustive list – including health status, age, disability, nationality, marital and family status, sexual orientation, and gender identity.¹⁰

These treaties should be interpreted using the Principles set out in the **Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity (Yogyakarta Principles), 2007**.¹¹ The Yogyakarta Principles are a set of international legal principles, drafted by civil society, which aim to give States greater clarity on their human rights obligations. These principles are:

- **Principle 1:** “All human beings are born free and equal in dignity and rights. Human beings of all sexual orientations and gender identities are entitled to the full enjoyment of all human rights.”
- **Principle 2:** “Everyone is entitled to enjoy all human rights without discrimination on the basis of sexual orientation or gender identity. Everyone is entitled to equality before the law and the equal protection of the law without any such discrimination whether or not the enjoyment of another human right is also affected. The law shall prohibit any such discrimination and guarantee to all persons equal and effective protection against any such discrimination. Discrimination on the basis of sexual orientation or gender identity includes any distinction, exclusion, restriction or preference based on sexual orientation or gender identity which has the purpose or effect of nullifying or impairing equality before the law or the equal protection of the law, or the recognition, enjoyment or exercise, on an equal basis, of all human rights and fundamental freedoms. Discrimination based on sexual orientation or gender identity may be, and commonly is, compounded by discrimination on other grounds including gender, race, age, religion, disability, health and economic status.”
- **Principle 3:** “Everyone has the right to recognition everywhere as a person before the law. Persons of diverse sexual orientations and gender identities shall enjoy legal capacity in all aspects of life. 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 one shall be forced to undergo medical procedures, including sex reassignment surgery, sterilisation or hormonal therapy, as a requirement for legal recognition of their gender identity. No status, such as marriage or parenthood, may be invoked as such to prevent the legal recognition of a person’s gender identity. No one shall be subjected to pressure to conceal, suppress or deny their sexual orientation or gender identity.”

In considering the international legal principles set out above it is clear that gender identity is a prohibited ground of discrimination under international law. Transgender people, therefore, are entitled to enjoy the full range of human rights set out in these documents. Similarly, they are entitled to the full range of human rights set out in their country’s Constitution – without any

Articles 2 and 26 of the ICCPR is to be taken as including sexual orientation.

⁹ Committee on Economic, Social and Cultural Rights, General Comment No 20 at para 27.

¹⁰ Committee on Economic, Social and Cultural Rights, General Comment No 20 at paras 28-35.

¹¹ Available at: www.yogyakartaprinciples.org.

conditions. This is because human rights apply to all human beings, whether they are lesbian, gay, bisexual, or transgender.

In 2014, the African Commission on Human and People's Rights passed a resolution that condemned systematic attacks and human rights violations – including murder, rape, assault, arbitrary imprisonment and other forms of persecution - against people because of their gender identity or sexual orientation. The African Commission urged member states to pass laws and to use their laws to punish all forms of violence targeted at people based on their gender identity or sexual orientation.¹²

Constitutional Protection in Southern African Countries

Progress is slowly being made to recognise and protect the human rights of transgender men and women in Southern Africa. The constitutions of Angola, Botswana, Lesotho, Malawi, Mozambique, Namibia, South Africa, Swaziland, Zambia and Zimbabwe all guarantee the right to equality and non-discrimination based on various grounds such as race or religion.

South Africa is the only country that guarantees, in its Constitution, protection from discrimination based on sex, gender and sexual orientation. The constitutions of several countries prohibit discrimination based on sex, while others like Swaziland outlaw discrimination based on gender. This does not mean that transgender people in other States are not entitled to constitutional protection. Courts have held that discrimination can be unfair even where the discrimination is not based on a listed ground of discrimination, when such discrimination is based on an analogous ground, i.e. where the discrimination is based on an attribute or characteristic that affects the human dignity of a person. Therefore, in addition to reading “sexual orientation” and “gender identity” into existing grounds of discrimination such as “sex” and “other status” “sexual orientation” and “gender identity” can also be seen as grounds analogous to the existing prohibited grounds of discrimination in the Constitution.¹³

In terms of international human rights law, gender identity is a prohibited ground of discrimination. Even if a country's Constitution does not specifically offer protection against discrimination based on gender identity, transgender people are entitled to enjoy the full range of human rights, because of the universal application of human rights – human rights apply to all human beings.

This was affirmed in the judgment of Botswana's Court of Appeal in the LEGABIBO case, where Kirby JP emphatically rejected the State's argument that a homosexual person enjoyed no fundamental rights:

“These are, in my view, totally unacceptable and irrational arguments. Fundamental rights are to be enjoyed by every person. To deny a person his or her humanity is to deny such person human dignity ... Members of the gay, lesbian and

¹² Resolution 275 on Protection against Violence and other Human Rights Violations against Persons on the basis of their real or imputed Sexual Orientation or Gender Identity, adopted by African Commission at its 55th Ordinary Session, in Angola, from 28 April to 12 May 2014.

¹³ *Vriend v Alberta* [1998] 1 S.C.R. 493.

*transgender community, although no doubt a small minority, and unacceptable to some on religious or other grounds, form part of the rich diversity of any nation and are fully entitled in Botswana, as in any other progressive state, to the constitutional protection of their dignity.*¹⁴

So far, only South Africa has legalised same-sex marriages and offers gender reassignment surgery. Transgender men and women in South Africa and Namibia can apply to change the gender markers in their identity documents.

Limitations of Constitutional Rights

"[T]he onus of proving that a limit on a right or freedom guaranteed by the Charter is reasonable and demonstrably justified in a free and democratic society rests upon the party seeking to uphold the limitation"

Canadian Supreme Court in *R v Oakes*¹⁵

Fundamental rights are universal, and are enjoyed by every member or class of society, irrespective of a person's gender identity or expression. In certain circumstances, however, the State may limit the fundamental rights of persons – if it is reasonably justifiable to do so within the objective circumstances. If the State seeks to limit the rights of any person, it must however prove that the limitation of these rights was proportionate and reasonably justifiable in a democratic society, and a failure to do so is an unjustifiable limitation of the right.

The State must provide evidence to justify the limitation of the right of any person and that there is no alternative or lesser means than the limitation of the right.

The Botswana Court of Appeal, in *Good v Attorney General*, held that:

*"It would be irresponsible in the highest degree for this court to make findings based on speculative submissions and on perceptions which may or may not be held by the public without any reliable factual material to support them."*¹⁶

Legal Recognition of a Person's Gender

The inability to change gender markers in official identity documents often has serious consequences for transgender individuals as they can be harassed by officials or even arrested because their identity documents do not match their physical appearance or gender expression. So a transgender woman whose identity document reflects her as a man, can be accused of fraud if she goes to a bank. She could experience difficulty at airports when she presents her passport which states she is male. She could experience harassment at work because her identity document reflects

¹⁴ The LEGABIBO judgment at para 60.

¹⁵ *R v Oakes* [1986] 1 SCR 103 at p 105D, 136J.

¹⁶ *Good v Attorney General* 2005 (2) BLR 337 (CA) at 349.

that she is male, or perhaps she was employed as a male.

The lack of documents matching their gender identity can expose transgender people to humiliation and discrimination – and amounts to a violation of a number of their human rights, including the right to privacy, the right to be free from cruel and degrading treatment, the right to equality, and the right to dignity.

In Kenya, a court allowed a change to the gender marker on the Applicant's Certificate of Secondary Education, stating 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 inherent dignity, which our Constitution protects. Human dignity is the cornerstone of the other human rights enshrined in the Constitution.”¹⁷

With the exception of South Africa and Namibia, other Southern African countries do not have specific provisions in their laws that allow transgender people to change the gender marker or sex description in their official documents. This does not, however, mean that the door is closed to effect these changes. Applicants should consider other provisions in national registration laws. Most countries have provisions that allow a person to apply for a new identity document if there has been a “material change” in their personal particulars. Applicants could also rely on their fundamental human rights that are guaranteed under their country's Constitution – as well as the international human rights documents discussed earlier.

¹⁷ *Republic v Kenya National Examination Council and Attorney General, Ex Parte AMI*, JR Case No. 147 of 2013, [2014] eKLR at page 11.

COUNTRY	Change Gender Description or Sex Status	Material Change in Particulars	Change Photograph	Change Forename/ Surname
Angola		Article 87 - Código do Registo Civil 2015		Article 87 - Código do Registo Civil 2015
Botswana		Section 16 - National Registration Act	Section 17 - National Registration Act	Sections 12 & 13 - Births & Deaths Registration Act
Lesotho		"Necessary" Section 8(1) National Identity Cards Act		Section 7(2) - Registration of Births and Deaths Act
Malawi		Section 20(1) - National Registration Act	Section 21(1) - National Registration Act	
Mozambique		Section 85(1) (m) - Código do Registo Civil		
Namibia	Section 7B - Births, Marriages & Deaths Registration Act		Section 12(1)(a) - Identification Act	Section 8 - Births, Marriages & Deaths Registration Act
South Africa	Section 2(1) - Alteration of Sex Description & Sex Status Act			
Swaziland		Section 8(3) - Births, Marriages & Deaths Registration Act		Sections 8(1) & 8(2) - Births, Marriages & Deaths Registration Act
Zambia		Section 9(2) - National Registration Act		
Zimbabwe				Section 18(2) & 18(3) - Births & Deaths Registration Act

Rights in the Workplace

Transgender people are often vulnerable in the workplace, where they face widespread stigma and discrimination because of their gender expression. Many transgender people find it difficult to get jobs or to keep their jobs – particularly if they decide to transition to give effect to their gender identity. Some are forced to conceal their gender identity at work, which violates their right to equality and human dignity.

An increasing number of Southern African countries are protecting employees from being discriminated against based on their gender or sexual orientation. Attention is also being paid to protection against sexual harassment at work.

COUNTRY	Protection from discrimination based on gender identity	Protection from discrimination based on sexual orientation	Protection from discrimination based on HIV/AIDS status	Protection against sexual harassment	Protection from discrimination on basis of "sex"
Angola					Article 4 - Lei do Trabalho 2015
Botswana	"GENDER" Section 23(d) - Employment Amendment Act 2010	Section 23(d) - Employment Amendment Act 2010	"HEALTH STATUS" Section 23(d) - Employment Amendment Act 2010; Section 1.6.1 National Industrial Relations Code of Good Practice: HIV/AIDS		Article 15 of the Constitution
Lesotho			Section 235E - Labour Code Amendment Act 2006	Section 5(2) - Labour Code	Sections 5(1) & 66(3)(d) - Labour Code
Malawi			Section 20(1) - Malawi Constitution: as interpreted in Banda v Lekha	Sections 6(1), (2), 7 - Gender Equality Act 2012	Sections 5(1), 6(1), 57(3) - Employment Act

Mozambique		Article 4(1) - Lei do Trabalho 2007	Article 4(1) - Lei do Trabalho 2007		Article 13 - Lei do Trabalho 2007; Articles 35 & 36 - Constitution
Namibia			Section 5(2) (f) - Labour Act 2007	Sections 5(8) & 5(9) - Labour Act 2007	Sections 5(2) (b) & 33(3) - Labour Act 2007
South Africa	"GENDER" Section 6(1) - Employment Equity Act 1998; Section 187(1) (f) - Labour Relations Act	Section 6(1) - Employment Equity Act 1998; Section 187(1) (f) - Labour Relations Act	Section 6(1) - Employment Equity Act 1998	Section 203 - Labour Relations Act; Code of Good Practice on Sexual Harassment	Section 6(1) - Employment Equity Act 1998, Section 187(1) (f) - Labour Relations Act
Swaziland	Sections 16(3) & 16(7) - Industrial Relations Act				Sections 29 & 35(3)(d) - Employment Act 1980; Sections 16(3) & 16(7) - Industrial Relations Act
Zambia			"HEALTH" New definition of discrimination in Article 266 of Constitution, as amended in 2016	Section 39 - Gender Equity and Equality Act, 2015	Section 36(4)(d) - Employment Amendment Act 2015; Article 11 - Constitution; section 15 - Gender Equity and Equality Act
Zimbabwe	"GENDER" Sections 5(1), 5(3), 5(4) - Labour Act, section 56(3) - Constitution		Section 5(1), 5(3), 5(4) - Labour Act		Section 56(3) - Constitution

Even if employment laws do not offer these direct protections, transgender people could rely on their fundamental human rights that are guaranteed under their country's Constitution – as well as the international human rights documents discussed earlier.

The Yogyakarta Principle 12 states that: “Everyone has the right to decent and productive work, to just and favourable conditions of work and to protection against unemployment, without discrimination on the basis of sexual orientation or gender identity.”

In South Africa, a transgender woman won a case against her employer for an automatically unfair dismissal.¹⁸ She underwent gender reassignment surgery and faced discrimination from her co-workers. The Labour Court made the following findings:

“The fact that the applicant was asked to hide that she is a transsexual is per se unfair discrimination. The fact that she has agreed to do so does not legitimise the discrimination that she endured....

This case shows what discriminated people undergo daily in the workplace. It is a sad indictment to our society that despite our discriminatory past and all the non-discriminatory laws that we have in place, that discrimination in the workplace still thrives. The applicant is one such victim ... She excelled in her workplace. She was the best. I do not understand why her changed gender would now affect her performance.”

Criminal Harassment

There is no law in any Southern African country that makes it illegal to be a transgender person. Yet, transgender people are often harassed and prosecuted unlawfully under criminal laws – because of their gender identity or gender expression. Such criminal harassment is a direct violation of the fundamental human rights to which transgender people are entitled, under their countries' constitutions and under international human rights treaties.

Often, authorities use laws that aim to protect “public morality”, nuisance laws, or vagrancy provisions to harass transgender people. They are also often targeted under provisions in Penal Codes that criminalise consensual sexual activity between same-sex couples. While ‘sodomy’ is still used as a legal term in many countries, its use as a clinically descriptive term is discouraged. Penetrative/insertive anal sex/intercourse is preferred in the more general context.

¹⁸ *Ehlers v Bohler Udderholm Africa (Pty) Ltd* (2010) 31 ILJ 2383 (LC).

COUNTRY	Consensual Sexual Acts between men	Consensual Sexual Acts between Women	Public Indecency	Nuisance and Vagrancy Provisions
Angola				
Botswana	Sections 164 & 167 - Penal Code	Section 167 - Penal Code	Section 179(e) – Penal Code	Sections 176, 179, 182 - Penal Code
Lesotho			Section 56 - Penal Code	
Malawi	Sections 153, 154, 156 - Penal Code	Section 137A - Penal Code	Section 180(d) - Penal Code	Sections 180(e) & 184(1)(c) - Penal Code
Mozambique				
Namibia	Sodomy is criminalised in the common law		Sections 7(b), 8, 9 - Combatting of Immoral Practices Act	Sections 42 & 44 - Criminal Procedure Act
South Africa				
Swaziland	Section 185(5) - Criminal Procedure and Evidence Act; Common law			
Zambia	Sections 155, 156, 158(1) - Penal Code	Section 158(2) - Penal Code	Section 178(e) – Penal Code	Sections 178(f), (g); 181(d) - Penal Code
Zimbabwe	Section 73 - Criminal Law Act		Section 77(1)(a) - Criminal Law Act	

A State must be able to justify, in terms of the law, any discriminatory treatment of transgender people. Otherwise acts by its officials will be arbitrary and illegal. When faced with arbitrary arrest or detention, a transgender person should be entitled to the fundamental legal principles set out in **Yogyakarta Principle 7**.

Yogyakarta Principle 7: “No one shall be subjected to arbitrary arrest or detention. Arrest or detention on the basis of sexual orientation or gender identity, whether pursuant to a court order or otherwise, is arbitrary. All persons under arrest, regardless of their sexual orientation or gender identity, are entitled, on the basis of equality, to be informed of the reasons for arrest and the nature of any charges against them, to be brought promptly before a judicial officer and to bring court proceedings to determine the lawfulness of detention, whether or not charged with any offence.”

The Right to Health

Article 12(1) of the ICESCR states that:

“The States Parties to the present Covenant recognise the right of everyone to the highest attainable standard of physical and mental health.”

This right is interpreted in **Yogyakarta Principle 17**:

“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. Sexual and reproductive health is a fundamental aspect of this right.”

Despite these protections under international law many transgender people feel let down by the health systems in their countries, whether these are private or public-health facilities. They face homophobic and transphobic attitudes from doctors and nurses who cannot understand their gender identity and who often do not have the knowledge and facilities to provide them with proper healthcare and advice. Many would rather avoid getting treatment than endure humiliation and invasion of their privacy.

Transgender people are vulnerable to HIV and AIDS, and yet they are often ignored in government programmes to combat the disease. In many countries, condoms, lubricants and other protection are not freely available.

Access to gender reassignment surgery is practically impossible. Hormone treatment is also not widely available in Southern Africa.

Transgender Rights in Angola

Rights under the Constitution of Angola

Title II (Articles 22-88) of the **Constitution** sets out the fundamental rights and freedoms of the individual. **Article 23** does not include gender or sexual orientation as prohibited grounds of discrimination. The United Nation’s Human Rights Committee has stated that the phrase “other status”, should be interpreted to include protection from discrimination based on gender identity and sexual orientation.

Article 26(2) reaffirms that the rights under the Constitution must be read in conjunction with the rights set out in the Universal Declaration of Rights, the African Charter, and the International Covenant on Civil and Political Rights.

Fundamental Human Right	Where is it in the Constitution?
Fundamental rights and duties	Title II
Right to life	Article 30
Right to liberty and personal security	Article 36(1)
Protection from torture, cruel or inhuman treatment	Articles 36(3)(b) & Article 60
Right to personal identity and privacy	Article 32
Rights of an accused person	Article 63
Freedom of expression	Article 40
Freedom of association	Article 48
Protection from discrimination	Article 23(2)
Right to equality	Article 23(1)
Right to personal integrity (human dignity)	Article 31
Freedom of assembly	Article 47
Right to work	Article 76
Right to education	Article 79

Changing your Gender Marker

There is no specific law that allows transgender persons in Angola to change the gender marker in their identity documents or passports. **Section 78** of the **Código do Registo Civil 2015** indicates that, in general, there should be no alteration of details entered into the registration records kept by the Civil Registrar. However, **section 87** gives the Civil Registrar general authority to make changes. This includes changes of name and when there is a change of facts which alter the legal

identity or status of the person registered. Transgender people could possibly use this section to change the sex description on their identity document.

If an application in terms of article 87 is rejected, applicants should also rely on their fundamental human rights that are guaranteed under the Constitution - as well as the international human rights documents discussed earlier.

Your Rights in the Workplace

- **Section 4** of the **Lei do Trabalho 2015** prohibits employment discrimination on many grounds, including sex. The reference to “sex” should be interpreted to include protection from discrimination based on gender identity – which is a prohibited ground in international law.
- **Section 15(1) and (2) of Law 8/04 on HIV and AIDS**, prohibits employment discrimination on the basis of HIV status.

Criminalisation and Harassment

Under **sections 70 and 71** of the **Código Penal 1889**, certain same-sex sexual acts were potentially prohibited. Angola is in the process of reforming the Penal Code. In its draft stage, the new code includes provisions which transgender people could use to protect their rights. For example, section 197 of the draft Penal Code makes it a crime to discriminate based on gender or sexual orientation, and section 174 prohibits sexual harassment.

The **Law against Domestic Violence 25 of 2011**, protects everyone against domestic violence. It could also be used where domestic violence is experienced by transgender persons in Angola.

- Domestic violence is defined under the Angolan law to include physical and psychological abuse, sexual violence, as well as verbal abuse. Family abandonment and damage to property is also labelled domestic violence.
- Domestic violence occurring in families, care facilities and female and male hostels are recognised.

Although there are no specific provisions in the law, constitutional norms and international law standards require that the government must be able to justify any discriminatory treatment of transgender people, otherwise acts by its officials will be arbitrary and illegal.

Access to Sexual and Reproductive Health

There is no access to gender reassignment surgery or hormone replacement therapy in Angola. Some transgender people go to South Africa to access these services but the cost of treatment may prevent this option.

The **National Strategy on HIV/AIDS 2011-2014** includes MSMs and sex workers in its discussion of at-risk groups.

Transgender Rights in Botswana

Rights under the Constitution of Botswana

Sections 3-19 of the Constitution set out the fundamental rights and freedoms of the individual. While section 3 does not include gender or sexual orientation as prohibited grounds of discrimination, it does include sex.

The rights under the Constitution must be read in conjunction with the rights set out in the African Charter and the International Covenant on Civil and Political Rights.

Fundamental Human Right	Where is it in the Constitution?
Fundamental rights and freedoms	Section 3
Right to life	Section 4
Right to personal liberty	Section 5
Protection from torture, inhuman or degrading treatment	Section 7
Right to privacy	Section 9
Rights of an accused person	Section 10
Freedom of expression	Section 12
Freedom of association and assembly	Section 13
Protection from discrimination	Section 15

Changing your Gender Marker

There is no specific law that allows transgender persons in Botswana to change the gender marker in their identity documents or passports. However, there are provisions in the **National Registration Act 26 of 1986**, that could be used by transgender persons to change the sex description in their identity document:

- **Section 16** deals with a material change in a person’s particulars. It reads:

“1) Where the registrar is of the opinion that any change in the particulars relating to a registered person materially affects his registration, he shall record the change and notify the Registrar of National Registration of the circumstances and recommend that the person concerned should be issued with a new identity card.

(2) The Registrar of National Registration shall, if he is satisfied that the change materially affects the person’s registration, cancel the identity card issued to that person and issue a new identity card to him.

(3) The particulars relating to the new identity card and its holder shall be recorded in the national

register and the register of the area in which that person is registered.”

- **Section 17 of the National Registration Act** allows a person to update their photograph in their identity card. **Sections 17(1)** and **17(2)** state that:

“(1) Every registered person may, whenever he is satisfied that his personal appearance has changed so as to make it likely that his identity as certified by the identity card may be questioned, apply to the registrar of the area in which he is registered for the issue of a new card with a more recent photograph and shall, when issued with a new identity card by the Registrar of National Registration, surrender his existing identity card to the registrar to be cancelled and destroyed.

(2) The registrar of the area in which the person is registered and the Registrar of National Registration shall cause the changes to be recorded in the relevant registers.”

- **Section 13 of the Births and Death Registration Act 48 of 1968** allows a person to change their forename/s. A person can apply, if they are 21 years or older. Their parent or guardian would have to apply on their behalf if they are younger than 21 years. **Section 13(3)(a)** states that:

“... the Registrar must be satisfied that the person has a settled wish and intention to be and to continue to be generally known by the new forename or forenames either in substitution for or in addition to the forename or forenames under which his birth was registered.”

- **Section 12** of the Act allows a person to alter a surname on a birth register.

Your Rights in the Workplace

- The **Employment Amendment Act 10 of 2010** amended section 23(d) of the Employment Act to add gender, sexual orientation and health status (including HIV/AIDS status) as prohibited grounds on which an employer cannot terminate a contract of employment.
- A new **section 23(e)** was introduced, which provides general protection against discrimination. It states that an employee cannot be fired for “any other reason which does not affect the employee’s ability to perform that employee’s duties under the contract of employment”
- The **Botswana National Code of Practice on HIV/AIDS and Employment**, and the **Code of Good Practice: HIV/AIDS and Employment (Trade Disputes Act)**, protect the rights of employees with HIV.

Criminalisation and Harassment

There is no law in Botswana which makes it illegal to be transgender. The Court of Appeal in the LEGABIBO case further made it clear that: *“There is no legislation in Botswana that prohibits anyone from being lesbian, gay or bisexual ... It is not, however, and never has been a crime in Botswana to be gay.”*¹⁹

Despite this, public officials often use other laws – especially the Penal Code – to harass transgender people and to subject them to arbitrary arrest and detention.

¹⁹ The LEGABIBO judgment at paras 56 and 62.

Sections 164, 165 and 167 of the Penal Code prohibit consensual sexual acts between same-sex partners for men and women:

- **Section 164** refers to “unnatural offences”, which refers to consensual and non-consensual acts of anal penetration.
- **Section 167** criminalises any act of “gross indecency” between persons – in public or in private.

Transgender persons have also been detained under **nuisance-related charges**:

- **Section 176** of the Penal Code sets out the offence of common nuisance.
- **Section 179** allows authorities to prosecute “**idle and disorderly persons**”. This includes someone who “publicly conducts himself in a manner likely to cause a breach of the peace”, and someone who “without lawful excuse does any indecent act.”
- Transgender persons – especially those who are engaged in sex work – also face harassment under the “**rogues and vagabond**” provision in **section 182** of the Penal Code.

The government must be able to justify, in terms of the law, any discriminatory treatment of transgender people – otherwise acts by its officials will be arbitrary and illegal.

The **Domestic Violence Act 10 of 2008** offers protection to transgender people when they experience violence at the hands of family members, their romantic or sexual partners, or from people with whom they share a house:

- The law defines an applicant as “any person” subjected to an act of domestic violence. This requires that the applicant was in a domestic relationship with the perpetrator. Domestic relationship is defined to include persons who were cohabiting, family members, persons who shared a residence, and persons in an actual or perceived intimate or sexual relationship.
- Domestic violence includes emotional, verbal and psychological abuse – as well as intimidation and harassment. An applicant can apply for a restraining order, occupancy order, or tenancy order under the Act.

Access to Sexual and Reproductive Health

Botswana does not offer gender reassignment surgery. Hormone therapy is available at government hospitals – but it is usually at the discretion of medical staff, who often have transphobic views. Some doctors and nurses believe that being transgender is a lifestyle choice rather than an intrinsic part of a person’s gender identity. Often transgender persons have to undergo invasive tests before they can access hormone therapy.

The country’s **National Strategic Framework for HIV and AIDS 2010-2016** includes in its guiding principles ensuring equal access to health and social support services regardless of race, creed, religious or political affiliation, sexual orientation or socio-economic status. It specifically mentions MSM and gay men as key populations who should be accommodated when developing programmes to address HIV.

Transgender Rights in Lesotho

Rights under the Lesotho Constitution

Chapter II of the Constitution sets out the protection of fundamental rights and freedoms. There is no mention of gender identity or sexual orientation, but section 4(1) refers to “sex” and “other status”. The United Nation’s Human Rights Committee has stated that the phrase “other status”, should be interpreted to include protection from discrimination based on gender identity and sexual orientation.

Fundamental Human Right	Where is it in the Constitution?
Fundamental rights and freedoms	Section 4(1)
Right to life	Section 5
Right to personal liberty	Section 6
Freedom of movement	Section 7
Protection from torture, inhuman or degrading treatment	Section 8(1)
Freedom from arbitrary search	Section 10
Right to respect for private and family life	Section 11
Right to a fair trial	Section 12
Freedom of expression	Section 14
Freedom of association	Section 16
Freedom of peaceful assembly	Section 15
Freedom from discrimination	Section 18
Right to equality	Section 19

Changing your Gender Marker

There is no law in Lesotho that makes provision for a transgender person to change the gender marker in their identity document. The **Lesotho Passports and Travel Documents Act 15 of 1998**, does not make provision for changes to a person’s sex description. A transgender person who uses a passport that does not reflect their gender expression could be charged with committing an offence.

The **National Identity Cards Act 9 of 2011** outlines new regulations for the national identity cards in Lesotho. **Section 8(1)** states:

“The Director shall take reasonable practicable steps to ensure that personal information entered into the Register is complete, accurate and updated where necessary.”

Transgender people can also rely on their rights protected by the Constitution including the rights to equality, freedom of expression and to personal liberty.

Your Rights in the Workplace

- **Section 5** of the **Lesotho Labour Code 24 of 1992** deals with non-discrimination, but does not include gender or sexual orientation as grounds of discrimination.

- **Section 5(1)** states that:

“The application by any person of any distinction, exclusion or preference made on the basis of race, colour, sex, marital status, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation, is incompatible with the provisions of the Code.”

- **Section 5(2)** prohibits sexual harassment in the workplace.
- **Section 66(3)(d)** states that a termination of employment based on a person’s sex, is not a valid reason. **Sections 66(1)** and **66(2)** outline that termination must be for a valid reason, such as work performance, employee behaviour at work, and operational requirements.
- **Section 235E** of the **Labour Code Amendment Act 5 of 2006** prohibits discrimination based on HIV status.

Criminalisation and Harassment

Consensual sex between two people of the same sex was not criminalised by the **Penal Code Act 6 of 2012**. There is still, however, a perception that the consensual same-sex sexual acts remains criminalised under the common law. However, the Code codified the common law criminal justice system and section 2(2) of the Penal Code Act specifically states that “no person shall be tried, convicted or punished for an offence other than an offence in this Code or any written law or statute in force in Lesotho”.

Transgender people may still face harassment under laws dealing with public indecency. This infringes a number of their human rights:

- **Section 56 of the Penal Code deals with public indecency.** It states that:

“(1) A person who creates or takes part in any indecent spectacle or performance, or who does in public or in private any indecent act which is calculated to offend any reasonable member of the public, commits an offence.”

Many LGBT people do not report incidents of violence due to the stigma associated with it, and the hostile treatment they experience at the hands of the police. This is despite **section 24(1)** of the **Police Service Act 7 of 1998** which states that a police officer must perform his duties impartially and with due regard to the Constitution.

The government must be able to justify, in terms of the law, any discriminatory treatment of transgender people - otherwise acts by its officials will be arbitrary and illegal.

Access to Sexual and Reproductive Health

There is widespread discrimination directed at transgender people by healthcare staff. This results in transgender people not being able to access condoms or lubricants – despite the government stating that it would continue with free condom distribution in the public sector.

Gender reassignment surgery is not available in Lesotho. Hormone treatment is also not available. Transgender people who wish to begin hormone therapy have to go to South Africa to access it which is expensive.

The **National HIV and AIDS Strategic Plan 2011/12-2015/16** includes MSM and sex workers as a priority group to promote prevention, but does not address the needs of WSW, lesbians, transgender, or intersex people.

Transgender Rights in Malawi

Rights under the Constitution of Malawi

Chapter IV of the Constitution deals with human rights. Section 20 guarantees the right to equality and protection from discrimination on a number of grounds. Gender identity and sexual orientation are, however, not among the listed grounds. However, the section refers to “sex” and “other status or condition”. The United Nation’s Human Rights Committee has stated that the phrase “other status” should be interpreted to include protection from discrimination based on gender identity and sexual orientation.

Fundamental Human Right	Where is it in the Constitution?
Fundamental rights and freedoms	Section 15
Right to life	Section 16
Personal liberty	Section 18
Human dignity	Section 19(1)
Protection from torture, cruel, inhuman or degrading treatment	Section 19(3)
Right to equality	Section 20
Right to privacy	Section 21
Family and marriage	Section 22
Freedom of expression	Section 35
Rights of arrested or detained persons	Section 42
Right to administrative justice	Section 43
Right to education	Section 25
Freedom of association	Section 32
Freedom of assembly	Section 38

Section 22 of the Constitution deals with the family and marriage, but it does not state explicitly that a marriage is between heterosexual persons. However, the **Marriage, Divorce and Family Relations Act of 2015**, has been condemned by human rights groups for increasing discrimination towards LGBT people. The Act prevents a transgender person from marrying someone who has the same sex as the transgender person’s birth sex. So, this means it would be unlawful for a man to marry a woman if her birth sex was male, or for a woman to marry a man if his birth sex was female.

Changing your Gender Marker

Malawi does not have a law that allows a transgender person to change the gender marker in their identity document. However, there are provisions in the **National Registration Act 13 of 2010** that could possibly be used by transgender persons to change the sex description in their identity document:

- **Section 20(1)** provides that where a change in particulars of a registered person materially affect his registration, the district registrar shall record the change and notify the Director of the circumstances and recommend that the person be issued with a new identity card. In terms of **section 20(2)**, if the director is satisfied that the change materially affects the registration, he will cancel the identity document and issue a new one.
- **Section 21(1)** provides that every registered person may, whenever he is satisfied that his appearance has changed so as to make it likely that his identity may be questioned, apply to the district registrar for the issue of a new card with a more recent photograph.

If an application in terms of sections 20(1) or 21(1) is rejected, a transgender person can rely on **section 43 of the Constitution**, which gives every person the right to procedurally fair administrative action and the right to written reasons.

Your Rights in the Workplace

- **Section 5 of the Employment Act 6 of 2000**, prohibits discrimination against an employee/prospective employee on basis of “sex” or “other status” in respect of recruitment, training, promotion, terms and conditions of employment, termination of employment, or other matters arising out of the employment relationship.
- **Section 5(3)** states that any person who contravenes the section is guilty of an offence and is liable to a fine or imprisonment for two years.
- **Section 6(1)** provides for equal remuneration for employees without distinction and discrimination of any kind – in particular on the basis of sex or “other status”.
- **Section 57(3)** states that it is not a valid reason to dismiss an employee or impose disciplinary action on the basis of the employee’s sex or “other status”.
- In terms of **section 63**, the remedies for unfair dismissal include an order for reinstatement, re-engagement or compensation.

It has been reported that employees are discriminated against in the work environment in various ways – including through pre-employment HIV testing or they are dismissed on the basis of their HIV status. In *Banda v Lekha*, the Malawi Industrial Relations Court held that discrimination based on HIV status is a violation of section 20(1) of the Constitution.²⁰ The Constitution was later amended to include “any other status or condition”.

²⁰ IRC 277 of 2004, [2005] MWIRC 44.

Section 7 of the Gender Equality Act of 2012 provides that the government must take active steps to eliminate sexual harassment in the workplace, by ensuring that employers have appropriate policies to deal with sexual harassment:

- **Section 7(2)** provides that a person who has suffered sexual harassment need not exhaust internal sexual harassment procedures before prosecution of the offence can be commenced or civil proceedings instituted.
- **Section 6** defines sexual harassment as “any form of unwanted verbal, non-verbal or physical conduct of a sexual nature in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated that the other person would be offended, humiliated or intimidated.”
- **Section 6(2)** states that a person who sexually harasses another commits an offence, and is liable to a fine or imprisonment for five years.

Criminalisation and Harassment

Transgender people are often unlawfully persecuted under Malawi’s tough criminal laws, which make it illegal to engage in consensual same-sex sexual activity. The **Penal Code** contains the following provisions:

- **Section 153** criminalises anyone who has “carnal knowledge” of any person “against the order of nature”. It carries a 14-year jail term.
- **Section 154** criminalises the attempting to commit an “unnatural offence”, which is punishable by up to seven years in prison.
- **Section 156** criminalises “indecent practices” between two men. It carries a five-year prison term for acts of gross indecency.
- **Section 137A** criminalises “indecent practices between females”. It is now illegal for any female to commit acts of “gross indecency” with another female, which is punishable by a prison term of five years.

Transgender persons are also harassed by officials who use vagrancy provisions in the **Penal Code**:

- **Section 180(d)** states that “every person who without lawful excuse, publicly does any indecent act” is deemed an idle and disorderly person.
- **Section 180(e)** states that “every person who in any public place solicits for immoral purposes” is deemed an idle and disorderly person.
- **Section 184(1)(c)** states that: “every person found in or upon or near any premises or in any road or highway or any place adjacent thereto or in any public place at such time and under such circumstances as to lead to the conclusion that such person is there for an illegal or disorderly purpose” shall be deemed to be a rogue and vagabond, and shall be guilty of a misdemeanour and liable for the first offence to imprisonment for six months, and for every subsequent offence to imprisonment for eighteen months.

The government must be able to justify, in terms of the law, any discriminatory treatment of transgender people – otherwise acts by its officials will be arbitrary and illegal.

The **Prevention of Domestic Violence Act 5 of 2006**, defines domestic violence as “any criminal offence arising out of physical, sexual, emotional or psychological, social, economic or financial abuse committed by a person against another person in a domestic relationship”.²¹ The Act provides for applicants to apply for a protection order against the perpetrator.

Access to Sexual and Reproductive Health

There is no access to gender reassignment surgery in Malawi. Transgender people face discrimination from health workers and many choose to avoid using healthcare facilities.

The **Gender Equality Act of 2012**, in **section 19(1)**, states that “every person has a right to adequate sexual and reproductive health” – which includes the right to:

- a) Access sexual and reproductive health services;
 - b) Access family-planning services;
 - d) Be protected from sexually transmitted infections;
 - e) Self-protection from sexually transmitted infections;
 - f) Choose the number of children and when to bear those children;
 - g) Control fertility; and
 - h) Choose an appropriate method of contraception.
- **Section 20(1)(a)** provides that every health officer “shall respect the sexual and reproductive health rights of every person without discrimination”.
 - **Section 20(1)(b)** states that every health officer “shall respect the dignity and integrity of every person accessing sexual and reproductive health services”.
 - **Section 20(1)(c)** states that every health officer “shall provide family planning services to any person demanding the services irrespective of marital status or whether the person is accompanied by a spouse.”
 - **Section 20(2)** states that any person who contravenes this section commits an offence and is liable to a fine or imprisonment for three years.

The **Malawi National HIV and AIDS Strategic Plan 2011-2016** targets prevention at MSM and sex worker populations. However, it does not address WSW, lesbian women transgender or intersex individuals. Malawi’s **HIV Prevention Strategy 2015-2020** targets key populations – including MSM and sex workers.

²¹ Section 1.

Transgender Rights in Mozambique

Rights under the Constitution of Mozambique

Title III (Articles 35-95) of the **Constitution** sets out the fundamental rights and freedoms of the individual. **Article 35** does not include gender or sexual orientation as prohibited grounds of discrimination. However, the reference to “sex” should be interpreted to include protection from discrimination based on gender identity – which is a prohibited ground in international law. Furthermore, **article 36** states that men and women should be treated equally in all aspects of the law.

Article 43 reaffirms that the rights under the Constitution must be read in conjunction with the rights set out in the Universal Declaration of Rights and the African Charter. They must also be read in conjunction with the International Covenant on Civil and Political Rights.

Fundamental Human Right	Where is it in the Constitution?
Fundamental rights and freedoms	Title III
Right to life	Article 40
Right to personal liberty and security	Article 59(1)
Protection from torture, cruel or inhuman treatment	Article 40(1)
Right to privacy	Article 41
Rights of an accused person	Article 59(2)
Freedom of expression	Article 48
Freedom of association and assembly	Article 52
Protection from discrimination	Articles 35 & 44
Right to equality	Article 36
Right to dignity	Article 41
Right to education	Article 88

Changing your Gender Marker

There is no specific law that allows transgender persons in Mozambique to change the gender marker in their identity documents or passports. **Section 77** of the **Código do Registo Civil 2004** indicates that, in general, there should be no alteration of details entered into the registration records kept by the Civil Registrar. However, **section 85(1)(m)** states:

*“85(1) Ao assento de nascimento são especialmente averbados:
(m) em geral, todos os factos juridicos que modifiquem os elementos de identificação ou o estado civil do registado.”*

This section gives the Civil Registrar general authority to make changes when there is a change of facts which alter the legal identity or status of the person registered. Transgender people could possibly use this section to change the sex description on their identity document.

If an application in terms of section 85(1)(m) is rejected, applicants could also rely on their fundamental human rights that are guaranteed under the Constitution – as well as the international human rights documents discussed earlier.

Your Rights in the Workplace

- **Section 4(1)** of the **Lei do Trabalho 2007** specifically outlaws discrimination based on sexual orientation, race and HIV/AIDS.
- **Section 13** indicates that the Constitution and other international treaties and conventions are the source of law inspiring the **Lei do Trabalho**. Because of this, it should be interpreted to forbid discrimination based on sex codified in **articles 35 and 36** of the **Constitution**. Furthermore, “sex” should include protection from discrimination based on gender identity, which is a prohibited ground in international law.
- Transgender individuals can find further protections in **sections 5 and 6** – which protect employees’ right to privacy. These articles forbid employers from requiring personal information from employees.
- Transgender employees might also turn to **section 11**, which outlines the special rights of female employees. These include respect, dignity, and non-prejudicial treatment.

Criminalisation and Harassment

Consensual same-sex sexual acts are not criminalised in Mozambique’s new **Penal Code enacted in 2015**.

However, transgender individuals still face other legal hurdles in Mozambique. **Section 7** of the **Family Law Statute** defines marriage as a union between a man and a woman. Furthermore, only married couples or opposite sex couples in a *de facto* union are allowed to adopt. Depending on the legal recognition of a transgender person’s sex, this could create obstacles to legally protecting your family.

The government must be able to justify, in terms of the law, any discriminatory treatment of transgender people – otherwise acts by its officials will be arbitrary and illegal.

The **Law on Domestic Violence Committed against Women 29 of 2009**, proscribes domestic violence committed against everyone, and particularly domestic violence against women. **Section 6** of the Act provides for a range of remedies, including apprehension of the weapons used by the perpetrator; placing the perpetrator under supervision and surveillance; and ensuring the safe return of the victim to the home where the violence occurred. Where the victim is a child, the perpetrator may lose parental rights over the child.

Access to Sexual and Reproductive Health

The **National Strategic HIV and AIDS Plan 2015-2019** includes key populations – including MSM and sex workers.

There is no access to gender reassignment surgery or hormone replacement therapy in Mozambique. Some transgender people go to South Africa to access these services but the high cost of treatment may prevent this option.

Transgender Rights in Namibia

Rights under the Constitution of Namibia

Chapter 3 of the Constitution protects the fundamental human rights and freedoms of all people. Article 10 does not include gender identity or sexual orientation as prohibited grounds of discrimination. The United Nation’s Human Rights Committee has stated that the phrase “other status”, should be interpreted to include protection from discrimination based on gender identity and sexual orientation.

Fundamental Human Right	Where is it in the Constitution?
Right to Life	Article 6
Personal liberty	Article 7
Human dignity	Article 8(1)
Protection from torture, cruel, inhuman or degrading treatment	Article 8(2)(b)
Right to equality	Article 10
Freedom from arbitrary arrest or detention	Article 11
Right to a fair trial	Article 12
Right to privacy	Article 13
Family	Article 14
Administrative justice	Article 18
Freedom of expression, assembly and association	Article 21
Right to education	Article 20

Changing your Gender Marker

Transgender persons in Namibia can apply to change their sex description in the birth register in terms of **section 7B** of the **Births, Marriages and Deaths Registration Act 81 of 1963**, which states that:

“The Secretary may on the recommendation of the Secretary of Health, alter in the birth register of any person who has undergone a change of sex, the description of the sex of such person and may for this purpose call for such medical reports and institute such investigations as he may deem necessary.”

The **Births, Marriages and Deaths Registration Act** does not define “change of sex”.

- The Legal Assistance Centre in Namibia (LAC) reported in 2015 that applications in terms of section 7B are done on a case-by-case basis and are not problematic – as long as a person can provide medical reports of their sex change.
- Once the application is granted, a transgender person can apply for a new identity document and passport.
- If the application is refused, a person is entitled to written reasons in terms of article 18 of the Constitution, which sets out the right to administrative justice.

Section 8 of the **Births, Marriages and Deaths Registration Act** provides that a person can alter his/her forename in the birth register. **Section 8B** provides for the alteration of a person’s surname in the birth register.

In the Government Gazette of 11 April 2014, the Ministry of Home Affairs and Immigration published forms and certificates for the Births, Marriages and Deaths Registration Act 81 of 1963.²² Annexure F is for an application to alter a first name in the birth register. Annexure G and H relate to an intention to change a surname. Annexure H is in the form of an affidavit in which the applicant states that among other things, their “gender description” was erroneously recorded in the birth certificate.

A transgender person who has not had a “change of sex” could use **section 12(1)(a)** of the **Identification Act 2 of 1996**:

- It states that “if an identity document does not reflect correctly the particulars of the person to whom it was issued, or contains a photograph which is no longer a recognizable image of that person” – the person shall hand over the identity document to the Minister.
- **Section 12(3)** states that the Minister shall cancel it and replace it with an improved identity document.

The LAC reports that some transgender people who have made applications to update their photographs have not been successful.

Applicants could also rely on their fundamental human rights that are guaranteed under the Constitution.

²² Legal Assistance Centre (2015) Namibian Law Issues on LGBT, available at: <http://www.lac.org.na/laws/2014/5444.pdf>

Your Rights in the Workplace

- **Section 5** of the **Labour Act 11 of 2007** is titled “prohibition of discrimination and sexual harassment in employment”.
- **Section 5(2)(b)** states that a person must not discriminate in any employment decision against any individual on a number of listed grounds which includes “sex”. The section does not include discrimination based on gender or sexual orientation.
- An employer who dismisses an employee because of their sex, can be charged with unfair dismissal in terms of **section 33(3)**. The section also does not include dismissal based on gender or sexual orientation.
- **Section 5(2)(f)** forbids discrimination based on a person’s HIV status.
- **Section 5(8)** prohibits direct or indirect sexual harassment of an employee.
- **Section 5(9)** states that when an employee resigns because of sexual harassment by the employer it would amount to constructive dismissal.
- The **National Code on HIV/AIDS in Employment of 2000**, prohibits discrimination and pre-employment HIV testing.

Criminalisation and Harassment

Transgender people in Namibia face harassment and discrimination by officials for “immoral practices” or through the use of loitering laws. Sodomy remains a common law crime in Namibia and is listed as a Schedule 1 offence in the **Criminal Procedure Act 25 of 2004**:

- **Sections 42 and 44** of the Criminal Procedure Act permit the arrest of a person for sodomy, without a warrant.
- **Section 44** allows a private person to make such an arrest without a warrant.

Transgender persons also face harassment under the **Combating of Immoral Practices Act 21 of 1980**.

- **Section 7(b)** makes it an offence for a person to “wilfully and openly exhibits himself in an indecent dress or manner at any door or window within view of any public street or place or in any place to which the public have access.”
- A person can be liable on conviction to a fine not exceeding R2 000 or to imprisonment for a period not exceeding two years – or to both such fine and such imprisonment.
- **Section 8** prohibits the “committing of immoral acts”.
- **Section 9** is a vague and broad section. It states that:

“Any person who is the owner or occupier of any house or place or has or acts or assists in the management or control thereof knowingly permits the use of such house or place for the purpose of committing any offence in terms of any provision of this Act, shall be guilty of an offence and liable on conviction to imprisonment for a period not exceeding two years or to such imprisonment and to a fine not exceeding one thousand rand.”

Transgender people who work as sex workers are a target for harassment:

- Some municipalities have adopted **loitering by-laws** that allow the arrest of sex workers.
- Transgender sex workers have reported that the police do not take them seriously or assist them when they report rape or other violent crimes.
- Some transwomen have reported being raped when they were placed in male cells after being arrested. Rape increases the risk of contracting HIV or STIs.

The government must be able to justify, in terms of the law, any discriminatory treatment of transgender people otherwise acts by its officials will be arbitrary and illegal.

Transgender people who face physical abuse and harassment from their families can get protection under the **Combating of Domestic Violence Act 4 of 2003**. The Act, however, does not offer protection from abuse in a same-sex relationship, since it specifically states that where it applies to persons in a relationship they should be of different sexes.

Access to Sexual and Reproductive Health

- **Section 40 of the National Health Act 2 of 2015** states that every person in Namibia has access to a State hospital or a State health service and is entitled to receive treatment or other medical care and benefit from any of the health services established by the Act.
- **Section 40(2)**, however, gives the superintendent of a state hospital wide powers to deny a person access to a State hospital “for any other reason whatsoever considered sufficient by the superintendent.”
- In terms of **section 40(3)**, any person denied access to a state hospital may appeal, within 14 days, to the Minister of Health.

Namibia also has a **Patient Charter** that was developed by the Ministry of Health in 1998. The rights of patients set out in the Charter include the rights to:

- Access health services without any discrimination;
- Be treated with respect and politeness;
- Privacy and confidentiality;
- Access information about the health and social services that are available.

Despite the rights set out in the National Health Act and the Patient Charter, many transgender people report stigma and discrimination at the hands of medical practitioners and staff when they try to access health services.

Section 51(2) of the **National Health Act** allows State patients to access a Special Fund for “special medical treatment”. This would include “any other medical treatment that requires treatment in an intensive or high care unit in a hospital due to post-surgery complications; or ... any prescribed medical treatment. Transgender persons who want to undergo gender reassignment surgery could possibly access the Special Fund. However, the surgery is not available in Namibia, and it is not clear if the Fund can be used to undergo the procedure in South Africa. Hormone treatment is not available at State health services and can only be accessed privately which can be expensive.

MSM are included in the definition of most-at-risk populations in the **National Strategic Framework for HIV and AIDS Response 2010/11-2015/16**. WSW, lesbians, transgender or intersex individuals were not referenced in the framework.

Transgender Rights in South Africa

Rights under the Constitution

South Africa is the only African country to offer constitutional protection against discrimination based on sex, gender *and* sexual orientation.

Fundamental Human Right	Where is it in the Constitution?
Right to equality	Section 9(3)
Human dignity	Section 10
Right to life	Section 11
Freedom and security of the person	Section 12
Right to privacy	Section 14
Freedom of expression	Section 16
Right to health care	Section 27
Right to administrative justice	Section 33
Rights of arrested, detained persons	Section 35
Freedom of assembly	Section 17
Freedom of association	Section 18

The **Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000** (“the **Equality Act**”) was enacted to give effect to section 9 of the Constitution – to prevent unfair discrimination and harassment:

- The Act defines “sex” to include intersex.
- **Section 6** states that “[n]either the State nor any person may unfairly discriminate against any person.”
- **Section 8** prohibits unfair discrimination on the grounds of gender.
- **Section 11** states that “[n]o person may subject any person to harassment.”
- The Act defines “harassment” to mean:

“Unwanted conduct which is persistent or serious and demeans, humiliates or creates a hostile or intimidating environment or is calculated to induce submission by actual or threatened adverse consequences and which is related to-
(a) sex, gender or sexual orientation, or

(b) a person's membership or presumed membership of a group identified by one or more of the prohibited grounds or a characteristic associated with such group."

In 2011 the Equality Court in *Lallu v Van Staden*²³ held that a neighbour's verbal abuse of a transgender woman amounted to harassment, hate speech and unfair discrimination. The Court awarded damages for infringement of the transwoman's dignity and costs for remedial psychological counselling.

The right to equality and the right not to be discriminated against on the basis of your gender, sex or sexual orientation is reflected in various acts which protect the rights of LGBT persons – such as the **Civil Unions Act 2006** which legalised same-sex marriage. **Section 8(4)** requires that if you were previously married under the Marriage Act or the Customary Marriages Act, you must produce a divorce order or a death certificate of your former spouse or partner.

Same-sex couples are also allowed to adopt children after sections of the Child Care Act and the Guardianship Act were declared to be unconstitutional by the Constitutional Court in *Du Toit v Minister for Welfare and Population Development*.²⁴

Changing your Gender Marker

Transgender people can apply to change their sex description in the birth register in terms of the **Alteration of Sex Description and Sex Status Act 49 of 2003**. **Section 2(1)** states:

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

- In terms of **section 2(2)(b)** an application must include medical reports by the doctors who carried out the surgical treatment or the doctors who provided the medical treatment.
- The Act does *not* make it compulsory that an applicant had to have undergone gender reassignment surgery. Hormonal treatment is sufficient.
- However, officials at the Department of Home Affairs sometimes apply the Act incorrectly and turn away applicants who have not had surgery. Applicants sometimes have to wait for over two years to get a response.
- If the application is granted, the Magistrate issues an order directing the Director-General to alter the sex description in the birth register of the person named in the order.
- An amended birth certificate is issued to the applicant in terms of **section 27A** of the **Births and Deaths Registration Act 51 of 1992**.
- The applicant must be given written reasons if the application is refused.
- The applicant can lodge an appeal to the Minister of Home Affairs within fourteen days of the decision.

²³ *Lallu v Van Staden* Roodepoort Equality Court, Case No 3 of 2011.

²⁴ *Du Toit v Minister for Welfare and Population Development* 2003(2) SA 198 (CC).

Your Rights in the Workplace

Section 23(1) of the Constitution states that everyone has the right to fair labour practices. The **Employment Equity Act 55 of 1998** was enacted to promote equal opportunity and to eliminate unfair discrimination in employment. **Section 6(1)** states:

“No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language, birth or on any other arbitrary ground.”

Section 6(3) provides that harassment of an employee is a form of unfair discrimination.

Section 185 of the Labour Relations Act 6 of 1995 provides that every employee has the right not to be unfairly dismissed and subjected to unfair labour practices. **Section 187(1)(f)** states:

“A dismissal is automatically unfair if the reason for the dismissal is that the employer unfairly discriminated against an employee directly or indirectly, on any arbitrary ground, including, but not limited to race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility.”

The South Africa courts have interpreted dismissal based on gender identity to be “automatically unfair”.²⁵

In addition to the prohibition against discrimination, laws and policies often also have a broader understanding of relationships and have been declared unconstitutional when there is discrimination against couples in same-sex relationships. **Section 27(2)(c) of the Basic Conditions of Employment Act 75 of 1997**, for example, allows for an employee to take family responsibility leave in the event of the death of a spouse or life partner.

Criminalisation and Harassment

While the **Constitution** guarantees transgender people the right to equality and the right not to be discriminated against on the basis of their sexual orientation and gender, the reality is that transgender people also face violence and harassment from officials and private citizens. South Africa has been identified as a “hot spot” for hate crimes against LGBT people.

- **Section 12(1)(a) and (b) of the Constitution** states that everyone has the right to freedom and security of the person – which includes the right not to be deprived of freedom arbitrarily or without just cause and not to be detained without trial.
- **Section 35 of the Constitution** sets out the rights of arrested, detained and accused persons, which includes the right to be brought before a court within 48 hours of being arrested, the right to be informed promptly of the reason for the detention, and the right to be detained in conditions consistent with human dignity.

²⁵ *Ehlers v Bohler Udderholm Africa (Pty) Ltd* (2010) 31 ILJ 2383 (LC).

The **Independent Police Investigative Directorate (IPID)** investigates any complaint of misconduct or an offence committed by a police official.

- This includes, in terms of **section 28 of the IPID Act 1 of 2011**, any rape by a police officer where he/she was on or off duty, the rape of any person while in police custody, or any complaint of torture or assault by a police officer.

Section 28(1) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 provides that:

- A victim of a sexual offence who has been exposed to the risk of being infected with HIV, may receive free post-exposure prophylaxis at a public hospital or clinic and free medical advice.
- The victim may also apply to a magistrate that the alleged offender be tested for HIV at State expense.
- These rights, though, are only available to victims of sexual offences, where the victims have laid a charge with the police or reported it at a public hospital or clinic within 72 hours of the offence taking place.
- **Section 30** also allows the victim of a sexual offence or an interested person to bring an application within 90 days of the alleged offence to have the alleged sex offender tested for HIV. The definition of “interested person” includes a same-sex permanent partner of the victim.
- The Act specifically provides that the offence of rape is gender neutral and relates to penetration in the mouth, vagina or anus. The Act also creates an offence of sexual violation for sexual acts which do not amount to penetration.

The **Domestic Violence Act 116 of 1998** also offers protection to transgender people who have been physically, sexually or emotionally abused, or who have been harassed or intimidated by their families, housemates or partners:

- **Section 2** states that a police officer at the scene must assist the complainant – which includes finding a suitable shelter or obtaining medical treatment.
- **Section 3** authorises a police officer to arrest a respondent without a warrant.

The government must be able to justify, in terms of the law, any discriminatory treatment of transgender people – otherwise acts by its officials will be arbitrary and illegal. When faced with arbitrary arrest or detention, a transgender person should follow the fundamental legal principles set out in **Yogyakarta Principle 7**, which was outlined above.

Access to Sexual and Reproductive Health

Section 27 of the **Constitution** states that everyone has the right to have access to healthcare services – including reproductive health care. **Section 27(3)** states that no one may be refused emergency medical treatment.

The **National Health Act 61 of 2003** does not include transgender and intersex people as a vulnerable group, although the Act does have specific provisions protecting healthcare users' confidentiality.

South Africa's **National Strategic Plan on HIV, STIs and TB 2012 – 2016** includes MSM, sex workers and transgender individuals in its definition of key populations.

Gender Transitioning Resources

In principle, individuals can begin hormone replacement therapy when they turn 18.²⁶ However, although it is theoretically possible to offer hormone treatment and monitoring widely in a public primary healthcare setting, the State has not yet formalised the systems and capacity to do this.

Patients who can afford to can access private care but there are still only a few providers who are mostly based in urban areas. Except for sporadic *ex gratia* payments medical aids generally do not cover surgical procedures as they are seen as cosmetic. Gender reassignment surgery is carried out mainly at two public hospitals: Groote Schuur Hospital in Cape Town and the Steve Biko Academic Hospital in Pretoria. However, both these facilities only do four operations a year resulting in a long waiting list for gender reassignment surgery. Transgender individuals will often go overseas to have surgery if they can afford it.

²⁶ <http://genderdynamix.org.za/wp-content/uploads/GP-Guide-Hormone-Prescribing.pdf>.

Transgender Rights in Swaziland

Rights under the Constitution of Swaziland

Section 14 sets out the protection of fundamental rights and freedoms. There is no reference to the sex of a person or to sexual orientation. However there is reference to “gender”. This should be interpreted to include protection from discrimination based on gender identity – which is a prohibited ground in international law.

Fundamental Human Right	Where is it in the Constitution?
Fundamental rights and freedoms	Section 14
Right to life	Section 15
Personal liberty	Section 16(1)
Dignity	Section 18(1)
Freedom from torture, inhuman or degrading treatment	Section 18(2)
Right to equality	Section 20
Right to a fair hearing	Section 21
Protection from arbitrary search	Section 22
Freedom of expression	Section 24
Freedom of association	Section 25
Right to privacy	Section 22

Changing your Gender Marker

There is no law in Swaziland that specifically allows transgender people to change the gender marker in legal documents.

Provisions of the **Births, Marriages and Deaths Registration Act 5 of 1983** could possibly be used to bring an application:

- **Section 8(1)** provides for the alteration of a forename/s in the births register. A person can apply on their own if they are 21 years of age.
- **Section 8(2)** allows for a surname to be altered in the births register.
- **Section 8(3)** provides that:

“...if after registration of birth, the change in any other particular of a person not provided for in this section has occurred, he, if he is 21 years of age, may apply to the Registrar directly or through respective district registrar or assistant district registrar for alteration of such a particular in the births register. Thereupon the Registrar shall, if satisfied that the applicant is competent to make the application and on production of documentary proof (in case of change of sex of the child a medical certificate from the medical practitioner shall be produced) and on payment of the prescribed fee, cause the said particular of the person to be altered in the original birth information form filed in his office, but without erasing the original entry.”

It is not clear if transgender persons could use this provision, or if any have used this provision to change the gender marker in their birth certificates.

Applicants should also rely on their fundamental human rights that are guaranteed under the Constitution.

Your Rights in the Workplace

The **Employment Act 5 of 1980** prohibits discrimination on the basis of sex in terms of **section 29**. There is no reference to discrimination based on gender or sexual orientation. **Section 35(3)(d)** states that the termination of employment on the basis of a person’s sex is unfair.

The **Industrial Relations Act 1 of 2000** defines “automatically unfair dismissal” to include where an employer unfairly discriminated against an employee based on their gender or sex:²⁷

- **Section 16(3)** sets out remedies for automatically unfair dismissal. It states that a court would first consider an order for reinstatement.
- **Section 16(7)** provides that compensation for an automatically unfair dismissal must be just and equitable – but not more than 24 months’ remuneration calculated based on the employee’s remuneration on the date of dismissal.

Criminalisation and Harassment

Consensual sex between men is criminalised as sodomy under the **common Law** and **section 185(5)** of the **Criminal Procedure and Evidence Act**. The law is silent about WSW. Same-sex practices are also charged as *indecent acts* or a *public nuisance* under the **common law**.

The government must be able to justify, in terms of the law, any discriminatory treatment of transgender people – otherwise acts by its officials will be arbitrary and illegal.

Access to Sexual and Reproductive Health

The **extended National Multi-sectoral HIV and AIDS Framework (eNSF) 2014-2018** includes MSM in the list of key populations, but does not address WSW, lesbians, transgender or intersex individuals. There is widespread stigma and discrimination relating to LGBTI people by healthcare workers and practitioners. Many transgender people do not access health facilities for this reason.

²⁷ Section 2(f).

There is no access to gender reassignment surgery or hormone replacement therapy in Swaziland. Some transgender people go to South Africa to access these services but the high cost of treatment may prevent this option.

Transgender Rights in Zambia

Rights under the Constitution of Zambia

Article 11 sets out the fundamental rights and freedoms of every person in Zambia whatever his or her “sex”. There is no reference to gender identity or sexual orientation. The reference to “sex” should be interpreted to include protection from discrimination based on gender identity, which is a prohibited ground in international law.

Article 8 of the Constitution of Zambia (Amendment) Act 2 of 2016 lists “morality and ethics” as a national value and principle – which also includes human dignity, equity, social justice, equality and non-discrimination. Article 266 of the amended Constitution defines “discrimination” to include sex, birth, health and social or economic status.

Fundamental Human Right	Where is it in the Constitution?
Fundamental rights and freedoms	Article 11
Right to life	Article 12
Personal liberty	Article 13
Freedom from torture, inhuman or degrading treatment	Article 15
Protection of privacy	Article 17
Rights of accused persons	Article 18
Freedom of expression	Article 20
Protection from discrimination	Article 23
Right to association and assembly	Article 21

Changing your Gender Marker

There is no law in Zambia that specifically allows transgender people to change the sex description in their birth documents.

Section 9(2) of the **National Registration Act 19 of 1964** could possibly be used to change a person’s sex description. It states that:

“In any case where a national registration card issued to a registered person ceases in any material particular to accurately represent his identity, such person shall, without undue delay, produce his national registration card and give such particulars as shall be necessary for the issue of a new national registration card to a registrar who, on payment of any fee and subject to any conditions which may be prescribed, shall issue to such person a new national registration card.”

Your Rights in the Workplace

The **Employment Act 57 of 1965** does not provide protection for unfair and unlawful discrimination by the employer against an employee. However, the **Employment Amendment Act 15 of 2015** added a **section 36(3)**, which states that:

“A contract of service shall not be terminated unless there is a valid reason for the termination connected with the capacity, conduct of the employee or based on the operational requirements of the undertaking.”

Section 36(4) states that it is not a valid reason to terminate a contract on a number of grounds, which include a person’s sex. The reference to “sex” should be interpreted to include protection from discrimination based on gender identity – which is a prohibited ground in international law.

Criminalisation and Harassment

Zambia has harsh laws which criminalise same-sex sexual acts for both men and women. These laws are unlawfully used to persecute transgender people. The **Penal Code Act of 1931, as amended in 2005**, has the following provisions:

- **Section 155** criminalises sodomy (“carnal knowledge against the order of nature”). It is punishable with imprisonment of not less than 15 years – and up to life imprisonment.
- **Section 156** provides that attempting to engage in sodomy is also a crime, which is punishable by 7-14 years in prison.
- **Section 158(1)** criminalises “gross indecency” by a male and criminalises consensual sexual acts between men in private. It carries a jail term of 7-14 years.
- **Section 158(2)** does the same with regard to women and it carries the same jail term.

Transgender persons are also harassed under vagrancy provisions in the **Penal Code**:

- **Section 178(e)** refers to “every person who, without lawful excuse, publicly does any indecent act.”
- **Section 178(f)** refers to a person who “publicly conducts himself in a manner likely to cause a breach of the peace”.
- **Section 178(g)** refers to a person who “in any public place solicits for immoral purposes”. All these persons are deemed to be idle and disorderly persons, and are liable to imprisonment for one month or to a fine not exceeding 60 penalty units or to both.
- **Section 181(d)** sets out the offence of being “a rogue and vagabond”. The first offence carries a jail term of three months. Every subsequent offence means imprisonment for one year.

Transgender people who work as sex workers are often arrested on charges of rogue and vagabond and ‘loitering’ – even though sex work itself is not criminalised.

Article 193(2)(e) of the **Constitution**, as amended, specifically imposes an obligation on the Police Service to uphold the Bill of Rights in the enforcement of their duties.

The **Anti-Gender-based Violence Act 1 of 2011** applies in cases where the victim of violence is in

a domestic relationship with the perpetrator. A domestic relationship includes a relationship where the victim is in an actual or perceived sexual relationship, of any duration, with the perpetrator. A domestic relationship also relates to instances where family members, parents or a spouse are the perpetrators of violence. A domestic relationship is also present where the victim and perpetrator share the same residence or are co-tenants, and where the victim is a house-help in the household of the perpetrator.

Gender-based violence refers to any physical, mental, social or economic abuse against a person because of that person's gender. Acts which fall within this definition include physical abuse; sexual abuse; emotional, verbal or psychological abuse; economic abuse; intimidation; harassment; stalking; controlling behaviour; malicious damage to property; depriving a person of access to property; trafficking; and conduct that in any way endangers the safety, health or wellbeing of the person, undermines the person's privacy, integrity or security, or detracts from the person's dignity.²⁸ A single act may amount to gender-based violence.²⁹

If a person has been a victim of gender-based violence from any type of domestic relationship, the Act places specific duties on police officers to assist him or her – including by responding promptly to any request for assistance, and offering protection.³⁰

The **Gender Equity and Equality Act 22 of 2015** provides, in section 15(1), that a person, public body or private body shall not discriminate against any sex. Section 16(1) goes further to state that a person, public body and private body has a duty to uphold the rights of both sexes, and to respect and safeguard the dignity of both sexes. Section 16(2) provides that a person, public body or private body, shall not exploit or subject any person to abusive, violent or degrading treatment. Any person who violates these provisions is liable to criminal punishment.

Section 39 of the Act criminalises the act of sexual harassment. Sexual harassment is defined in the Act, as including:

“conduct or contact of a sexual nature, such as the following:

- a) having physical contact, making advances, comments or innuendos without the consent of a person;*
- b) being offensive, humiliating or intimidating to a person in a suggestive manner; or*
- c) threatening or imposing a condition on a person for doing or undertaking anything or creating a hostile environment for an employee.”*

Access to Sexual and Reproductive Health

The **Gender Equity and Equality Act 22 of 2015** specifically protects women's sexual and reproductive rights in section 21. **Section 32(3)** provides that a health officer shall respect the sexual and reproductive health rights and dignity of every person without discrimination.

²⁸ See definitions in section 3(1) of the Anti-Gender-Based Violence Act, Act 1 of 2011.

²⁹ Section 4 of Anti-Gender-Based Violence Act.

³⁰ Sections 5, 7 and 8 of Anti-Gender-Based Violence Act.

Transgender Rights in Zimbabwe

Rights under the Constitution of Zimbabwe

Section 44 states that “the State and every person ... and every institution and agency of the government at every level must respect, promote, protect and fulfil the rights and freedoms set out in this Chapter.”

Section 56(3) prohibits unfair discrimination on a number of grounds, including sex and gender. These should be interpreted to include protection against discrimination based on gender identity – which is a prohibited ground in international law.

Fundamental Human Right	Where is it in the Constitution?
Rights and freedoms	Section 44
Right to life	Section 48
Personal liberty	Section 49
Rights of arrested and detained persons	Section 50
Right to human dignity	Section 51
Right to bodily and psychological integrity	Section 52
Freedom from torture or cruel, inhuman or degrading treatment	Section 53
Equality	Section 56(1)
Protection from discrimination	Section 56(3)
Right to privacy	Section 57
Freedom of expression	Section 61
Administrative justice	Section 68
Rights of accused persons	Section 70
Right to health care	Section 76
Marriage rights	Section 78(3)
Freedom of association	Section 58

Section 47 of the **Constitution** further provides that the Chapter on rights in the Constitution “does not preclude the existence of other rights and freedoms that may be recognised or conferred by law, to the extent that they are consistent with this Constitution.”

Changing your Gender Marker

Zimbabwe does not have a specific law that allows transgender people to change the gender marker on their birth documents, or other official documents. Transgender people should rely on their fundamental human rights that are guaranteed under the Constitution.

Section 18(2) of the Births and Deaths Registration Act 11 of 1986 allows a person to change their forename. **Section 18(3)** provides for the change of a surname, but the Registrar-General must be satisfied that it is for a “lawful purpose”. It appears unlikely that these provisions could be useful when trying to change a gender marker.

Your Rights in the Workplace

The **Labour Act 16 of 1985, as amended**, protects employees against discrimination:

- **Section 5(1)** states that no employer shall discriminate against any employee or prospective employee on a number of grounds - including gender and HIV/AIDS status. The listed grounds do not include sex or sexual orientation. “Gender” should be interpreted to include protection from discrimination based on gender identity – which is a prohibited ground in international law.
- **Section 5(3)** provides that any person who contravenes subsection (1) or (2) shall be guilty of an offence.
- **Section 5(4)** allows an employee to claim damages from the employer.
- **Section 12B(3)(a)** provides that an employee is unfairly dismissed, if the employer deliberately made continued employment intolerable for the employee.

Criminalisation and Harassment

Transgender people are also unlawfully targeted by the harsh provisions in the **Criminal Law (Codification and Reform) Act 23 of 2004**:

- **Section 61** defines sexual intercourse as being between a male and female. Sodomy is included in the definition of “**unlawful sexual conduct**”.
- **Section 73** criminalises sodomy.
- **Section 77** refers to “public indecency”.
- **Section 77(1)(a)** states that: “Any person who indecently exposes himself or herself or engages in any other indecent conduct which causes offence to any other person in or near a public place, or in or near a private place within the view of such other person shall be guilty of public indecency.”
- **Section 77(2)** states that “No person shall be convicted of public indecency unless the words or conduct in question are sufficiently serious to warrant punishment”. The court will consider various factors – including the nature of the conduct, the age and gender of the person who witnessed the conduct, and the degree of offence caused to the person who witnessed the conduct.

- **Section 78** makes it an offence to transmit a sexually transmitted disease and makes a person liable to a fine or imprisonment for a period not exceeding five years or both.

The **Domestic Violence Act 14 of 2006** interprets a complainant to include a person who co-habits with the respondent or who has been in an intimate relationship with the respondent, or who has lived with the respondent. The definition of domestic violence is wide and includes physical, sexual, emotional, verbal and economic abuse, intimidation, and also harassment. The Act makes an act of domestic violence an offence and entitles the complainant to a protection order. **Section 5** places specific duties on police officers to assist complainants.

Access to Sexual and Reproductive Health

Section 29(1) of the **Constitution** states that “the State must take all practical measures to ensure the provision of basic, accessible and adequate health services throughout Zimbabwe.” **Section 29(2)** provides that no person should be refused emergency medical treatment at any health institution.

There are no laws or policies that provide for hormonal treatment or any other gender-affirming healthcare for transgender people. Transgender people who want to access hormonal treatment usually look to the black market or travel outside Zimbabwe – mainly to South Africa – to access this medication.

Resources

INTERNATIONAL HUMAN RIGHTS DOCUMENTS

African Charter of Human and People's Rights, 1986
International Covenant on Civil and Political Rights (ICCPR), 1966
Universal Declaration of Human Rights, 1948
Yogyakarta Principles, 2007

ANGOLA

Código do Registo Civil, 2015
Código Penal, 1889
Constitution, 2010
Family Law Code, 1988
Domestic Violence Act, 25 of 2011
Law on HIV and AIDS, 8 of 2004
Lei do Trabalho, 2015 (Labour Law of 2015)

BOTSWANA

Births and Deaths Registration Act, 48 of 1968
Constitution, 1966
Domestic Violence Act, 10 of 2008
Employment Amendment Act, 10 of 2010
National Registration Act, 26 of 1986
Penal Code, 1964

LESOTHO

Constitution, 1993
Labour Code, 24 of 1992
Labour Code (Amendment) Act, 5 of 2006
National Identity Cards Act, 9 of 2011
Passports and Travel Documents Act, 15 of 1998
Penal Code Act, 6 of 2012

Police Service Act, 7 of 1998

MALAWI

Constitution, 1994

Employment Act, 6 of 2000

Gender Equality Act, 2012

Marriage, Divorce and Family Relations Act, 2015

National Registration Act, 13 of 2010

Penal Code, 1929

Prevention of Domestic Violence Act, 5 of 2006

MOZAMBIQUE

Código do Registo Civil, 2004

Constitution, 2004

Domestic Violence Act, 29 of 2009

Family Law Statute, 2004

Lei do Trabalho, 2007

Penal Code, 2014

NAMIBIA

Births, Marriages and Deaths Registration Act, 81 of 1963

Combatting of Domestic Violence Act, 4 of 2003

Combatting of Immoral Practices Act, 21 of 1980

Constitution, 1990

Criminal Procedure Act, 25 of 2004

Identification Act, 2 of 1996

Labour Act, 11 of 2007

National Health Act, 2 of 2015

SOUTH AFRICA

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

Basic Conditions of Employment Act, 75 of 1997

Births and Deaths Registration Act, 51 of 1992

Civil Union Act, 17 of 2006

Constitution, 1995

Criminal Law (Sexual Offences and Related Matters) Amendment Act, 32 of 2007

Domestic Violence Act, 116 of 1998

Employment Equity Act, 55 of 1998
Independent Police Investigative Directorate Act, 1 of 2011
Labour Relations Act, 6 of 1995
National Health Act, 61 of 2003
Promotion of Equality and Prevention of Unfair Discrimination Act, 4 of 2000

SWAZILAND

Births, Marriages and Deaths Registration Act, 5 of 1983
Constitution, 2005
Employment Act, 5 of 1980
Industrial Relations Act, 1 of 2000

ZAMBIA

Anti-Gender-Based Violence Act, 1 of 2011
Constitution, 1991
Constitution Amendment Act, 2 of 2016
Employment Act, 57 of 1965
Employment Amendment Act, 15 of 2015
Gender Equity and Equality Act, 22 of 2015
National Registration Act, 19 of 1964
Penal Code, 1931

ZIMBABWE

Births and Deaths Registration Act, 11 of 1986
Constitution, 2013
Criminal Law (Codification and Reform) Act, 23 of 2004
Domestic Violence Act, 14 of 2006
Labour Act, 16 of 1985
Prevention of Discrimination Act, 19 of 1998

