

# 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*<sup>23</sup> 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*.<sup>24</sup>

## 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.

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

<sup>24</sup> *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”.<sup>25</sup>

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.

<sup>25</sup> *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.<sup>26</sup> 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.

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