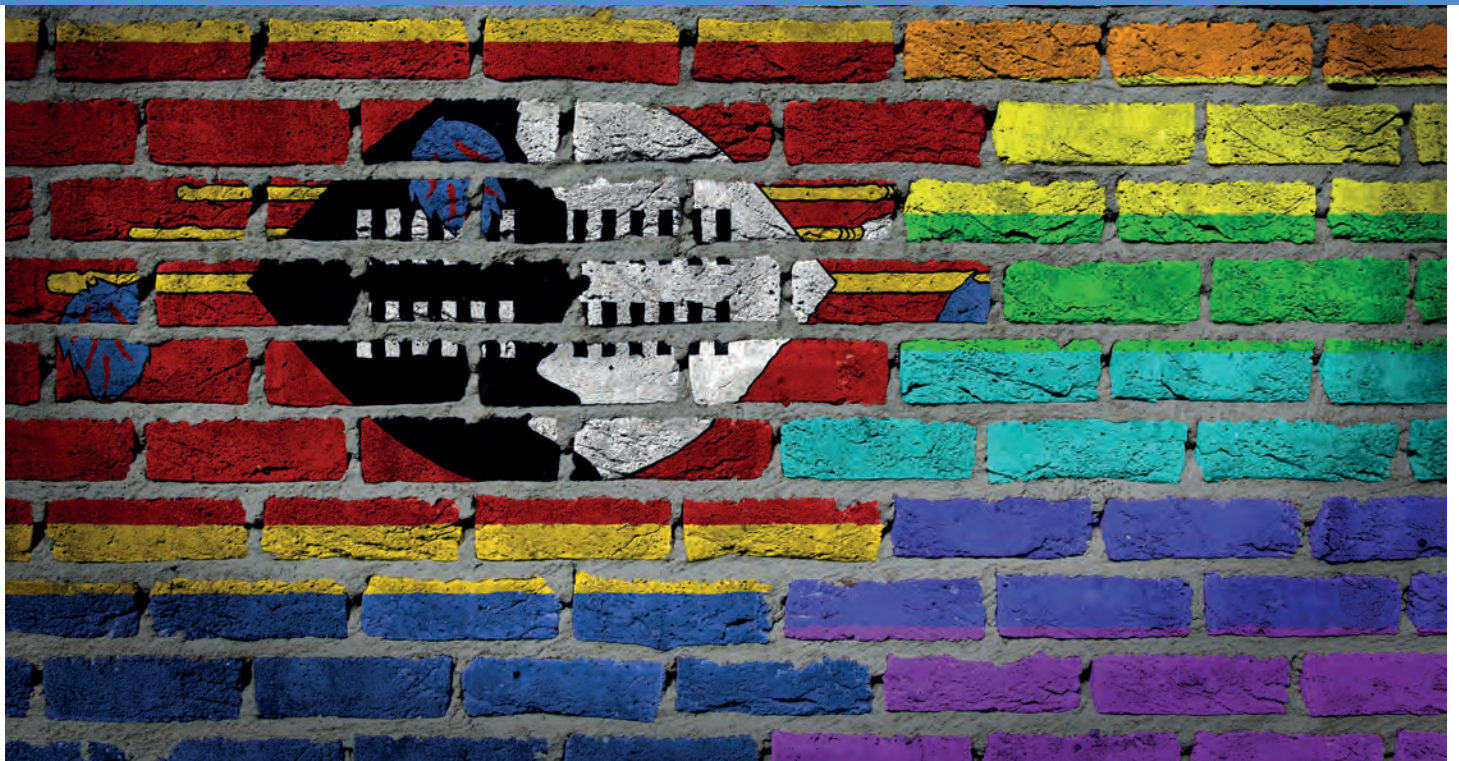


# Legal Gender Recognition in Eswatini

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





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## About TransSwati

TransSwati is a trans-led grassroots organisation working to defend and promote the human rights of transgender and gender non-conforming persons in Eswatini. The organisation was registered in 2018 to serve trans and gender non-conforming persons across Eswatini through empowerment programs, awareness raising and advocacy for respect of the rights of trans persons in Eswatini.

## About the Southern Africa Litigation Centre

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

## Authorship and acknowledgement

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**Southern Africa Litigation Centre**

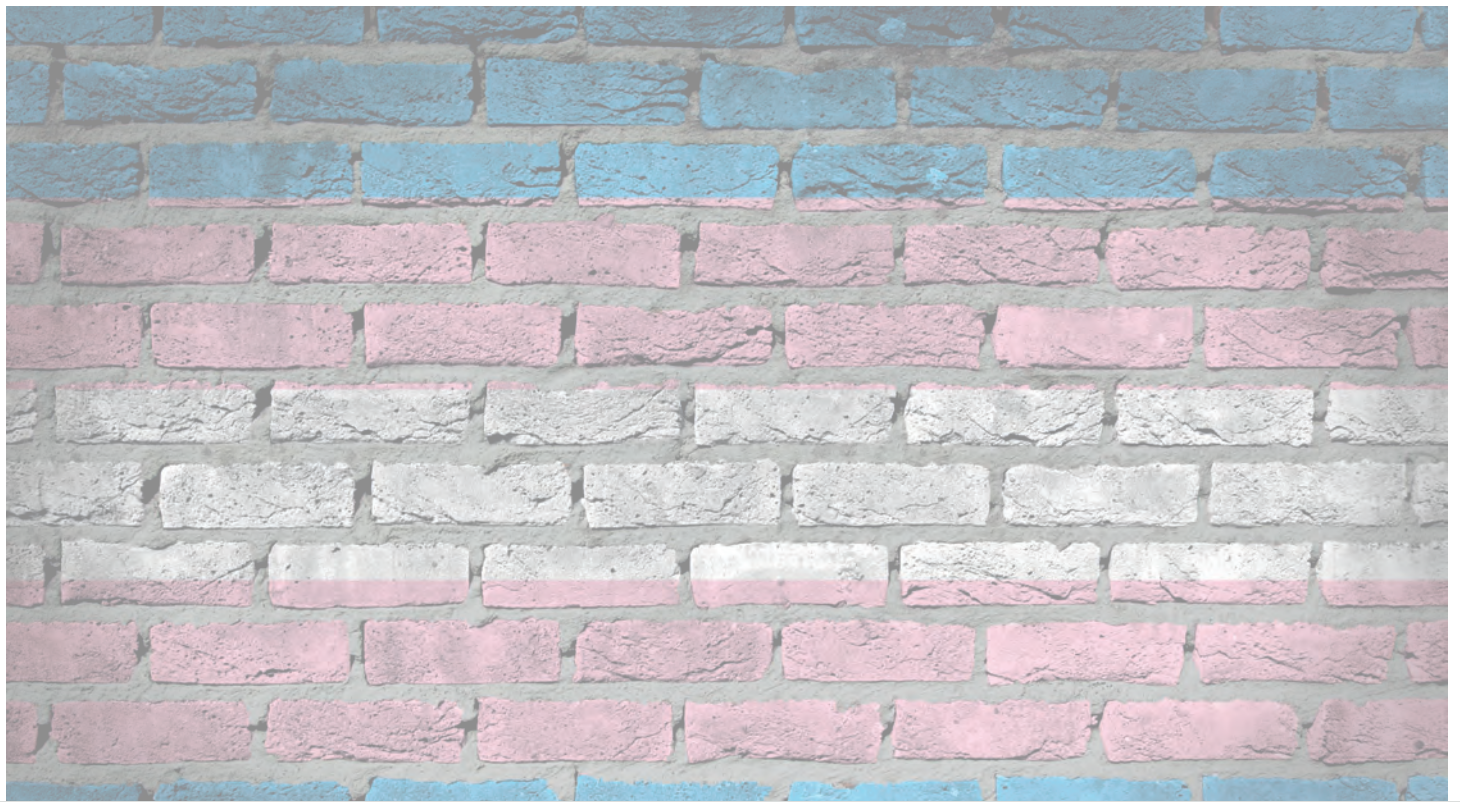
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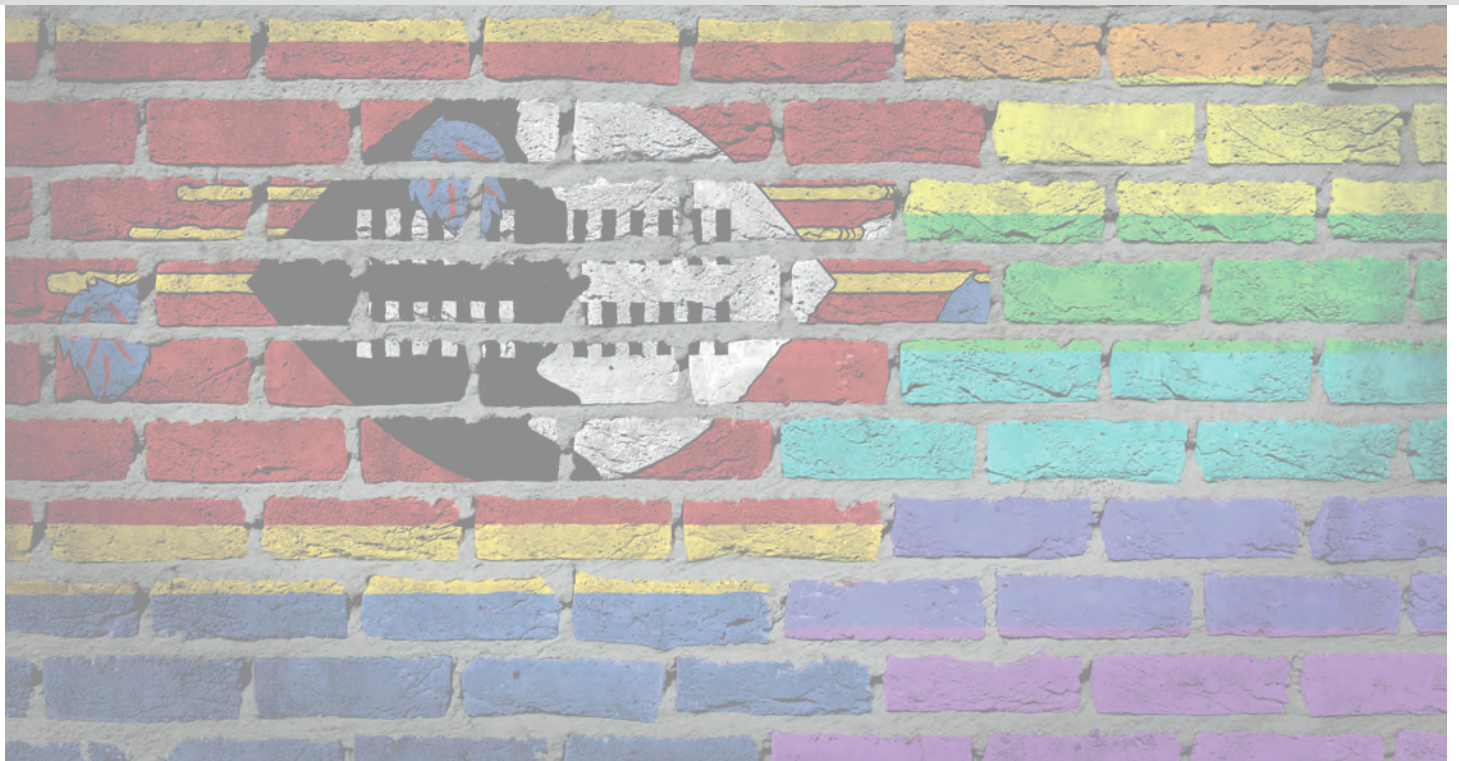
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# List of acronyms

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





# Understanding gender identity and gender affirmation

<b>Cisgender</b>	Describes a person whose sense of personal identity and gender corresponds with the sex assigned to them at birth.
<b>Gender</b>	Refers to the socially constructed roles, behaviours, expressions and identities of girls, women, boys, men, and gender diverse people. It influences how people perceive themselves and each other, how they act and interact, and the distribution of power and resources in society. Gender is usually conceptualised as a binary (girl/woman and boy/man) yet there is considerable diversity in how individuals and groups understand, experience, and express it.
<b>Gender affirmation</b>	The process in which transgender or gender diverse people have their gender affirmed or recognised.
<b>Gender affirming care, gender affirming healthcare</b>	Healthcare provided to support a transgender or gender diverse person's gender affirmation. This can include hormonal treatment, surgical interventions, as well as psychosocial support, hair removal and speech therapy.
<b>Gender affirming practices</b>	The steps taken by a transgender or gender diverse person to affirm their gender socially, psychologically, medically and/or legally. This includes their gender expression, any form of gender affirming healthcare they might use, and steps towards legal gender recognition.
<b>Gender expression</b>	The presentation of a person's gender through physical appearance and behaviour – including dress, hairstyles, accessories, cosmetics – and mannerisms, speech, behavioural patterns, names and personal references. A person's gender expression may or may not conform to that person's gender identity.
<b>Gender identity</b>	Each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms.



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<b>Gender marker</b>	<b>The code used on identity documents, passports or other state-issued documents that signifies someone's sex assigned at birth. Usual options are (M) for male, (F) for female, or (X) for non-disclosed or non-binary.</b>
<b>Gender non-conforming</b>	A person whose gender identity and/or gender expression does not conform to typical feminine or masculine identity or expression.
<b>Legal gender recognition</b>	The process through which transgender and gender non-conforming people are able to ensure that their official documents, such as identity documents, driver's licenses and school certificates, reflect their actual gender identity rather than the sex assigned to them at birth.
<b>Sex</b>	Sex refers to a set of biological attributes in humans and animals. It is primarily associated with physical and physiological features including chromosomes, gene expression, hormone levels and function, and reproductive/sexual anatomy. Sex is usually categorized as female or male but there is variation in the biological attributes that comprise sex and how those attributes are expressed.
<b>Sex assigned at birth</b>	The assignment and classification of people as male, female, intersex, or another sex assigned at birth, often based on physical anatomy at birth and/or karyotyping.
<b>Sex change / change of sex</b>	An outdated term for gender affirmation (see above).
<b>Sex change operation</b>	An outdated term for gender affirming surgery.
<b>Transgender</b>	An umbrella term for people whose gender identity and/or expression is different from cultural expectations based on the sex they were assigned at birth. Being transgender does not imply any specific sexual orientation. Therefore, transgender people may identify as straight, gay, lesbian, bisexual, etc.
<b>Transgender man</b>	A person who identifies as a man but was assigned a female sex at birth.
<b>Transgender woman</b>	A person who identifies as a woman but was assigned a male sex at birth.
<b>Transitioning</b>	Undergoing the process of gender affirmation. Most often used in relation to medical gender affirmation.





# Introduction

This brief is written to support engagements around legal gender recognition between the Government of Eswatini and organisations advocating for the rights of lesbian, gay, bisexual, transgender and intersex (LGBTI) individuals in Eswatini. The brief aims to provide empirical evidence based on up-to-date international scientific understanding and best practices on issues pertaining legal gender recognition, including to changing 'sex' or gender in identity documents. To understand these issues, the brief also provides contextual information on the understanding of and the relationship between sex and gender, on gender affirming practices and gender affirming healthcare, as well as on international best practices related to the legal affirmation of sex or gender. The brief is meant to assist the Government of Eswatini to interpret and revise its laws and policies to align it with international standards and current understandings of gender identity and gender affirmation.

The brief was developed in consultation with organisations representing the interests of LGBTI persons and persons who identify as transgender, gender non-conforming or gender diverse, who met for a consultative meeting in Manzini on 21 May 2022. At this consultation, individuals affiliated with TransSwati, who self-identified as transgender, gender non-conforming or gender diverse, shared their experiences with having documents that do not reflect their gender or trying to change their name or gender marker. These real-life experiences are used to contextualise the legal framework that is the focus of this brief. This brief also draws, with their permission, on personal narratives recorded by TransSwati of its constituents.

## What is legal gender recognition?

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

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

## Why is legal gender recognition important?

A recent analysis by the Legal Resources Centre in Cape Town, South Africa shows why it is important for transgender people to be able to change their gender markers and possess identity documents that match their gender identity. Transgender people whose gender does not fit the sex/gender listed in their identity documents are vulnerable to discrimination and stigmatization wherever they are required





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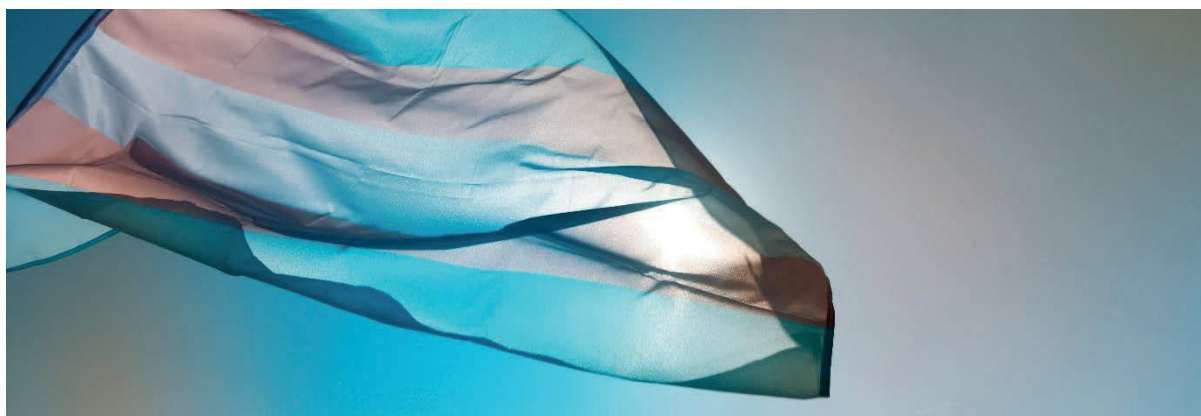
to show an identity document for verification of their identity. This can involve threats of violence, or mean that they face denials of travel, bank accounts and healthcare, and are often unable to fully participate in the civil and political life of their country. Often, identity verification is required at times when people are particularly vulnerable, including when faced with a medical emergency, when they are homeless, or when they are crossing borders. As the report states:

*The mismatch between the physical appearance of transgender individuals and their identity documentation has numerous consequences on their ability to conduct day-to-day life. It was noted earlier that the gender mismatch between the identity documentation and the appearance of the individuals has resulted in accusations of fraud and refusals of, for example, bank services.<sup>1</sup>*

This was also acknowledged by the Botswana High Court in **ND v Attorney General of Botswana and Others**,<sup>2</sup> when it noted with concern the ongoing distress and discomfort experienced by transgender

persons when they are required to explain intimate details of their life to strangers whenever they seek to access routine services. The Court observed that the lack of legal recognition amounts to an invasion of the right to privacy and that arbitrary interference or embarrassment, and the intrusion of privacy faced by transgender persons may be avoided or minimised by the State by allowing them to change the gender marker on their identity documents.

The legal recognition of gender identity permits transgender people to align their identity documents with their expressed gender or gender identity and is an important step towards the realisation of the fundamental rights of transgender persons. To this end, legal gender recognition has been identified as a crucial step for achieving several Sustainable Development Goals (SDGs),<sup>3</sup> including gender equality, ensuring healthy lives and fulfilling the commitment to “leave no one behind.”<sup>4</sup> Following the principle of self-determination, any person who wishes to access legal gender recognition should be able to do so.




<sup>1</sup> Legal Resources Centre and Gender Dynamix (2015).

<sup>2</sup> *ND v Attorney General* MAHGB-000449-11 (unreported, delivered on 29 September 2017).

<sup>3</sup> United Nations (2015).

<sup>4</sup> UNDP & APTN (2017).





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

A recent study sheds light on the experiences of transgender and gender non-conforming people in Eswatini.<sup>5</sup> The study was conducted by the University of Cape Town and The Rock of Hope in Eswatini. It was approved by the Scientific and Ethics Committee, Ministry of Health and Social Welfare, Eswatini. The study shows that transgender and gender non-conforming people in Eswatini often experience discrimination and violence because of their gender identity.

Of the 20 transgender and gender non-conforming people in the study, 55% were unemployed, and many said they did not have sufficient funds to cover their everyday needs. Transgender people may struggle to find employment but also may have less financial support from relatives due to family rejection. Alternately, transgender people may remain in unsafe familial circumstances or relationships due to financial dependence. This is illustrated by the narratives collected by TransSwati:

*Z is always verbally abused by her cousin [...] The mother to Z says she cannot fully accept Z as a woman. She sometimes mentions that she wishes her child to change and act as a [...] She once burnt Z's female clothes and asked Z to buy men's clothes. Z wishes to rent her own apartment just to be at peace, unfortunately she is still a*

*dependent since she does not have stable source of income.*

*She was badly assaulted [by her boyfriend] and bled from the mouth. Police were called and she was taken to hospital. She says, "Whenever I'm in pain, I wish I could be independent, I sometimes feel maybe I do not want to lose him just because I'm not fully independent".*

Transgender and gender minority people in the 'Are we doing alright?' study also struggled with accessing healthcare. Eighty percent said they had been treated disrespectfully at a healthcare facility because of their gender identity. Half said they had been insulted at a healthcare facility, and 45% had been denied healthcare because of their gender identity. Forty-five percent also said they had hidden health concerns from their healthcare provider because they were afraid to disclose their gender identity. At the same time, the study suggests that transgender and gender non-conforming people might be at higher risk of experiencing violence and mental ill-health compared to the general population. Eighty-five percent had experienced verbal harassment because of their gender identity. For example, the narratives collected by TransSwati documented the negative experiences of transwomen, involving constant attention

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<sup>5</sup> Muller, A., Daskilewicz, K. and the Southern and East African Research Collective on Health (2019).





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and remarks when walking around their neighbourhoods:

*Whenever she goes out to the local shop, she has questions to answer and she has every community member's attention because of her physical appearance. She is not free in her own body, and this has affected her psychologically. During the interview she stated that she has opted staying within her homestead just to avoid the response of the community members whenever she goes out. "I am never at ease, I am always harassed, I am a head turner, and this eats me up emotionally, I wish I had a way to make these people to accept me as I am," she said.*

*Whenever C goes around public places within the community, some members call her "bhuti sissi" (sissy boy), saying she was not properly raised to be a man and that's the reason she is transgender and wears female clothing. This has made C avoid going to shops and other busy areas in her own home area. "I cannot go outside my home freely for fear of the unknown, the only place I feel safe for me is within my parents' yard and this makes me feel caged. I wish one could go around my community just to sensitize my community members about transgender people because I'm not free in my own home area and this is so depressing".*

This harassment can also take place at work:

*At work, other employees used to hold small talks and laughed whenever S passes by. "I feel like it's better to start my own small business and be my own boss because as a transwoman I face*

*a lot of challenges at work for being different and this is so depressing and so unhealthy mentally, whenever I go past some people I hear them say sissy-boy in hushed voices".*

*Q is currently employed as a cross border truck driver. Most logistics companies rent one big house for their employees to share with each of them having a bedroom then share the restroom, kitchen and living room. [...] Unfortunately, the fact that Q is a transgender man does not sit well with the work mates. Thus, they do not want to share the house with him. They have complained to their boss that they do not want to stay in the same house with them because he is a transman. Due to the discrimination, he is forced to find his own accommodation far from work at his own expense because the company only offers shared accommodation.*

In the 'Are we doing alright?' study, 70% of transgender and gender non-conforming people had experienced physical violence, and three in five (60%) had experienced sexual violence. This, too, is illustrated by the experiences of transgender people in TransSwati's community narratives. One transman relays the experience of being assaulted:

*A couple of years ago, L went out with a friend to have a couple of drinks at a local club and was attacked by unknown men who were shouting homophobic words. It was late and L did not notice who these two men were. They beat him up and left him lying in pain as they ran away. Then February 2021, L went to the same place with a group of friends and some*





*guy verbally assaulted him for his physical appearance. [...]*

*“Ever since that took place I cannot freely go out because I fear for my life. I can never freely walk around my own home area. I feel like it will happen again. I wish I could overcome this ongoing fear I live every day, every time I step out of my home”.*

Perhaps unsurprisingly, given these stressful, demeaning, and unsafe home, work, and social circumstances illustrated by these individual experiences, the ‘Are we doing alright?’ study also showed that mental health concerns were high among transgender and gender non-conforming people in Eswatini.<sup>6</sup> Sixty percent of transgender participants showed signs of depression. Twenty-two percent showed signs of moderate or severe anxiety and 42% had tried to commit suicide.

## Negative experiences due to having an incorrect gender marker

International research, as well as research from Eswatini, suggests that not having a gender marker that reflects one’s identity and expression impacts access to healthcare and mental health and wellbeing. The ‘Are we doing alright?’ study showed that almost half (45%) of transgender people in Eswatini had been denied access to healthcare.<sup>7</sup> This is, at least in part, linked to not being able to change one’s gender marker in the identity documents and thus not having an identity

document that matches one’s gender identity and gender expression.

This effectively means that transgender people, whose gender identity and expression are likely to be different from the sex assigned to them at birth and from what is recorded on their identity documents, cannot access services without the risk of denial or discrimination (because they would immediately be outed as being transgender) or accused of fraud (if it is believed that the identity document they are producing is not their own).

At a consultation with community organisations and transgender individuals in Manzini,<sup>8</sup> people shared examples of how having an identity document that does not reflect one’s gender identity or gender expression poses significant barriers to participating in daily life.

People at the community consultation explained:

*I am afraid to cross the border, I almost got arrested in South Africa, I cannot apply for a loan.*

*There are certain essential services we are missing just because of our gender markers. We have a problem with financial services, we cannot access our own money.*

One woman described her experience trying to get service at a bank when the cashier would not serve her because her identity document stated she was a man:

<sup>6</sup> Muller, A., Daskilewicz, K. and the Southern and East African Research Collective on Health (2019).

<sup>7</sup> *Id.*

<sup>8</sup> Community consultation by the authors of the research brief, Manzini, 21 May 2022.





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*I once was told by the cashier [when she saw the documents] “You see the line is long, if you are playing, please step aside, people in the line are getting angry”. I waited aside. Then eventually a guy who had come to one of our activities [had received training about LGBTI people] said oh I know these people, you should attend to them. Then she eventually called me in to serve me.*

A transgender woman shared her experience with TransSwati, about applying for a passport and being turned away because she was wearing make-up. As her identification documents stated ‘Male’, the officials wanted her assigned gender and photo to align:

*T, a transgender woman visited the home affairs [...] for a travel document. T came in her usual woman self, wearing make-up. She had her documents screened and the officer assisting her realised that her documents were written male, she then called a colleague and T was ordered to wipe off her make up to get her travel document picture taken. This was only said because she is not a cisgender woman, she had to appear in the travel document without any make up. T left the offices and met a woman in the same ministry that knew her and she narrated her story. The lady took her back to the offices, telling the officers it was against the law refusing a travel document just because she had make-up on.*

Two people told of instances where the police were involved because their identity document did not match their gender, and they were suspected of fraud:

*When I was doing my driver’s license, they actually called the police.*

*I had an experience with police officers, who pulled me over at a roadblock. They checked my driver’s license, that had a feminine name, they wanted to see my ID that says I’m female. They threatened to lock me up and charge me with fraud.*

In the narratives by TransSwati, one transman recounted being stopped by officials at the border to South Africa, and told that he could not again cross with his current documents, which noted ‘Female’:

*O is a visibly proud transman and would often travel from Eswatini to South Africa through the Mahamba border post. He had to be questioned by the immigration officers at some point over why his gender marker read female instead of male. He explained to the team and was let through, but on his third attempt, he was told never to come back with the same travel document if he wished to gain entry or exit unless it bore the gender marker male, he was told they would never let him through. O never sat foot at Mahamba border post since that incident happened.*

A transwoman noted in the community consultation that when she went for her first job interview, her mismatched documents outed her as a transgender person.

A teacher also spoke about continuing to have problems because of her documents when going to sign employment contracts at new schools:





*When I go to sign contracts, I always get problems, because I am in a skirt... Once someone said this is not your documents, in front of other people, it was really embarrassing.*

One transman in the community consultation recounted how not having the appropriate gender reflected in his documents resulted in him being shuttled from ward to ward in a hospital at a time when he was unwell, compromising his care:

*I once arrived in hospital and was unconscious, so they took me to a male ward. But then they sent me to a female ward after seeing my docs. Then the shift changed, then they ordered me to go to the male ward, because they did not want me to be in the female ward. And here it would be very helpful to have the right gender marker. And we should not rely on luck. We need strategic methods.*

Another transman at the consultation observed that when getting a vaccination against the COVID-19 virus, the healthcare person identified him as a man based on his presentation. Whilst this was an affirming experience, he is concerned that the card does not match his identity document, which could be a problem later:

*Recently I was vaxxed for COVID. I went to VX CENTRE, and you have to give ID. When I gave ID, the man still wrote 'M', instead of 'F', even though that's not in my ID. So, if I want to cross the border, there will be confusion, and thinking I am using someone else's card. I went to hospital and someone also wrote 'M', but then I spoke and she wanted to change it,*

*and I said no it is fine, I want to use this card!*

In addition to the mismatch between a person's gender and their identity documents, healthcare can also be complicated for trans people because of a lack of knowledge and acceptance by healthcare providers. The same man explains that they went into a clinic to have a test, and the card that they had gotten that said 'M' (for male) then proved a barrier to their getting the appropriate tests.

*I was going for screening, I was going to ladies' side, so when I went there, there was this old mama there. She looked at me and looked at the card, and she said 'Hai, hai, hai, you must go to the other side!'. I tried to explain to her but she refused to attend to me, and then called someone younger. The younger person was keen to know what was going on and was able to attend to me.*

These examples demonstrate some of the difficulties transgender people in Eswatini experience when their gender identity and expression do not match their identity document. But besides impeding access to healthcare, travel, bank accounts and other civic rights, not having an identity document that matches one's gender identity and gender expression also increases the risk of experiencing violence, negatively impacting one's mental health.





## Negative experiences trying to attain documents

Many people at the community consultation shared experiences of trying to attain new identity documents, including gender markers that reflect their gender identity and expression. No one, however, successfully attained official identification with a correct gender marker.

A transwoman explained that when she went to get an identity document recently, she was questioned about why her gender presentation did not match her birth certificate, demonstrating how transgender people experience challenges and hostility even applying for documents with their sex assigned at birth:

*I had a problem doing ID last week, I have a male birth certificate. I was questioned are you a boy or a girl. I was shocked. If I say I am a female, they will say you are a male in the ID. It's a trick. I said am transgender. I dress as a woman, that I am. I asked if I am allowed to apply as a woman? I was told that I could not.*

A transman described the long and difficult process of unsuccessfully applying for a change of gender marker. During this process, the local Home Affairs office disclosed information about his application which led to bullying and harassment in his community:

*So, five years ago, I decided to apply for change of name and gender marker. Gender marker is more important. I was at first received well and allowed to fill out forms. I made payment.*


*When I went back for feedback that lady had transferred, and there was a new guy I had to explain afresh. He did not receive me well and he started calling his colleagues one by one. They told me to come back. Before the date, I started hearing rumours around town, and getting transphobic comments, and told I should just forget that it doesn't happen in Swaziland. So, it was the Home Affairs people starting rumours.*

*I was scared. But I went back, and they told me to go to [another office]. I was received well but I was told I must be examined by doctors who must confirm that I am fully a man. She gave me her number and told me she will consult first to see if it's possible.*

*I followed up, but kept getting put off, now she is not receiving my calls. The whole process took about two months. So, to date I am still stuck with these documents that say I am female, when my appearance is a man. That was five years ago, but I've always wanted to make another attempt. I feel suicidal because of the discrimination.*

These experiences illustrate how complex and confused even ascertaining the possibility of and process for changing a gender marker is, as well as the discrimination and harassment that transgender people undertaking this process can face. It also underscores the toll that constant discrimination, exacerbated or triggered by the constant outing and humiliation of having identity documents that do not match one's gender, takes on individuals. This comports with findings that show that transgender and gender-diverse





people have a higher burden of mental health consequences.<sup>9</sup>

A transwoman describes the process of applying, again unsuccessfully, for a passport. To confirm her gender, officials looked at her social media accounts, and required a consultation with a doctor, who questioned her about her relationship status and family life. Despite this long invasive process, she has still not been granted a passport.

*I went to apply for passport. I supplied every doc needed. I got a call from a friend, whose husband works there. She said the woman there would not sign off the passport, so the husband said I am a relative, and they went through my Facebook profile to show I am a woman. I went to collect, [but] the officers said but I am a woman, and I should see a doctor at the Ministry of Health. I went to the doctor, and he asked did I have a boyfriend, did he know I am trans? My family is ok? He advised that he is going to take the matter up with the Deputy Prime Minister's office, because there are two other people on their radar who have a problem with gender marker. But then, also due to*

*COVID, it is a constant issue of they are out of office.*

Another person describes going to apply for a passport and being told that they would have to have a physical exam to confirm their gender, and so did not proceed with the application.

*I also wanted to apply for passport, and they wanted to screen me first. To go into a back room and check, so I did not apply.*

These instances demonstrate the different, arbitrary, and unsuccessful paths individuals have been directed through to attain appropriate identification documents. It is evident that there is no clearly defined process, and that individual bureaucrats subject individual trans and gender diverse people to different processes that are invasive.

To ensure that all people in Eswatini, including transgender people, have full access to all public services and can fully participate in civic life, they need to be able to change the sex/gender marker in their identity documents to match their gender identity and expression.

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<sup>9</sup> Bockting, W. O., et al. (2013).





# Defining sex, gender and gender affirmation

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

## Sex

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

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

## Gender

Whilst sex refers to the biological features of a body, gender in this context refers to someone’s identity. This means it is a person’s sense of self, of who they are. In the past, gender was mostly thought to be binary (either woman or man) and linked to the sex of a body.<sup>10</sup> People assumed that persons with a penis and XY chromosomes (male sex) identify themselves as men (their gender). And that persons with breasts, vaginas, and XX chromosomes (female sex) identify themselves as women.


By now, it is clear that gender is much more diverse than only woman or man, and that it is not necessarily linked to biological sex. This means that biological sex does not determine a person’s gender. This also means that people can identify their gender as woman, as man, or as another gender. The term ‘transgender’ has developed into a broad category for people who experience a mismatch between the sex assigned to them at birth and their gender identity.<sup>11</sup>

There is a wide diversity in people’s gender identity and gender expression. Gender identity is an innate characteristic, it is not a choice or a preference, and it cannot be altered or

<sup>10</sup> Drescher, J. (2009); Drescher J., Cohen-Kettenis, P. and Winter, S. (2012).

<sup>11</sup> Victor, C.J., et al. (2017).





changed. Current research shows that gender outside of the strict man/woman binary is simply a part of human diversity, it is not an illness, and it is not a medical condition.<sup>12</sup>

## Gender affirmation

Gender affirmation is the process in which transgender people have their gender affirmed or recognised.<sup>13</sup> This means that the biological sex that they were identified with at birth does not determine their gender, and that their body reflects their gender identity, rather than the sex they were assigned at birth. Gender affirmation contains four elements: social gender affirmation, psychological gender affirmation, medical gender affirmation and legal gender affirmation. Transgender people might choose to affirm their gender in one or more of these four areas.

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

In order to understand society's understanding of gender and gender diversity, and thus how it is reflected in the law, it is necessary to understand how the conception of gender and gender diversity has changed in the history of medicine. By 1983, when the Eswatini parliament passed the Births, Marriages and Deaths Registration Act, it was widely understood that so-called 'sex changes' were possible and that laws should make provision for it. This is what the Births, Marriages and Deaths Registration Act of 1983 does. Since then, however, the medical language has changed, and 'sex change' is now called gender affirmation. When reading the 1983 Act in today's context, this shift in language should be taken into consideration.

The first recognition of gender that goes beyond the man/woman binary is evidenced in the work of Magnus Hirschfeld in the early 20<sup>th</sup> century. In his research, he said that there was a so-called 'third sex'. By this, he meant people whose gender

identity does not match the sex assigned to them at birth (today, we would use the term transgender to refer to the people he described).<sup>14</sup> The German-American doctor Harry Benjamin was the first to start a healthcare service for gender affirmation in the 1950s.<sup>15</sup> During the middle of the 20<sup>th</sup> century, gender affirmation surgeries (then known as 'sex change operations') became more common, even though they did not necessarily challenge the perception of sex or gender as binary. The wider public also learned more about them, for example, through books that were written by people who had transitioned.<sup>16</sup>

From the 1950s, some healthcare providers started to provide care to support people whose gender identity did not match the sex assigned to them at birth. These healthcare providers supported their patients to change their physical body through hormone therapy and surgery. The aim was to modify the body to match the person's gender. Initially, the clinical

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<sup>12</sup> Suess, A., Espineira, K., Walters, P.C. (2014).

<sup>13</sup> The Lancet (2016).

<sup>14</sup> See Hirschfeld, M. (1910); Hill, D.B. (2005).

<sup>15</sup> Benjamin, H. (2006).

<sup>16</sup> See, for example, Jorgensen, C. (1967).





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approaches focused a lot on ‘sex change operations’ or ‘sex reassignment surgeries’, to change the physical sex from male to female, or female to male, as completely as possible. This included the surgical removal or construction of breasts, as well as surgery to change genitals.

In South Africa, gender affirmation surgeries began to increase from the 1960s. For example, Dr Derk Crichton, a Durban-based gynaecologist, remembers that between 1969 and 1993 he performed 58 “gender reassignment surgeries” in Durban.<sup>17</sup> By 1970, the largest public hospital in Cape Town, Groote Schuur Hospital, offered healthcare services to “transgender patients”.<sup>18</sup> In Pretoria, H.F. Verwoerd hospital also offered healthcare services related to ‘sex change’. Although there is little information available, anecdotal evidence suggests that the hospital had a “Transsexual Clinic” since the late 1970s.<sup>19</sup>

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

Since the 1970s, the language used to describe people whose gender does not

match the sex assigned to them at birth increasingly shifted. This was because people wanted to be seen in their own right, and not only as ‘patients’. They started organisations to advocate for themselves and wanted medicine and doctors to have less of a say about their lives and their bodies. As a result, the language changed to the language we know and use today. Instead of ‘sex change’ we now say gender affirmation. Instead of ‘transsexual’ we say ‘transgender’. This also shows an important change in our understanding of sex and gender: the main issue at hand is gender (one’s identity), and not sex (one’s physical characteristics). This saw a shift away from the language of ‘transsexuals’ towards ‘transgender people’, and an understanding that the issue at stake was not related to ‘sex’ but to ‘gender’.<sup>20</sup>

As the field of transgender health progressed, healthcare providers recognised that not every transgender person wanted or needed surgery.<sup>21</sup> While many individuals did need both hormone therapy and surgery, others need only hormone therapy. In other words, gender affirming care became more individualised. This was important because it became clear that surgery was not the only option available to people whose gender did not match their sex assigned at birth. Today, the healthcare options available are much more comprehensive. These healthcare options are named gender affirming care, which reflects today’s understanding of sex and gender. The terms ‘gender affirming care’ and ‘gender affirming surgery’ are, by now, well established internationally.

<sup>17</sup> Crichton, D. (1993).

<sup>18</sup> Wilson, D., et al. (2014).

<sup>19</sup> Theron, A. (1980), cited in: Camminga, B. (2016).

<sup>20</sup> Camminga, B. (2016).

<sup>21</sup> World Professional Association for Transgender Health (2012).





As medicine has evolved, the various ways in which bodies can be changed to affirm gender identities also evolved. At least in Europe and North America, they have also become more accessible. *The Lancet*, one of the most widely read medical journals in the world, published a special issue on 'Transgender Health'.<sup>22</sup> In this issue, the articles summarised the current understanding of gender identity as distinct from physical sex, pointed to health disparities due to gender identity-related discrimination and stigma, and explained the contemporary terminology and aspects of gender affirmation.

## From pathology to self-determination

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

In the 1980s, gender diversity was regarded as a mental health condition. Doctors and other healthcare providers thought that people whose gender does not match the sex assigned to them at birth had a mental health condition, that there was something

inherently pathological about their gender diversity. Today, this assumption has been proven wrong, and it is increasingly accepted that gender diversity is a natural variation and is not a mental illness (or any other illness). This is illustrated by the way that gender diversity has been represented in medical classifications.

Medical classifications are manuals in which doctors and other healthcare providers list the diseases they know, their symptoms, and their treatments. When something is included in a medical classification manual, it is meant to guide doctors on how to treat it. There are two main medical classification manuals worldwide. The International Classification of Diseases (ICD) is published by the World Health Organization (WHO) and lists every medical condition that the WHO considers an illness.<sup>23</sup> The ICD is the basis on which healthcare providers treat patients, and on which healthcare systems develop treatment guidelines and allocate resources. In addition to the ICD, the Diagnostic and Statistical Manual of Mental Disorders (DSM) is a manual specifically for mental health conditions.<sup>24</sup> Published by the American Psychiatric Association, it lists the definitions and diagnostic criteria for all mental health concerns that are considered mental illnesses. It is the basis on which mental health professionals diagnose and treat mental illnesses. Thus, it is similar to the ICD, but focuses only and specifically on mental health.

In the past, both manuals included a diagnosis on 'transsexualism'. This reflected the understanding of medicine at the time. Transgender activists and academics have always pointed out that gender diversity in and of itself is not pathological, and that

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<sup>22</sup> The Lancet (2016).

<sup>23</sup> World Health Organisation (2019).

<sup>24</sup> American Psychiatric Association (2013).





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therefore it should not be considered an illness, and not have a diagnosis.<sup>25</sup> Many transgender people and healthcare providers have advocated for the removal of gender diversity-related diagnoses from diagnostic manuals.

In the ICD-11, published in 2019 and operational from 2022, the World Health Organisation renamed the diagnosis related to gender diversity, moving it out of the section on mental health.<sup>26</sup> Instead of 'gender identity disorder', the diagnosis is now called 'gender incongruence', which aims to reflect the mismatch (the incongruence) between persons' gender identity and their sex characteristics. The 'gender incongruence' diagnosis has been moved to the section on sexual health.

According to the WHO "[t]his [change] reflects evidence that trans-related and gender diverse identities are not conditions of mental ill health and classifying them as such can cause enormous stigma."<sup>27</sup>

The World Professional Association for Transgender Health (WPATH) emphasises that the self-determination of transgender people is important.<sup>28</sup> That is, that transgender people themselves should be the ones who make decisions about their bodies, about whether they want to use medical interventions to affirm their gender, and how and when they want to do it. It means that doctors should not decide this for transgender people.



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

<sup>26</sup> World Health Organisation (2019)

<sup>27</sup> World Health Organisation (Europe) (2019).

<sup>28</sup> World Professional Association for Transgender Health (2012).





# What is gender affirming care?

Gender affirmation includes a range of social, psychological, behavioural or medical (including hormonal treatment or surgery) interventions designed to support and affirm an individual's gender identity.<sup>29</sup> It works towards alleviating the potential distress that transgender people experience through exploring and locating a gender identity that is suited to each individual.<sup>30</sup> Gender affirmation encompasses any, or all, of the following: social gender affirmation, psychological gender affirmation, legal gender affirmation and/or medical gender affirmation.<sup>31</sup>

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

*changes in the gender expression and role (which may involve living part time or full time in another gender role, consistent with one's gender identity) [social gender affirmation]; hormone therapy to feminize or masculinize the body; surgery to change primary and/or secondary sex characteristics (e.g. breasts/chest, external and/or internal genitalia, facial features, body contouring); psychotherapy (individual, couple, family, or group) for purposes such as exploring gender identity, role and*

*expression; addressing the negative impact of gender dysphoria and stigma on mental health; alleviating internalised transphobia enhancing social and peer support; improving body image; or promoting resilience.*<sup>32</sup>

Due to the individualised nature of each person's lived experience, transgender persons might choose to pursue all, some, or none of these pathways of care.<sup>33</sup> Regardless of what the specific care is, WPATH also stresses the following principles for healthcare providers, based on which all care should be provided:<sup>34</sup>

- Exhibit respect for patients with non-conforming gender identities (do not pathologise differences in gender identity or expression);
- Provide care (or refer to knowledgeable colleagues) that affirms patients' gender identities and reduces the distress of gender dysphoria, when present;
- Become knowledgeable about the healthcare needs of transsexual, transgender, and gender non-conforming people, including the benefits and risks of treatment options for gender dysphoria;
- Match the treatment approach to the specific needs of patients, particularly their goals for gender expression and need for relief from gender dysphoria;
- Facilitate access to appropriate care;

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<sup>29</sup> *Id.*

<sup>30</sup> Coleman, E., et al. (2012).

<sup>31</sup> The Lancet (2016).

<sup>32</sup> Coleman, E., et al. (2012).

<sup>33</sup> Spencer, S., et al. (2017).

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





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- Seek patients' informed consent before providing treatment;
- Offer continuity of care; and
- Be prepared to support and advocate for patients within their families and communities (schools, workplaces, and other settings).<sup>35</sup>

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

### The elements of gender affirmation include:<sup>36</sup>

#### Social gender affirmation

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

The 'Are we doing alright?' study showed that between 33% and 80% of transgender people in Eswatini were undertaking social

gender affirmation, modifying their gender presentation by binding or tucking.<sup>37</sup>

#### Psychological gender affirmation

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

#### Medical gender affirmation

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

#### *Hormonal gender affirmation*

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


<sup>35</sup> *Id.*

<sup>36</sup> The Lancet (2016).

<sup>37</sup> Binding is a technique to flatten one's breast or chest by using constrictive materials and clothing. Tucking is a technique to hide the bulge of male

genitalia so that they are not conspicuous through clothing; Müller, A., Daskilewicz, K. & The Southern and East African Research Collective for Health (2019), page 58.





Most of these changes occur within two years.

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

The 'Are we doing alright?' study showed that only 15% of transgender people in Eswatini were using gender affirming hormone treatment at the time, although only one person reported having access to hormones through the healthcare system.<sup>38</sup> Likely, people receive these hormones without a prescription because very few medical practitioners are willing to prescribe hormones. This means that people use hormones without the necessary medical supervision to minimise the risk of side effects. The Eswatini Ministry of Health has recognised that transgender

and gender diverse people are a vulnerable population with little access to healthcare, and thus has issued a training manual to healthcare providers to increase knowledge about trans health and healthcare needs and thus to improve access to gender affirming care.<sup>39</sup>

### *Surgical gender affirmation*

Surgery, and genital surgery, is considered the last step of gender affirmation for transgender people.<sup>40</sup> Many transgender and gender non-conforming people might be happy with their gender affirmation through social and hormonal processes only. Gender affirming surgery is not a prerequisite for gender affirmation. For some transgender people, however, surgical interventions are a medical necessity. Surgery can help people feel more at ease in the presence of sex partners or in their everyday life. In some settings, particularly where non-conforming gender expressions are stigmatised, surgery might reduce risk of harm through violence because it allows people to be less obviously gender non-conforming in public.

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

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<sup>38</sup> Müller, A., Daskilewicz, K. & The Southern and East African Research Collective for Health (2019).

<sup>39</sup> Ministry of Health (2016). Improving access to comprehensive health care services for key

populations in Swaziland: Training manual for healthcare providers.

<sup>40</sup> World Professional Association for Transgender Health (2012).





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**Feminising surgical interventions include:**

- Breast/chest surgery: augmentation mammoplasty (build-up of breast tissue);
- Genital surgery: penectomy (removal of the penis), orchiectomy (removal of the testicles), vaginoplasty (creation of a vagina), clitoroplasty (creation of a clitoris), vulvoplasty (creation of a vulva);
- Non-genital, non-breast surgical interventions: facial feminization surgery, liposuction, lipofilling, voice surgery, thyroid cartilage reduction, gluteal augmentation (implants/lipofilling), hair reconstruction, and various aesthetic procedures.<sup>41</sup>

**Masculinising surgical interventions include:**

- Breast/chest surgery: subcutaneous mastectomy (removal of breasts), creation of a male chest;
- Genital surgery: hysterectomy/salpingo-oophorectomy (removal of uterus), phalloplasty (creation of a penis), vaginectomy (removal of the vagina), scrotoplasty (creation of testicles), and implantation of erection and/or testicular prostheses;
- Non-genital, non-breast surgical interventions: voice surgery (rare), liposuction, lipofilling, pectoral implants, and various aesthetic procedures.<sup>42</sup>

***Voice and communication therapy***

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

## Legal gender affirmation and recognition

Whilst legal gender recognition is a crucial aspect of legal protection for transgender people on its own, it is also an important element of gender affirmation. According to *The Lancet* special edition on Transgender Health, legal gender recognition is the fourth element of gender affirmation.<sup>43</sup> Supporting this, the World Health Organisation states that:

*Legal gender recognition, represented through documents reflecting a person's gender identity, is important for protection, dignity and health. Many countries [...] impose a number of conditions on changing documents [...]. Human rights bodies conclude that [such] requirements run counter to respect for bodily integrity, self-determination and human dignity, and can cause and perpetuate discrimination against transgender people.*<sup>44</sup>

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> The Lancet (2016).

<sup>44</sup> World Health Organisation (Europe) (2019).





## The benefits of gender affirmation

Both the World Health Organisation (WHO) and the American Psychiatric Association's (APA) diagnostic guidelines say that gender affirming care is important for the physical and mental wellbeing of transgender people who wish to transition.<sup>45</sup>

Despite the individualised nature of gender affirming care, it is a clinically recognised necessity for those who wish to align their body to their identified gender.<sup>46</sup> This necessity has been acknowledged by the WHO, APA, WPATH, and various health districts around the world. For example, the Royal College of Psychiatrists uses the SOC-7 to inform its United Kingdom standards of care,<sup>47</sup> and the American Medical Association (AMA) states that gender affirming care is neither cosmetic nor experimental and that:

*If [transgender people do not have access to it, this] can result in clinically significant distress, dysfunction, debilitating depression, and for some people without access to appropriate medical care and treatment, suicidality and death.*<sup>48</sup>

The WPATH, in the current Standards of Care 7 (SOC-7) and an expansive body of research,<sup>49</sup> as well as the AMA have recognised that the –

*Lack of access to care adversely impacts on the mental health of*

*transgender and gender variant people, and both hormonal and surgical treatments have been shown to be efficacious in these individuals.*<sup>50</sup>

Currently, access to gender affirmation in Eswatini is minimal. Only one in thirteen transgender people has access to gender affirming hormone treatment through the healthcare system, and no one has access to gender affirming surgery.<sup>51</sup> Whilst transgender individuals affirm their gender through social affirmation, often with the support of LGBTI organisations, medical and legal affirmation is beyond reach for most. Research suggests that this contributes to the high levels of mental ill health among transgender people in Eswatini.

To reduce discrimination in healthcare and to increase the quality of care offered to transgender people, the Eswatini Ministry of Health developed a training manual for healthcare providers. One chapter instructs healthcare providers on the healthcare needs of transgender people, including the need for gender affirming care.<sup>52</sup>

Gender affirming care, today's equivalent of 'sex change operations', can happen by social affirmation, hormone treatment, or surgery. It is unnecessary to undergo all aspects of gender affirming care – so someone may undergo only the social affirmation of gender affirmation, but not the hormonal or surgical. This is especially the case in places where gender affirming care is not easily accessible, such as in Eswatini.

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<sup>45</sup> Colizzi, M., Costa, R., Todarello, O. (2015). Spencer, S., et al. (2017).

<sup>46</sup> *Id.*

<sup>47</sup> Royal College of Psychiatrists (2013). Spencer, S., et al. (2017).

<sup>48</sup> American Medical Association, House of Delegates. (2008).

<sup>49</sup> See, for example, Smith, Y.L.S., et al. (2005) and Newfield, E., et al. (2006).

<sup>50</sup> Drescher, J. and Haller, E. (2012). Spencer, S., et al. (2017).

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

<sup>52</sup> Ministry of Health (2016).





# Review of international principles around legal gender recognition and affirmation

This section reviews international guidance and accepted principles around legal gender recognition from a human rights perspective.

In 2006, a panel of international human rights experts published the *Yogyakarta Principles (YP)*, a guidance document that addresses a broad range of international human rights standards and their application to issues of sexual orientation and gender identity.<sup>53</sup> In 2017, the panel published additional principles, which expanded on the original document and reflect developments in international human rights law and practice. These new Principles are called *The Yogyakarta Principles plus 10*.<sup>54</sup> The new document also contains 111 ‘additional State obligations’, related to areas such as torture, asylum, privacy, health, and the protection of human rights defenders. These Principles are instructive in defining legal and human rights principles for legislating and implementing legal gender recognition.

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

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

### YOGYAKARTA PRINCIPLE 31

#### THE RIGHT TO LEGAL RECOGNITION

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

#### STATES SHALL:

A) Ensure that official identity documents only include personal information that is relevant, reasonable and necessary as required by the law for a legitimate purpose, and thereby end the registration of the sex and gender of the person in identity documents such as birth certificates, identification cards, passports and driver licences, and as part of their legal personality;

B) Ensure access to a quick, transparent and accessible mechanism to change names, including to gender-neutral names, based on the self-determination of the person;

#### C) While sex or gender continues to be registered:

i. Ensure a quick, transparent, and accessible mechanism that legally recognises and affirms each person’s self-defined gender identity;

ii. Make available a multiplicity of gender marker options;


iii. Ensure that no eligibility criteria, such as medical or psychological interventions, a psycho-medical diagnosis, minimum or maximum age, economic status, health, marital or parental status, or any other third party opinion, shall be a prerequisite to change one’s name, legal sex or gender;

iv. Ensure that a person’s criminal record, immigration status or other status is not used to prevent a change of name, legal sex or gender.

<sup>53</sup> Yogyakarta Principles (2006).

<sup>54</sup> Yogyakarta Principles Plus 10 (2017).





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

The Yogyakarta Principle 3 asserts that:

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

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

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

## The right to privacy (YP-6)

A key component of respecting an individual's privacy means respecting their inherent dignity as a person.

Denying legal gender recognition to a person who has affirmed their gender socially or medically has the consequence of forcing them to effectively disclose their transition whenever they must use a form of identification that holds information

about their legal gender. This is in violation of Yogyakarta Principle 6(f):

*The right to privacy ordinarily includes the choice to disclose or not to disclose information relating to one's sexual orientation or gender identity. Ensure the right of all persons ordinarily to choose when, to whom and how to disclose information pertaining to their sexual orientation or gender identity, and protect all persons from arbitrary or unwanted disclosure, or threat of disclosure of such information by others. (YP6-F).*

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

Yogyakarta Principle 17 (YP-17) affirms international human rights commitments related to the highest attainable standard of health. It reiterates the International Covenant on Economic, Social and Cultural Rights,<sup>55</sup> and General Comment 14,<sup>56</sup> and clarifies that everyone has the right to the highest attainable standard of health without discrimination based on sexual orientation or gender identity:

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

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

*G. Facilitate access by those seeking body modifications related to gender*

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<sup>55</sup> International Covenant on Economic, Social and Cultural Rights, 1976, ratified by Lesotho in 1992.

<sup>56</sup> Committee on Economic, Social and Cultural Rights, General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12).



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*reassignment to competent, non-discriminatory treatment, care and support.*

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

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

and expression. It asserts that to choose one's name is a fundamental aspect of the right to freedom of expression.

YP-19:

*Everyone has the right to freedom of opinion and expression, regardless of sexual orientation or gender identity. This includes the expression of identity or personhood through speech, deportment, dress, bodily characteristics, choice of name, or any other means.*

YP-19(C):

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

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

Yogyakarta Principle 19 (YP-19) returns to social and legal gender affirmation through choice of one's name and interprets it through the frame of freedom of opinion







# Overview of relevant laws in Eswatini

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

- The Constitution of 2005, which is the supreme law of the country and requires that all other laws are interpreted in compliance with its provisions, including the bill of rights and the directives of State policy in the Constitution;
- The Births, Marriages and Deaths Registration Act No. 5 of 1983;
- The Identification Order No. 4 of 1998;
- The Children's Protection and Welfare Act No. 6 of 2012, which domesticates the provisions of the UN Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child;
- The Employment Act No. 5 of 1980.

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

## The Constitution

Section 2 of the Constitution of the Kingdom of Eswatini (2005) declares that "this Constitution is the supreme law of Eswatini and if any other law is inconsistent with this Constitution that other law shall, to the extent of the inconsistency, be void".

Fundamental human rights contained in the Constitution are universal and apply to all persons - regardless of gender identity or expression - and are thus equally applicable to transgender persons. As such, the government of Eswatini should adopt policies aimed at promoting a society based on equality and justice for all citizens, including transgender persons. Section 14(3) of the Constitution specifically states that "a person of whatever **gender**, race, place of origin, political opinion, colour, religion, creed, age or disability **shall be entitled** to the fundamental rights and freedoms of the individual...".

Eswatini's courts have confirmed that constitutional provisions conferring rights and freedoms should be broadly interpreted, and that provisions which restrict rights and freedoms should be given a narrow construction and should satisfy the principle of legality.<sup>57</sup>

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<sup>57</sup> *Swaziland Coalition of Concerned Civic Organisations Trust and Others v Elections and*

*Boundaries Commission & Others* (26/08) [2010] SZSC 36 (28 May 2010).



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HUMAN RIGHT	SECTION IN CONSTITUTION
Fundamental freedoms	Section 14
Protection of personal liberty	Section 16
Protection of freedom of expression	Section 24
Equality before the law	Section 14, 20
Protection from inhuman or degrading treatment	Section 18
Freedom from discrimination	Section 20
Right to privacy	Section 14
Protection against arbitrary search	Section 22
Protection of freedom of movement	Section 26
Rights of workers	Section 32
Right to administrative justice	Section 33

***The right to equality and freedom from discrimination***

Section 14(1)(a) of the Constitution guarantees all persons equality before the law and equal protection of the law. Section 20(1) of the Constitution further says that –

*All persons are equal before and under the law in all spheres of political, economic, social and cultural life and in every other respect and shall enjoy equal protection of the law.*

However non-recognition of the gender identity of transgender persons denies them equal protection of the law, thereby leaving them extremely vulnerable to harassment, violence and sexual assault in public spaces, airports, at home and also by the police. This can also result in extreme discrimination in all spheres of society, especially in the fields of employment, education, banking and healthcare.

Section 20 of the Constitution explicitly prohibits discrimination, including on the grounds of ‘gender’:

*(2) For the avoidance of any doubt, a person shall not be discriminated against on the grounds of **gender**, race, colour, ethnic origin, tribe, birth, creed or religion, or social or economic standing, political opinion, age or disability.*

*(3) For the purposes of this section, “discriminate” means to give different treatment to different persons attributable only or mainly to their respective descriptions by **gender**, race, colour, ethnic origin, birth, tribe, creed or religion, or social or economic standing, political opinion, age or disability.*





The inclusion of 'gender' in the Constitution has as its purpose a broader notion of discrimination incorporating gender roles and gender stereotypes. 'Gender' as a prohibited ground of discrimination should be read to include discrimination based on gender identity, which discrimination is formed by perceptions of gender roles.

In any event, the prohibited grounds of discrimination are not exhaustive, and should be understood to include other characteristics which are inherent to a person's dignity, including sexual orientation and gender identity. The Industrial Court of Appeal, in the case of **Satellite Investments v Dlamini and Others** stated that the prohibited grounds of discrimination in section 20 were not a closed list:

*Society throws up a vagary of new and unprecedented situations that the Legislature, in all its manifold wisdom would not have anticipated. The question then is, if there is a type of discrimination, which is obviously untenable and totally insupportable, should the Courts, when approached*

*by a litigant to distraint such conduct, turn a blind eye thereon for no other reason than that it is not specifically proscribed in either section? My answer is an emphatic No!*

*If that were to be so, it would mean that the Courts would thereby fail to protect victims of overt discrimination and the Courts' hands would be withered and be unable to move in order to give needed protection for no other reason than that the Legislature, many years ago, in 1980, for argument's sake, never anticipated the type of discrimination alleged by a complainant before Court. This would amount to the Courts failing to perform their duties.<sup>58</sup>*

This interpretation is in line with Eswatini's international<sup>59</sup> and regional<sup>60</sup> treaty obligations. The High Court has noted in **Sihlongonyane**<sup>61</sup> that section 20 of the Constitution should be understood in conjunction with Eswatini's obligations under international instruments:

<sup>58</sup> *Satellite Investments v Dlamini and Others*, [2011] SZICA 5, paras 25-26.

<sup>59</sup> Similarly, United Nations human rights treaty bodies have confirmed that sexual orientation and gender identity are included among prohibited grounds of discrimination under international human rights law: This means that it is unlawful to make any distinction of people's rights since they are lesbian, gay, bisexual or transgender (LGBT), just as it is unlawful to do so based on skin colour, race, sex, religion or any other status. See also: United Nations Human Rights Committee, the Committee on Economic, Social and Cultural Rights, the Committee on the Rights of the Child, the Committee against Torture, and the Committee on the Elimination of Discrimination against Women. The UN Committee on Economic, Social and Cultural Rights, in General Comment No. 20 incorporates sexual orientation and gender identity under the term 'other status' in the International Covenant on Economic, Social and Cultural Rights:

"Other status" as recognised in article 2, paragraph 2 General Comment No. 20, Non-discrimination in economic, social and cultural rights (art. 2, para. 2 of the International Covenant on Economic, Social and Cultural Rights), E/C.12/GC/20, 2 July 2009, at para 32.

<sup>60</sup> Article 2 of the African Charter on Human and Peoples' Rights prohibits discrimination based on distinctions of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or any status. The African Commission read article 2 to be inclusive of discrimination based on a person's perceived or real sexual orientation or gender identity. African Commission, Resolution 275: Resolution on Protection against Violence and other Human Rights Violations against Persons on the basis of their real or imputed Sexual Orientation or Gender Identity, ACHPR/Res.275(LV) 2014.

<sup>61</sup> *Sihlongonyane v Sihlongonyane* [2013] SZHC 144.





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*Our country is a member of the United Nations and is signatory to the relevant convention or covenant. In enacting sections 20 and 28 of the Constitution, the country was fully appreciative or mindful of its own obligations to its people on this front and of its international obligations under these international instruments.*

Gender is mentioned explicitly as a ground on which individuals may not be discriminated against. Transgender people are distinctly vulnerable to discrimination based on their status as a gender minority. Thus, the denial of enabling documents, resulting in the denial of healthcare, employment, financial services, and other basic services as detailed in the experiences of transgender people, infringes the right to be treated equally and to be free of discrimination based on gender.

The Eswatini government in the **National Multisectoral HIV and AIDS Strategic Framework (NSF) 2018 – 2023**, has recognised that LGBTI persons are an at-risk and vulnerable component of Eswatini population.<sup>62</sup> The NSF advocates for improved health services for key and vulnerable populations.

However, not changing the sex/gender marker of transgender people, creates a situation where transgender people cannot access health services. Almost half of transgender people in Eswatini (45%) have been denied healthcare,<sup>63</sup> often because

their identity documents do not match their gender identity and expression.

### *The right to dignity*

Section 18(1) of the Constitution states that “the dignity of every person is inviolable”.

In *Sacolo and Another v Sacolo and Others*<sup>64</sup> the High Court held that the common law doctrine of marital power was violated the right to dignity, and stated that:

*...life without dignity is a sound that is not heard. Dignity speaks... It is a combination of thought and feeling... It has to be borne in mind that dignity of all is a sacrosanct human right and sans dignity, human life loses its substantial meaning.*<sup>65</sup>

The right to dignity has also been recognised in regional law. Article 5 of the ACHPR provides that “every individual shall have the right to the respect of the dignity inherent in a human being and to **the recognition of his legal status.**”

The right to dignity requires that the State facilitates legal gender recognition of all persons. The Botswana High Court in *ND v Attorney General of Botswana and Others* said that “the recognition of the Applicant’s gender identity lies at the heart of his fundamental right to dignity... Legal recognition of the Applicant’s gender identity is, therefore, part of the right to dignity and freedom to express himself in a manner he feels psychologically comfortable with”.<sup>66</sup>

<sup>62</sup> The Government of the Kingdom of Eswatini (2018), 15, 20.

<sup>63</sup> Müller, A., Daskilewicz, K., and the Southern and East African Research Collective for Health (SEARCH) (2019).

<sup>64</sup> (1403/16) [2019] SZHC (166) (30 August 2019)

<sup>65</sup> *LM v Attorney General and Another*, MAHGB-591-16, 11 June 2019; *Johar and Others v Union of India and Another* (Writ Petition No. 76 of 2016, Supreme Court of India), quoted in *Sacolo* at para 16.

<sup>66</sup> MAHGB-000449-11 (unreported, delivered on 29 September 2017).





### *Protection from inhumane or degrading treatment*

Section 18(2) of the Constitution states that “a person shall not be subjected to torture or to inhuman or degrading treatment or punishment”.

The African Commission emphasised in the case of *Doebbler v Sudan* that article 5 of the Charter “prohibits not only cruel but also inhuman and degrading treatment. This includes not only actions which cause serious physical or psychological suffering, but which humiliate or force the individual against his will or conscience.”<sup>67</sup> The Commission reiterated that this section “is to be interpreted as widely as possible to encompass the widest possible array of physical and mental abuses.”<sup>68</sup>

As the experiences documented in the brief show, the absence of an identity document that reflects one’s gender identity can lead to a range of degrading treatment. Having a gender marker, which is different from the gender with which one identifies, places one at risk of practical and actual detriment and vulnerability, humiliation and anxiety on a daily basis where they have to disclose the circumstances surrounding the divergence between their gender marker and appearance. Refusal to allow a change of gender marker which coincides with a person’s gender identity and expression violates the right not to be treated in an inhuman and degrading manner.

### *Right to privacy*

Section 14(1)(c) of the Constitution protects the privacy of the home and other property rights of the individual.

Privacy is closely associated with our basic inherent human dignity: our right to “privacy fosters human dignity insofar as it is premised on, and protects, an individual’s entitlement to ‘a sphere of private intimacy and autonomy’”.<sup>69</sup>

The Constitutional Court of South Africa summarised its jurisprudence on the individual right to privacy as it relates to dignity in *NM and Others v Smith and Others*:

*The right to privacy recognises the importance of protecting the sphere of our personal daily lives from the public. In doing so, it highlights the interrelationship between privacy, liberty and dignity as the key constitutional right which constructs our understanding of what it is to be a human being. All these rights are therefore inter-dependent and mutually reinforcing. We value privacy for this reason at least – that the constitutional conception of being a human asserts and seeks to foster the possibility of human beings choosing how to live their lives within the overall framework of the broader community. The protection of this autonomy, which flows from our recognition of individual human worth presupposes personal space within which to live this life.*<sup>70</sup>

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<sup>67</sup> (2003) AHRLR 153 (ACHPR 2003) at para 36.

<sup>68</sup> *Id* at para 37.

<sup>69</sup> *Teddy Bear Clinic for Abused Children v Minister of Justice and Constitutional Development* 2014 (1) SACR 327, para 64.

<sup>70</sup> *NM and Others v Smith and Others* 2007 (5) SA 250 (CC), paras 49 and 50.





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The risk of difficulties, arbitrary interference or embarrassment and the intrusion of privacy may be avoided or minimised by the State by allowing a change in gender marker on identity documents.

#### *Protection against arbitrary search*

Section 22(1) of the Constitution protects against random and unauthorised searches. Section 14(1)(e) of the Constitution entrenches the right to “protection from ... arbitrary search and entry”. Transgender persons are often subjected to invasive searches and interrogation when their identity documents do not match their gender identity

#### *Freedom of movement*

Section 26(1) of the Constitution safeguards freedom of movement, yet, as shown above, this freedom is inhibited when transgender persons are unable to access identity and travel documents reflecting their gender identity.

#### *Freedom of expression*

The right to freedom of expression is protected in section 24 of the Constitution. The Human Rights Committee (HRC) in General Comment 34 elaborates on the content of this right.<sup>71</sup> The HRC notes that freedom of opinion and expression are indispensable conditions for the full development of the person and are essential for any society. The right constitutes the foundation stone for every free and democratic society and is “a necessary condition for the realisation of the principles of transparency and accountability that are, in turn, essential for

the promotion and protection of human rights”.<sup>72</sup>

As an expression of free choice, the decision to live one’s life in accordance with one’s gender identity must be respected.

#### *Rights of workers*

Section 32 of the Constitution protects the rights of workers and requires parliament to ensure equal payment for equal work without discrimination; and protect employees from victimisation and unfair dismissal or treatment. Unfortunately, the absence of legal gender recognition makes it hard for transgender and gender non-conforming persons to assert their rights in the workplace.

#### *Right to administrative justice*

Section 33 of the Constitution protects the right to administrative justice:

*(1) A person appearing before any administrative authority has a right to be heard and to be treated justly and fairly in accordance with the requirements imposed by law including the requirements of fundamental justice or fairness and has a right to apply to a court of law in respect of any decision taken against that person with which that person is aggrieved.*


*(2) A person appearing before any administrative authority has a right to be given reasons in writing for the decision of that authority.*

As shown by the experiences documented in this brief, transgender persons face

<sup>71</sup> General Comment 34 to the Human Rights Committee, CCPR/C/GC/34, 12 September 2011.

<sup>72</sup> *Id* at para 3.





numerous violations of their right to administrative justice, often being refused identity documents or services without being heard and provided with justifiable reasons. Access to services ends up being arbitrary, often depending on one's networks within a community. The right to administrative justice will be supported by adequate guidelines on changing a person's particulars in their identification documents.

## The Children's Protection and Welfare Act of 2012

Section 3 of the Act sets out the basic principles, including that a child's welfare and best interests are paramount; that every child is protected from harm; and that the child's views are considered. In particular, section 3(2) provides:

*(g) a child should be kept informed of matters affecting him in a way and to an extent that is appropriate, having regard to the child's age and ability to understand;*

*(h) if a child is able to form and express views about his care, the views shall be given consideration, taking into account the child's, age, capacity and ability to understand.*

Section 3(4) emphasises that “where there is anything to the contrary or less protective or less promotive in any law, the provisions of this Act shall apply”. This means that the provisions in the Constitution and Children's Protection and Welfare Act must guide the interpretation of laws relating the legal gender recognition. The Children's Protection and Welfare Act in section 246(5) emphasises that “the Births, Marriages and Deaths Registration Act No. 5 of 1983 is repealed to the extent that it is inconsistent

with the provisions of this Act”. Section 246(7) further repeals the Age of Majority Act. No. 11 of 1953, thus entrenching the norm that a person of 18 years of age is capable of making their own decisions and that the views of children under 18 years of age must be considered in any decision relating to them.

Section 4 of the Act provides that a “child shall not be discriminated against on the grounds of **gender**, race, age, religion, disability, health status, custom, ethnic origin, rural or urban background, birth, socio-economic status, refugee status **or other status**.” Failure to recognise a child's gender identity would amount to discrimination and expose the child to harm. A child should not be refused the possibility of a change to their birth certificate or to apply for an identity document that is different to their birth certificate simply on the basis of their gender identity.

Children over the age of 12 may consent to medical treatment, including hormonal therapy, in terms of section 239(2) of the Act if they are of “sufficient maturity and has the mental capacity to understand the benefits, risks, social and other implications of the treatment”. In terms of section 239(6) however, consent of the Children's Court would be necessary for a surgical operation where a parent or guardian unreasonably refuses consent. Importantly, in terms of the Births, Marriages and Deaths Registration Act, surgery is not a requirement for a change in gender marker.

Section 244 of the Children's Protection and Welfare Act provides that a children may not be refused reproductive health information, reproductive health protective devices or technologies, and must ensure their confidentiality.





## The Births, Marriages and Deaths Registration Act of 1983

Section 8 of the Act provides for alterations to the births register. Of relevance is section 8(1) and section 8(3). Since the Children's Protection and Welfare Act of 2012 defines a child as being under the age of 18 and repeals the Age of Majority Act of 1853, section 8 should be read to allow for a change of name, surname and gender marker by a person when they reach the age of 18 years.

Section 8(1) of the Act requires the Registrar to effect any name change on the births register on application by a person who is competent (i.e. either over 18 years of age or with a parent or guardian if under 18) and who has paid the required fee:

*(1) If the birth of any person has been registered, whether under this Act or under any law repealed thereby, and the first name or names under his birth was registered, is or are altered, he if he is twenty-one years of age or over, or either of his parents or his guardian, if he is under twenty-one years of age, **may apply to the Registrar for the alteration of his first name or names in the births register**, and thereupon the Registrar may, **if satisfied that the applicant is competent to make the application** and upon payment by him of the prescribed fees, amend the registration of such person's birth by entering the altered first name or names in the register and on the original birth information form filed in his office in connection with the registration of such birth, without erasing the original first name or names therefrom, and shall instruct the*


*registration officer concerned to make a similar entry in his births register and duplicate birth information form filed in his office.*

Importantly, section 8(1) does not specify that a change in the first name(s) should be linked to a specific sex or gender of the applicant.

Section 8(3) of the Act requires the Registrar to effect any other change on the births register on application by a person who is competent (i.e., either over 18 years of age or with a parent or guardian if under 18) and who has paid the required fee. The section also allows a change of gender marker on the births register – such a change requires in addition any documentary proof (in the case of an adult) or a medical certificate (in the case of a child).

*(3) 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 twenty-one years of age, or either of his parents or his guardian if he is under twenty-one 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 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, and shall instruct the registration officer of the*





*district or sub-district in which the birth of the person was registered to make a similar inscription in his births register and duplicate birth information form filed in his office.*

**Yogyakarta Principle 31** can be used as an aid to interpret the Act in today's context. In particular, the following points should be considered:

- The language of YP31 clearly affirms that the terminology of the Births, Marriages and Deaths Registration Act of 1983 is outdated. The terminology of YP31 should be used when interpreting the Act, and 'change of sex' should be read to mean 'gender affirmation'.
- YP31 (C)(iii) highlights the principle of self-determination. According to YP31 (C)(iii), 'change of sex' or, in more contemporary language, 'gender affirmation', can come about through the full range of gender affirmation methods that exists (including social affirmation by changing one's pronouns and gender expression), so that medical interventions do not become a prerequisite to changing one's particulars.

The healthcare options available have evolved from only surgeries to a whole range of interventions, including gender affirming surgery and hormone treatment. Gender affirmation can be done in many ways, not only through surgery. The Births, Marriages and Deaths Registration Act of 1983 does not specify that 'change of sex' must happen in any specific way and nor does it specify what would constitute documentary proof.

Importantly, section 246(5) of the Children's Protection and Welfare Act of 2012

provides that the Births, Marriages and Deaths Registration Act is repealed **"to the extent that it is inconsistent with the provisions of this Act"**. Section 8(3) must accordingly be interpreted in a manner that is in the best interests of the child, in which case the clause that requires a medical certificate as proof of gender affirmation of a child must be disregarded.

## The Identification Order of 1998

When interpreting the Identification Order, it is important to read the law holistically and in line with the Constitution.

Section 4 of the Identification Order sets out priorities for information recorded in the population register. Importantly, 'sex' is not included in the list, but what is required is a recent photograph noting the person's most current features:

### ***4. Particulars of persons which shall be included in population register.***

*(1) There shall, in respect of every person whose name is included in the population register, be entered the following particulars of that person:*

*(a) his birth entry number referred to in section 5(3);*

*(b) the required particulars to be furnished when notice of birth is given;*

*(c) if he has attained the age of 16 years, his ordinary place of residence and his postal address;*

*(d) if he is a citizen of Eswatini but is not such a citizen by birth, the date of his naturalisation or registration as such a citizen, and if he is not a citizen or was not born in Eswatini, the date of his entry into Eswatini, and the country of which he is a citizen and the date of his entry into Eswatini;*





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(e) his occupation, profession, trade or employment;

(f) date of registration;

**(g) a recent photograph, if he has attained the age of 16 years;**

(h) in the case of a non-citizen, particulars concerning his passport and residence permit;

(i) particulars of his driver's licences, if any, issued or valid under or by virtue of a law in force in Eswatini;

(j) after his death, the required particulars furnished when notice of his death was given, and on permanent departure from Eswatini, the date of such departure, and particulars concerning the cancellation in the prescribed manner of his identity document;

(k) his region, Chief and Indvuna; and

(l) such other particulars as may be determined by the Minister by notice in the Gazette.

Section 5 of the Order says that sex is denoted in the setting of the identity number. According to section 7, the identity document itself *may* contain information about a person's sex. This suggests that the law can be interpreted so that a person who is gender non-conforming can opt out of having a gender marker on their identity document. The section should be read to remove discretion from the Registrar to refuse a Swazi citizen an identity document.

#### **7. Identity documents.**

(1) (a) The Registrar **shall** on receipt of an application in the prescribed manner for an identity document by a person referred to in section 3(1) who has attained the age of 16 years, and after the person concerned has complied with the provisions of section 9, **issue an identity document** in the prescribed manner to such person.

(b) The application referred to in paragraph (a) shall be made within such period as may be prescribed in respect of a specified person or category of persons.

(2) **An identity document may contain only the following particulars in relation to the person to whom it was issued:**

(a) his identity number referred to in section 5(2) and the date of issue of the identity document;

(b) his full name, sex and date of birth, and the place where such person was born;

(c) whether or not he is a citizen of Eswatini;

(d) a recent photograph of himself;

(e) his fingerprints; and

(f) his region, Chief and Indvuna.

Section 13 of the Order allows correction or replacement of an identity document in the case where the particulars on the document are no longer correct, or the photograph no longer reflects the image of the person. This shows that the law anticipated that changes might occur, and that it aims to ensure that identity documents reflect a person's current characteristics. If corrections to a photo or gender marker are required, the Order requires the Registrar to effect such changes and issue a replacement document.


#### **13. Correction, cancellation and replacement.**

(1) If —

(a) 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 recognisable image of that person;** or

(b) a temporary identity certificate or a certificate of particulars of birth does





*not reflect correctly the particulars of the person to whom it was issued; the person concerned or the guardian of the person to whom the certificate of particulars of birth was issued, as the case may be, shall within the prescribed period hand over or send by registered post the identity document, temporary identity certificate or certificate of particulars of birth, as the case may be, to the Registrar.*

*(2) If the identity document, temporary identity document or certificate of particulars of birth referred to in subsection (1) is not handed over or sent, the Registrar may obtain restoration thereof or seize it.*

*(3) If by virtue of this section the **Registrar** has obtained possession of an identity document, temporary identity document or a certificate of particulars of birth, he **shall effect the necessary corrections** or in the prescribed manner cancel it **and replace it with a correct identity document, temporary identity document or certificate of particulars of birth, as the case may be.***

The Minister may issue regulations relating to the Identification Order, and section 18 allows the issuing of regulations to clarify the interpretation and application of the Order, including:

*(d) the making of special arrangements in connection with the inclusion of the names of persons in the population register in exceptional circumstances;*

*(e) the issuing of instructions and the prescribing of forms by the Registrar which may be necessary for the effective carrying out of the provisions of this Order, and, in general, as to all matters which, in terms of this Act, are required or permitted to be prescribed or which he deems necessary or expedient to prescribe in order that the objects of this Act may be achieved.*

## The Employment Act of 1980

Section 29 of the Act provides that:

*No employer shall, in any contract of employment between himself and an employee discriminate against any person or between employees on grounds of race, colour, religion, marital status, **sex**, national origin, tribal or clan extraction, political affiliation **or social status.***

This section's reference to 'sex' and 'social status' ensures a broad interpretation which also protects the rights of transgender persons.

Section 35 of the Act prohibits unfair dismissal. According to section 35(3)(d), dismissal shall be deemed to be unfair if based on "*the race, colour, religion, marital status, **sex**, national origin, tribal or clan extraction, political affiliation or **social status** of the employee.*"





## Recommendations

We have shown that transgender persons cannot fully access their rights if they do not have an identity document that recognises their gender identity and expression. Ensuring full access to legal gender recognition for transgender and gender non-conforming persons in Eswatini is thus a constitutional obligation and an obligation emanating from international treaties that the country has ratified.

The language of the Births, Marriages and Deaths Registration Act of 1983 should be read in today's context. Importantly, when considering the literature and framing of this topic in the 1980s, then the intention of the legislature was not to exclude the possibility of people transitioning or affirming their gender. The difference between the Act of 1983, which was meant to deal with this possibility, and today, 2022, is that the language has evolved. Thus, reading the act in line with today's context, and interpreting it to mean legal gender affirmation, would not distort the intention of parliament nor the meaning of the legislation itself. It would also be in line with the Children's Protection and Welfare Act, which respects bodily autonomy.

## Recommendations for the interpretation of existing legislation

### *Births, Marriages and Deaths Registration Act of 1983*

- The Act must be interpreted in accordance with the Children's Protection and Welfare Act.
- Since the Age of Majority Act. No. 11 of 1853 has been repealed, section 8 should be read to allow for a change of name, surname or gender marker by a person when they reach the age of 18 years.
- Section 8(1) of the Act requires the Registrar to effect any name change on the birth register on application by a competent person (i.e. either over 18 years of age or with a parent or guardian if under 18) and who has paid the required fee.
- Section 8(1) does not specify that a change in the first name(s) should be linked to a specific sex or gender of the applicant.
- Section 8(3) of the Act should be interpreted to provide for the change of sex or gender in the Register.
- The requirement that a 'change of sex' has occurred, listed in section 8(3) of the Act, should be interpreted to mean that gender affirmation has occurred. Gender affirmation encompasses social gender affirmation; psychological affirmation; medical gender affirmation (hormonal and/or surgical) or legal gender affirmation.
- Section 8(3) of the Act requires the Registrar to effect any other change on the birth register on application by a competent person (i.e. either over 18 years of age or with a parent or guardian if under 18) and who has paid the required fee. The section also allows a change of gender marker on the birth register.





- The Act does not specify that ‘change of sex’ must happen in any specific way, nor does it require documentary proof only from a healthcare provider.
- Section 8(3) must be interpreted in a manner that is in the best interests of the child, in which case the clause that requires a medical certificate as proof of gender affirmation of a child must be disregarded.

#### *The Identification Order of 1998*

- Section 7 should be interpreted in a way that a person who is gender non-conforming can opt-out of having a gender marker on their identity document.
- The Order should be read to remove discretion from the Registrar to refuse a Swazi citizen an identity document.
- Section 13 of the Order allows correction or replacement of an identity document in the case where the particulars on the document are no longer correct, or the photograph no longer reflects the image of the person. The Order requires the Registrar to effect such changes and issue a replacement document.

## Regulations for the Births, Marriages and Deaths Registration Act

The Ministry of Home Affairs should issue regulations for the change of sex/gender marker based on section 8(3) of the Births, Marriages and Deaths Registration Act of 1983. These regulations should:

- Be developed in consultation with organisations that represent the interests of lesbian, gay, bisexual, transgender and intersex persons in Eswatini;
- Be based on the principle of self-determination, in line with international best practice and the Yogyakarta Principles;
- Interpret the term ‘change of sex’ in section 8(3) of the Births, Marriages and Deaths Registration Act of 1983 to mean gender affirmation;
- Interpret the phrase ‘change of sex change has occurred’ to mean gender affirmation through social, hormonal or surgical affirmation has occurred, and be clear that any one of those is sufficient to apply for a change of particulars;
- Ensure that there are no limitations to the eligibility for section 8(3) of the Births, Marriages and Deaths Registration Act of 1983. Anyone should be allowed to apply for a change of sex/gender marker without discrimination.
- The guidelines/ regulations should be accessible, non-discriminatory, and consistent across various state-issued documents and apply to both new and existing documents.
- The regulations must further conform to the Children’s Protection and Welfare Act.

## Recommendations for policy reform

Policy reform may be necessary to fulfil the constitutional rights of transgender persons in Eswatini. Here, we provide recommendations for which the government of Eswatini should





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start consultations with organisations that represent the interests of lesbian, gay, bisexual, transgender and intersex people in Eswatini.

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





# References

## Articles and reports

American Medical Association House of Delegates (2008) Removing Financial Barriers to Care for Transgender Patients.

American Psychiatric Association (2013) Diagnostic and Statistical Manual of Mental Disorders [Internet]. 5th ed. *American Journal of Psychiatry*.

Bauer, G.R., Pyne, J., Francino, M.C., Hammond, R. (2013) "Suicidality among trans people in Ontario: Implications for social work and social justice" *Serv Soc.* 59(1):35.

Benjamin, H. (2006) "Transsexualism and Transvestism as Psycho-Somatic and Somato-Psycho Syndromes" in S. Stryker & S. Whittle (eds.) *The Transgender Studies Reader*. New York: Routledge.

Bhinder, J., & Upadhyaya, P. (2021) "Brief History of Gender Affirmation Medicine and Surgery" *Urological Care for the Transgender Patient*, 249-254.

Bockting, W., Miner, M., Swinburne R. et al (2013) "Stigma, Mental Health, and Resilience in an Online Sample of the US Transgender Population" *American Journal of Public Health* 103(5), 943-951.

Camminga, B. (2016) *Bodies over Borders and Borders over Bodies: The 'Gender Refugee' and the Imagined South Africa*. Doctoral dissertation, University of Cape Town.

Coleman, E., Bockting, W., Botzer, M., Cohen-Kettenis, P.T., De Cuypere, G., Feldman, J., et al. (2012) "Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People" *Int J Transgenderism* 13(4):165–232.

Colizzi, M., Costa, R., Todarello, O. (2015) "Dissociative symptoms in individuals with gender dysphoria: Is the elevated prevalence real?" *Psychiatry Res.* 226(1):173–80.

Crichton, D. (1993) "Gender Reassignment Surgery for Male Primary Transsexuals" *South African Medical Journal*, 83, 347.

Drescher, J. (2009) "Queer Diagnoses: Parallels and Contrasts in the History of Homosexuality, Gender Variance, and the Diagnostic and Statistical Manual" *Archives of Sexual Behavior*, 39(2), 427-460.

Drescher, J., Cohen-Kettenis, P. and Winter, S. (2012) "Minding the body: Situating gender identity diagnoses in the ICD-11" *International Review of Psychiatry*, 24(6), 568-577.

Drescher, J. and Haller, E. (2012) American Psychiatry Association Position Statement on Access to Care for Transgender and Gender Variant Individuals.





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- Gergen, K.J. (2001) "Psychological science in a postmodern context" *American Psychologist*, 56(10), 803–813.
- Green, R., and Fleming, D. (1990) "Transsexual surgery follow-up: Status in the 1990s" *Annual Review of Sex Research*, 1(1), 163-174.
- Hill, D.B. (2005) "Sexuality and gender in Hirschfeld's *Die Transvestiten*: a case of the 'elusive evidence of the ordinary'" *Journal of the History of Sexuality*, 14(3), 316-332.
- Hirschfeld, M. (1910) *Die Transvestiten*. Berlin: Pulvermann
- Human Rights Committee (2011) General Comment 34, CCPR/C/GC/34, 12 September 2011.
- Jorgensen, C. (1967) *Christine Jorgensen: A Personal Autobiography*, Paul S. Eriksson, New York.
- Klausen, S.M. (2015) *Abortion Under Apartheid: Nationalism, Sexuality and Women's Reproductive Rights in South Africa*, Oxford: Oxford University Press.
- Legal Resources Centre and Gender Dynamix (2015) Briefing Paper: Alteration of Sex Description and Status Act 49 of 2003.
- Müller, A., Daskilewicz, K. and the Southern and East African Research Collective on Health (2019) 'Are we doing alright?' Realities of violence, mental health, and access to healthcare related to sexual orientation and gender identity and expression in Eswatini: Research report based on a community-led study in nine countries. Amsterdam: COC Netherlands.
- Newfield, E., Hart, S., Dibble, S., Kohler, L. (2006) "Female-to-male transgender quality of life" *Qual Life Res*, 15(9):1447–57.
- Royal College of Psychiatrists (2013) Good practice guidelines for the assessment and treatment of adults with gender dysphoria. London.
- Rubin, G. (1975) "The Traffic in Women: Notes on the 'political Economy' of Sex" in Reiter R.R. (ed) *Toward an anthropology of women*, Monthly Review Press.
- Smith, Y.L.S., Van Goozen, S.H.M., Kuiper, A.J., Cohen-Kettenis, P.T. (2005) "Sex Reassignment: Outcomes and Predictors of Treatment for Adolescent and Adult Transsexuals" *Psychol Med*, 35:89–99.
- Spencer, S., Meer, T., and Müller, A. (2017) "'The Care is the Best You Can Give at the Time': Health Care Professionals' Experiences in Providing Gender Affirming Care in South Africa." *PLoS One*, 12(7).
- Suess, A., Espineira, K., Walters, P.C. (2014) "Depathologization" *TSQ Transgender Stud Q*, 1(1–2): 73–7.
- The Lancet (2016) Transgender Health.





Theron, A. (1980) "Criteria for the Evaluation of Male-to-Female Transsexual Patients" *South African Family Practice Journal*, 1(10), 5-7., cited in: B. Camminga (2016) *Bodies over Borders and Borders over Bodies: The 'Gender Refugee' and the Imagined South Africa*. Doctoral dissertation, University of Cape Town.

UNDP & APTN (2017) *Legal Gender Recognition: A Multi-Country Legal and Policy Review in Asia*.

UN Committee on Economic, Social and Cultural Rights (2000) General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12).

Unger, R.K. (1979) "Toward a redefinition of sex and gender" *American Psychologist*, 34(11), 1085–1094.

United Nations Sustainable Development Goals, 2030 Agenda for Sustainable Development (2015).

Victor, C.J., Nel, J.A., Lynch, I., Mbatha, K. (2014) "The Psychological Society of South Africa Sexual and Gender Diversity Position Statement: Contributing Towards a Just Society" *South African J Psychol*, 44(3): 292–302.

Walker, P.L., & Cook, D.C. (1998) "Brief communication: gender and sex: vive la difference" *American Journal of Physical Anthropology*, 106(2), 255-9.

Wilson, D., de Villiers, A., Marais, A., Addinall, R., & Campbell, M.M. (2014) "Transgender issues in South Africa, with particular reference to the Groote Schuur Hospital Transgender Unit" *South African Medical Journal*, 104(6).

World Health Organisation (2019) *The ICD-10 classification of mental and behavioural disorders: clinical descriptions and diagnostic guidelines*. Geneva: WHO.

World Health Organisation (Europe) (2019) *Brief on transgender health in the context of ICD-11*.

World Professional Association for Transgender Health (2012) *Standards of Care for the Health of Transsexual, Transgender, and Gender-Nonconforming People*. World Professional Association for Transgender Health (WPATH).

Yogyakarta Principles (2006) *The Yogyakarta Principles: Principles on the application of international human rights law in relation to sexual orientation and gender identity*.

Yogyakarta Principles Plus 10 (2017) *The Yogyakarta Principles plus 10: Additional principles and State obligations on the application of international human rights law in relation to sexual orientation, gender identity, gender expression and sex characteristics to complement the Yogyakarta Principles*.





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## Laws and policies

Births, Marriages and Deaths Registration Act No. 5 of 1983

Children's Protection and Welfare Act No. 6 of 2012

Constitution of 2005

Employment Act No. 5 of 1980

Government of the Kingdom of Eswatini (2018) The National Multisectoral HIV and AIDS Strategic Framework (NSF) 2018 – 2023.

Identification Order No. 4 of 1998

Ministry of Health (2016) Improving access to comprehensive health care services for key populations in Swaziland: Training manual for healthcare providers.

## Case law

*Johar & Others v Union of India & Another*, Writ Petition No. 76 of 2016, Supreme Court of India.

*LM v Attorney General & Another*, MAHGB-591-16, Botswana High Court, 11 June 2019.

*ND v Attorney General of Botswana & Others*, MAHGB-000449-11, Botswana High Court (unreported, 29 September 2017).

*NM and Others v Smith and Others* 2007 (5) SA 250 (CC).

*Sacolo v Sacolo* (1403/16) [2019] SZHC (166) (30 August 2019)

*Satellite Investments v Dlamini & Others*, [2011] SZICA 5.

*Sihlongonyane v Sihlongonyane* [2013] SZHC 144.

*Swaziland Coalition of Concerned Civic Organisations Trust & Others v Elections and Boundaries Commission & Others* (26/08) [2010] SZSC 36 (28 May 2010).

*Teddy Bear Clinic for Abused Children v Minister of Justice and Constitutional Development* 2014 (1) SACR 327.







