

CHAPTER 10

**SEXUAL
ORIENTATION
AND GENDER
IDENTITY IN
SCHOOLS**

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KEYWORDS

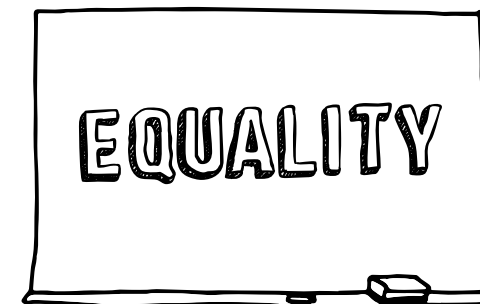
When we talk about gender identity and sexual orientation, there are terms that are sometimes used. It is helpful to understand these terms. It is important to bear in mind, however, that gender identity and sexual orientation are complex. The terms that are used here must not be treated as fixed and all-encompassing. This means that there are many ways in which we express our gender identity and sexual orientation, and not all of these ways may be captured by these terms.

Heterosexual: A person who is heterosexual is physically or romantically attracted to members of the opposite gender.

Homosexual: A person who is homosexual is physically or romantically attracted to people of the same gender. Men who are attracted to men may sometimes identify as gay. Women who are attracted to other women may sometimes identify as lesbian.

LGBTQI: You will often hear or see people using the term 'LGBTQI'. This is an acronym for the various sexual orientations and gender identities we have discussed. Lesbian (L), Gay (G), Bisexual (B), Transgender (T) and Intersex (I). You will also sometimes see people using the term LGBTQIAQ, and other variations of this term.

Cisgender: Cisgender is a term used when a person's gender identity aligns with the gender assigned to them at birth.



Bisexual: A person who is bisexual is physically and romantically attracted to members of their own gender as well as members of the opposite gender.

Gender non-conforming: Gender non-conforming is a term used to describe a person or a person's actions that do not ascribe to gender norms.

Asexual: A person who is asexual has no or very few feelings of sexual attraction to others.

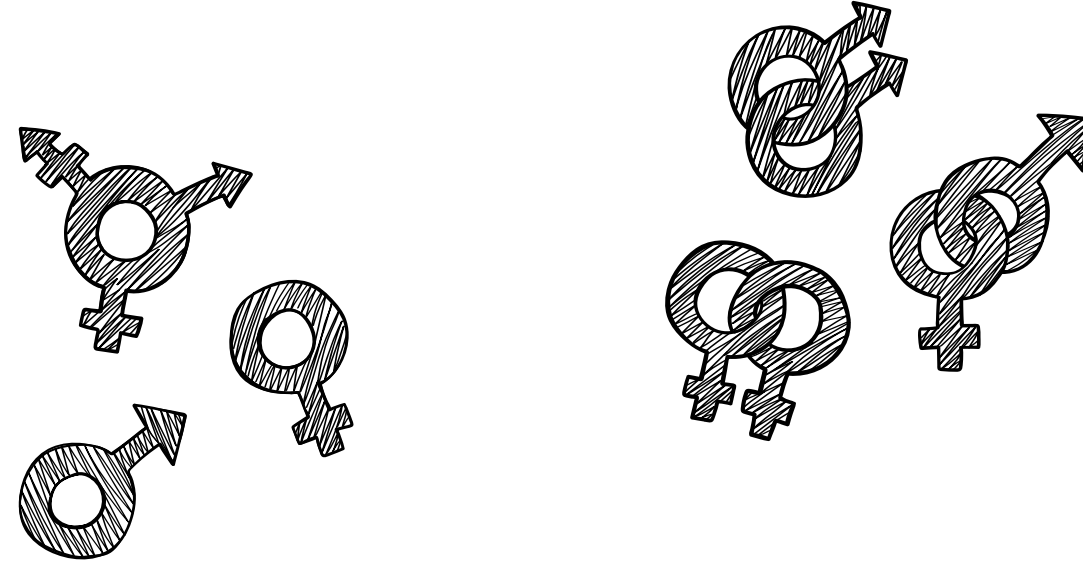
Intersex: A term used to describe when a person is born with natural physical and biological sex characteristics that do not align with what is typically understood as male or female.

Transgender: Transgender is a term that describes a wide range of gender identities and expressions. A person who is transgender has a gender identity that is not the same as the one they were assigned at birth.

Queer: The term 'queer' is sometimes used as an umbrella or all-inclusive term to describe expressions of gender identity and sexual orientation that are not the society-imposed norm.

Non-binary gender: This is an umbrella term that may be used to describe persons who do not identify with the binary gender categories of 'man' and 'woman'.

When this chapter uses the term 'LGBTQI', we are referring to all expressions of gender identity and sexual orientation, including asexual and queer.



INTRODUCTION

As we grow older, we begin to form a sense of identity. We discover who we are and who we want to be in the world. As part of this process, we discover how we want to identify and express our **gender** and our **sexual orientation**.

It is important for all people to respect each other and treat each other equally, irrespective of how we choose to identify or express ourselves.

GENDER IDENTITY

Gender identity is a person's innermost sense of themselves as being male, female, a combination of both, or neither. Gender identity refers to how people perceive themselves, regardless of their biological sex. Biological sex refers to one's physical attributes that are assigned within the binary as either 'male' or 'female' at birth. A person's

gender identity can be the same or different from their biological sex. Each person is unique, and an individual.

Gender identity can be expressed in various ways, such as by a person's behaviour, clothing, haircut and voice. It is important to remember that an individual's gender identity and expression may differ from society's expectations and opinions of how different genders express themselves, so we should not make assumptions and judgments about someone's gender identity based on their appearance or the way in which they express themselves. As part of respecting a

person's gender identity, it is important not to misgender them. Misgendering refers to labelling others as a gender other than that with which a person identifies and/or not using the pronoun with which they identify.

SEXUAL ORIENTATION

All of us go through a process during which we discover what it means to be attracted to others, and the types of relationships we want to form. Sexual orientation refers to the physical or romantic attraction that a person has to the male gender, to the female gender, to neither or to both.

LAW AND POLICY

THE CONSTITUTION

The Constitution is the supreme law in our country, and no law or conduct is allowed to be inconsistent with the Constitution. Chapter 2 of our Constitution contains the Bill of Rights, which applies to everyone. These rights protect each and every person.

The Bill of Rights guarantees that every person has the right to equality, the right to dignity, the right to privacy and the right to bodily integrity. The Constitution also guarantees freedom of expression. In the context of education, the Bill of Rights also guarantees that everyone has the right to basic education, and that a child's best interests are paramount in matters concerning children.

Let us look at some of these rights more closely.

EQUALITY

Section 9 of the Constitution states that all people are equal before the law, and have the right to equal enjoyment and the protection of the law. The **right to equality** includes 'the full and equal enjoyment of all rights and freedoms'.

In protecting everyone's right to equality, the Constitution specifically prohibits unfairly discriminating against someone on the basis of their 'gender', 'sex' or 'sexual orientation'.

Unfair discrimination is when you are treated differently from other people, and your dignity, equality and rights as a human being are impaired by such treatment. This means that neither the government nor any individual is allowed to discriminate against a person based on how they choose to identify and express their sexual orientation or gender identity.

In the case of *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others*, the Constitutional Court held that 'sexual orientation' must be afforded a broad, all-encompassing and inclusive interpretation. The Constitutional Court highlighted that this is because of the impact of discrimination on LGBTQI persons in our history, and the fact that LGBTQI persons are a minority group in our society. In a number of cases, the Constitutional Court has affirmed that LGBTQI persons must not be discriminated against in our country. Importantly, South Africa also guarantees the right of all people to be legally married, regardless of their sexual orientation. The right of LGBTQI persons to enter into a marriage was confirmed by the Constitutional Court in the case of *Minister of Home Affairs and Another v Fourie and Another*.

The Constitutional Court has also held that school policies that have the effect of discriminating against learners are unlawful, and limit a learner's right to basic education. It is therefore important for all schools to ensure that school admissions policies and codes of conduct do not unfairly discriminate against LGBTQI learners.

DIGNITY

Dignity is a founding value of our Constitution, and is entrenched in Section 10 of our Bill of Rights. A person's **right to dignity** means that every human being is worthy of esteem and respect. This is true regardless of your sexual orientation, your identity, or how you express your gender.

In the matter of *Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Another*, the Constitutional Court explained

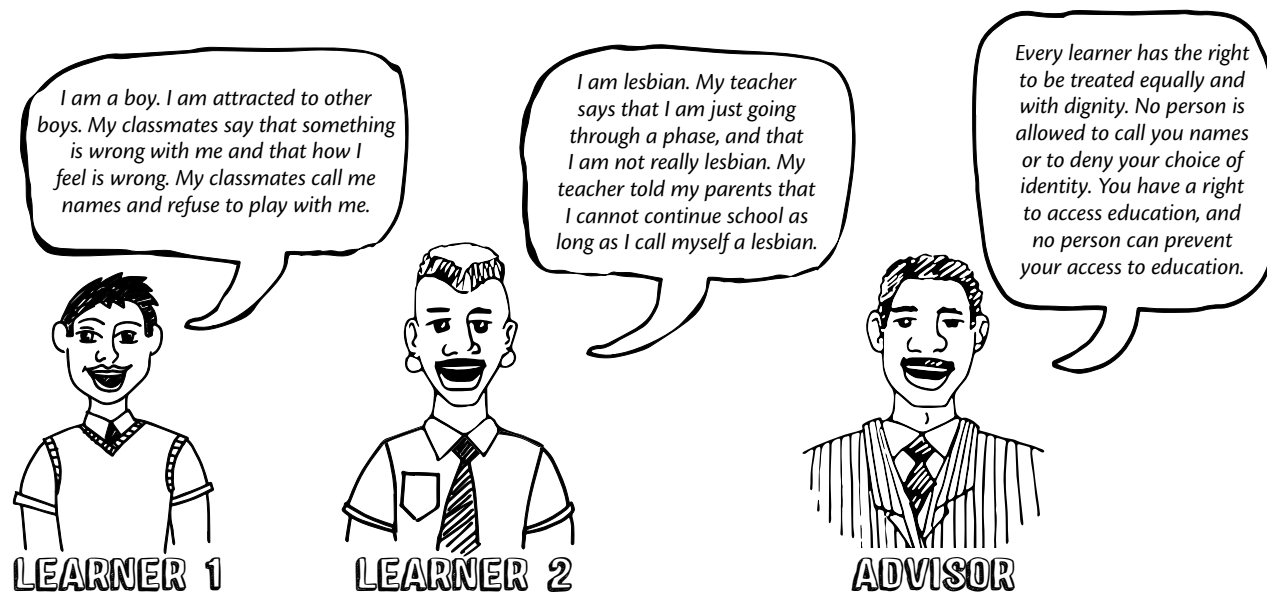
that the right of children to dignity has special importance in our society:

[D]ignity recognises the inherent worth of all individuals (including children) as members of our society, as well as the value of the choices that they make. It comprises the deeply personal understanding we have of ourselves, our worth as individuals and our worth in our material and social context ... children's dignity rights are of special importance and are not dependent on the rights of their parents. Nor is the exercise by children of their dignity rights held in abeyance until they reach a certain age. [Authors' emphasis]

The Constitutional Court also recognised evidence that it is normal and healthy for adolescents to explore their sexuality, and that it is important for children not to feel shamed in the process of their sexual development.

THE RIGHT TO EQUALITY AND DIGNITY PROTECTS LEARNERS

In a school, a learner's rights to **equality and dignity** mean that they should never be treated differently or valued less because of their sexual orientation or gender identity. No person (whether he or she is a teacher, a principal, a parent or another learner) can treat a learner differently because of the manner in which they express their gender, or because of the persons they are attracted to. To do so would amount to an infringement of their rights to equality and dignity. Such conduct is prohibited by our Constitution, and should be prohibited in a school's policies and code of conduct.



Some examples of conduct that infringes the rights to equality and dignity include:

- Calling a person insulting names because of how they express their gender identity or sexual orientation
- Refusing to interact with someone because of their gender identity or sexual orientation.
- Refusing to allow learners to join a particular sports team based on their gender identity or sexual orientation
- Refusing to admit a learner to a school because of their gender identity or sexual orientation
- Forcing a learner to wear a dress or to wear pants, or to otherwise present themselves as a girl or a boy, even though they want to express themselves differently
- Refusing to allow a learner to utilise facilities, such as bathrooms, for the gender with which they identify.

FREEDOM OF EXPRESSION

Everyone has the right to talk about and express their gender identity and their sexuality freely, and the right to choose when to do so. Section 16 of the Constitution protects this freedom, and this right should not be limited.

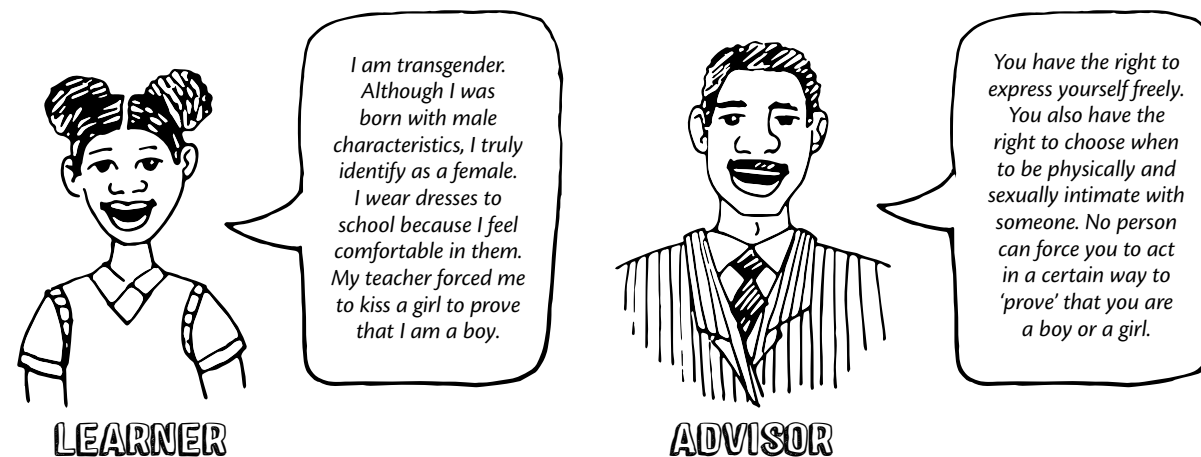
The Constitutional Court has emphasised the importance of free expression to childhood development. In *S v M (Centre for Child Law as Amicus Curiae)*, the Constitutional Court said the following:

Individually and collectively all children have the right to express themselves as independent social beings, to have their own laughter as well as sorrow, to play, imagine and explore in their own way, to themselves get to understand their bodies, minds and emotions, and above all to learn as they grow how they should conduct themselves and make choices in the wide social and moral world of adulthood. [Authors' emphasis]

The Constitutional Court has also specifically held that school policies such as dress code can sometimes discriminate against learners by restricting their

ability to express their identity freely, and that a school must reasonably accommodate the needs of all learners.

It is important to remember that **freedom of expression** does *not* protect hate speech. In terms of Section 16(2)(c) of the Constitution, advocacy of hatred based on a person's gender, which constitutes incitement to cause harm, is unconstitutional. In addition, the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 ('Equality Act') prohibits hate speech on the basis of certain grounds, including sex, gender and sexual orientation. In the case of *Qwelane v South African Human Rights Commission and Another*, the Constitutional Court held that the words of a publication which demeaned gay and lesbian people on the basis of their sexual orientation amounted to hate speech under the Equality Act. While it is beyond the scope of this chapter to discuss this in any depth, it is worth noting that the Court also held that certain aspects of the Equality Act were invalid.



PRIVACY AND BODILY INTEGRITY

In addition to the right to express oneself freely, a person also has the **right to privacy** protected by Section 14 of the Constitution. The right to privacy means that a person has the right to decide if, when and with whom they discuss and express their gender identity and sexuality. The Constitutional Court explained, in the *National Coalition* case, that expression of sexuality falls within the sphere of private intimacy and autonomy:

Privacy recognises that we all have a right to a sphere of private intimacy and autonomy which allows us to establish and nurture human relationships without interference from the outside community. The way in which we give expression to our sexuality is at the core of this area of private intimacy. [Authors' emphasis]

It is also important to recognise that Section 12 of our Constitution protects a person's **right to psychological and bodily integrity**. A person's right to psychological and bodily integrity

means that they have the right to control and make decisions about their own bodies, and the right for their bodies not to be violated. This is important in ensuring that all persons are able to express themselves freely if they choose to, and to ensure their privacy if they choose to be private. The Equality Act's prohibition on **harassment** also protects the right to privacy and psychological and bodily integrity. The Equality Act defines harassment as unwanted conduct which is persistent and serious and which demeans, humiliates or intimidates a person based on their gender or sexual orientation.

RESPECTING FREEDOM OF EXPRESSION AND THE RIGHT TO PRIVACY OF LEARNERS

In schools, school governing bodies, educators, parents, teachers and other learners must respect the free expression and privacy of all learners.

Some examples of conduct that would infringe the rights to privacy and bodily integrity include:

- Forcing a learner to identify as gay or lesbian, or as a man or a woman, against their will
- Disclosing or requiring a learner to disclose their sexual orientation without their consent or against their will
- Refusing to allow transgender learners to use the toilets designated for the gender they identify with
- Refusing to allow a gay or transgender learner to wear a school dress
- 'Inspecting' a learner to confirm their gender identity or sexual orientation
- Forcing an LGBTQI learner to take part in physical or sexual acts to prove his or her sexual orientation or gender, or to 'correct' their sexual orientation or gender.

CASE STUDY

MPHELA V MANAMELA AND OTHERS (2016)

In this matter, a transgender learner (Nare Mphela) was the victim of ongoing hate speech, harassment and discrimination by her school principal between 2013 and 2014. The school principal would call the learner derogatory names, misgender her and instruct other learners to follow her to the bathroom and try to see and feel her private parts. This caused a hostile and intimidating environment leading to great psychological distress. The learner eventually failed matric in 2014. The learner, assisted by the South African Human Rights Commission, instituted Equality Court proceedings against her school principal and the Limpopo Department of Education due to the ongoing harassment and discrimination she was experiencing based on her gender identity. The Equality Court held in favour of the learner and awarded her R100 000 in damages.

INTERNATIONAL LAW

International law plays an important role in our constitutional democracy. In terms of our Constitution, the courts must take international law into consideration when interpreting the Bill of Rights.

The international community has entered into various human-rights treaties that protect the equality, dignity, privacy and bodily integrity of LGBTQI learners. Examples of international law instruments that are important to the protection of the rights of LGBTQI learners include:

- **Universal Declaration of Human Rights** – Recognises that all people are equally entitled to the rights and freedoms set out in the Declaration;
- **International Covenant on Civil and Political Rights** – Recognises that all people are equally entitled to (among other things) freedom of association, freedom of expression, and the right to liberty and security of the person;
- **Convention on the Rights of the Child** – Article 8 provides that State Parties must respect the right of the

child to preserve his or her identity without unlawful interference;

- **Convention against Discrimination in Education** – Article 1(1) recognises that ‘discrimination’ includes any distinction, exclusion, limitation or preference based on (among other things) sex, and has the purpose or effect of nullifying or impairing equality of treatment in education;
- **African Charter on the Rights and Welfare of the Child** – Article 21(1) requires states to take all appropriate measures to eliminate harmful social and cultural practices affecting the welfare, dignity, normal growth and development of the child, including those customs and practices discriminatory to the child on the grounds of sex or other status.

South Africa must take steps to advance its obligations in terms of international law, and ensure that the rights of all learners in schools – regardless of their gender identity or sexual orientation – are protected.

SCHOOL POLICIES SHOULD CONFORM TO THE CONSTITUTION

The preamble to the South African Schools Act, 1996 (SASA) recognises that there is a need to redress past injustices in educational provision, and to combat all forms of unfair discrimination and intolerance.

Section 5(1) of SASA makes it clear that a public school must admit learners and serve their educational requirements without unfairly discriminating in any way. In terms of Section 20(1)(a) of SASA, the school governing body has a duty to promote the best interests of the school, and to ensure the provision of quality education for **all** learners at the school.

The school governing body of a school is responsible for determining the admission policy and code of conduct for a school. While the school governing body has this power, the policies and Code of Conduct must comply with the Constitution. The Department of Basic Education has published Guidelines for a Code of Conduct for Learners (‘the Code of Conduct Guidelines’), which emphasise that the school Code of Conduct must be developed with all stakeholders in the school – including the parents, educators, learners and non-educators at the school. The Code of Conduct Guidelines also emphasise the rights of learners to equality, dignity and privacy.

It is important for school governing bodies, educators, parents and learners to support the development of inclusive school policies that actively promote respect for LGBTQI learners, and that

take into account gender and sexuality diversity. School uniform policies are an important example of school policies which ought to be inclusive and sensitive to LGBTQI learners.

Learners should not be subjected to disciplinary process or punishment on the basis of their gender identity or expression or their sexual orientation. The Department of Basic Education has published a guide on combating homophobic bullying in school, which provides important guidelines on the steps that all stakeholders can take in developing inclusive policies and a safe environment for all learners.

The Western Cape Education Department has published Draft Guidelines on Gender Identity and Sexual Orientation in Public Schools for public comment. However, various organisations have raised concerns regarding these draft guidelines.

It is important to note that private schools must also ensure that the rights of LGBTQI learners are protected. In *AB and Another v Pridwin Preparatory School*, the Constitutional Court made it clear that private schools are bound by the right to basic education and a child’s right to have their best interests considered of paramount importance.

WHAT CAN SCHOOLS AND EDUCATORS DO TO ENSURE A MORE INCLUSIVE AND SAFE ENVIRONMENT FOR LGBTQI LEARNERS?

There are many active steps that schools can take to work towards a more inclusive environment. Some examples include:

- Developing a gender-neutral dress code for learners, to ensure that LGBTQI learners are not discriminated against
- Ensuring that there are school rules and policies to effectively combat bullying, including cyber-bullying, of LGBTQI learners
- Encouraging the school community to embrace LGBTQI learners, and to speak openly and respectfully about diversity
- Supporting learner-led initiatives, such as the formation of student clubs and societies, aimed at developing LGBTQI allyship and inclusiveness
- Developing the school curriculum so as to promote the understanding and respect of all learners.



LEARNERS CAN PROTECT THEIR RIGHTS

It is important to know our rights. It is also important to know who to contact and what steps to take if our rights (or those of anyone else) are violated.

If any person at school discriminates against you on the basis of your gender identity and expression or sexual orientation, there are various ways to obtain help. You should always try to speak to counsellors or people that you trust. There are also public institutions you can consult and processes that you can follow.

We describe some of those processes here. There are many avenues for help, and the ones discussed here are just examples. There are also various LGBTQI rights non-profit organisations all over South Africa that have been created to offer support.

THE SOUTH AFRICAN HUMAN RIGHTS COMMISSION (SAHRC)

The SAHRC was formed in order to promote respect for human rights and a culture of human rights. In order to fulfil its obligations, the SAHRC has the power to investigate cases where human rights have been violated, either by the state or by any other person. If there are instances where a learner has been discriminated against or otherwise had their rights violated on the basis of their sex, gender or sexual orientation, the SAHRC is empowered to investigate the matter.

You can report any incident of discrimination to the SAHRC.

To lodge a complaint, call the SAHRC's telephone number: 011 877 3600. A complaint can also be lodged on their website: www.sahrc.org.za.

COMMISSION FOR GENDER EQUALITY

According to Section 187 of the Constitution, the Commission for Gender Equality (CGE) must 'promote respect for gender equality and the protection, development and attainment of gender equality'.

Complaints concerning issues of gender equality can be made to the CGE in the following ways:

- Send a complaint in writing to: Commission for Gender Equality, P.O. Box 32175, Braamfontein, 2017
- Submit a complaint by email to: cgecomplaints@tip-offs.com
- Submit a complaint online at <https://cge.org.za>
- Lodge a complaint by calling 0800 007 709.

EQUALITY COURT

The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 ('Equality Act') gives effect to the right to equality.

The Equality Act aims to promote equality and to prevent, prohibit and ultimately eliminate unfair discrimination, harassment and hate speech. It does so by providing content to the right to equality, and provides a mechanism for protection through the establishment of the Equality Court.

The Equality Act is an important tool, as it provides remedies for victims of unfair discrimination, hate speech and harassment.

Equality courts are supposed to be less formal than normal courts, and their rules and procedures are more relaxed. You can approach an equality court (the magistrate's court or high court in your community) at any point in order to lodge a complaint. It is not a rule that you need a lawyer to do so. You also do not have to pay anything in order to approach an equality court for assistance.

The Equality Court has been empowered to grant various forms of relief, such as: the payment of damages; directing that specific steps be taken to stop the unfair discrimination, hate speech or harassment; an unconditional apology; or requiring the offending party to undergo an audit of specific policies or practices as determined by the court.

SOUTH AFRICAN COUNCIL OF EDUCATORS (SACE)

SACE is a body that is specifically empowered to take action against educators who breach certain ethics codes. A wide range of misconduct can be reported to SACE, such as verbal abuse, harassment, and physical intimidation.

Any educator, learner, parent, community member or interested person may lodge a complaint with SACE. Complaints can also be lodged anonymously. The complaint should be lodged in writing, and include as much detail as possible. Once the complaint is lodged, SACE will open a file and allocate a case number. The person against whom the complaint has been made will be contacted and asked to respond within a specific time period (usually five or ten days).

The SACE Ethics Committee will then make a decision on how to proceed. This may include actions such as investigating the matter further, taking disciplinary action against the person complained about, or referring the issue to the South African Police Services and/or the Education Labour Relations Council.

A letter of complaint may be forwarded to:

The Chief Executive Officer, South African Council for Educators (SACE), Private Bag X 127, Centurion, 0046.

The letter may also be hand-delivered to the Chief Executive Officer, South African Council for Educators (SACE), 240 Lenchen Avenue, Centurion, 0046; or it may be emailed to ethics@sace.org.za.

SOUTH AFRICAN POLICE SERVICES ('SAPS')

Conduct such as serious verbal and physical abuse, harassment and inappropriate sexual advances constitute a criminal offence. Such an incident can be reported to the Child Protection Unit of the South African Police Services, and criminal charges can be laid.

CONCLUSION

The Constitution recognises that all learners are equal. Every learner should be free to choose their gender identity and determine their sexual orientation and the manner in which they express themselves. Unfair discrimination against learners based on the choices they make about their gender identity and sexual orientation is unconstitutional, and should not be allowed in our schools. The Constitution further recognises the right of LGBTQI learners to dignity. It is important that we do not allow LGBTQI learners to be treated with less respect than other learners. There is still a lot to be done to ensure equal treatment of LGBTQI learners.

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CASES

AB and Another v Pridwin Preparatory School and Others 2020 (5) SA 327 (CC).

Head of Department, Department of Education, Free State Province v Welkom High School and Another; Head of Department, Department of Education, Free State Province v Harmony High School and Another 2014 (2) SA 228 (CC).

MEC for Education: KwaZulu-Natal and Others v Pillay 2008 (1) SA 474 (CC).

Minister of Home Affairs and Another v Fourie and Another 2006 (1) SA 524 (CC).

Mphela v Manamela and Others (2016), case no1/Seshego Magistrates Court (Equality Court).

National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others 1999 (1) SA 6 (CC).

Qwelane v South African Human Rights Commission and Another [2021] ZACC 22.

S v M (Centre for Child Law as Amicus Curiae) 2008 (3) SA 232 (CC).

Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Another 2014 (2) SA 168 (CC).

LEGISLATION, POLICY AND GUIDELINES

Civil Union Act 17 of 2006.

Constitution of the Republic of South Africa, 1996.

Department of Basic Education 'Challenging Homophobic Bullying In Schools', 2016.

Department of Education 'Guidelines for the Consideration of Governing Bodies in Adopting a Code of Conduct for Learners', 1998.

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

South African Schools Act 84 of 1996.

INTERNATIONAL AND REGIONAL INSTRUMENTS

African Charter on the Rights and Welfare of the Child (ACRWC), 1990.

Convention against Discrimination in Education, 1960.

Convention on the Rights of the Child (CRC), 1989.

International Covenant on Civil and Political Rights (ICCPR), 1966.

Universal Declaration of Human Rights (UDHR), 1948.