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 is 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 sex.

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

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

**Asexual** A person who does not have strong feelings of physical attraction to either men or women.

**Intersex** Some people are born with physical and biological characteristics that are not exclusively 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 does not match their biological sex. Transgender individuals may feel that their true sex is not their biological sex.

**Queer** The term ‘queer’ may be used as an umbrella term to describe expressions of gender identity and sexual orientation that are not the society imposed norm. The term is used to be as inclusive as possible of the full spectrum of expressions of gender identity and sexual orientation.

**LGBTI** You will often hear or see people using the term ‘LGBTI’. 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 LGBTIAQ, and other variations of this term.

When this chapter uses the term ‘LGBTI’, we are referring to all expressions of gender identity and sexual orientation, including asexual and queer.
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 and the right to privacy. The Constitution also guarantees freedom of expression. In the context of education, the Bill of Rights also guarantees that every child 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 express their sexual orientation or gender identity.

The case of *S v M (Centre for Child Law as Advisor v Minister of Justice and Others)*, the Constitutional Court has explained that the right of children to dignity has special importance in our society. (Dignity 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 deep 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 dependent on the rights of their parents. Nor is she the exercise by children of their dignity rights held in abeyance until they reach a certain age. [Author’s emphasis])

The Constitutional Court has also recognised 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.

**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 or how you express your gender. In the matter of *Toddy Booi Clinic for Abused Children and Another v Minister of Justice and constitutional Development and Another*, the Constitutional Court has explained that the right of children to dignity has special importance in our society. (Dignity 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 deep 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 dependent on the rights of their parents. Nor is she the exercise by children of their dignity rights held in abeyance until they reach a certain age. [Author’s emphasis])

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 LGBTI learners.

**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. 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 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.

**SPEECH**

Everyone has the right to talk about and express their gender identity and their sexuality freely, and the right to choose what to do. In addition to the right to express oneself, a person also has the right of freedom of expression does not protect communication words against anyone where there is a clear intention to be hurtful, harmful or to incite harm, or promote or propagate hatred on the basis of certain grounds. These grounds include sex, gender and sexual orientation.

**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 privacy (1998 ZACC 15 at para 32) [Author’s emphasis].

Every learner has the right to be treated equally and with dignity. No person is allowed to call you names or to deny you choice of identity. You have a right to access education and no person can prevent your access to education!...
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 their own bodies, and the right 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 and the definition on harassment also protects the right to privacy and psychological and bodily integrity. The Equality Act defines harassment as unwarranted conduct which is persistent and serious and which demeans, humiliates or intimates a person based on their gender or sexual orientation.

RESPECTING FREEDOM OF EXPRESSION AND THE RIGHT TO PRIVACY OF LEARNERS

In schools, 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 are:

- Refusing to allow a transgender learner to use a toilet intended for the opposite sex.
- 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 LGBTI learner to take part in physical or sexual acts to prove her or his sexual orientation or gender, or to ‘correct’ their sexual orientation or gender.

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 LGBTI learners. Examples of international law instruments that are important to the protection of the rights of LGBTI learners include:

- Universal Declaration of Human Rights
- International Covenant on Civil and Political Rights
- International Covenant on Economic, Social and Cultural Rights
- African Court on Human and Peoples’ Rights
- African Commission on Human and Peoples’ Rights
- African Charter on the Rights and Welfare of the Child

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 the Schools Act 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 the Schools Act, 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 also published a guide on combating homophobia in schools, which provides important guidelines on the steps that all stakeholders can take in developing inclusive policies and a safe environment for all learners.

WHAT CAN SCHOOLS AND EDUCATORS DO TO ENSURE A MORE INCLUSIVE AND SAFE ENVIRONMENT FOR LGBTI 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 LGBTI learners are not discriminated against.
- Ensuring that there are school rules and policies to effectively combat bullying against LGBTI learners.
- Encouraging the school community to embrace LGBTI learners, and to speak openly and respectfully about diversity.
- Developing school curricula to assist teachers and learners in understanding and respecting LGBTI 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 rights are violated.

If any person at school discriminates against you on the basis of your gender identity 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 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 LGBTI-rights non-profit organisations all over South Africa, which have been created to offer support.

HUMAN RIGHTS

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.

The SAHRC telephone number for lodging a complaint is 011 877 3600. A complaint can also be lodged on their website: www.sahrc.org.za.

EQUALITY COURT


- 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, and their rules and procedures are more relaxed than in normal courts. You can approach an equality court (the magistrates’ 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.

The SACE Ethics Committee will then investigate the complaint. The Chief Executive Officer, South African Council for Educators (SACE) 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 COUNCIL OF EDUCATORS (‘THE SACE’)

The 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 the SACE, such as verbal abuse, harassment, and physical intimidation.

Any educator, learner, parent, community member or interested person may lodge a complaint with the 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, the 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 (within 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.

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.
The Constitution recognises that all learners are equal. Every learner should be free to choose their gender identity, 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 LGBTI learners to dignity. It is important that we do not allow LGBTI learners to be treated with less respect than other learners. There is still a lot to be done to ensure equal treatment of LGBTI learners.