

Comments on Provincial Guidelines

Name of Department:	Western Cape Education Department		
Matter: (Title of Legislation)	Western Cape Education Department's Gender Identity and Sexual Orientation Policy.		
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Introduction

1. This is a joint submission made by Equal Education (“**EE**”) and the Equal Education Law Centre (“**EELC**”) on the Western Cape Education Department’s draft Gender Identity and Sexual Orientation Policy (“**draft Policy**”).¹
2. EE is a membership-based, democratic movement of learners, parents, teachers and community members advocating for the provision of both an equal and quality education in South Africa.
3. EELC is a public interest law centre that aims to advance the right to a basic education through various means, including legal assistance, research, advocacy, and strategic litigation.

General Comments on the draft Policy

4. EE and EELC recognise the importance of a policy in schools that addresses issues relating to gender identity and sexual orientation, particularly one which is able to respond to the complexities of these issues with nuance and sensitivity.

¹ Our thanks to Sacha Knox for her valuable input, in particular, in respect of the outlining of key definitions and concepts.

5. Whilst we recognise the step taken by the Western Cape Department of Education (“**WCED**”) to introduce the draft Policy, we are concerned that the draft, in its current form, fails to adequately address these complexities, and is wholly lacking in nuance and sensitivity. In addition, the draft Policy fails to provide a focused, well-designed, rights-based strategy to ensure that LGBTQIA+ learners are safe at school, are protected from discrimination and are able to participate in the educational environment without fear and exclusion.
6. The WCED must ensure that it capacitates and provides resources to schools in order to enable them to implement the finalised policy.
7. We have completed the “Comments” table below, as required, addressing each of the proposed provisions individually. However, while the table allows for suggestions to be made for amendments, deletions or additions in respect of each provision, this format does not allow us to comprehensively address the alarming oversights, problematic language and underlying vagueness contained in the draft Policy. Accordingly, over and above the guidance provided in the “Comments” table, we also address general concerns below, which should be remedied across the entire draft Policy.

Use of binary gender pronouns

8. It is deeply concerning that a draft Policy, which is aimed at facilitating inclusive, sensitive educational environments, uses gender binary pronouns such as ‘*his*’ and ‘*her*’ throughout. This has the effect of excluding persons who identify as non-binary; that is, a person who does not only and exclusively identify as a man or a woman. Non-binary people may identify as being both a man and a woman, somewhere in between, or as falling completely outside these categories.
9. All binary pronouns, such as ‘*his*’ or ‘*her*’ in the draft Policy must be changed to the non-binary terms ‘*them*’, ‘*their*’ or ‘*they*’.

Problematic language and terminology in the draft Policy

10. The acronym ‘LGBTQI’ is used throughout the draft Policy. This is a narrow term and the acronym LGBTQIA+ is more inclusive. The expanded term should be used throughout the draft Policy instead of LGBTQI. The expanded definitions of LGBTQIA+ are set out in the Comments table below.
11. We also note that in some cases, for example in the discussion of uniforms and physical appearance, the term LGBTQI appears to be used without any consideration of context, and without recognising that sexual orientation and gender identity are distinct concepts which may be relevant at different times. Steps must be taken to educate the school community about these distinctions.

12. There is also language used throughout the draft Policy that may have the unintended consequence of increasing, rather than reducing exclusion and stigmatisation of LGBTQIA+ learners. For example, subsection 13.2 requires schools to “*be vigilant against learners who pretend to be LGBTQI with the intention to deceive...in order to abuse concession and exceptions...*” This language encourages LGBTQIA+ learners to be viewed and treated with suspicion, rather than to be treated with respect.
13. The draft Policy also refers to sexual orientation and gender identity as “matters to be dealt with”. This automatically stigmatises questions of sexual orientation and gender identity.
14. All language of this nature should be removed from the draft Policy.

Vagueness of the draft Policy

15. We are concerned about the vague and generally non-committal way in which the draft Policy has been written. While the spirit of the draft Policy is clearly about creating more inclusive school environments, the language of the draft Policy does not go far enough to place strong obligations on schools to implement its proposals.
16. The use of the words “may” and “encouraged to” throughout the draft Policy, along with, for instance, the suggestion in section 12 that measures to promote inclusivity should be implemented subject to approval by majority opinion, create the impression that the implementation of certain sections of this draft Policy depends largely on the inclination of powerful stakeholders at a school.
17. Furthermore, the draft Policy does not do enough to ensure that the measures described therein are proactively taken, regardless of whether the school knows of learners at the school identifying as LGBTQIA+ or not. In the absence of proactive steps, situations may occur where exceptions are made in response to particular learners, potentially making them feel like “special cases”, instead of establishing general practices that are inclusive. For instance, section 9 allows for exceptions to be made for specific learners regarding the use of toilets. Ideally, schools should be moving towards arrangements that allow learners to use the bathrooms they are comfortable with, without having to explain their gender identity or sexual orientation to staff.
18. The draft Policy also fails to outline procedural steps that should be followed, and the factors that should be taken into consideration, in the determination of a number of important aspects. Vague, undefined or non-existent processes and standards do not promote transparent or consistent decision-making processes, and run the risk of resulting in arbitrary or unreasonable determinations, with no recourse of appeal or review.
19. It is recommended that omissions or inadequacies of this nature be addressed throughout the draft Policy.

Comments:

<p>Clause <i>(Indicate clause/ regulation Number)</i></p>	<p>Comment <i>(State why the clause/regulation or proposed amendment is not supported or what the problem is with the provision)</i></p>	<p>Suggestion <i>(Suggested deletion/amendment/ addition)</i></p>
<p>Section 1 - "Definitions"</p>		
<p>Section 1</p>	<p>The draft Policy fails to acknowledge the complexity of gender identity and sexual orientation and the impossibility of capturing all experiences in an exhaustive manner.</p>	<p>It is recommended that the following (or similar) paragraph be included in the draft Policy before the list of definitions:</p> <p><i>Understanding of the following terms and expressions, which relate to gender identity and sexual orientation, assists in making our schools more inclusive. However, gender identity and sexual orientation are complex and the terms and expressions used in this Policy must not be treated as fixed, exhaustive and all-encompassing. There are a multitude of ways in which we express our gender identity and sexual orientation and not all of these are necessarily captured by the terms and expressions defined below.</i></p>
	<p>The draft Policy currently defines the term <i>"bisexual"</i> as <i>"a person who is sexually attracted to both men and women."</i> This definition reflects a reductive understanding of bisexuality.</p>	<p>We recommend that the definition for "bisexual" be amended in the following way:</p> <p><i>"bisexual" means a person who is not exclusively sexually attracted to people of one particular gender.</i></p>
	<p>The draft Policy currently defines the term <i>"gender characteristics"</i> as <i>"the way in which a person expresses his or her social identity as a member of a particular sex by using style of dressing, the wearing of prostheses or other means."</i> This definition is confusing and it is not clear how this differs from the definition for <i>"gender expression"</i>.</p>	<p>We recommend that the definition for "gender characteristics" be removed.</p>
	<p>The draft Policy currently defines the term <i>"gender expression"</i> as <i>"the way in which a person expresses his or her gender</i></p>	<p>We recommend that the definition for "gender expression" be amended in the following way:</p>

	<p>identity, typically through their appearance, dress and behaviour.” This definition can be expanded to include more ways in which people may express their gender.</p>	<p>“gender expression” means the way in which a person outwardly expresses their gender identity, typically through their name, pronoun, appearance, dress and behaviour.</p>
	<p>The draft Policy currently defines the terms “gender reassignment” or “gender affirming actions” as “a process which is undertaken for the purpose of reassigning a person’s sex by changing physiological or other sexual characteristics, and includes any part of such a process; or steps taken by a LGBTQI person to affirm their gender identity including social transition, gender affirming hormone treatment and gender affirming surgeries.” This reference to gender reassignment is outdated. In general, the process described here can be phrased in more appropriate terms.</p>	<p>We recommend that the term “gender reassignment” be entirely removed and replaced with “transition”. We recommend further that the definition be amended as follows:</p> <p>“Transition” or “gender affirming actions” refers to the process through which, or the steps taken by, transgender people to begin to live as the gender with which they identify, rather than the one typically associated with their sex assigned at birth. Social transition may include aspects such as changing names, pronouns, hairstyle and clothing. Medical transition may include medical processes such as gender affirming hormone therapy and gender affirming surgeries.</p> <p>We recommend further that a footnote be added after this definition to emphasise the following:</p> <p><i>Not all transgender individuals seek, or have access to, medical care as part of their transition and privacy around one’s transition choices should always be respected.</i></p>
	<p>The draft Policy defines the term “hermaphrodite” or “intersex” as “a person having both male and female sex organs”. The term “hermaphrodite” may be considered offensive, and should be removed. In addition, the terms “male” and “female” should not be used in such an essentialist way, and we recommend that this be revised.</p>	<p>The term “hermaphrodite” should be removed from the draft Policy. In addition, the definition of the term “intersex” should be amended to read as follows:</p> <p>“Intersex” means a variety of naturally occurring conditions, in which a person is born with a reproductive or sexual anatomy that does not adhere to the stereotypical ideas of a ‘male’ or ‘female’ body.</p>
	<p>The draft Policy defines the term “homophobia” as “a fear or dislike of homosexual people”. This definition fails</p>	<p>We recommend that the definition of the term “Homophobia” be amended in the following way:</p>

	<p>to acknowledge that these emotions are based on irrational assumptions, which may move beyond feelings of “fear” and “dislike” and extend to feelings of hatred. In addition, the current definition fails to recognise that homophobia includes positive acts of violence, harassment and discrimination against queer people.</p>	<p>“Homophobia” means an irrational fear or hatred of, or violence, harassment or discrimination perpetrated against, homosexual people.</p>
	<p>The draft Policy defines the term “<i>homosexual</i>” as “<i>a lesbian or gay person who is sexually attracted to people of the same sex and not to people of the opposite sex</i>”. However, this definition is restrictive to the extent that it assumes that such an attraction is only sexual. The reference to “opposite sex” is unnecessary.</p>	<p>We recommend that the definition of the term “Homosexual” be amended in the following way:</p> <p>“Homosexual” means the romantic or sexual attraction between members of the same sex or gender.</p>
	<p>The draft Policy defines the term “<i>lesbian</i>” as “<i>a woman who is sexually attracted to other women</i>”. However, this definition assumes that such an attraction is only sexual, and fails to acknowledge that the term “woman” must be defined broadly to include trans- and/or non-binary women.</p>	<p>We recommend that the definition of the term “Lesbian” be amended in the following way:</p> <p>“Lesbian” means a womxn who is romantically or sexually attracted to other womxn.</p>
	<p>The draft Policy defines “<i>LGBTQI</i>” as “<i>lesbian, gay, bisexual, transgender, queer or questioning, and intersex</i>”. The draft Policy defines the terms “<i>lesbian</i>”, “<i>bisexual</i>”, “<i>transgender</i>”, and “<i>queer</i>”, but fails to define the remaining words associated with the term “<i>LGBTQI</i>”, namely, “<i>gay</i>”, and “<i>questioning</i>”.</p>	<p>Section 1 should be revised to include references to, and definitions of, the terms “<i>gay</i>” and “<i>questioning</i>”. The Department of Basic Education’s guide to <i>Challenging Homophobic Bullying in Schools</i> (undated) is one potential source from which further definitions may be obtained. For example, this guide defines “<i>gay</i>” as “<i>someone who is attracted to people of the same gender. While many women identify as gay, the term lesbian is also used for women</i>”.</p>
	<p>The “<i>LGBTQI</i>” acronym and definition is too narrow. Since it is the purpose of the draft Policy to create an inclusive environment in schools for all learners, it is important that as many identities as possible are explicitly recognised and acknowledged. Therefore, the expanded acronym LGBTQIA+ should rather be used throughout the report and additional definitions for terms included in this acronym must be provided in the draft</p>	<p>The term “LGBTQI” should be amended to “LGBTQIA+” throughout the draft Policy. Additionally, the definition for LGBTQI should be replaced with the following:</p> <p>“LGBTQIA+” means “<i>lesbian, gay, bisexual, transgender, queer or questioning, intersex, asexual and plus</i>”.</p> <p>All of the terms included in this definition should be defined in the draft Policy. We</p>

	Policy.	make recommendations to this effect below.
	The term “ <i>queer</i> ” is currently defined as an umbrella term for “lesbian, gay, bisexual, transgender and intersex”. This is a limited definition of the term and should be expanded.	The term “ queer ” should be amended and expanded to read as follows: <i>“queer” is an umbrella term which may be used to describe expressions of all gender identities and sexual orientations which are not heterosexual or cisgender.</i>
	The draft Policy defines “ <i>sexual orientation</i> ” as “ <i>a person’s sexual identity in relation to the gender to which they are attracted to; the fact of being heterosexual, homosexual, bisexual or any other sexual orientation</i> ”. This definition implies that a person is attracted to only one gender. In addition, this definition fails to recognise sexual orientation and gender identity as separate, distinct, parts of an individual’s identity.	We recommend that the definition of “ sexual orientation ” be revised in the following way: <i>“sexual orientation” means a person’s romantic or sexual attraction to people of a specific gender or genders. Sexual orientation and gender identity must be seen as separate, distinct parts of people’s overall identities.</i>
	The draft Policy currently defines “ <i>transphobia</i> ” to mean “ <i>a fear or dislike of transgender people</i> ”. However, we recognise “transphobia” to be based on irrational assumptions, which have invoked feelings beyond a “fear” or “dislike” of transgender people, such as feelings of hatred. In addition, “transphobia” should not be limited to invoking negative emotions, but should include acts of violence, harassment or discrimination perpetrated against transgender people.	We recommend that the definition of “ transphobia ” be revised in the following way: <i>“transphobia” means an irrational fear or hatred of, or violence, harassment or discrimination perpetrated against transgender people</i>
	The draft Policy currently defines the term “ <i>transgender</i> ” as “ <i>a person whose sense of personal identity and gender does not correspond with their birth sex</i> ”. We recommend that this definition highlight that sex is ‘assigned’ at birth.	We recommend that the definition of “ transgender ” be revised in the following way: <i>“transgender” means a person whose sense of personal identity and gender is different to what is generally considered typical for their sex assigned at birth.</i>

	<p>The draft Policy fails to define other important terms relating to gender identity and sexual orientation, which suggests an inadequate conceptualisation of the policy.</p> <p>We therefore recommend that the “definitions” section be developed so that learners, teachers, principals, and other stakeholders have access to the appropriate vocabulary to engage with issues relating to gender identity and sexual orientation.</p>	<p>The following definitions should be added to the draft Policy:</p> <p>“asexual” means a person who does not have sexual attraction to others, or has low or absent interest in or desire for sexual activity.</p> <p>“cisgender” is a term for people whose gender identity matches the sex they were assigned at birth.</p> <p>“gender” refers to a complex relationship between physical traits and one’s internal sense of self as male, female, both, or neither (gender identity), as well as one’s outward presentation and behaviours (gender expression).</p> <p>“gender binary” refers to a socially constructed system in which gender is assumed to only involve the categories of ‘male’ and ‘female’.</p> <p>“gender dysphoria” refers to an intense and persistent discomfort with the characteristics of one’s assigned sex at birth. Affirming and supporting a person’s gender identity can help to significantly decrease their dysphoria, while rejecting or requiring a person to conceal their gender identity can increase their level of dysphoria.</p> <p>“gender nonconforming” describes a person whose behaviours or gender expression falls outside stereotypical expectations.</p> <p>“gender spectrum” refers to an understanding of gender as involving a wide range of identities and expressions.</p> <p>“heterosexual” refers to the romantic or sexual attraction between people on opposite ends of the gender binary.</p> <p>“non-binary” means a person who does not only and exclusively identify as a man or a woman. Non-binary people may identify as being both a man and a woman, somewhere</p>
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		<p><i>in between, or as falling completely outside these categories.</i></p> <p><i>“plus” is included in the LGBTQIA+ acronym to encompass a list of other identities and orientations, ensuring that the term is as inclusive and intentional as possible about representing different expressions and identities.</i></p> <p><i>“womxn” is a term used instead of ‘women’ to indicate that transgender women and those who identify as women are included in this category (in other words, not just cisgender women.)</i></p>
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Section 2 - “Legislative Framework”

<p>Section 2 - “Legislative Framework”</p>	<p>The draft Policy fails to take into account initiatives previously undertaken by the Department of Basic Education (“DBE”) that may inform the steps various role players, such as learners, teachers, and school communities can take to promote a safer, supportive learning environment and address homophobic, transphobic, and other bullying related to gender identity and sexual orientation. In particular, the draft Policy should be informed by the DBE’s Guide to <i>Safer Schools for All: Challenging Homophobic Bullying in Schools</i>, the DBE’s <i>Guidelines for the Prevention and Management of Sexual Violence and Harassment in Schools</i> (2008), and the DBE’s <i>National School Safety Framework</i>.</p>	<p>It is recommended that the Legislative Framework be revised to include references to the following documents:</p> <ul style="list-style-type: none"> ● the DBE’s guide to <i>Safer Schools for All: Challenging Homophobic Bullying in Schools</i>; ● the DBE’s <i>Guidelines for the Prevention and Management of Sexual Violence and Harassment in Schools</i> (2008); ● the DBE’s <i>National School Safety Framework</i>.
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Section 3 - “Purpose”

<p>Section 3 - “Purpose”</p>	<p>While the current purpose of the draft Policy is to create an educational environment which is free from discrimination and stigma related to gender identity and sexual orientation, it is crucial that the draft Policy also promotes additional fundamental rights and freedoms of all LGBTQIA+ learners, including the rights to human dignity,</p>	<p>We recommend that section 3 be amended to include the following:</p> <p><i>“ensure that every student has equal access to all aspects of the educational program;</i></p> <p><i>promote a culture of inclusiveness and an inclusive teaching and learning environment;</i></p>
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	<p>equality, security of person, and the right of all learners to a basic education.</p>	<p><i>create an educational environment that protects and promotes every learner’s right to human dignity, equality, and security of person; and</i></p> <p><i>protect and advance every learner’s right to a basic education.”</i></p>
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Section 4 - “Scope”

<p>Section 4 - “Scope”</p>	<p>Section 4 limits the application of the draft Policy to “<i>all ordinary public schools</i>”. Section 12(3) of the South African Schools Act, 1996, identifies three types of public schools, including, an ordinary public school, a public school for learners with special education needs, or a public school that provides education with a specialised focus on sport, performing or creative arts.</p> <p>By singling out ordinary public schools, the draft Policy effectively excludes other kinds of public schools from its ambit.</p> <p>In addition, this section fails to include independent schools from within its ambit, and it is recommended that these schools also be subject to the provisions of the Policy.</p>	<p>We recommend that section 4 be revised so that it applies to <i>all</i> public schools and independent schools.</p> <p>We recommend further that the reference to “ordinary public schools” in section 3 of the draft Policy be removed and replaced with “public schools and independent schools”.</p>
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Section 5 - “Gender Identity”

<p>Section 5 - “Gender Identity”</p>	<p>This section fails in its attempt to guide school staff in ensuring that schools are safe spaces for LGBTQIA+ learners. The entire framing of this section treats queerness as an exception that needs to be ‘dealt with’ and introduces measures that single out LGBTQIA+ learners. Furthermore, one implication of these measures is that schools depend on learners to share information about their gender identity and sexual orientation with the school, in order to be accommodated. Instead, school policies should allow for inclusion regardless of whether learners share such information</p>	<p>The following should be included at the beginning of this section:</p> <p><i>“Schools must assume that learners fall within the full spectrum of gender identities and sexual orientations. Therefore, inclusive measures must be put in place proactively, rather than in response to a learner sharing information about their gender identity or sexual orientation with the school. As far as possible, measures should be put in place that do not require a learner to share any information regarding their gender identity or sexual orientation with the school.</i></p>
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	with the school or not.	<i>Proactive steps must be taken to ensure that learners are aware of the school's policies relating to gender identity and sexual orientation".</i>
Section 5	The heading of this section is confusing as the section does not deal with gender identity as a concept, nor does it only focus on issues related to gender identity. Instead, the section deals with how a school should respond when a learner decides to share information about their gender identity or sexual orientation with someone at the school.	The heading of Section 5 should be changed from "Gender Identity" to "Confidentiality and Support" to ensure that the meaning and purpose of the section is clear.
Section 5, subsection 5.1.	<p>Subsection 5.1 states that when a learner discloses their gender identity and/or sexual orientation, <i>"the matter must be treated with great sensitivity and confidentiality"</i>.</p> <p>The use of the words "the matter" could be interpreted as suggesting that gender identity and/or sexual orientation is a problem to be 'dealt with'. In fact, the words <i>"dealing with the matter"</i> are included in section 5.1.4(a) to support this interpretation. Rather, the draft Policy should ensure that the learner is treated with sensitivity, respect and that their confidentiality is protected.</p>	<p>Section 5.1 should be replaced with:</p> <p><i>"When a learner shares information about their gender identity and/or sexual orientation with the principal, educator, a fellow learner, or anyone else at the school, such learner must be treated with respect and understanding, their privacy must be protected, and they must be provided with all required support"</i>.</p>
Section 5, subsection 5.1.1	<p><i>Subsection 5.1.1</i> requires the learner who discloses their gender identity and/or sexual orientation to be <i>"referred to a social worker, psychologist or any other organisation which deals with matters of this nature..."</i>.</p> <p>Consequently, once the learner shares information about their identity, the learner is immediately treated like a matter to be handled and counselled.</p> <p>Referral to a social worker, psychologist or the like should not be as a matter of course, but only where the learner has requested support or has consented to</p>	<p><i>Subsection 5.1.1</i> should be replaced with the following:</p> <p><i>"Should the learner express the need for psychosocial services and support, and has consented to such services being provided, the learner should be referred to a social worker, psychologist or any other relevant organisation or practitioner"</i>.</p>

	receiving such support.	
Section 5, subsection 5.1.2	<p>Subsection 5.1.2 states that the principal <i>“must manage and coordinate this process”</i>. This does not acknowledge that a principal may not be privy to information about a learner’s gender identity or sexual orientation and that a learner may not consent to such information being shared with the principal.</p>	<p>Subsection 5.1.1 should be replaced with the following:</p> <p><i>“Where the learner has shared information about their gender identity or sexual orientation, or has consented to such information being shared with the principal, and where the learner expresses the need for psychosocial services and support, the principal must manage and coordinate the process as outlined in the rest of this section. Where the learner has not shared information about their gender identity and sexual orientation with the principal and has not consented to such information being shared with the principal, but has shared this information with an educator, such educator must manage and coordinate the process as outlined in the rest of this section”.</i></p>
Section 5, subsection 5.1.3	<p>Subsection 5.1.3 requires a principal to <i>“report to the school governing body that a learner is LGBTQI, without necessarily divulging the learner’s name or gender identity”</i>. The effect of this is to negate the requirement in subsection 5.1 above, which requires sensitivity and confidentiality. It is not sufficient that a principal is not required to divulge their names.</p> <p>In addition, this specific requirement further entrenches the impression created in certain parts of the draft Policy that learners with certain gender identities and or sexual orientations must be singled out and are cases that need to be dealt with.</p> <p>The rationale behind this provision is also not entirely clear. School stakeholders, including school governing bodies, should ensure that schools are inclusive spaces, regardless of whether they know of particular learners in the school who</p>	<p>This provision should be removed entirely from the draft Policy.</p>

	identify as LGBTQIA+.	
Section 5	<p>Section 5 of the draft Policy fails to substantially detail the caution with which all school community members, with whom an LGBTQIA+ learner discusses their gender identity and/or sexual orientation, must handle this information. It is imperative that the draft Policy explains the responsibility to protect this learner’s privacy.</p> <p>In its current form, the draft Policy does not ensure that communication with parents/guardians regarding a learner’s gender identity or sexual orientation happens in consultation with the learner to ensure their privacy is protected and that their preferences for referring to their gender identity are respected.</p>	<p>We recommend that the following wording be included in section 5:</p> <p><i>“The principal, educator, fellow learners or any other person with whom the LGBTQIA+ learner has chosen to discuss their gender identity and/or sexual orientation, must be made aware that they have a responsibility to keep the information confidential. Anyone entrusted with this information should not share information regarding the gender identity and/or sexual orientation of a learner who has confided in them with others without their permission, as this can have serious repercussions on the personal safety, religious, or family situation of that learner.</i></p> <p><i>In order to protect their privacy and respect learners’ pronoun preferences, school staff who contact parents/guardians in relation to a learner’s gender identity or sexual orientation, should consult the learner, and only do so if absolutely necessary and with the consent of the learner. The person contacting the parent/guardian must consult the learner to determine the appropriate way to reference the learner’s gender identity”.</i></p>
Section 5, subsection 5.1.4		<p>We recommend the following amendment to the lead-in to subsection 5.1.4:</p> <p><i>“With the consent of the learner, the principal may convene a meeting with the learner and their parent/guardian(s). If the learner is not comfortable with their parent/guardian(s) being present, this safe space should still be afforded to the learner in order to -</i></p> <p>We also recommend amendments to paragraphs (a), (c) and (d) below”:</p>
Section 5, subsection 5.1.4; (a)		<p>Section 5.1.4 (a) should be replaced with:</p> <p><i>“(a) gain an understanding of the perceptions and expectations of the learner and/or their parent/guardian(s), should they be involved”.</i></p>

Section 5, subsection 5.1.4; (c)		<p>Section 5.1.4 (c) should be replaced with:</p> <p><i>“(c) clearly state that learners and/or parent(s), should they be involved in the process, may request or can apply for an exception to the school’s code of conduct following the processes outlined in this Policy”.</i></p>
Section 5, subsection 5.1.4; (d)		<p>Section 5.1.4 (d) should be amended as follows:</p> <p><i>“(d) take any further decisions that will ensure that the learner’s school experience is safe, non-discriminatory and inclusive, for example, decisions about:</i></p> <ul style="list-style-type: none"> <i>• whether the learner prefers that the information they shared, be kept confidential;</i> <i>• how to ensure that the learner feels comfortable to express their gender identity;</i> <i>• how to ensure that the learner feels free to participate in the school’s extra-curricular activities”.</i>
Section 6 - “Gender Expression”		
Section 6	This section fails to ensure that learners’ preferences regarding pronouns, which may be an important part of their gender expression, are respected.	<p>The following subsection should be added to section 6:</p> <p><i>“Learners have the right to choose what pronouns they want to use, and learners and staff must respect this decision by using their preferred pronouns when referring to them”.</i></p>
Section 6, subsection 6.2	It is very unfortunate that learners’ gender identity is ignored by administrative processes such as school data collection systems. Schools should take steps to communicate to learners that they can	<p>It is recommended that section 6.2 be amended to read as follows:</p> <p><i>“Where a learner’s gender identity does not align with their sex description on their birth</i></p>

	<p>change their sex description on their birth register at the Department of Home Affairs and to explain the process to them.</p>	<p><i>register, schools must alert learners to the option of changing their sex description at the Department of Home Affairs and must explain the process to them”.</i></p>
<p>Section 7 - “Dress Code and Physical Appearance”</p>		
<p>Section 7, subsection 7.1</p>	<p>Subsection 7.1 indicates that schools are merely <i>“encouraged to accommodate the dress code preferences of LGBTQI learners”</i> in their codes of conduct. In order to avoid arbitrary discrimination, schools must be obliged to ensure that their dress codes are inclusionary and that the necessary steps are taken to ensure that learners are able to express their gender identity.</p> <p>The use of the term LGBTQI in this section indicates the draft Policy is unclear on the distinction between gender identity and sexual orientation. This section is specifically relevant to gender non-conforming learners and should make that clear.</p> <p>The use of the terms “girls” and “boys” in section 7.1 again resorts to gender binary terms.</p>	<p>Subsection 7.1 should be replaced with the following:</p> <p><i>“Schools <u>must</u> ensure that their dress codes are inclusionary and that the necessary steps are taken to allow learners to express their gender identity.</i></p> <p><i>Schools <u>must</u> accommodate the dress code preferences of gender non-conforming learners in their respective codes of conduct and may introduce gender-neutral uniforms, or may allow learners to choose any combination of clothes that form part of the school uniform, regardless of their sex. The measures outlined in the paragraph above must include active steps which allow learners an opportunity to express themselves without the emotional or administrative burden of disclosing their gender identity if they are uncomfortable doing so”.</i></p>
<p>Section 7, subsection 7.2</p>	<p>Subsection 7.2 provides that learners may apply to a school requesting a deviation from a school’s uniform policy. Such applications need to be signed by a learners’ parents. As such, a learner may only apply for such a deviation based on their parents’ approval, thereby unreasonably limiting a learner’s opportunity to submit such an application if their parents do not approve of such a request or have not been informed of the learner’s gender identity. This undermines the right to dignity and expression of the child and should not be required.</p> <p>Schools should take active steps to allow learners to express their gender identity through the school uniform, without the</p>	<p>With the implementation of our recommendations for the amendment of subsection 7.1, subsection 7.2 will be unnecessary and should be removed.</p>

	<p>learner having to bear the onus of requesting permission or having to communicate any information about their gender identity with the school.</p> <p>The effective implementation of our earlier recommendation that schools must accommodate the dress code preferences of gender non-conforming learners in their respective codes of conduct, will ensure that such active steps are put in place.</p>	
Section 7, subsection 7.2	<p>We recommend that a process whereby a school's code of conduct can be reviewed should be included in the policy. Further, the WCED should issue a template uniform policy in order to guide schools in the development of inclusive codes of conduct.</p>	<p>The following wording should be included in the policy:</p> <p><i>“Where a learner is of the view that a school’s code of conduct does not sufficiently accommodate all gender identities, such learner or their parent/guardian(s) may apply to the Head of Department (HOD) at the Western Cape Education Department to have the code of conduct reviewed and amended to account for all gender identities. The HOD must make a decision in respect of this application and respond to the learner or their parent/guardian(s) within 14 days.</i></p> <p>We also recommend that the following wording be added:</p> <p><i>“The Western Cape Education Department will provide schools with template uniform policies in order to guide schools in the development of inclusive codes of conduct to accommodate all gender identities”.</i></p>
Section 7, subsection 7.3	<p>The language used in subsection 7.3 is vague and confusing. It is not clear what is meant by “anything goes” and the section therefore does not succeed in its attempt to assist schools in making decisions about school uniforms.</p>	<p>Subsection 7.3 should be removed.</p>
Section 9 - “Use of Facilities”		
Section 9,	Subsection 9.1.1 states that a school <i>may</i>	It is recommended that section 9.1.1 be

<p>subsection 9.1.1</p>	<p>allow an LGBTQIA+ learner to use the toilets and changing rooms they are most comfortable with. In determining whether to allow LGBTQIA+ learners to use toilets or changing rooms where they feel most comfortable, subsection 9.1.1 provides that schools must consider “<i>safety measures</i>”, “<i>inherent risks</i>”, and the “<i>sensitivity of other learners</i>”.</p> <p>The use of the word “may” is problematic. In order to avoid arbitrary discrimination, schools <i>must</i> be obliged to ensure that that queer learners are able to use toilets and changing rooms they are comfortable with. This may be achieved by schools making available gender-neutral or private bathrooms and change rooms, allowing queer learners to use the change rooms on a separate schedule to other learners, or allowing queer learners to use educators’ bathroom facilities.</p> <p>Reference to ‘safety measures’ and ‘risks’ also imply that LGBTQIA+ learners pose a threat to other learners. Moreover, while the sensitivity of other learners is taken into account, no consideration is given to the privacy and comfort of queer learners.</p> <p>Schools should take every possible step to allow queer learners to use bathroom and change room facilities they are most comfortable using, without having to request permission or having to communicate any information about their gender identity with the school. Where provision needs to be made beyond gender-neutral or private facilities, formal requests can be made. A clear process should be outlined for such applications.</p>	<p>replaced with:</p> <p><i>“Schools <u>must</u> ensure that LGBTQIA+ learners are able to use toilets and changing room facilities that they feel safe and comfortable with and that the necessary steps are taken to make this happen. In doing so, schools may make available gender-neutral or private bathrooms and change rooms.</i></p> <p><i>Schools, with the support of the Western Cape Department of Education, should take every possible step to allow queer learners to use bathroom and change room facilities they feel most comfortable and safe using, without having to request permission or having to communicate any information about their gender identity with the school”.</i></p> <p>We further recommend that the following addition be made:</p> <p><i>“Where schools are unable to provide gender-neutral toilets or change-room facilities, or the learner prefers not to use such separate facilities, the school, with the support of the Western Cape Department of Education, will ensure that the learner has access to toilet and change-room facilities at the school in a manner that protects their privacy, dignity, and safety”.</i></p>
<p>Section 9, subsection 9.1.2</p>	<p>Section 9.1.2 grants a school the discretion to provide “unisex toilets”, but only to the extent that it is “reasonably practicable” and “within available financial resources and infrastructure”. Read together with section 9.1.1, the discretion allowed in section 9.1.2 fails to ensure adequate measures are taken to</p>	<p>The contents of section 9.1.2 are already dealt with in the revised wording of section 9.1.1 above, and section 9.1.2 in its current form can be deleted.</p>

	<p>accommodate LGBTQIA+ learners. A school <i>must</i> be obliged to ensure that appropriate and safe bathroom and changing facilities are made available to LGBTQIA+ learners, and may do so through various means, including, providing for a gender neutral bathroom.</p> <p>The term 'gender neutral' is preferable to 'unisex'.</p>	
Section 9	<p>This policy speaks largely to the obligation on schools to ensure that the preferences of LGBTQIA+ learners regarding school toilets and changing facilities are accommodated, but does not speak to the obligation on the Western Cape Department of Education to consider these factors when constructing or renovating toilets and bathrooms.</p>	<p>The following addition should be made to section 9:</p> <p><i>“The Western Cape Education Department and school governing bodies must ensure that during the construction or renovation of school toilets and bathrooms, explicit consideration is given to how the construction or renovation can best ensure that toilets and changing facilities are inclusive and sufficiently accommodate learners of different gender identities and sexual orientations.”</i></p>
<p>Section 10 - “School Excursions and Hostels”</p>		
Section 10	<p>Section 10 of the draft Policy deals with both school excursions and school hostel accommodation, and applies the same considerations to both these topics. Although hostel accommodation and school excursions may involve some of the same considerations, it is recommended that these two issues be addressed independently as different processes and criteria may need to be considered when making decisions about a learner in each circumstance.</p> <p>In addition, the draft Policy fails to outline a process for deciding the placement of learners in hostel accommodation or the arrangements for school excursions. In particular, reference is only made to the need for <i>“careful consideration and preparation”</i>, and that these issues need to be <i>“thought about carefully”</i>. In respect of school excursions, the meaning of</p>	<p>It is recommended that “School Excursions” and “Hostel accommodation” be treated as two separate items in the draft Policy.</p> <p><u>Hostel accommodation:</u></p> <p>In respect of hostel accommodation, we recommend the following be included in place of the current section 10:</p> <p><i>“Schools may not refuse any learner placement in a school hostel based on their gender identity or sexual orientation.</i></p> <p><i>Schools must be obliged to provide safe and appropriate accommodation for all learners, and may do so through various means, including the provision of individual rooms and bathroom facilities.</i></p> <p><i>Hostel application processes must allow learners to indicate their hostel preference.</i></p>

“reasonable adjustments” is unclear and the reference to *“risk assessments”* once again implies that queer learners pose a threat.

Moreover, the absence of a defined, transparent process, informed by relevant criteria, may lead to inconsistent, unreasonable and arbitrary decisions.

Where a gender non-conforming learner indicates a preference for a hostel accommodating learners of a sex different to the sex assigned to that learner at birth, all necessary steps must be taken to accommodate that learner in such a hostel, having due regard to that learner’s privacy, dignity, and safety. For example, by making gender-neutral sections of hostels available.

In deciding on learner placement, the primary considerations are the learner’s privacy, dignity, and safety. Additional factors that may be considered include, but are not limited to, the learner’s age and the hostel facilities available, for example, the possibility of private rooms and bathroom facilities or the existence of communal toilets and showers. The needs of each learner must be assessed individually and on a case by case basis.

In order to ensure that the best interests of a learner are taken into consideration, including their safety and privacy, the decision of placement must be taken after consultation with the learner and a parent or guardian.

Where a learner’s application to be placed in a hostel accommodating learners of a sex different to the sex assigned to that learner at birth, is refused, that learner or parent/guardian(s) may apply to the HOD to review their application. The HOD must make a decision regarding the application within 14 days.

Discrimination and homophobic, or other bullying must be strictly and explicitly prohibited in hostel accommodation.

Schools must provide sensitivity training to all hostel staff and hostel learners providing them with information regarding gender identity and sexual orientation, and which is aimed at advancing a culture of inclusiveness”.

School excursions:

		<p>In respect of school excursions, we recommend that the following be included in place of the current provisions dealing with excursions:</p> <p><i>“No learner may be refused to participate in any school excursion on the basis of their gender identity or sexual orientation. Teachers and school staff must make every effort to ensure that learners are not discriminated against or excluded during a school excursion on the basis of their gender identity or sexual orientation.</i></p> <p><i>In the event that sleeping arrangements need to be made for the purposes of longer school excursions:</i></p> <p><i>(i) A school must ensure that adequate sleeping arrangements are made, which accommodate all learners in a safe and dignified manner.</i></p> <p><i>(ii) The primary considerations are the learner’s privacy, dignity, and safety. Additional factors that may be considered include, but are not limited to, the age of the learner, and the availability of private bathroom and changing facilities.</i></p> <p><i>(iii) To ensure that the best interests of the learner are taken into consideration, a decision regarding sleeping arrangements must be made, in consultation with the learner and with the parent or guardian”.</i></p>
	<p>The draft Policy, in its current form, does not include proactive measures to ensure that the accommodation of LGBTQIA+ learners is considered when construction or renovations take place at a school.</p>	<p>The following addition should be made to section 10:</p> <p><i>“The Western Cape Education Department and school governing bodies must ensure that during the construction or renovation of school buildings, including hostels, explicit consideration is given to how the construction or renovation can best ensure that accommodation at the school is inclusive and sufficiently accommodates learners of different gender identities.”</i></p>

Section 11 - “School Functions and the Matric Dance”		
Section 11, subsection 11.1	Subsection 11.1 states that learners “should” be allowed to have dress code preferences of their choice. The use of the word ‘should’ suggests that this position is aspirational, rather than the learner’s right.	We recommend the following wording to replace subsection 11.1: <i>“All learners <u>must</u> be allowed to exercise the dress code preferences of their choice when attending school functions and matric dances”.</i>
Section 11, subsection 11.2	The wording of subsection 11.2 does not state that the obligation is on schools to ensure learners feel safe to bring a partner of their choice.	We recommend the following wording to replace subsection 11.2: <i>“Schools must ensure that all learners feel free to bring a partner of their choice to the matric dance regardless of sexual orientation and gender identity”.</i>
Section 12 - “Single Gender Schools”		
Section 12, subsection 12.1	The language in this subsection is confusing and will likely lead to unfair discrimination against LGBTQIA+ learners. Instead of describing what schools “may” do, this subsection should prohibit discrimination against learners based on their gender identity and sexual orientation and should oblige schools to make provision for the admission of learners whose gender identity aligns with the gender of learners catered for by the school.	We recommend the following amendment: <i>“Single gender schools may not, in their admissions process, discriminate against learners based on their gender identity or sexual orientation. Schools must make provision in their Admissions Policy for the admission of learners whose gender identity aligns with the gender of learners catered for by the school”.</i>
Section 12, subsection 12.4	Subsection 12.4 states that “schools may engage in suitable education campaigns with parents and learners of the school community to ensure that the decision of the school to include the admission of LGBTQI learners is understood by parents and learners”. Engagement in education and sensitivity campaigns with the school community should be obligatory and should not only be limited to admission of LGBTQIA+ learners, but to general issues relating to gender identity and sexual orientation.	This section should be amended as follows: <i>“A school <u>must</u> engage in suitable education campaigns and sensitivity training with parents, guardians and learners of the school community in relation to gender identity and sexual orientation, including the admission of LGBTQIA+ learners to the school”.</i>
Section 12,	A learner’s right to access basic	Subsections 12.2, 12.3 and 12.5 must be

<p>subsections 12.2, 12.3 and 12.5</p>	<p>education as protected by Section 29 (1)(a) of the Constitution is not subject to the ‘wishes’ of anyone person. It is unlawful to deny a learner access to education on the basis that the <i>“majority of the parents and learners”</i> may be opposed to the admission of a learner. Furthermore, it is discriminatory to base this decision on a learner’s gender identity and sexual orientation.</p>	<p>removed from the draft Policy in order for the policy to withstand constitutional scrutiny.</p>
<p>Section 13 - “Safe Space”</p>		
<p>Section 13, subsection 13.2</p>	<p>Subsection 13.2 requires schools to <i>“be vigilant against learners who pretend to be LGBTQI with the intention to deceive...in order to abuse concessions and exceptions...”</i></p> <p>This language is highly problematic. It encourages LGBTQIA+ learners to be viewed and treated with suspicion. It also implies that there is a burden of proof placed on such learners to show evidence of their identity and/or orientation.</p>	<p>Subsection 13.2 must be removed from the draft Policy.</p>
<p>Section 13, subsection 13.3</p>	<p>Subsection 13.3 provides for the establishment of “Diversity Social Associations” that aim to embrace diversity. However, the draft Policy omits to define such associations and to explain their purpose.</p>	<p>It is recommended that “Diversity Social Associations” be defined.</p>
	<p>The creation of a “safe space” in schools will require that various role players, including learners, teachers, school governing bodies, school hostel staff, and departmental officials, play an active role in creating a safe environment.</p> <p>A zero tolerance approach should be taken towards homophobic, transphobic, and all bullying related to gender identity, gender expression, and/ or sexual orientation. As such, a school’s code of conduct should include an anti-bullying policy that specifically addresses such bullying. Schools must also create and</p>	<p>It is recommended that section 13 include additional steps and strategies that schools may use to raise awareness around, and prevent violence and homophobic, transphobic and bullying related to gender identity and/or sexual orientation.</p> <p>The following wording should be added to section 13:</p> <p><i>“Schools must set up and enforce school rules and policies on homophobic, transphobic and other bullying relating to gender identity, gender expression and sexual orientation.”</i></p>

	<p>implement strategies to address bullying of this nature. The Department of Basic Education’s <i>Guidelines on Challenging Homophobic Bullying in Schools</i> and the <i>National School Safety Framework</i> may inform this process, and assist in creating strategies to respond to homophobic bullying. The draft Policy should define homophobic and related types of bullying.</p>	<p><i>School Safety Committees must integrate the topic of homophobic, transphobic and other bullying into their activities.</i></p> <p><i>School administrators, teaching, and non-teaching staff, school governing bodies, and other relevant role players such as educators and school hostel staff, must receive on-going training on the issues of homophobic, transphobic and other bullying.</i></p> <p><i>Adult supervision must be increased in bullying “hotspots”.</i></p> <p><i>Schools, with support of the WCED, must provide learners, parents, guardians and the wider school community with information on gender identity, sexual orientation and homophobic, transphobic and other bullying and the consequences thereof. Learner Representative Councils should be utilised as a means to ensure learner participation.</i></p> <p><i>Schools, with the support and guidance of the WCED, must create reporting mechanisms whereby any violence, discrimination or homophobic, transphobic and other bullying relating to gender identity and sexual orientation may be reported.</i></p> <p><i>School districts must ensure that all learners have access to mechanisms of support such as a guidance counsellor or social worker and that stakeholders mandated with facilitating such support are sensitive to the experiences of LGBTQIA+ learners and do not discriminate against them in any way”.</i></p>
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Section 14 - “Curriculum Inclusiveness”

<p>Section 14, subsection 14.2</p>	<p>While we recognise the value of the strategies highlighted in section 14.2 that aim to integrate gender inclusiveness into a school curriculum, we recommend that additional strategies be employed in addition to these. The recommendations made are not exhaustive, but aim to highlight other steps that can be taken</p>	<p>The following should be added to section 14.2:</p> <p><i>“A curriculum must include an age-appropriate engagement with the topics of sexual and gender diversity, and must raise awareness around homophobic, transphobic and other bullying of this nature.</i></p>
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	<p>within the school environment to advance inclusiveness.</p>	<p><i>These topics may be explored within a range of subject areas, including Life Orientation and Health.</i></p> <p><i>Schools must ensure that learners are provided with accurate information on LGBTQIA+ rights, and particularly the right not to be discriminated against.</i></p> <p><i>Materials related to gender identity, gender expression and sexual orientation should be acquired by the school and made available in the school library.</i></p> <p><i>Schools must revise teaching programmes to ensure the removal of homophobic, transphobic or any material which is inflammatory on issues of gender identity and sexual orientation”.</i></p>
<p>Section 14, subsection 14.3</p>	<p>We note the problematic nature of the following statement contained in section 14.3: <i>“Emphasising the importance of good moral values should be the backbone of sexual education”</i>. The definition of “good moral values” is highly subjective, and may potentially be used to discriminate against, or discredit the experiences and feelings of LGBTQIA+ learners. Furthermore, questions of morality are not relevant as constitutionally enshrined rights must guide the approach of all stakeholders. As such it is recommended that this statement be removed in its entirety.</p>	<p>We recommend that section 14.3 be replaced with:</p> <p><i>“Schools must ensure that learners are educated on issues relating to sexual orientation and gender identity, and that they understand that these are distinct concepts. Learners should also be educated on how to treat these issues and experiences responsibly and with sensitivity”.</i></p>
<p>Section 15 - “Western Cape Education Department’s Training of Schools to Raise Awareness”</p>		
<p>Section 15</p>	<p>The way this section has been drafted, creates confusion about who is responsible for the various actions described in this section. For instance, while the heading explicitly mentions the Western Cape Department of Education, the subsections also speak to obligations on principals and school communities.</p>	<p>We recommend that the title of this section be changed to “Training of schools and school communities to ensure inclusivity”</p>
<p>Section 15, subsection</p>	<p>This subsection does not provide sufficient clarity on how regularly training</p>	<p>Subsection 15.1 be replaced with:</p>

<p>15.1</p>	<p>will be provided and does not specify that training must be particular to the role of the stakeholders receiving the training. It is unlikely that a blanket approach to training a variety of stakeholders will sufficiently equip these stakeholders to protect the rights of LGBTQI+ learners in their various contexts.</p> <p>The section limits training to the issue of gender diversity and fails to include training relating to gender expression or sexual orientation.</p> <p>Furthermore, the section fails to put an obligation on the Western Cape Department of Education to provide gender sensitivity training specifically for school staff to ensure that they are able to support LGBTQIA+ learners.</p>	<p><i>“The Western Cape Education Department <u>must</u> provide regular training to education stakeholders, including districts, principals, governing bodies, educators, and learners to create awareness around gender identity, gender expression and sexual orientation, and to ensure that no learner is excluded or discriminated against because of their gender identity or sexual orientation. This training must be tailored to the roles of the stakeholders attending the training to ensure that they are clear on their specific responsibilities in ensuring that schools are safe and welcoming spaces for LGBTQI+ learners. School staff must be provided with sensitivity training to ensure that they are equipped to support LGBTQI+ learners within the school context”.</i></p>
<p>Section 15, subsection 15.2</p>	<p>The phrasing of this subsection is vague and does not clarify who this responsibility falls to or which staff will receive such continuous professional development training.</p>	<p>Subsection 15.2 should be replaced with:</p> <p><i>“The Western Cape Education Department will provide ongoing professional development opportunities to build the skills of school staff and employees of the WCED to prevent, identify and respond to homophobic, transphobic and other forms of bullying, harassment and discrimination”.</i></p>