

Annexure A

Comments on Draft Provincial Guidelines			
Name of Department:	Western Cape Education Department		
Matter: <i>(Title of Legislation)</i>	Draft Guidelines on Gender Identity and Sexual Orientation in Public Schools of the Western Cape Education Department		
Contact Person:	Adv. Lynn Coleridge-Zils	Due date for comments:	11 May 2020
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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 Draft Guidelines on Gender Identity and Sexual Orientation in Public Schools (“Draft Guidelines”) published by the of the Western Cape Education Department (“WCED”).<sup>1</sup>
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. The 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.

<sup>1</sup> Our thanks to Sacha Knox for her valuable contributions made in the outlining of key definitions and concepts. These contributions were made in respect of EE and EELC’s joint submission on the Draft Policy made on 6 September 2019, and have been reiterated in these comments on the Draft Guidelines.

3. On 6 September 2019, EE and the EELC made a joint submission on the WCED’s draft Gender Identity and Sexual Orientation Policy (“**Draft Policy**”). It appears as though the Draft Guidelines are intended to replace the Draft Policy.
4. In our previous submission on the Draft Policy, we highlighted serious inadequacies. We are also aware that various other civil society organisations, some with extensive expertise in the field of gender identity and sexual orientation, submitted comments raising similar concerns. Unfortunately, despite our comprehensive commentary on the Draft Policy, we note that most of the provisions contained in the Draft Policy are replicated and remain unchanged in the Draft Guidelines. This unfortunate replication has led to the perpetuation of a number of serious concerns now present in the Draft Guidelines, and signals the WCED’s failure to earnestly respond to and engage with the problems raised by civil society.
5. Consequently, many of the concerns raised by EE and the EELC in relation to the Draft Policy, which include general comments relating to the problematic use of language and terminology, the inappropriate use of binary terms, and unclear or vague language, have been iterated in this submission. Additionally, we also address the issue of the Draft Policy being changed to Draft Guidelines. Many of our previous clause-by-clause comments are also iterated in the prescribed table below.

## **General Comments**

### *The shift from a policy to guidelines*

6. It appears that the Draft Guidelines are intended to replace the previous Draft Policy. This can be gleaned from the fact that the purpose and scope of the Draft Policy align entirely with that of the Draft Guidelines, and that the provisions of the Draft Policy have been almost entirely replicated in the Draft Guidelines. It is unclear what the WCED’s rationale is for making this change, which may potentially have immediate consequences when it comes to the enforceability of the document.

7. A policy, if properly drafted, is an instructive instrument, or an intentional, authoritative statement of expectations.<sup>2</sup> Whilst it cannot inflexibly bind a decision-maker, a decision to depart from a policy cannot be taken without reason and, *“must be exercised reasonably and in a procedurally fair manner”*.<sup>3</sup> A guideline on the other hand, can in principle, be more readily deviated from as it merely recommends steps and processes.
8. Throughout the Draft Guidelines, words and phrases such as “may”, “it is recommended” or “it is encouraged” are used, diluting the potential obligations and responsibilities on role players such as governing bodies and principals, reducing them to mere recommendations and suggestions, as opposed to directives.
9. While the spirit of the Draft Guidelines is clearly about creating more inclusive school environments, the language therein does not go far enough to place strong obligations on schools to implement its proposals. As a result, some obligations are so diluted so as to render some clauses entirely meaningless or worse, irrational. For example, sub-clause 12.4 has been revised to merely *recommend* that *“schools be fair and objective”* in their decision to admit LGBTQI+ learners and *“not be swayed by the subjective wishes of a particular group”*. The Draft Guidelines therefore imply that a school’s exercise of fairness and objectivity is merely discretionary, and suggest that unfair and subjective processes can be employed and that schools may well be swayed by a particular group.
10. That is not to say that the previous Draft Policy, in the form in which it was previously drafted was particularly authoritative. It too contained vague language and obligations. Thus, styling of the document as a policy as opposed to a guideline, does not address our concerns in and of itself. In order for any policy to be effective, it must also be clear and authoritative. In order to be effectively implemented and enforced as a policy, these substantive inadequacies, which are replicated in the current Draft Guidelines, would have to be remedied.
11. **We therefore ask the WCED to explain its decision to publish the document as guidelines and not a policy, and to justify this decision as being in the best interests of learners. We also**

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<sup>2</sup> Roux NL, Public policy-making and policy analysis in South Africa amidst transformation, change and globalisation: Views on participants and role players in the policy analytic procedure. *Journal of Public Administration*, vol. 37 no 4, December 2002 at 425.

<sup>3</sup> *Member of the Executive Council for Education in Gauteng Province and others v Governing Body of the Rivonia Primary School and others* [2013] ZACC 34 at paras 54 and 58.

**recommend that, if, and only if, all the substantive gaps in the draft document Draft Guidelines are filled, that it be published as a policy.**

*Use of binary gender pronouns and problematic language*

12. It is deeply concerning that a document which should aim to facilitate 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.
13. **All binary pronouns, such as “his” or “her” in the Draft Guidelines must be changed to the non-binary terms “them”, “their” or “they”.**
14. The term LGBTQI+ is used throughout the Draft Guidelines without any consideration of context, and without recognising that sexual orientation and gender identity are distinct concepts which may be relevant at different times.
15. **Steps must be taken to educate the school community about these distinctions, and such distinctions should be clearly expressed throughout the Draft Guidelines, where applicable.**

*Vague language and processes*

16. We are concerned about the vague and generally non-committal language used in the Draft Guidelines, which does not go far enough to place strong obligations on, or provide sufficient direction to, schools or other relevant stakeholders to implement its principles.
17. Some language is so vague as to render some clauses entirely meaningless. For example, in the context of referring a learner to a social worker or psychologist when they disclose their sexual orientation or gender identity, sub-clause 5.1.2 states that “the principal may manage and coordinate this process”. It is unclear what it means for the principal to manage the process. Moreover, use of the word “may” also simply indicates the ability (not the obligation) of the principal to manage the process, which goes without saying.

18. The Draft Guidelines also fail to include 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 characterising the Draft Guidelines do not promote transparent or consistent decision-making, and may result in arbitrary or unreasonable determinations, with no recourse of appeal or review.
19. **It is recommended that vague language and processes in the Draft Guidelines be clarified to ensure implementation of the principles the document claims to support.**

*Ensuring processes that protect privacy and dignity of learners*

20. The Draft Guidelines fail to ensure that the measures described therein are proactively taken, regardless of whether the school knows of learners identifying as LGBTQI+ 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” or “a matter to be dealt with”, instead of establishing general practices that are inclusive. For instance, clause 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 school staff.

**COMMENTS:**

<p><b>Clause</b> (<i>Indicate clause/ regulation Number</i>)</p>	<p><b>Comment</b> (<i>State why the clause/regulation or proposed amendment is not supported or what the problem is with the provision</i>)</p>	<p><b>Suggestion</b> (<i>Suggested deletion/amendment/ addition</i>)</p>
<p><b>Clause 1 - “Definitions”</b></p>		
<p>Clause 1</p>	<p>The Draft Guidelines fail 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 a similar) paragraph be included in the Draft Guidelines 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 these Guidelines 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 Guidelines define “bisexual” as “<i>a person who is sexually attracted to both men and women</i>”. This definition reflects a reductive understanding of bisexuality.</p>	<p>It is recommended that the definition for “<b>bisexual</b>” 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 Guidelines define the term “gender characteristics” 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>”.</p>	<p>We recommend that the definition for “<b>gender characteristics</b>” be removed.</p>

	<p>This definition is confusing and it is not clear how this differs from the definition for “gender expression”.</p>	
	<p>The Draft Guidelines define the term “gender expression” as <i>“the way in which a person expresses his or her gender identity typically through his or her appearance, dress and behaviour”</i>.</p> <p>This definition can be expanded to include more ways in which people may express their gender.</p>	<p>It is recommended that the definition for <b>“gender expression”</b> be amended in the following way:</p> <p><i>“gender expression” means the way in which a person outwardly expresses their gender identity, typically through their name, pronoun, appearance, dress and behaviour.</i></p>
	<p>The Draft Guidelines define the term “gender reassignment” or “gender affirming actions” as <i>“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 lesbian, gay, bisexual, transgender, queer or questioning, intersex person to affirm their gender identity, including social transition, gender affirming hormone treatment and gender affirming surgeries”</i>.</p> <p>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 <b>“gender reassignment”</b> be entirely removed and replaced with <b>“transition”</b>. We recommend further that the definition be amended as follows:</p> <p><i>“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.</i></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 Guidelines define “hermaphrodite” or “intersex” as a <i>“person having both male and female sex organs”</i>.</p>	<p>We recommend that the term <b>“hermaphrodite”</b> should be removed from the Draft Guidelines.</p>

	<p>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>In addition, the definition of the term “<b>intersex</b>” should be amended to read as follows:</p> <p><i>“<b>Intersex</b>” 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.</i></p>
	<p>The Draft Guidelines defines “homophobia” as “<i>a fear or dislike of homosexual people</i>”.</p> <p>This definition fails 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>We recommend that the definition of the term “<b>homophobia</b>” be amended in the following way:</p> <p><i>“<b>Homophobia</b>” means an irrational fear or hatred of, or violence, harassment or discrimination perpetrated against, homosexual people.”</i></p>
	<p>The Draft Guidelines define the term “homosexual” 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 therefore unnecessary.</p>	<p>We recommend that the definition of the term “<b>homosexual</b>” be amended in the following way:</p> <p><i>“<b>Homosexual</b>” means the romantic or sexual attraction between members of the same sex or gender.</i></p>
	<p>The Draft Guidelines currently define “lesbian” as “<i>a woman who is sexually attracted to other women</i>”.</p> <p>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 “<b>Lesbian</b>” be amended in the following way:</p> <p><i>“<b>Lesbian</b>” means a womxn who is romantically or sexually attracted to other womxn.</i></p>

	<p>The Draft Guidelines defines “LGBTQI+” as <i>“lesbian, gay, bisexual, transgender, queer or questioning, intersex, and includes other sexual identities such as pansexual, asexual and omnisequal”</i>.</p> <p>We note that the Draft Guidelines differ from the Draft Policy and refer to an expanded term, “LGBTQI+” (as opposed to “LGBTQI”). The Draft Guidelines define “LGBTQI+” as including other sexual identities such as pansexual, asexual and omnisequal. However, while the Draft Guidelines define the terms “lesbian”, “bisexual”, “transgender”, “queer”, and “intersex”, they fail to define the term “gay” as well as the additional words associated with the term “LGBTQI+”, namely, “questioning”, “pansexual”, “asexual” and “omnisequal”.</p>	<p>Clause 1 should be revised to include references to, and definitions of, the terms “gay”, “questioning”, “pansexual”, “asexual” and “omnisequal”.</p> <p>The Department of Basic Education’s (“DBE”) 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 “gay” as “someone who is attracted to people of the same gender. While many women identify as gay, the term lesbian is also used for women”.</p>
	<p>The Draft Guidelines define the term “queer” as <i>“an umbrella term for lesbian, gay, bisexual, transgender and intersex persons”</i>. This is a limited definition of the term and should be expanded.</p>	<p>The term “<b>queer</b>” should be amended and expanded to read as follows:</p> <p><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></p>
	<p>The Draft Guidelines define “sexual orientation” as “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”.</p> <p>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.</p>	<p>We recommend that the definition of “<b>sexual orientation</b>” be revised in the following way:</p> <p><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></p>
	<p>The Draft Guidelines define “transphobia” to mean <i>“a fear or dislike of transgender people”</i>. However, we recognise “transphobia” to be based on irrational assumptions, which have invoked</p>	<p>We recommend that the definition of “<b>transphobia</b>” be revised in the following way:</p>

	<p>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.</p>	<p><b>“transphobia”</b> means an irrational fear or hatred of, or violence, harassment or discrimination perpetrated against, transgender people.</p>
	<p>The Draft Guidelines define “transgender” to mean “a person whose sense of personal identity and gender does not correspond to their birth sex”. We recommend that this definition highlight that sex is “assigned” at birth.</p>	<p>We recommend that the definition of <b>“transgender”</b> be revised in the following way:</p> <p><b>“transgender”</b> means a person whose sense of personal identity and gender is different to what is generally considered typical for their sex assigned at birth.</p>
<p>Additional definitions</p>	<p>The Draft Guidelines fail to define other important terms relating to gender identity and sexual orientation, which suggests an inadequate conceptualisation of the Draft Guidelines.</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 Guidelines:</p> <p><b>“asexual”</b> means a person who does not have a sexual attraction to others, or has low or absent interest in or desire for sexual activity.</p> <p><b>“cisgender”</b> is a term for people whose gender identity matches the sex they were assigned at birth.</p> <p><b>“gender”</b> 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><b>“gender binary”</b> refers to a socially constructed system in which gender is assumed to only involve the categories of “male” and “female”.</p> <p><b>“gender dysphoria”</b> 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,</p>

		<p><i>while rejecting or requiring a person to conceal their gender identity can increase their level of dysphoria.</i></p> <p><i>"gender nonconforming" describes a person whose behaviours or gender expression falls outside stereotypical expectations.</i></p> <p><i>"gender spectrum" refers to an understanding of gender as involving a wide range of identities and expressions.</i></p> <p><i>"heterosexual" refers to the romantic or sexual attraction between people on opposite ends of the gender binary.</i></p> <p><i>"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 in between, or as falling completely outside these categories.</i></p> <p><i>"plus" is included in the LGBTQI+ 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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**Clause 2 - "Legislative Framework"**

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

<p>Purpose</p>	<p>While the current purpose of the Draft Guidelines 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 Guidelines also promote additional fundamental rights and freedoms of all LGBTQI+ learners, including the rights to human dignity, equality, security of person, and the right of all learners to a basic education.</p>	<p>It is recommended that clause 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> <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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**Clause 4 - “Scope”**

<p>Clause 4 - Scope</p>	<p>Clause 4 of the Draft Guidelines states that “This guideline is applicable to all public schools.”</p> <p>We note that this sub-clause has been revised from the Draft Policy, which stated that the “policy is applicable to all <i>ordinary</i> public schools”. Removal of the word “ordinary” extends the scope of the Draft Guidelines to full service and special schools. However, this clause still fails to include independent schools in its ambit, and it is</p>	<p>It is recommended that clause 4 be amended to apply to both public schools and independent schools.</p> <p>We also recommend that the reference to “all public schools” in clause 3(1)(b) of the Draft Guidelines be amended to apply to all public schools <u>and</u> independent schools, or to all schools.</p>
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	<p>recommended that these schools also be subject to the provisions of the Draft Guidelines.</p> <p>It seems it is the intention of the WCED to exclude independent schools from the scope of these Draft Guidelines. The title of the document has been changed from “WCED’s Gender Identity and Sexual Orientation Policy” in the Draft Policy to “Draft Guidelines on Gender Identity and Sexual Orientation in <i>Public Schools</i> of the WCED” in the Draft Guidelines.</p>	<p>We recommend further that the title of the Draft Guidelines be amended as follows:</p> <p><i>“Western Cape Education Department’s Draft Guidelines on Gender Identity and Sexual Orientation in Schools”</i></p>
<p><b>Clause 5 - “Gender Identity”</b></p>		
<p>Clause 5</p>	<p>This clause fails in its attempt to guide school staff in ensuring that schools are safe spaces for LGBTQI+ learners. The entire framing of this clause treats queerness as an exception that needs to be “dealt with” and introduces measures that single out LGBTQI+ 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>We recommend that the following be included at the beginning of this clause:</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>
<p>Heading</p>	<p>The heading of clause 5 currently reads; “Gender Identity”. This may potentially cause confusion as this clause does not deal with gender identity as a concept, nor does it only focus on issues related to gender identity. Instead, the clause 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.</p>	<p>It is recommended that the heading of clause 5 be changed from “Gender Identity” to “Confidentiality and Support” to ensure that the meaning and purpose of the section is clear.</p>

<p>Clause 5 - additional comment</p>	<p>Clause 5 of the Draft Guidelines fails to substantially detail the caution with which all school community members, with whom an LGBTQI+ learner discusses their gender identity and/or sexual orientation, must handle this information. It is imperative that the draft Guidelines explains the responsibility to protect this learner’s privacy.</p> <p>In its current form, the draft Guidelines do 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 clause 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>
<p>Sub-clause 5.1</p>	<p>Sub-clause 5.1 states that when a learner discloses his or her gender identity and/or sexual orientation to the principal, educator or a fellow learner, <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 “dealing with the matter” are included in sub-clause 5.1.4(a) to support this interpretation. Rather, the Draft Guidelines should ensure that the learner is treated with sensitivity, respect and that their confidentiality is protected.</p>	<p>We recommended that sub-clause 5.1 to be revised to read:</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>

<p>Sub-clause 5.1.1</p>	<p>Sub-clause 5.1.1 encourages schools <i>“to refer a learner to a social worker, psychologist, or any other organisation which deals with matters of this nature in order to facilitate counselling and assistance.”</i></p> <p>This sub-clause has been revised to state that a school is <i>encouraged</i> to make such referrals (as opposed to previously being obliged to do so).</p> <p>This revision is problematic as it affords schools an unfettered discretion to make referrals, while no clarity is provided on whether a learner may refuse this.</p> <p>Referral to a social worker, psychologist or the like should only take place where the learner has requested support or has consented thereto.</p> <p>In addition, the phrasing of this clause implies that once the learner shares information about their identity, the school is encouraged to treat the learner like a matter to be handled and counselled.</p>	<p>It is recommended that sub-clause 5.1.1 be revised to read:</p> <p><i>“Should the learner express the need for psychosocial services and support, after having been informed about these available services, 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>
<p>Sub-clause 5.1.2</p>	<p>Sub-clause 5.1.2 states that the <i>“principal may manage and coordinate this process”</i>.</p> <p>We note that this sub-clause has been revised to state that a principal <i>may</i> manage and coordinate this process (as opposed to previously being obliged to do so). However, this sub-clause does not clarify under what circumstances a principal would do so. In addition, the sub-clause suggests that the principal is not the only role player that can assist in the management and coordination of the process, but fails to clarify who else could assist, and the process to be followed to make that determination. Use of the word <i>“may”</i> also simply indicates the ability (not the obligation) of the principal to manage the process, which goes without saying.</p> <p>Lastly, this sub-clause does not acknowledge that a principal may not be privy to information about</p>	<p>It is recommended that sub-clause 5.1.2 be revised as follows:</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.</i></p> <p><i>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</i></p>

	<p>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><i>outlined in the rest of this section”.</i></p> <p>In addition, we recommend that the Draft Guidelines clarify which other role players, apart from the principal, may assist with management and coordination, and the process used to make this determination.</p>
<p>Sub-clause 5.1.3</p>	<p>Sub-clause 5.1.3 provides that in order to maintain confidentiality, “the principal may report to the governing body that a learner is LGBTQI+, without necessarily divulging the learner’s name or gender identity.”</p> <p>This is a revision from the Draft Policy, which compelled the principal to share this information with the governing body.</p> <p>This sub-clause is problematic as it affords a principal an unfettered discretion to report an LGBTQI+ learner to the governing body and leaves open the possibility that a learners’ identity may be shared without their consent.</p> <p>The effect of this is to negate the requirement in sub-clause 5.1 above, which requires sensitivity and confidentiality. It is not sufficient that a principal is not required to divulge learners’ names.</p> <p>Furthermore, this specific requirement further entrenches the impression created in certain parts of the Draft Guidelines 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>Lastly, 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 identify as LGBTQI+.</p>	<p>It is recommended that this clause be removed entirely from the Draft Guidelines.</p>

<p>Sub-clause 5.1.4</p>	<p>The lead-in to sub-clause 5.1.4 of the Draft Guidelines states the following:</p> <p><i>“With the consent of the learner, the principal may convene a meeting with the learner and his or her parent(s) to -”.</i></p> <p>We note that the lead-in to this sub-clause has been revised, and now states that a principal <i>may</i> convene a meeting with a learner and his or her parents (as opposed to previously stating that a principal <i>must</i> convene such a meeting). However, the sub-clause fails to afford learners an opportunity to have such a meeting in the event that a learner is not comfortable with a parent or guardian being present.</p>	<p>We recommend the following amendment to the lead-in to sub-clause 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>Sub-clause 5.1.4 (a)</p>	<p>Sub-clause 5.1.4 (a) states,</p> <p><i>“... gain an understanding of the perceptions and expectations of the learner and his or her parent(s) in dealing with the matter ...”.</i></p>	<p>We recommended that this sub-clause be revised as follows:</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>
<p>Sub-clause 5.1.4 (c)</p>	<p>Sub-clause 5.1.4 (d) provides</p> <p><i>“...clearly state that parents may request or can apply for an exception to the school’s code of conduct where reasonable or practicable; ...”.</i></p>	<p>We recommend that sub-clause 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 these Guidelines”.</i></p>
<p>Sub-clause 5.1.4 (d)</p>	<p>Sub-clause 5.1.4 (d) states the following:</p> <p><i>“... take any further decisions, for example, about -</i></p> <p><i>(i) whether the matter must be handled confidentially;</i></p> <p><i>(ii) self-expression and conduct on the part of the</i></p>	<p>We recommend that sub-clause 5.1.4 (d) 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"> <li>● <i>whether the learner prefers that the information they shared, be kept</i></li> </ul>

	<p><i>learner;</i></p> <p><i>(iii) allowing for freedom of participation, where reasonable and practicable, in the school’s extracurricular activities and the use of other school facilities.”</i></p>	<p><i>confidential;</i></p> <ul style="list-style-type: none"> <li>● <i>how to ensure that the learner feels comfortable to express their gender identity;</i></li> <li>● <i>how to ensure that the learner feels free to participate in the school’s extra-curricular activities”.</i></li> </ul>
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**Clause 6 - “Gender Expression”**

<p>Sub-clause 6.1</p>	<p>Sub-clause 6.1 states that an LGBTQI+ learner has the right to choose the first name by which he or she wants to be known to educators, school staff and fellow learners, irrespective of his or her gender characteristics or assigned sex at birth.</p> <p>While this sub-clause affords LGBTQI+ learners the right to choose their preferred names, it fails to afford them a right to choose their preferred pronouns.</p> <p>The sub-clause also continues to make use of binary terms such as “his” or “her”, which excludes learners that do not necessarily identify with these words. This may potentially lead to direct or indirect discrimination against LGBTQI+ learners by educators and learners.</p>	<p>It is recommended that the use of the words “he” or “she” as well as “his” or “her” in sub-clause 6.1 be removed and replaced with non-binary terms.</p> <p>It is recommended further that the following be inserted to sub-clause 6.1:</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>
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<p>Sub-clause 6.2</p>	<p>Sub-clause 6.2 currently stipulates that the LGBTQI+ learner will maintain his or her sex description on the Central Education Management Information System (CEMIS) as it appears on his or her birth certificate or where he or she has altered his or her sex description on his or her birth register at the Department of Home Affairs.</p> <p>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</p>	<p>It is recommended that sub-clause 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 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>
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	they can change their sex description on their birth register at the Department of Home Affairs, should they wish to do so, and to explain the process to them.	
<b>Clause 7 - “Dress Code and Physical Appearance”</b>		
Sub-clause 7.1	<p>Sub-clause 7.1 indicates that schools are merely <i>“encouraged to accommodate the dress code preferences of LGBTQI+ learners”</i> in their respective 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 that the Draft Guidelines are unclear on the distinction between gender identity and sexual orientation. This section is specifically relevant to gender non-conforming learners and this distinction should be expressed more clearly.</p> <p>The use of the terms “girls” and “boys” in sub-clause 7.1 again resorts to gender binary terms, and should be avoided.</p>	<p>It is recommended that sub-clause 7.1 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.</i></p> <p><i>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 to the school if they are uncomfortable doing so”.</i></p>
Sub-clause 7.2	<p>Sub-clause 7.2 states that <i>“Schools are also encouraged to allow for deviations from the school’s uniform policy on cultural, medical and gender diversity grounds”</i>. In addition, <i>“a letter of application signed by the parents may be submitted to the principal”</i>.</p> <p>This sub-clause has been revised to state that a letter of application signed by parents <i>may</i> be submitted to the principal (as opposed to</p>	<p>With the implementation of our recommendations for the amendment of sub-clause 7.1, sub-clause 7.2 will be unnecessary and should be removed.</p>

	<p>previously obliging parents to submit such a letter of application to the principal).</p> <p>The sub-clause fails to clarify what steps or processes a learner should follow if wanting to deviate from a schools' uniform policy, without parental consent.</p> <p>In addition, schools should take active steps to allow learners to express their gender identity through the school uniform, without the 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 made in respect of sub-clause 7.1 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>	
Sub-clause 7.2	<p>We recommend that the Draft Guidelines include a process whereby a school's code of conduct or uniform policy can be reviewed. Furthermore, 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 or uniform policy 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 or uniform policy 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</i></p>

		<i>development of inclusive codes of conduct to accommodate all gender identities”.</i>
Sub-clause 7.3	<p>Sub-clause 7.3 recommends that <i>“neatness and cleanliness be the underlying principles of the school’s dress code and the onus be on parents and learners to ensure that they remain presentable at all times”.</i></p> <p>It is unclear why the WCED feels it necessary to include this here. Its inclusion is offensive and it serves no purpose.</p>	We recommend that this sub-clause be removed.
Sub-clause 7.4	<p>The language used in sub-clause 7.4 is vague and confusing. It is not clear what is meant by <i>“anything goes”</i> and the sub-clause therefore does not succeed in its attempt to assist schools in making decisions about school uniforms.</p>	We recommend that this sub-clause be removed.
<b>Clause 8 - “Participation in Sports”</b>		
Sub-clause 8.1	<p>Sub-clause 8.1 states that <i>“Learners of all sexual orientations and gender identities may be encouraged to participate in sports, free from bullying, harassment and discrimination.”</i></p> <p>This sub-clause has been revised to include the word “may” as opposed to <i>“should be encouraged to participate in school sports, ...”</i>.</p> <p>This sub-clause implies that schools may choose whether or not to encourage LGBTQI+ learners to participate in sports, potentially allowing for a scenario in which a school chooses to discourage or refuse LGBTQI+ learners from participating.</p>	<p>We recommend that sub-clause 8.1 be amended to state the following:</p> <p><i>“Learners of all sexual orientations and gender identities should be encouraged to participate in school sports, free from bullying, harassment and discrimination.”</i></p>

## Section 9 - "Use of Toilet and Changing Room Facilities"

<p>Sub - clause 9.1.1</p>	<p>Sub-clause 9.1.1 states that a school may allow an LGBTQI+ learner to use the toilets and changing rooms they are most comfortable with. Sub-clause 9.1.1 provides further that, when making its determination, schools must consider the "safety measures", and "inherent risks", and it is recommended that the "sensitivity of other learners also be taken into account".</p> <p>It is problematic that an LGBTQI+ learner "may" be allowed to use the toilets and changing rooms they are most comfortable with. In order to avoid arbitrary discrimination, schools must be obliged to ensure that LGBTQI+ learners are able to use the toilets and changing room facilities they are comfortable with. Schools may achieve this by, for example, making gender-neutral or private bathrooms and change room facilities available, 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>The need for schools to consider "safety measures" and "inherent risks" in its determination also implies that LGBTQI+ learners pose a threat to other learners.</p> <p>We note that this sub-clause has been revised to only <i>recommend</i> that the sensitivity of other learners also be taken into account (as opposed to the instruction in the Draft Policy that "<i>the sensitivity of other learners must also be taken into account</i>"). This phrasing is problematic and could contribute to discrimination against queer learners.</p> <p>Schools should take every possible step to allow queer learners to use bathroom and changing room facilities they are most comfortable with, without having to request permission, or having</p>	<p>It is recommended that sub-clause 9.1.1 be replaced with the following:</p> <p><i>"Schools <u>must</u> ensure that LGBTQI+ 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 these facilities available. In doing so, schools may make gender-neutral or private bathrooms and changing room facilities available."</i></p> <p><i>"Schools, with the support of the Western Cape Department of Education, should take all the necessary steps to allow queer learners to use bathroom and changing 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 changing 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 changing room facilities at the school in a manner that protects their privacy, dignity, and safety".</i></p>
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	<p>to communicate any information about their gender identity with the school. Where provision needs to be made beyond making gender-neutral or private facilities available, learners should be allowed to make formal requests, and a clear process should be outlined in these guidelines for such applications.</p>	
Sub-clause 9.1.2	<p>Sub-clause 9.1.2 grants a school the discretion to provide “<i>unisex toilets</i>”, but only to the extent that it is “<i>reasonably practicable</i>” and within “<i>available financial resources and infrastructure</i>”. Read together with sub-clause 9.1.1, the discretion allowed in sub-clause 9.1.2 fails to ensure adequate measures are taken to accommodate LGBTQI+ learners at school. A school must be obliged to ensure that appropriate and safe bathroom and changing room facilities are made available to LGBTQI+ 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>	<p>The contents of sub-clause 9.1.2 is already dealt with in the recommended revised wording of sub-clause 9.1.1 above, and sub-clause 9.1.2 should be deleted.</p>
Clause 9 - Additional Comment	<p>While the Draft Guidelines allow LGBTQI+ learners to use school toilets and changing room facilities they are most comfortable with, the Draft Guidelines fail to address the obligation on the Western Cape Department of Education to consider this when constructing or renovating toilets and bathrooms.</p>	<p>It is recommended that the following addition should be included in clause 9:</p> <p><i>“The Western Cape Education Department and school governing bodies must ensure that during the construction or renovation of school toilets, bathrooms, and changing room facilities, explicit consideration is given to how the construction or renovation can best ensure that toilets and changing room facilities are inclusive, and sufficiently accommodate learners of different gender identities and sexual orientations.”</i></p>

## Clause 10 - "School Excursions and Hostels"

<p>Clause 10</p>	<p>Clause 10 of the Draft Guidelines addresses 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 Guidelines fail to outline a process for placing LGBTQI+ learners in hostel accommodation, or the process to be followed when a LGBTQI+ learner goes on a school excursion. 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>, while sub-clause 10.2 merely recommends that sleeping arrangements be considered very carefully before an excursion takes place.</p> <p>In respect of LGBTQI+ learners' participation in school excursions, as mentioned in sub-clause 10.2, the meaning of <i>"reasonable adjustments"</i> is unclear, while the reference to <i>"risk assessments"</i> once again implies that queer learners pose a threat to other learners.</p> <p>Moreover, the absence of a defined, transparent process, informed by relevant criteria, may lead to inconsistent, unreasonable and arbitrary decisions.</p> <p>Lastly, we note with concern that the Draft Policy, which stated that <i>"The sleeping arrangements will have to be thought about carefully before the excursion takes place"</i>, has now been revised to state the following in sub-clause 10.2 of the Draft Guidelines: <i>"It is recommended that sleeping</i></p>	<p>It is recommended that "School Excursions" and "Hostel accommodation" be treated as two separate items in the Draft Guidelines</p> <p><u>Hostel Accommodation</u></p> <p>In respect of hostel accommodation, we recommend the following to replace the current contents of clause 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> <p><i>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.</i></p> <p><i>When deciding on a LGBTQI+ learners' placement in a hostel, a school should give primary consideration to 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</i></p>
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*arrangements be considered very carefully before the excursion takes place, ...". This revision irrationally implies that schools have a choice as to whether or not they consider these arrangements carefully.*

*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, which aims to advance a culture of inclusiveness".*

School excursions:

We recommend that the current provisions dealing with school excursions be replaced with the following:

*"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.*

		<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 school must give primary consideration to 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 bathrooms 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 a parent or guardian”.</i></p>
Clause 10 - additional comment	The Draft Guidelines, in their current form, do not include proactive measures to ensure that the accommodation of LGBTQI+ learners is considered when construction or renovations take place at a school.	<p>The following addition should be included in clause 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>
<b>Clause 11 - “School Functions and the Matric Dance”</b>		
Sub-clause 11.1	Sub-clause 11.1 of the Draft Guidelines states the following: <i>“It is encouraged that learners be allowed to have dress code preferences of their choice.”</i>	We recommend that the following wording replace the current contents of sub-clause 11.1:

	<p>We note that the previous Draft Policy stated that: “[l]earners <i>should</i> be allowed to have dress code preferences of their choice”.</p> <p>We had previously commented that the use of the word “should” suggests that this position is aspirational, rather than a learner’s right. The current formulation of “it is encouraged” in the Draft Guidelines is even more discretionary, and implies that schools are not obligated to allow LGBTQI+ learners to wear their preferred dress code.</p>	<p><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></p>
Sub-clause 11.2	<p>The wording of sub-clause 11.2 fails to expressly oblige schools to ensure that learners feel safe to bring a partner of their choice.</p>	<p>We recommend that the following wording replace the current contents of sub-clause 11.2:</p> <p><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></p>
<p><b>Clause 12 - “Single Gender Schools”</b></p>		
Sub-clause 12.2	<p>While we recognise that the Draft Guidelines now clarify that governing bodies may admit LGBTQI+ learners and may make provision for their enrolment in a school’s admission policy, the language in this sub-clause remains confusing, and will likely lead to unfair discrimination against LGBTQI+ learners. Rather than only describing what governing bodies “may” do, this sub-clause should also prohibit governing bodies from discriminating against learners based on their gender identity and sexual orientation in admission processes.</p> <p>In addition, the Draft Guidelines should expressly oblige governing bodies to make provision for the admission of learners whose gender identity</p>	<p>We recommend that sub-clause 12.2 be amended in the following way:</p> <p><i>“Governing bodies of single gender schools may not, in their admissions process, discriminate against learners based on their gender identity or sexual orientation. Governing bodies 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></p>

	aligns with the gender of learners catered for by the school.	
Sub-clause 12.3 and 12.4	<p>A learner’s right to access basic education as protected by section 29(1)(a) of the Constitution is not subject to the “wishes” of any one person or group of people. It is therefore unlawful to deny a learner access to education on the basis that the “majority of the parents and learners” may be opposed to the admission of a learner.</p> <p>Furthermore, it is discriminatory to base the decision to admit a learner on their gender identity and sexual orientation in any circumstances.</p> <p>In addition, we note that this sub-clause has been revised to merely recommend that “schools be fair and objective in this instance and not be swayed by the subjective wishes of a particular group” (as opposed to the more instructive statement made in the Draft Policy that schools “<u>must</u> be fair and objective in this instance”). The Draft Guidelines therefore imply that a school’s exercise of fairness and objectivity is merely discretionary and suggest that unfair and subjective processes can be employed, and that schools may well be swayed by a particular group.</p>	We recommend that sub-clause 12.3 and 12.4 be removed in order for the Draft Guidelines to withstand constitutional scrutiny.
Sub-clause 12.5	<p>Sub-clause 12.5 states that “schools may engage in suitable education campaigns with the 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”.</p> <p>Engagement in education and sensitivity campaigns with the school community should be obligatory and should not only be limited to the admission of LGBTQI+ learners at school, but should also extend to general issues relating to gender identity and sexual orientation.</p>	<p>This sub-clause should be amended as follows:</p> <p>“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 LGBTQI+ learners to the school”.</p>

### Section 13 - "Safe Space"

<p>Clause 13.1</p>	<p>Sub-clause 13.1 states that <i>"It is recommended that schools strive to create an environment where LGBTQI+ learners get affirmation that, whatever their sexual orientation and gender identity are, they are respected, valued and deemed part of the normal spectrum of sexual orientations and gender identities."</i></p> <p>We note that this sub-clause has been revised to merely <i>recommend</i> that schools create such an environment, whereas the draft Policy had previously stated that schools <i>"must strive"</i> to do so.</p> <p>The wording of sub-clause 13.1 of the Draft Guidelines therefore implies that the creation of a school environment in which LGBTQI+ learners are affirmed, respected, and valued is merely discretionary, and that a school may choose not to follow such a recommendation.</p>	<p>It is recommended that sub-clause 13.1 be replaced by the following:</p> <p><i>"Schools <u>must</u> strive to create an environment where learners get affirmation that, whatever their sexual orientation and gender identity are, they are respected, valued and deemed part of the normal spectrum of sexual orientations and gender identities."</i></p>
<p>Sub-clause 13.2</p>	<p>In sub-clause 13.3, the WCED recommends that <i>"social diversity associations"</i> be established. However, the Draft Guidelines fail to define such associations, and do not explain their nature and purpose.</p>	<p>It is recommended that <i>"social diversity associations"</i> be defined in Clause 1 of the Draft Guidelines (namely in <i>"Definitions"</i>).</p>
<p>General comment on clause 13</p>	<p>The creation of a <i>"safe space"</i> 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-</p>	<p>It is recommended that clause 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>It is therefore recommended that the following wording be added to clause 13:</p> <p><i>"Schools must set up and enforce school rules and policies on homophobic, transphobic,</i></p>

	<p>bullying policy that specifically addresses such bullying.</p> <p>Schools must also create and implement strategies to address bullying of this nature. The Department of Basic Education’s “Guidelines on Challenging Homophobic Bullying in Schools” and the “National School Safety Framework” may inform this process, and assist in creating strategies to respond to homophobic bullying. In addition, the Draft Guidelines should define homophobic and related types of bullying.</p>	<p><i>and other bullying relating to gender identity, gender expression and sexual orientation.</i></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 where incidents of bullying are more prevalent on the school premises.</i></p> <p><i>Schools, with the 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 LGBTQI+ learners and do not discriminate against them in any way” .</i></p>
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**Clause 14 - "Curriculum Inclusiveness"**

<p>Sub-clause 14.2</p>	<p>The lead-in to sub-clause 14.2 of the Draft Guidelines states that <i>"It is recommended that gender inclusion be integrated in the curriculum, by - ..."</i>. We note that this sub-clause has been revised and differs from the Draft Policy, which stated that <i>"Gender inclusion <u>should</u> be integrated into the curriculum, by -..."</i>.</p> <p>The wording of sub-clause 14.2 of the draft Guidelines therefore implies that the integration of gender inclusivity into the curriculum is discretionary, and may potentially result in schools choosing not to do so.</p> <p>In addition, while we recognise the value of the strategies highlighted in sub-clause 14.2 that aim to integrate gender inclusiveness into a school curriculum, we recommend that additional strategies be employed. The recommendations made are not exhaustive, but aim to highlight other steps that can be taken within the school environment to advance inclusiveness.</p>	<p>Sub-clause 14.2 should be amended as follows:</p> <p><i>"Schools <u>must</u> integrate gender inclusivity in the school curriculum, by -"</i></p> <p>In addition, the following should be added to sub-clause 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> <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 LGBTQI+ 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>
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**Clause 15 - “Training of Schools by the Western Cape Education Department to raise Awareness”**

<p>Clause 15</p>	<p>The way this clause has been drafted creates confusion about who is responsible for the various actions described in this clause. For instance, while the heading explicitly mentions the Western Cape Department of Education, the sub-clauses also speak to obligations of principals and school communities.</p>	<p>We recommend that the title of this clause be changed to <i>“Training of schools and school communities to ensure inclusivity”</i>.</p>
<p>Sub-clause 15.1</p>	<p>This sub-clause does not provide sufficient clarity on how regularly training 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 sub-clause also limits training to the issue of gender diversity and fails to include training relating to gender expression or sexual orientation.</p> <p>Furthermore, the sub-clause fails to obligate the WCED to provide gender sensitivity training specifically for school staff to ensure that they are able to support LGBTQI+ learners.</p>	<p>We recommend that sub-clause 15.1 be replaced with the following:</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.</i></p> <p><i>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.</i></p> <p><i>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>Sub-clause 15.2</p>	<p>The phrasing of this sub-clause is vague and does not clarify who will be responsible for conducting this training, or which staff will receive such continuous professional development training.</p>	<p>Sub-clause 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</i></p>

		<i>homophobic, transphobic and other forms of bullying, harassment and discrimination” .</i>
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