



# Legal Gender Recognition in Botswana.

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



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## About Lesbians, Gays and Bisexuals of Botswana

LEGABIBO (Lesbians, Gays and Bisexuals of Botswana) is a national membership organisation formed in 1998 to raise awareness, tolerance and celebration of sexual and gender diversity. LEGABIBO was officially registered in April 2016 after a long court battle seeking legal recognition of the organisation by the Government of Botswana. The organisation works across programme areas including legal reform, increased access to sexual reproductive health services, partnerships for movement building and public education.

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

# Authorship and acknowledgement

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# List of acronyms

<b>ACHPR</b>	African Commission for Human and Peoples' Rights
<b>AIDS</b>	Acquired Immunodeficiency Syndrome
<b>AMA</b>	American Medical Association
<b>APA</b>	American Psychiatric Association
<b>BONELA</b>	Botswana Network on Ethics, Law and HIV and AIDS
<b>CEDAW</b>	Convention on the Elimination of All Forms of Discrimination against Women
<b>DCNR</b>	Department of Civil and National Registration
<b>DSM</b>	Diagnostic and Statistical Manual of Mental Disorders
<b>HIV</b>	Human Immunodeficiency Virus
<b>HRC</b>	United Nations Human Rights Council
<b>ICCPR</b>	International Covenant on Civil and Political Rights
<b>ICD</b>	International Classification of Diseases
<b>ICESCR</b>	International Covenant on Economic, Social and Cultural Rights
<b>ICJ</b>	International Commission of Jurists
<b>LEA</b>	Legal Environment Assessment
<b>LEGABIBO</b>	Lesbians, Gays and Bisexuals of Botswana
<b>LGBTI</b>	Lesbian, Gay, Bisexual, Transgender and Intersex
<b>MSM</b>	Men who have sex with men
<b>NGO</b>	Non-governmental organisation
<b>SDGs</b>	Sustainable Development Goals
<b>SOC</b>	Standards of Care
<b>SOGIE</b>	Sexual orientation and gender identity and expression
<b>STI</b>	Sexually transmitted infection
<b>UDHR</b>	Universal Declaration of Human Rights
<b>UN</b>	United Nations
<b>UNDP</b>	United Nations Development Programme
<b>WHO</b>	World Health Organization
<b>WPATH</b>	World Professional Association for Transgender Health
<b>YP</b>	Yogyakarta Principles

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# Understanding gender identity and gender affirmation: definitions and key concepts

<b>Cisgender</b>	Describes a person whose sense of personal identity and gender corresponds with the sex assigned to them at birth.
<b>Gender</b>	Gender refers to the socially constructed roles, behaviours, expressions, and identities of girls, women, boys, men, and gender diverse people. It influences how people perceive themselves and each other, how they act and interact, and the distribution of power and resources in society. Gender is usually conceptualized as a binary (girl/woman and boy/man), yet there is considerable diversity in how individuals and groups understand, experience, and express it <sup>1</sup>
<b>Gender affirmation</b>	The process in which transgender or gender diverse people have their gender affirmed or recognized.
<b>Gender affirming care, gender affirming healthcare</b>	Healthcare provided to support a transgender or gender diverse person's gender affirmation. This can include hormonal treatment, surgical interventions, as well as psychosocial support, hair removal and speech therapy.
<b>Gender affirming practices</b>	The steps taken by a transgender or gender diverse person to affirm their gender socially, psychologically, medically and/or legally. This includes their gender expression, any form of gender affirming healthcare they might use, and steps towards legal gender recognition.
<b>Gender expression</b>	The presentation of a person's gender through physical appearance and behaviour – including dress, hairstyles, accessories, cosmetics – and mannerisms, speech, behavioural patterns, names, and personal references <sup>2</sup> . A person's gender expression may or may not conform to that person's gender identity.
<b>Gender identity</b>	Each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech, and mannerisms <sup>3</sup>
<b>Gender marker</b>	The code used on identity documents, passports, or other State-issued documents that signifies someone's sex assigned at birth. Usual options are (M) for male, (F) for female, or (X) for non-disclosed or non-binary.
<b>Gender non-conforming</b>	A person whose gender identity and/or gender expression does not conform to typical feminine or masculine identity or expression.
<b>Legal gender recognition</b>	The process through which transgender and gender non-conforming people are able to ensure that their official documents, such as identity documents, driver's licenses, and school certificates, reflect their actual gender identity rather than the sex assigned to them at birth.

<sup>1</sup> Canadian Institute of Health Research: Definitions of Sex and Gender.

<sup>2</sup> Yogyakarta Principles plus 10 (2017).

<sup>3</sup> Preamble, Yogyakarta Principles (2007).

<b>Sex</b>	Sex refers to a set of biological attributes in humans and animals. It is primarily associated with physical and physiological features including chromosomes, gene expression, hormone levels and function, and reproductive/sexual anatomy. Sex is usually categorized as female or male but there is variation in the biological attributes that comprise sex and how those attributes are expressed <sup>4</sup>
<b>Sex assigned at birth</b>	The assignment and classification of people as male, female, intersex, or another sex assigned at birth, often based on physical anatomy at birth and/or karyotyping.
<b>Sex change</b>	An outdated term for gender affirmation.
<b>Sex change operation</b>	An outdated term for gender affirming surgery.
<b>Transgender</b>	An umbrella term for people whose gender identity and/or expression is different from cultural expectations based on the sex they were assigned at birth. Being transgender does not imply any specific sexual orientation. Therefore, transgender people may identify as straight, gay, lesbian, bisexual, etc <sup>5</sup>
<b>Transgender man</b>	A person who identifies as a man but was assigned a female sex at birth.
<b>Transgender woman</b>	A person who identifies as a woman but was assigned a male sex at birth.
<b>Transitioning</b>	Undergoing the process of gender affirmation. Most often used in relation to medical gender affirmation.



```

000)
switchcode(b)
end sub

sub procedure transmit2(disp b as boolean)
switchcode2(b)
delay: us(10000)
switchcode2(b)
delay: us(10000)
switchcode2(b)
end sub

sub procedure interrupt
TMR0 := %0
INTCON = %20 'set TOIE, clear TOIF
'scan input pin
if Button(GPIO, 5, 10, 1) then
state = true
else
state = false
and if
if state <> oldstate then
if state = true then
change true/false below depending on whether you
device goes high or low on triggering
transmit2%true
else
change false/true below depending on whether you
device goes high or low on triggering
transmit2%false
end if
end if
end sub

```

<sup>4</sup> Canadian Institute of Health Research: Definitions of Sex and Gender.

<sup>5</sup> Glossary on Gender Identity and Sexual Orientation.

# Introduction

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

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

In 2017, the Botswana High Court ordered the Government to change the gender marker on the identification document of a transgender individual.<sup>1</sup> In doing so, the High Court held that:

*"...the State has a duty to uphold the fundamental human rights of every person and to promote tolerance, acceptance and diversity within our constitutional democracy. This includes taking all necessary legislative, administrative and other measures to ensure that procedures exist whereby all State-issued identity documents which indicate a person's gender/sex reflect the person's self-defined gender identity."*<sup>2</sup>

The Botswana Government has agreed to abide by this court decision and gave its commitment to undertake an ongoing review of national laws "to address discrimination of marginalised and disadvantaged groups in society such as ... lesbians, gays, bisexuals, transgender and/or intersex persons."<sup>3</sup>

The Botswana Ministry of Health and Wellness in a 2017 report, recognised the need for full legal gender recognition:

*"Given the practical challenges and the risk of rights violations when individuals have identity documents "mismatched" with their gender identity, review section 16 of the National Registration Act with the aim of ensuring transgender and intersex persons are able to change the gender marker on their identity cards. If this law is changed, it would be beneficial to review additional legal provisions concerning gender identity to ensure harmonisation."*<sup>4</sup>

This research brief provides up to date information to the Government of Botswana, based on empirical evidence and international best practices, to inform the development of legislative and administrative measures that ensure the procedures for legal gender recognition ordered by the court.

The brief was developed in response to reports of administrative and procedural challenges for people wanting to change their legal gender marker after the *ND v Attorney General of Botswana* judgment. It was developed in consultation with organisations representing the interests of persons who identify as transgender, gender non-conforming or gender diverse, who met for a consultative meeting in Gaborone on 5 and 6 October 2019. At this meeting, transgender and gender diverse people shared experiences of being denied a change of gender marker in their identity documents. People said they had been told that they needed to obtain a court order in order to change their gender marker. Such requests indicate a misunderstanding of the *ND v Attorney General of Botswana* judgment among the authorities responsible for changes to identity documents. This misunderstanding results in a barrier for transgender people who want to change their gender marker in their identity documents. It highlights the need for the Government of Botswana to take legislative, administrative and other measures to ensure that people can change their gender marker freely and without barriers.

<sup>1</sup> ND v Attorney General of Botswana and Another, MAHGB-000449-15, 29 September 2017.

<sup>2</sup> ND v Attorney General of Botswana and Another, MAHGB-000449-15, 29 September 2017, para 80.

<sup>3</sup> Republic of Botswana (2018) National Report submitted Human Rights Council, para 52.

<sup>4</sup> Assessment of Legal and Regulatory Framework For HIV, Aids and Tuberculosis, Botswana Ministry of Health and Wellness (2017), p. 107.

# What is legal gender recognition?

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

A transgender person's ability to live in dignity, equality, and security is severely compromised if they do not have an identity document that matches their gender identity, and that instead lists their title, name, sex and/or gender based on the sex assigned to them at birth.

## Why is legal gender recognition important?

A recent analysis by the Legal Resources Centre in Cape Town, South Africa shows why it is important for transgender people to be able to change their gender markers and possess identity documents that match their gender identity. Transgender people whose gender does not fit the sex/gender listed in their identity documents are vulnerable to discrimination and stigmatization wherever they are required to show an identity document for verification of their identity. This can involve threats of violence, or mean that they face denials of travel, bank accounts and healthcare, and are often unable to fully participate in the civil and political life of their country. Often, identity verification is required at times when people are particularly vulnerable, including when faced with a medical emergency, when they are homeless, or when they are crossing borders. As the report states:

*"The mismatch between the physical appearance of transgender individuals and their identity documentation has numerous consequences on their ability to conduct day-to-day life. It was noted earlier that the gender mis-match between the identity documentation and the appearance of the individuals has resulted in accusations of fraud and refusals of, for example, bank services."<sup>5</sup>*

<sup>5</sup> Legal Resources Centre and Gender Dynamix (2015).

This has also been acknowledged by the Botswana High Court in *ND v Attorney General of Botswana and Others*,<sup>6</sup> when it noted with concern the ongoing distress and discomfort experienced by transgender persons when they are required to explain intimate details of their life to strangers whenever they seek to access routine services. The High Court of Botswana observed that the lack of legal recognition amounts to an invasion of the right to privacy, and that arbitrary interference or embarrassment and the intrusion of privacy faced by transgender persons may be avoided or minimised by the State by allowing them to change the gender marker on their identity documents.

The legal recognition of gender identity permits transgender people to align their identity documents with their expressed gender or gender identity and is an important step towards the realisation of the fundamental rights of transgender persons. To this end, legal gender recognition has been identified as a crucial step for achieving a number of Sustainable Development Goals (SDGs),<sup>7</sup> including gender equality, ensuring healthy lives and fulfilling the commitment to "leave no one behind."<sup>8</sup> Following the principle of self-determination, any person who wishes to access legal gender recognition should be able to do so.

<sup>6</sup> *ND v Attorney General MAHGB-000449-11* (unreported, delivered on 29 September 2017 ("ND").

<sup>7</sup> United Nations (2015).

<sup>8</sup> UNDP & APTN (2017).

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

Compared to the general population, transgender, gender non-conforming and gender diverse people in Botswana experience higher levels of discrimination, violence and ill health. This is because their gender identity, which does not conform to narrowly defined societal norms, renders them more vulnerable. Gender identity is a so-called social determinant of health, which means that it is a factor that influences people's health via their social context, their communities and their experiences of social exclusion.<sup>9</sup> In Botswana, the Ministry of Health and Wellness has recognised this, and transgender people are considered a vulnerable population under the *Botswana Second National Strategic Framework for HIV & AIDS 2010-2017*.<sup>10</sup>

The recent *'Are we doing alright?'* study sheds light on the lived experiences of transgender and gender non-conforming people in Botswana.<sup>11</sup> The study was conducted by the University of Cape Town and three non-governmental organisations in Botswana (LEGABIBO, BONELA and Rainbow Identity Association). It was approved by the University of Botswana and the Botswana Ministry of Health and Wellness and was carried out in eleven locations across Botswana. The study shows that transgender and gender non-conforming people in Botswana often experience discrimination and violence because of their gender identity and expression.

Of the 77 transgender and gender non-conforming people in the study, less than half (45%) were employed. Two thirds (67%) said that they did not have sufficient funds to cover their everyday needs. Two in five (39%) had hidden health concerns from their healthcare provider because they were afraid to disclose their gender identity. More than half said that because of their gender identity, they had been treated disrespectfully at

a healthcare facility (55%), almost half (46%) said they had been insulted at a healthcare facility, and one quarter (25%) had been denied healthcare because of their gender identity.

At the same time, the *'Are we doing alright?'* study suggests that transgender and gender non-conforming people might be at higher risk of experiencing violence and mental ill-health, compared to the general population.<sup>12</sup> More than half (56%) had experienced verbal harassment because of their gender identity, half (48%) had experienced physical violence and more than one third (38%) had experienced sexual violence.

The same study showed that mental health concerns were high among transgender and gender non-conforming people in Botswana.<sup>13</sup> Half of the transgender and gender non-conforming study participants (53%) showed signs of depression. Between one in four and one in six showed signs of moderate or severe anxiety (22% among transgender women, 24% among transgender men and 17% among gender non-conforming people). Many had attempted suicide: one in three transgender women (32%), more than one in three transgender men (35%) and three in five gender non-conforming people (61%).

International research, as well as research from Botswana, suggests that not being able to change one's gender marker has a negative impact on access to healthcare and mental health and wellbeing. The *'Are we doing alright?'* study showed that one in four transgender people in Botswana (25%) had been denied access to healthcare.<sup>14</sup> This is, at least in part, linked to not being able to change one's gender marker in the identity documents, and thus not having an identity document that matches one's gender identity and gender expression.<sup>15</sup> In its *Assessment of Legal And Regulatory Framework For HIV, AIDS And Tuberculosis*, the Botswana Ministry of Health and Wellness noted that:

*"Transgender persons in Botswana are unable to access identity documents that reflect their gender identity, which is a barrier to health services, including in the context of HIV. For example, if a transgender woman has an identity document that indicates she*

<sup>9</sup> The ways in which gender identity works as a social determinant of health has been well established in international academic literature. See, for example, Hendricks, M.L. and Testa, R.J. (2012).

<sup>10</sup> See the report by the Botswana Ministry of Health and Wellness (Republic of Botswana: Ministry of Health and Wellness and United Nations Development Program (UNDP), 2017).

<sup>11</sup> See Müller, A., Daskilewicz, K. and the Southern and East African Research Collective on Health (2019).

<sup>12</sup> Id.

<sup>13</sup> Id.

<sup>14</sup> Id.

<sup>15</sup> Muzenda, G., The Other Foundation (2016).

*is male, she may be denied admission into a health facility. In one documented case, a transwoman's identity card did not reflect her gender identity—her identity card photo indicated she was 'male'. When she presented her identity card at a health facility, a health worker called the police who took her into custody. Identity card issues also lead to confusion and delays in access to HIV-related and other health services for transgender and gender non-conforming persons ...*<sup>16</sup>

The necessity of a correct national identity document goes beyond healthcare, however. The High Court of Botswana explains that:

*"In Botswana, the National Identity [document] plays a pivotal role in every Motswana's daily life, as it links him/her with any service they require from various institutions. Most activities in the country require every Motswana to produce their identity document ('Omang') for identification for purposes of receiving services e.g. in shops where one desires to pay through a credit card, in banks for various services and in other institutions. Problems arise where there is a discrepancy between the information in the identity document and the physical appearance of the person identified ..."*<sup>17</sup>

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

*"The lack of legal recognition and protection places transgender and intersex people in Botswana at higher risk of discrimination, violence and abuse. It also creates difficulty in finding stable employment when gender expressions are different to official identity documents."*<sup>18</sup>

In various existing reports, transgender and gender diverse Botswana share examples of how having an identity document that does not reflect one's gender identity or gender expression poses significant barriers to participating in daily life. An unemployed accountant who identifies as a transgender man remembered that during an employment interview, he was accused of fraud when his identity document did not match his gender. He was not offered the position:

*"Every time I present my identity documents, people shut down and stare. Once I was accused of impersonation and fraud. So, I had to explain to them my sex characteristics. Even then, they still did not employ me."*<sup>19</sup>

Research conducted by the International Commission of Jurists (ICJ) found reports of transwomen in Botswana being singled out for abuse by police and detained for fraud because their identity documents did not match their gender identity:<sup>20</sup>

*"The police find it OK to arrest transwomen and say they are cross dressing. It's just like a gay man cross-dressing, they find it a nuisance. The law doesn't say anything about it. That person is expressing their gender identity."*<sup>21</sup>

For transgender people who travel internationally, having a passport that does not match their gender identity and expression further poses problems when boarding flights and entering other countries, and even results in immigration detention.<sup>22</sup>

These examples show the manifold difficulties that transgender people in Botswana experience when their identity document does not match their gender identity and expression. But besides impeding access to healthcare, travel, bank accounts and other civic rights, not having an identity document that matches one's gender identity and gender expression also increases the risk for experiencing violence, and it negatively impacts one's mental health. Because transgender and gender non-conforming people in Botswana struggle to change their gender marker in their identity documents, it is very likely that at least some of the mental health burden that has been described in the 'Are we doing alright?' study is due to this.

<sup>16</sup> Cited in Republic of Botswana: Ministry of Health and Wellness and United Nations Development Programme (UNDP) (2017) p. 107.

<sup>17</sup> ND v Attorney General of Botswana and Another, MAHGB-000449-15, 29 September 2017, para 23.

<sup>18</sup> Muzenda, G., The Other Foundation (2016), p. 11.

<sup>19</sup> Cited in Muzenda, G. (2016), p. 11.

<sup>20</sup> ICJ (2013), p. 51.

<sup>21</sup> ARASA (2016), p. 96.

<sup>22</sup> ICJ (2013) Women's Access to Justice in Botswana, p. 51

The High Court of Botswana recognised that not having identity documents that match their gender identity denies transgender people the equal protection of the law -

*"thereby leaving [them] extremely vulnerable to harassment, violence and sexual assault in the public space, airports, at home and also by the police. This can also result in extreme discrimination in all spheres of society, especially in the field of employment, education and health care."<sup>23</sup>*

In order to ensure that all people in Botswana, including transgender and gender non-conforming people, have full access to all public services and can fully participate in civic life, they need to be able to change the sex/gender marker in their identity documents to match their gender identity and expression. However, the findings from the 'Are we doing alright?' study show that this is impossible for most transgender and gender non-conforming Botswana: 82% of transgender people who participated in the study currently have an identity document with an incorrect gender marker.<sup>24</sup>

The following section explains the current legislation and shows how, under Botswana's current laws, a change of sex/gender marker is possible in line with the High Court judgment of *ND v Attorney General of Botswana and Another*.

The research brief then outlines the constitutional rights that transgender and gender non-conforming people, like all people in Botswana, hold. It is for the realisation of these rights that people need identity documents that match their gender identity and expression. The brief concludes by reviewing several gender recognition laws from other countries that are considered best practices. Finally, the research brief provides specific recommendations to various stakeholders in order to improve access to legal gender recognition for transgender and gender non-conforming people in Botswana.

<sup>23</sup> ND v Attorney General of Botswana and Another, MAHGB-000449-15, 29 September 2017, para 130.

<sup>24</sup> Personal communication Prof A. Müller, international principal investigator of the study. This number only speaks to Botswana who identify as transgender women or transgender men. Botswana who identify as gender non-conforming do not have the option of a third gender marker that recognizes their non-binary gender identity. It is likely that study participants who identified as gender non-conforming encounter similar barriers when accessing public services, as their gender expression likely does not match the gender marker on their identity document.

## Defining sex, gender and gender affirmation

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

### Sex

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

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

### Gender

Whilst sex refers to the biological features of a body, gender in this context refers to someone's identity. This means it is a person's sense of self, of who they are. In the 1970s, gender was mostly thought to be binary (either woman or man) and linked to the sex of a body.<sup>25</sup> People assumed that persons with a penis and XY chromosomes (male sex) identify themselves as men (their gender). And that persons with breasts, vaginas, and XX chromosomes (female sex) identify themselves as women.

By now, it is clear that gender is much more diverse than

<sup>25</sup> Drescher, J. (2009); Drescher, J., Cohen-Kettenis, P. and Winter, S. (2012).

only woman or man, and that it is not necessarily linked to biological sex. This means that biological sex does not determine a person's gender. This also means that people can identify their gender as woman, as man, or as another gender. The term 'transgender' has developed into a broad category for people who experience a mismatch between the sex assigned to them at birth and their gender identity.<sup>26</sup>

There is a wide diversity in people's gender identity and gender expression. Gender identity is an innate characteristic, it is not a choice or a preference, and it cannot be altered or changed. Current research evidence shows that gender outside of the strict man/woman binary is simply a part of human gender diversity, it is not an illness, and it is not a medical condition in and of itself.<sup>27</sup>

## Gender affirmation

Legal gender recognition is an important part of gender affirmation. Gender affirmation is the process in which transgender people have their gender affirmed or recognized.<sup>28</sup> This means that the biological sex that they were identified with at birth does not determine their gender, and that their body reflects their gender identity, rather than the sex they were assigned at birth. Gender affirmation contains four elements: social gender affirmation, psychological gender affirmation, medical gender affirmation and legal gender affirmation. These are explained in more detail in the section "What is gender affirming care?". Transgender people might choose to affirm their gender in one or more of these four areas.

## From pathology to self-determination

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

In the 1980s, gender diversity was regarded as a mental health condition. Doctors and other healthcare providers thought that people whose gender does not match the sex assigned to them at birth had a mental health condition, that there was something inherently pathological about their gender diversity. Today, this assumption has been proven wrong, and it is increasingly accepted that gender diversity is a natural variation and is not a mental illness (or any other illness). This is illustrated in the way that gender diversity has been represented in medical classifications.

Medical classifications are manuals in which doctors and other healthcare providers list the diseases they know, their symptoms, and their treatments. When something is included in a medical classification manual, it is meant to guide doctors on how to treat it. This, by definition, shows that it is regarded as an illness or a disease. There are two main medical classification manuals worldwide. The International Classification of Diseases (ICD) is published by the World Health Organization (WHO) and lists every medical condition that the WHO considers an illness.<sup>29</sup> The ICD is the basis on which healthcare providers treat patients, and on which healthcare systems develop treatment guidelines and allocate resources. In addition to the ICD, the Diagnostic and Statistical Manual of Mental Disorders (DSM) is a manual specifically for mental health conditions.<sup>30</sup> Published by the American Psychiatric Association, it lists the definitions and diagnostic criteria for all mental health concerns that are considered mental illnesses. It is the basis on which mental health professionals diagnose and treat mental illnesses. Thus, it is similar to the ICD, but focuses only and specifically on mental health.

<sup>26</sup> Victor, C.J., Nel, J.A., Lynch, I., Mbatha, K. (2014). Spencer, S., Meer, T. and Müller, A. (2017).

<sup>27</sup> Suess, A., Espineira, K., Walters, P.C. (2014).

<sup>28</sup> The Lancet (2016).

<sup>29</sup> World Health Organization (2019).

<sup>30</sup> American Psychiatric Association (2013).

Transgender activists and academics have always pointed out that gender diversity in and of itself is not pathological, and that therefore it should not be considered an illness, and not have a diagnosis.<sup>31</sup> Many transgender people and healthcare providers have advocated for the removal of gender diversity-related diagnoses from diagnostic manuals.

In the ICD-11, published in 2019 and operational from 2022, the World Health Organization renamed the diagnosis related to gender diversity, moving it out of the section on mental health.<sup>32</sup> Instead of 'gender identity disorder', the diagnosis is now called 'gender incongruence', which aims to reflect the mismatch (the incongruence) between persons' gender identity and their sex characteristics. The 'gender incongruence' diagnosis has been moved to the section on sexual health. According to the WHO "[t]his [change] reflects evidence that trans-related and gender diverse identities are not conditions of mental ill health and classifying them as such can cause enormous stigma."<sup>33</sup>

The World Professional Association for Transgender Health (WPATH) emphasises that the self-determination of transgender people is important.<sup>34</sup> That is, that transgender people themselves should be the ones who make decisions about their bodies, about if and when they change their sex/gender marker on their identity document, and whether, how and when they want to use medical interventions to affirm their gender. It means that doctors should not decide this for transgender people. This principle of self-determination is important. It should guide States in how to provide healthcare for transgender people, but also in allowing transgender people to make other decisions for themselves – for example, changing their gender markers on identity documents.

## What is gender affirming care?

Legal gender recognition is an important aspect of gender affirmation. Gender affirmation, however, is more than changing one's sex/gender marker on identity documents. Legal gender recognition can form part of a larger process of gender affirmation. For this reason, the following section provides an overview of all areas of gender affirmation. It is important to note that medical gender affirmation is not a prerequisite for legal gender recognition.

Gender affirmation includes a range of social, legal, psychological, behavioural or medical (including hormonal treatment or surgery) interventions designed to support and affirm an individual's gender identity.<sup>35</sup> It works towards alleviating the potential distress that transgender people experience through exploring and locating a gender identity that is suited to each individual.<sup>36</sup> Gender affirmation encompasses any, or all, of the following: social gender affirmation, psychological gender affirmation, legal gender recognition and/or medical gender affirmation.<sup>37</sup>

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

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

<sup>31</sup> Suess, A., Espineira, K., Walters, P.C. (2014).

<sup>32</sup> World Health Organization (2019)

<sup>33</sup> World Health Organization (Europe) (2019).

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

<sup>35</sup> Id.

<sup>36</sup> Coleman, E., Bockting, W., Botzer, M., Cohen-Kettenis, P.T., De Cuypere, G., Feldman, J., et al. (2012).

<sup>37</sup> The Lancet (2016).

*on mental health; alleviating internalized transphobia enhancing social and peer support; improving body image; or promoting resilience.*<sup>38</sup>

Due to the individualised nature of each person's lived experience, transgender persons might choose to pursue all, some, or none of these pathways of care.<sup>39</sup> Regardless of what the specific care is, WPATH also stresses the following principles, based on which aspects should be provided:<sup>40</sup>

- Exhibit respect for patients with non-conforming gender identities (do not pathologise differences in gender identity or expression);
- Provide care (or refer to knowledgeable colleagues) that affirms patients' gender identities and reduces the distress of gender dysphoria, when present;
- Become knowledgeable about the healthcare needs of transsexual, transgender, and gender non-conforming people, including the benefits and risks of treatment options for gender dysphoria;
- Match the treatment approach to the specific needs of patients, particularly their goals for gender expression and need for relief from gender dysphoria;
- Facilitate access to appropriate care;
- Seek patients' informed consent before providing treatment;
- Offer continuity of care; and
- Be prepared to support and advocate for patients within their families and communities (schools, workplaces, and other settings).<sup>41</sup>

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

The elements of gender affirmation include:<sup>42</sup>

## Social gender affirmation

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

## Psychological gender affirmation

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

## Medical gender affirmation

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

## Hormonal gender affirmation

Feminising or masculinising hormone therapy—the administration of hormones to induce feminising or masculinising changes—is a medically necessary intervention for many transgender and gender non-conforming individuals. The goal of hormone therapy is to initiate changes that will make the body more aligned to the individual's gender identity. Most of these changes occur within two years.

- Feminising hormone therapy aims to support breast growth, a decrease in the erectile function, a decreased in the size of the testicles, and an increased percentage of body fat compared to muscle mass, with a shift in body shape towards more conventionally feminine-looking. For feminizing hormone therapy, oestrogen and progesterone is given, together with an androgen blocker, usually orally.

<sup>38</sup> Coleman, E., Bockting, W., Botzer, M., Cohen-Kettenis, P.T., De Cuypere, G., Feldman, J., et al. (2012).

<sup>39</sup> Spencer, S., et al. (2017).

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

<sup>41</sup> Id.

<sup>42</sup> The Lancet (2016).

- Masculinising hormone therapy aims to support the deepening of the voice, enlargement of the clitoris, increased growth of facial and body hair, cessation of menstruation, breast reduction, and a decreased percentage of body fat compared to muscle mass, with a shift in body shape towards more conventionally masculine-looking. For masculinising hormone therapy, testosterone is given, usually by injection.
- Breast/chest surgery: subcutaneous mastectomy (removal of breasts), creation of a male chest;
- Genital surgery: hysterectomy/salpingo-oophorectomy (removal of uterus), phalloplasty (creation of a penis), vaginectomy (removal of the vagina), scrotoplasty (creation of testicles), and implantation of erection and/or testicular prostheses;
- Non-genital, non-breast surgical interventions: voice surgery (rare), liposuction, lipofilling, pectoral implants, and various aesthetic procedures.<sup>45</sup>

### Surgical gender affirmation

Surgery, and genital surgery in particular, is considered the last step of gender affirmation for transgender people.<sup>43</sup> Many transgender and gender non-conforming people might be happy with their gender affirmation through social and hormonal processes only. Gender affirming surgery is not a prerequisite for gender affirmation. For some transgender people, however, surgical interventions are a medical necessity. Surgery can help people feel more at ease in the presence of sex partners or in their everyday life. In some settings, particularly where non-conforming gender expressions are stigmatized, surgery might reduce risk of harm through violence because it allows people to be less obviously gender non-conforming in public.

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

Feminising surgical interventions include:

- Breast/chest surgery: augmentation mammoplasty (build-up of breast tissue);
- Genital surgery: penectomy (removal of the penis), orchiectomy (removal of the testicles), vaginoplasty (creation of a vagina), clitoroplasty (creation of a clitoris), vulvoplasty (creation of a vulva);
- Non-genital, non-breast surgical interventions: facial feminization surgery, liposuction, lipofilling, voice surgery, thyroid cartilage reduction, gluteal augmentation (implants/lipofilling), hair reconstruction, and various aesthetic procedures.<sup>44</sup>

Masculinising surgical interventions include:

### Voice and communication therapy

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

## Legal gender affirmation and recognition

Whilst legal gender recognition is a crucial aspect of legal protection for transgender people on its own, it is also an important element of gender affirmation. According to *The Lancet* special edition on Transgender Health, legal gender recognition is the fourth element of gender affirmation.<sup>46</sup> Supporting this, the World Health Organization states that:

*"Legal gender recognition, represented through documents reflecting a person's gender identity, is important for protection, dignity and health. Many countries [...] impose a number of conditions on changing documents [...]. Human rights bodies conclude that [such] requirements run counter to respect for bodily integrity, self-determination and human dignity, and can cause and perpetuate discrimination against transgender people."<sup>47</sup>*

<sup>43</sup> World Professional Association for Transgender Health (2012).

<sup>44</sup> Id.

<sup>45</sup> Id.

<sup>46</sup> The Lancet (2016).

<sup>47</sup> World Health Organization (Europe) (2019).

## The benefits of gender affirmation

Both the World Health Organization (WHO) and the American Psychiatric Association's (APA) diagnostic guidelines say that gender affirming care is important for the physical and mental wellbeing of transgender people who wish to transition.<sup>48</sup>

Despite the individualized nature of gender affirming care, it is a clinically recognised necessity for those who wish to align their body to their identified gender.<sup>49</sup> This necessity has been acknowledged by the WHO, APA, WPATH, and various health districts around the world. For example, the Royal College of Psychiatrists uses the SOC-7 to inform its United Kingdom standards of care,<sup>50</sup> and the American Medical Association (AMA) states that gender affirming care is neither cosmetic nor experimental and that:

*"if [transgender people do not have access to it, this] can result in clinically significant distress, dysfunction, debilitating depression, and for some people without access to appropriate medical care and treatment, suicidality and death."<sup>51</sup>*

The World Professional Association on Transgender Health, in the current Standards of Care 7 (SOC-7) and an expansive body of research,<sup>52</sup> as well as the American Psychiatric Association have recognized that the –

*"lack of access to care adversely impacts on the mental health of transgender and gender variant people, and both hormonal and surgical treatments have been shown to be efficacious in these individuals."<sup>53</sup>*

## Review of international principles around legal gender recognition and affirmation

This section reviews international guidance and accepted principles around legal gender recognition from a human rights perspective. These international principles are aids to the interpretation of domestic laws.

In 2006, a panel of international human rights experts published the *Yogyakarta Principles (YP)*, a guidance document that addresses a broad range of international human rights standards and their application to issues of sexual orientation and gender identity.<sup>54</sup> In 2017, the panel published additional principles, which expand on the original document and reflect developments in international human rights law and practice. These new Principles are called *The Yogyakarta Principles plus 10*.<sup>55</sup> The new document also contains 111 'additional State obligations', related to areas such as torture, asylum, privacy, health, and the protection of human rights defenders.

The *Yogyakarta Principles* and the *Yogyakarta Principles plus 10* are instructive in defining legal and human rights principles for legislating and implementing legal gender recognition.

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

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

<sup>48</sup> Colizzi, M., Costa, R., Todarello, O. (2015). Spencer, S., et al. (2017).

<sup>49</sup> Id.

<sup>50</sup> Royal College of Psychiatrists (2013). Spencer, S., et al. (2017).

<sup>51</sup> American Medical Association, House of Delegates. (2008).

<sup>52</sup> See, for example, Smith, Y.L.S., Van Goozen, S.H.M., Kuiper, A.J., Cohen-Kettenis, P.T. (2005) and Newfield, E., Hart, S., Dibble, S., Kohler, L. (2006).

<sup>53</sup> Drescher, J. and Haller, E. (2012). Spencer, S., et al. (2017).

<sup>54</sup> Yogyakarta Principles (2006).

<sup>55</sup> Yogyakarta Principles Plus 10 (2017).

**FIGURE 1: YOGYAKARTA PRINCIPLE 31 - THE RIGHT TO LEGAL RECOGNITION<sup>56</sup>**

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

## PRINCIPLE 31

### STATES SHALL:

- A. Ensure that official identity documents only include personal information that is relevant, reasonable and necessary as required by the law for a legitimate purpose, and thereby end the registration of the sex and gender of the person in identity documents such as birth certificates, identification cards passports and driver licences, and as part of their legal personatlity;
- B. Ensure access to a quick, transparent and accessible mechanism to change names, including to gender-neutral names, based on the self-determination of the person;
- C. While sex or gender continues to be registered:
  - i. Ensure a quick, transparent, and accessible mechanism that legally regocnises and affirms each person's self-defined gender identity;
  - ii. Make available a multiplicity of gender marker options;
  - iii. Ensure that no eligibility criteria, such as medical or psychological interventions, a psycho-medical diagnosis, minimum or maximum age, economic status, health, marital or parental status, or any other third party opinion, shall be a prerequisite to change one's name, legal sex or gender;
  - iv. Ensure that a person'a criminal record, immigration status or other status is not used to prevent a change of name, legal sex or gender.

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

The Yogyakarta Principle 3 asserts that:

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

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

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

<sup>56</sup> Yogyakarta Principles Plus 10 (2017).

## The right to privacy (YP-6)

A key component of respecting an individual's privacy means respecting their inherent dignity as a person.<sup>57</sup>

Denying legal gender recognition to a person who has affirmed their gender socially or medically has the consequence of forcing them to effectively disclose their transition whenever they have to use a form of identification that holds information about their legal gender. This is in violation of Yogyakarta Principle 6(f):

*"The right to privacy ordinarily includes the choice to disclose or not to disclose information relating to one's sexual orientation or gender identity."*

*Ensure the right of all persons ordinarily to choose when, to whom and how to disclose information pertaining to their sexual orientation or gender identity, and protect all persons from arbitrary or unwanted disclosure, or threat of disclosure of such information by others."*

<sup>57</sup> The HIV and AIDS Legal Environment Assessment report (2014).

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

Yogyakarta Principle 17 (YP-17) affirms international human rights commitments related to the highest attainable standard of health. It reiterates the International Covenant on Economic, Social and Cultural Rights,<sup>58</sup> and General Comment 14,<sup>59</sup> and clarifies that everyone has the right to the highest attainable standard of health without discrimination based on sexual orientation or gender identity:

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

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

*"G. facilitate access by those seeking body modifications related to gender reassignment to competent, non-discriminatory treatment, care and support."*

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

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

YP-17(g), (k) and (l) are directly relevant in the context of Botswana, where gender affirming healthcare is currently not readily available.

By not changing the sex/gender marker of transgender people on identity documents, the Government of Botswana creates a situation where transgender people cannot access health services.

<sup>58</sup> International Covenant on Economic, Social and Cultural Rights, 1976.

<sup>59</sup> Committee on Economic, Social and Cultural Rights, General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12).

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

Yogyakarta Principle 19 (YP-19) returns to social and legal gender affirmation through choice of one's name and interprets it through the frame of freedom of opinion and expression. It asserts that to choose one's name is a fundamental aspect of the right to freedom of expression.

YP-19:

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

YP-19(C):

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

## Overview of relevant laws in Botswana

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

### Interpretation Act of 1984

The Interpretation Act No. 20 of 1984 (Cap 01:04) provides important guidance on the interpretation of Botswana's laws. The Act reinforces two cardinal rules of interpretation: Firstly, an Act shall be construed as a whole;<sup>60</sup> and secondly, "every enactment shall be deemed remedial and for the public-good and shall receive such fair and liberal construction as will best attain its object according to its true intent and spirit".<sup>61</sup> The courts have used the same approach when interpreting the Constitution:

*"A constitution such as the Constitution of Botswana, embodying fundamental rights, should as far as its language permits be given a broad construction. Constitutional rights conferred without express limitation*

<sup>60</sup> Section 29 of the Interpretation Act, 1984.

<sup>61</sup> Section 26 of the Interpretation Act, 1984.

should not be cut down by reading implicit restrictions into them, so as to bring them into line with the common law.”<sup>62</sup>

Although no law appears to define either ‘sex’ or ‘gender’, the Interpretation Act uses these terms interchangeably:

“44. **Gender and number**

(1) In an enactment words importing the male **sex** include the female **sex** and words importing the female **sex** include males.

(2) Where an enactment employs the term “person” or “party”, the use of a pronoun importing gender shall not of itself be construed as limiting the term to a natural person...”

## Constitutional framework

The Constitution of Botswana has a bill of rights, which guarantees the fundamental rights and freedoms of all people, without discrimination on any grounds (including the ground of “sex”). These protections include, amongst others, the rights to life, privacy and freedom of expression. Transgender, gender non-conforming and gender diverse people in Botswana, like everyone else, have full access to all rights listed in the Constitution.

In the 2016 case of *Attorney General v Rammoge and 19 Others*, the Botswana Court of Appeal confirmed that every person in Botswana is entitled to constitutional rights, irrespective of their sexual orientation or gender identity.<sup>63</sup>

*“Members of the gay, lesbian and transgender community, although no doubt a small minority, and unacceptable to some on religious or other grounds, form part of the rich diversity of any nation and are fully entitled in Botswana, as in any other progressive state, to the constitutional protection of their dignity.”<sup>64</sup>*

In the case of *ND v Attorney General of Botswana*,<sup>65</sup> the Botswana High Court explicitly stated that the State has a duty to protect the rights of transgender individuals. This judgment was cited with approval by the Botswana High Court in the case of *LM v Attorney General of Botswana*:

<sup>62</sup> Kentridge JA in *AG v Moagi* 1982 (2) BLR 124.

<sup>63</sup> *Attorney General of Botswana v Rammoge and 19 Others*, 2016 All Bots 165 (CA), para 60: “Fundamental rights are to be enjoyed by every person ... To deny any person his or her humanity is to deny such person human dignity.”

<sup>64</sup> *id.*

<sup>65</sup> *ND v Attorney General of Botswana and Another*, MAHGB-000449-15, 29 September 2017, para 130 (unreported).

*“[t]he State has a duty to uphold the fundamental rights of every person and to promote tolerance, acceptance and diversity within our constitutional democracy.”<sup>66</sup>*

These cases lay out the constitutional principles. They have established that transgender and gender non-conforming people are protected under all rights in the Constitution of Botswana and are entitled to access all services available to people living in Botswana, without discrimination based on their gender identity. Legal gender recognition can help ensure that individuals are able to express themselves freely, and enjoy their daily lives in a dignified manner, without inhibiting their movement, education, access to services and privacy, and without risking discrimination, and cruel treatment. As such, the Government of Botswana should protect the rights of transgender persons and facilitate legal gender recognition.<sup>67</sup>

FUNDAMENTAL HUMAN RIGHT	SECTION IN CONSTITUTION
Right to dignity	Section 3
Right to protection of the law	Section 3
Freedom from inhuman and degrading treatment	Section 7
Right to privacy	Section 9
Freedom of expression	Section 12
Freedom of movement	Section 14
Freedom from discrimination	Section 15

### *The right to equal protection of the law*

Section 3 of the Constitution of Botswana protects the rights of “every person”. Previous case law established that transgender people, regardless of their gender identity, have the right to equal protection of the law under section 3 of the Constitution.<sup>68</sup>

In the *ND v Attorney General of Botswana and Another* judgment, the High Court pointed out that in order to -

*“uphold the fundamental human rights of every person [including transgender persons] and to promote tolerance, acceptance, and diversity within our constitutional democracy l... the State has a duty to taking all necessary legislative.*

<sup>66</sup> Cited with approval by the High Court. See *LM v Attorney General of Botswana* 2019 All Bots 46 (HC), para 151.

<sup>67</sup> See section 26 of the Constitution.

<sup>68</sup> *ND v Attorney General of Botswana and Another*, MAHGB-000449-15, 29 September 2017, para 77.

*administrative and other measures to ensure that procedures exist whereby all State-issued identity documents which indicate a person's gender/sex reflect the person's self-identified gender identity.*<sup>69</sup>

Thus, being able to have an identity document that correctly reflects one's self-identified gender identity is a fundamental question of equality before the law. Being forced to use an identity document that incorrectly reflects a sex assigned at birth, which is not aligned to one's gender identity, because there exist no procedures to change one's gender marker, violates the right to equal protection of the law.

### **The right to freedom from inhuman and degrading treatment**

The Botswana Constitution provides for the protection from inhuman and degrading treatment. In section 7, the Constitution states that "no person shall be subjected to torture or to inhuman or degrading punishment or other treatment".

In the *ND v Attorney General of Botswana and Another* judgment, the High Court of Botswana found that not having an identity document that matches a person's gender identity exposes that person to unwanted embarrassment, and that -

*"Having a gender marker which is fundamentally different from [a person's] psychological and self-identified gender forces [them] into recurring situations of tension with officials and institutions when [they are] required to present [their] identity document."*<sup>70</sup>

Drawing on the African Commission of Human and Peoples' Rights, the High Court argued that inhuman and degrading treatment includes "not only actions which cause serious physical or psychological suffering, but which humiliate or force the individual against his will or conscience."<sup>71</sup> Noting that the section on inhuman and degrading treatment "is to be interpreted as widely as possible to encompass the widest possible array of physical and mental abuse",<sup>72</sup> the High Court found that being forced to hold an identity document that does

not match one's gender identity amounts to degrading and inhuman treatment, in violation of section 7 of the Constitution of Botswana.

### **The right to privacy**

Section 9 of the Constitution of Botswana affords people the right to freedom from arbitrary interference with their privacy.

In the judgment of *ND v Attorney General of Botswana and Another*, the High Court highlighted how the applicant, a transgender man with an identity document that incorrectly describes his sex as 'female', is often required "to explain intimate details of his life and identity to strangers to access basic routine services."<sup>73</sup> The High Court established that this is "an invasion of his right to privately define and live his own identity without the interference of others".<sup>74</sup> Thus, this High Court has ruled that refusing to change the gender marker on trans people's identity documents violates their constitutional right to privacy.<sup>75</sup>

### **The right to freedom of expression**

Section 12 of the Constitution of Botswana states that no person shall be hindered in the enjoyment of their freedom of expression.

In the *ND v Attorney General of Botswana and Another* judgment, the High Court held that:

*"the law should ... provide [people] with the opportunity, ability and freedom to express [their] chosen self-identified gender identity through varied ways and by means of expression, speech, mannerism, clothing and attitude."*<sup>76</sup>

The judgment draws on case law from India as well as on the International Covenant on Civil and Political Rights, detailed by General Comment 34 by the UN Human Rights Council, and the African Commission on Human and Peoples' Rights, to affirm that a person's decision to live their life in accordance with their gender identity is an expression of free choice and must be respected.<sup>77</sup>

<sup>69</sup> Id., para 80.

<sup>70</sup> *ND v Attorney General of Botswana and Another*, MAHGB-000449-15, 29 September 2017, para 151.

<sup>71</sup> See *Doebbler vs Sudan*, (2003) AHRLR 153 (ACHPR 2003), para 36.

<sup>72</sup> *Doebbler v Sudan*, (2003) AHRLR 153 (ACHPR 2003), para 36.

<sup>73</sup> *ND v Attorney General of Botswana and Another*, MAHGB-000449-15, 29 September 2017, para 107.

<sup>74</sup> Id., para 107.

<sup>75</sup> Id.

<sup>76</sup> Id., para 111.

<sup>77</sup> *ND v Attorney General of Botswana and Another*, MAHGB-000449-15, 29 September 2017, para 122.

The judge agreed with the applicant that by refusing to change his gender on his identity card, the State violated his freedom of expression.

### **The right to protection from discrimination**

Section 15 of the Constitution of Botswana states that: "no law shall make any provision that is discriminatory either of itself or in its effect" and that "no person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority".

The Botswana Court of Appeal has explained the ambit of the right to freedom of discrimination in *Attorney General v Dow*:

*"I do not think that the framers of the Constitution intended to declare in 1966 that all potentially vulnerable groups or classes who would be affected for all time by discriminatory treatment have been identified and mentioned in the definition in section 15(3). I do not think that they intended to declare that the categories mentioned in that definition were forever closed. In the nature of things, as farsighted people trying to look into the future, they would have contemplated that with the passage of time not only the groups or classes which had caused concern at the time of writing the Constitution but other groups or classes needing protection would arise. The categories might grow or change. In that sense, the classes or groups itemised in the definition would be, and in my opinion, are by way of example of what the framers of the Constitution thought worth mentioning as potentially some of the most likely areas of possible discrimination."*<sup>78</sup>

In the *ND v Attorney General of Botswana and Another* judgment, the High Court held that Government's refusal to change the applicant's gender marker violated his constitutional right to freedom from discrimination. Drawing on the definition of discrimination detailed in section 15 of the Botswana Constitution, on case law,<sup>79</sup> as well as on international human rights law and treaties by the UN Human Rights Council and the African

Commission on Human and Peoples' Rights,<sup>80</sup> the judgment established that gender identity should be considered a prohibited ground for discrimination.

### **The right to dignity**

The Botswana Court of Appeal has emphasised that:

*"Members of the ... transgender community, although no doubt a small minority, and unacceptable to some on religious or other grounds, form part of the rich diversity of any nation and are fully entitled in Botswana, as in any other progressive state, to the constitutional protection of their dignity."*<sup>81</sup>

The High Court of Botswana confirmed that legal gender recognition is a prerequisite for upholding the right to dignity of transgender Botswana:

*"...the recognition of the Applicant's gender identity lies at the heart of his fundamental right to dignity. Gender identity constitutes the core of one's sense of being and is an integral part of a person's identity. Legal recognition of the Applicant's gender identity is therefore part of the right to dignity and freedom to express himself in a manner he feels psychologically comfortable with."*<sup>82</sup>

The High Court of Botswana also recognised that an identity document with the correct gender marker is indispensable for this:

*"The recognition of our citizenship and personal identity by the State which includes the ability to have access to proper identification is at the core of humanity and dignity. Identity documents not only enable us to have access to routine services, healthcare, social security and employment but affords us an opportunity to live in dignity."*<sup>83</sup>

*"Having an identity document that correctly reflects his self-identified gender identity is fundamental to realising the dignity of the Applicant."*<sup>84</sup>

<sup>78</sup> *Attorney General v Dow* (1992) BLR 119 (CA) at page 146(H).

<sup>79</sup> *Diau v Botswana Building Society*, 2003 (2) BLR 409 (IC).

<sup>80</sup> See, for example, CESCR General Comment 20 at para 28-32; ACHPR Resolution 275 on 'Protection from violence and discrimination based on real or perceived sexual orientation or gender identity'.

<sup>81</sup> *Attorney General v Rammoge*, 2016 All Bots 165 (CA), para 60.

<sup>82</sup> *LM v Attorney General of Botswana* 2019 All Bots 46 (HC), paras 151-152.

<sup>83</sup> *ND v Attorney General of Botswana and Another*, MAHGB-000449-15, 29 September 2017, para 83.

<sup>84</sup> *Id.*, para 87.

Consequently, by not providing transgender people with the opportunity to change their gender marker in their identity documents to correctly reflect their self-identified gender identity, the State violates their right to dignity.

## Children's Act of 2009

The Children's Act No. 8 of 2009 (Cap. 28:04), requires that the Act takes precedence over other laws relating to children.<sup>85</sup> In terms of the Act, the best interests of the child overriding: "A person or the court performing a function or exercising a power under this Act shall regard the best interests of the child as the paramount consideration."<sup>86</sup>

One of the guiding principles of the Act is that "no decision or action shall be taken whose result or likelihood is to discriminate against any child on the basis of sex, family, colour, race, ethnicity, place of origin, language, religion, economic status, parents, physical or mental status, or any other status."<sup>87</sup>

Finally, the Act provides that "every child has a right to a name, from birth, which neither stigmatises nor demeans the dignity of that child."<sup>88</sup>

These provisions are important because they indicate the duty to amend the Births Register and National Register where information on the register relating to a child affects the dignity of the child and the best interests of the child requires such amendment. This ought to be understood to include information relating to the child's name and gender marker.

## Employment Act of 1982

Section 23 of the Employment Act No. 29 of 1982 (Cap. 47:01) prohibits the dismissal of an employee on the basis of "(d) the employee's race, tribe, place of origin, social origin, marital status, *gender, sexual orientation*, colour, creed, health status or disability; or (e) any other reason which does not affect the employee's ability to perform that employee's duties under the contract of employment". This provision is an example of how Botswana's legal framework refers to 'sex' and 'gender' interchangeably.

<sup>85</sup> Section 3 of the Children's Act, 2009.

<sup>86</sup> Section 5 of the Children's Act, 2009.

<sup>87</sup> Section 7(a) of the Children's Act, 2009.

<sup>88</sup> Section 11 of the Children's Act, 2009.

## The system of civil and national registration in Botswana

Given the constitutional imperatives for legal gender recognition that have been established by the High Court judgment, and have been outlined in the previous section, it is important to understand the current legislative and administrative procedures through which personal particulars, including gender markers, are registered and recorded in Botswana. The following section provides an overview of the legal and administrative foundations of the civil registration system and outlines how a change of gender marker is possible under the *National Registration Act* of 1986.

The Department of Civil and National Registration (DCNR), located in the Ministry of Nationality, Immigration and Gender Affairs is responsible for registering and maintaining civil registration databases. There are three national registers: The Births Register, the National Register and the Deaths Register. The Births Register and the Deaths Register are legislated by the *Births and Deaths Registration Act* of 1968, whilst the National Register is legislated by the *National Registration Act* of 1986.

The High Court judgment of *ND v Attorney General of Botswana* has established that the *National Registration Act* should be applied when people wish to change the gender marker in their identity documents.

## Births and Deaths Registration Act of 1968 and the Births Register

The *Births and Deaths Registration Act* No. 48 of 1968 (Cap 30:01) establishes the legal framework for the registration of all births and deaths in the Births Register and the Deaths Register. By registering in the Births Register, citizens receive a birth certificate that states the particulars that have been registered. This includes their name and first name(s), and sex.<sup>89</sup>

The Births Register and the Deaths Register are kept by the Registrar of Births and Deaths. The *Births and Deaths Registration Act* allows the Registrar to change surnames<sup>90</sup> and forenames<sup>91</sup> in birth certificates, upon application and for a prescribed fee.

<sup>89</sup> SI 18 of 1 April 1969: Births and Deaths Registration Regulations, Form CRB3, Certificate of Birth.

<sup>90</sup> Section 12 of the Births and Deaths Registration Act, 1968.

<sup>91</sup> Section 13 of the Births and Deaths Registration Act, 1968.

The information registered in the Births Register forms the basis for the additional information in the National Register. Of these particulars in the Births Register, only first name and surname can be changed on application to the Registrar under the *Births and Deaths Registration Act*. Any other particulars can only be changed by order from the High Court.

In terms of section 15 of the Act, the High Court may on application alter the Births Register to correct an error. The application must be made by motion in accordance with the procedure specified in Order 13 of the Rules of the High Court of Botswana for bringing an application on notice of motion.<sup>92</sup> The Court in determining the application is not bound by the same rules of evidence as in other matters,<sup>93</sup> and the Chief Justice may make rules to regulate and prescribe the procedure for such applications.<sup>94</sup>

## National Registration Act of 1986 and the National Register

The *National Registration Act* of No. 26 of 1986 (Cap 01:02) is the legal framework for the National Register. The Act requires every citizen of Botswana over the age of 16 to register with the Registrar of National Registration.<sup>95</sup> The National Register is a “national register of all citizens of Botswana of the age of 16 years or over ... to whom identity cards have been issued”.<sup>96</sup> The information in the National Register is linked to the Births Register.<sup>97</sup> These identity cards are referred to as ‘Omang’ (meaning ‘Who are you?’ in Setswana).

The National Register records, among other particulars, the name, age, sex, place of birth, and registration number.<sup>98</sup> Upon registration, the applicant needs to provide fingerprints and a photograph, and the Registrar records the following particulars: name, principal place of residence in Botswana, sex, marital status and name of spouse (if applicable), date of registration and unique registration number. The particulars in the National Register form the basis of the personal information for personal identity documents.

There is an obligation on persons to inform the Registrar if there is a change to their particulars.<sup>99</sup> Thus, the Act clearly anticipates that changes do occur. If the changes are not material, the district Registrar can simply make a note on the Register.<sup>100</sup> If the Registrar considers the change to be ‘material’, a new identity document should be issued, and the change should be recorded in the National Register.<sup>101</sup> The Registrar may require documentary information to support the application,<sup>102</sup> and the Registrar is obliged to keep any information so provided confidential.<sup>103</sup>

The Act further provides that where a person believes that their identity as certified by the identity card may be questioned, a new identity card may be issued.<sup>104</sup> The section specifically refers to the issuing of a new identity card where one’s appearance in the photo on the identity card has changed. However, if sections 16 and 17 are read together, where a person’s gender identity has changed, both the gender marker and photographs ought to be subject to change.

The Omang confirms a person’s legal identity, and is a requirement in order to access numerous services, including opening a bank account, obtaining credit or loans, reporting to the tax authority, obtaining a marriage certificate, obtaining private health insurance, accessing healthcare services, enrolling in social insurance programs, qualifying for cash transfers, food or other safety net programs (especially those provided by or through the government), obtaining a cell phone account, obtaining a passport, getting a driver’s license, registering for and voting during national elections, registering a vehicle, obtaining healthcare, purchasing property such as a house, and obtaining tuition assistance for education.<sup>105</sup> In order to apply for an Omang, a person has to provide their birth certificate.

The unique ID number issued at birth is the same one used for the Omang at age 16 years. This provides a link between the Births Register, the National Identification System, and the Deaths Register.<sup>106</sup>

<sup>92</sup> SI 91 of 28 September 1979: Births and Deaths (Alteration of Register) Rules.

<sup>93</sup> Section 18 of the Births and Deaths Registration Act, 1968.

<sup>94</sup> Section 17 of the Births and Deaths Registration Act, 1968.

<sup>95</sup> Section 6(1) of the National Registration Act, 1986.

<sup>96</sup> Section 4 of the National Registration Act, 1986.

<sup>97</sup> World Bank (2016). ID4D Country Diagnostic: Botswana, Washington, DC: World Bank.

<sup>98</sup> Section 5 of the National Registration Act, 1986.

<sup>99</sup> Section 14 of the National Registration Act, 1986.

<sup>100</sup> Section 15 of the National Registration Act, 1986.

<sup>101</sup> Section 16 of the National Registration Act, 1986.

<sup>102</sup> Section 7(1) of the National Registration Act, 1986.

<sup>103</sup> Section 20 of the National Registration Act, 1986.

<sup>104</sup> Section 17 of the National Registration Act, 1986.

<sup>105</sup> World Bank (2016).

<sup>106</sup> World Bank (2016).

On the face of the card, the unique ID number, name, age, sex, place of birth, and colour of eyes is printed. To this effect, the Omang provides information on 'sex', which is reflected in writing on the card, as well as in the fifth number in the ID number, where 1 represents male and 2 represents female sex. This information is drawn from the National Register.

Importantly, the High Court has established, in the *ND v Attorney General*, that the 'sex' recorded in the Omang refers to both sex and gender. The High Court held that in legislation and administrative procedures in Botswana, the terms 'sex' and 'gender' have become blurred through their interchangeable usage:

*"examples of this blurring of sex and gender within our society are abound. ... It is quite evident that in our daily activities there is no formal distinction between sex and gender. ... It appears to me that the two terms have reached a point where the distinction between them has been blurred by usage."<sup>107</sup>*

The purpose of the Omang is to identify people and verify their identity. The High Court of Botswana has observed that: "A person's physical appearance is *prima facie* evidence of proof of the content of the National Register and the identity document."<sup>108</sup>

Thus, the particulars of the identity document holder, including their 'sex', are verified by their appearance. A person's appearance, however, cannot give information about their sex, because sex characteristics are not immediately visible. A person's appearance necessarily provides information about the person's gender and gender expression. The High Court thus observed that whilst the information on the Omang is recorded as 'sex', what the Omang does, to identify people and verify their identity, is to look at people's gender.

## Change of Name Act of 1963

The Change of Name Act No. 28 of 1963 (Cap. 15:02) regulates the change of surnames, and specifies that surnames may be changed when the change denotes a change in kinship relations (women can change their surname upon marriage, divorce or widowhood; children can change their surname upon adoption). This change is affected immediately upon application to the Department of Civil and National Registration.

<sup>107</sup> *ND v Attorney General and Another*, paras 175, 184.

<sup>108</sup> *Id.*, para 35.

## Data Protection Act of 2018

The Data Protection Act No. 32 of 2018 regulates the protection of personal data and seeks to ensure that the privacy of individuals in relation to their personal data is maintained.

Relevant definitions in the Act include:

- "personal data" which refers to "information relating to an identified or identifiable individual, which individual can be identified directly or indirectly, in particular by reference to an identification number, or to one or more factors specific to the individual's physical, physiological, mental, economic, cultural or social identity".
- "processing of personal data" refers to "any operation or a set of operations which is taken in regard to personal data, whether or not it occurs by automatic means, and includes the collection, recording, organisation, storage, adaptation, alteration, retrieval, gathering, use, disclosure by transmission, dissemination or otherwise making information available, alignment or combination, blocking, erasure or destruction of such data;" and
- "sensitive personal data" refers to "personal data relating to a data subject which reveals his or her: (a) racial or ethnic origin; (b) political opinions; (c) religious beliefs or philosophical beliefs; (d) membership of a trade union; (e) physical or mental health or condition; (f) sexual life; (g) filiation; or (h) personal financial information."

Sensitive personal data may not be processed except under specific conditions and with the consent of the data subject.<sup>109</sup> Health professionals are subject to professional secrecy, but may process sensitive personal data for health or medical purposes, where the processing is necessary for medical diagnosis or healthcare.<sup>110</sup>

Every person has the right to enquire whether a data controller or data processor has personal data relating to them and to challenge any refusals of such requests.<sup>111</sup> A person also has the right to challenge personal information relating to them and to have it deleted, rectified or amended.<sup>112</sup>

Complaints relating to the processing of one's personal information may be lodged with the Commissioner at the Information and Data Protection Commission.<sup>113</sup>

<sup>109</sup> Section 20 of the Data Protection Act, 2018.

<sup>110</sup> Section 23 of the Data Protection Act, 2018.

<sup>111</sup> Section 30(1)(a) of the Data Protection Act, 2018.

<sup>112</sup> Section 30(1)(e) of the Data Protection Act, 2018.

<sup>113</sup> Section 42 of the Data Protection Act, 2018.

## Recent case law related to legal gender recognition from Botswana

Two recent decisions from the High Court of Botswana affirmed the right of transgender people to hold identity documents that reflect their gender. They provide clear guidance on the legal framework within which these identity documents should be applied for and issued, and outline the responsibilities of the Government of Botswana, especially the Registrar of National Registration of Botswana.

### *ND v Attorney General of Botswana and Another (2017)*

In 2017, the High Court ruled that a transgender man should be allowed to hold official documents that reflect his gender identity.

The applicant, who remained anonymous to protect his privacy, brought the case against the Government when he was not allowed to change the gender marker on his identity document to reflect his gender identity as a man. He was assigned a female sex at birth but identifies as a man. His gender expression is that of a man, and when he was asked to identify himself, the fact that his identity document identifies him as 'female' frequently posed challenges.

The High Court looked at two specific issues: whether not changing the applicant's gender marker on his identity document violated his constitutional rights, and whether the current legal framework in Botswana would allow the relevant government authority to change the gender marker on his identity document. In brief, the answer to both these considerations was yes.

The Court found that by refusing to change the man's gender on his identity document, which forced him to hold an identity document that incorrectly identified him as female, Botswana's Registrar of National Registration had violated several of the applicant's basic constitutional rights, including his rights to dignity, privacy, freedom of expression, equality and freedom from discrimination and inhuman and degrading treatment.

The High Court looked at existing legislation in Botswana and found that the *National Registration Act* provides a legal framework that allows people to change the gender marker in their identity documents. The High Court highlighted that under section 16 of the *National Registration Act*, the Registrar is empowered to change the particulars of a registered person, if the particulars "materially affect the person's registration".<sup>114</sup> The High Court determined that a change in a person's gender is indeed a material change and should result in the issuing of a new identity document that shows the correct gender.

The judge ordered that the applicant should receive an identity document that correctly shows his gender as male. The judge also ordered that Government needed to ensure that "all State-issued identity documents which indicate a person's gender/sex reflect the person's self-defined gender identity", and said that Government needs to take "all necessary legislative, administrative and other measures to ensure that procedures exist".<sup>115</sup>

Following the judgment, the Registrar of National Registration of Botswana agreed to issue the applicant with a new identity document that reflects his male gender identity.

### *The Kgositau case (2017)*

Almost at the same time as the case of ND, another High Court in Botswana considered the case of Tshepo Ricki Kgositau, a transgender woman who litigated because she wanted her identity document to correctly reflect her sex/gender as female. Because the gender marker in her identity document was recorded as male, she encountered many challenges and difficulties in situations of everyday life. Like the applicant in the ND case, Ms Kgositau had not been allowed to change her gender marker.

Based on the *ND v Attorney General of Botswana and Another* judgment, the presiding judge in the Kgositau case ordered the Botswana Government to issue Ms Kgositau with a new identity card that correctly shows her gender identity as female.<sup>116</sup>

<sup>114</sup> *ND v Attorney General of Botswana and Another*, MAHGB-000449-15, 29 September 2017, para 34.

<sup>115</sup> *Id.*, para 80.

<sup>116</sup> Reuters, 12 December 2017; Ethan, 8 August 2017.

# Law and policy relating to legal gender recognition in Botswana

The judgment in the High Court case of *ND v Attorney General of Botswana and Another* analysed the need for legal gender recognition within the constitutional and legal framework of Botswana. This following section explains how legal gender recognition is feasible under the legal framework of Botswana.

## Legal and administrative pathways to legal gender recognition in Botswana

During the community consultations that took place to inform this research brief, transgender and gender diverse people relayed that even after the *ND v Attorney General of Botswana and Another* judgment, they were asked for a court order when they tried to change their gender marker. This indicates a misunderstanding of how the *ND* judgment is to be translated into administrative procedures to change one's gender marker in one's identity document.

At first glance, the request for a court order seems consistent with the administrative process undergone by ND and Ms Tshepo Ricki Kgositau. These two cases have been described in the previous section. In the case of ND, the High Court ordered the Registrar of the National Registration to issue a new identity document that reflects ND's male gender identity. In the case of Ms Kgositau, the judge ordered the Registrar of Births and Deaths to amend the registers to correctly reflect Ms Kgositau's female gender identity, which would result in a new identity document.

However, insisting on a court order for people to receive a new identity document that correctly reflects their gender identity falls short of complying with the order of the High Court in the judgment of *ND v Attorney General of Botswana and Another*. Whilst the High Court did order the Registrar of the National Registration to issue a new identity document for ND, the judgment also mandated the State to take -

*"all necessary legislative, administrative and other measures to ensure that procedures exist*

*whereby all State-issued identity documents which indicate a person's gender/sex reflect the person's self-defined gender identity."*

The judgment indicates that procedures should be created by the State to allow people to change their gender marker without having to resort to the judiciary, which can be a prohibitive, cumbersome and costly exercise.

This section provides an overview of the possibilities of changing personal particulars in identity documents under the current legal framework, and outlines the administrative procedure for changing a gender marker anticipated in the *ND* judgment.

## The legal framework for changing personal particulars in identity documents

It is possible for people to change some of their personal particulars in the Births Register and the National Register, which are then also displayed on their Omang. The changes that are relevant for legal gender recognition are name changes, a changed photograph and the change of sex/gender marker. There are three laws that regulate such changes are the *Change of Name Act of 1963*, the *Births and Deaths Registration Act of 1968* and the *National Registration Act of 1986*.

### Change of name

Name changes are common changes to personal particulars: about 15,000 requests are made annually to process such name changes.<sup>117</sup> Changes to one's name are regulated by two different Acts, depending on whether the change affects the surname or the first name.

- The *Change of Name Act Law No. 28 of 1963* (Cap. 15:02) regulates the change of surnames, and specifies that surnames may be changed when the change denotes a change in kinship relations (women can change their surname upon marriage, divorce or widowhood; children can change their surname upon adoption); this change is effected immediately upon application to the Department of Civil and National Registration.
- The *Births and Deaths Registration Act No. 48 of 1968*

<sup>117</sup> World Bank. 2016. ID4D Country Diagnostic: Botswana, Washington, DC: World Bank License: Creative Commons Attribution 3.0 IGO (CC BY 3.0 IGO)

regulates the change of first name and surname in the Births Register, which is used for updating information in the National Register for individual identity, and thus subsequently in the Omang. There is no requirement that the new name needs to be aligned to that person's registered sex/gender.

Persons who wish to change their first name so that it correctly reflects their gender identity thus fall under the administrative procedures in the *Births and Deaths Registration Act*.

## Change of gender marker

The High Court in *ND v Attorney General of Botswana and Another* confirmed that persons can change their gender marker through the *National Registration Act* of 1986.<sup>118</sup>

The *National Registration Act* allows for changes in the recorded particulars of a person. Unlike the *Change of Name Act* and the *Births and Deaths Registration Act*, it does not narrowly link changes only to surname or first name. Instead, section 16 of the *National Registration Act* says that the Registrar needs to change the particulars of a registered person in circumstances where there is a 'material change' to the person's particulars.

The High Court, in the *ND* judgment, has established that a gender identity that does not match the sex assigned at birth, which is recorded in the birth register, constitutes a 'material change'. Thus, under section 16 of the *National Registration Act*, the Registrar needs to change the particulars of persons whose self-identified gender identity does not match the recorded sex, following the procedure set out in section 14 of the Act:

*"The National Registration Act allows for the Registrar to effect changes to the Omang where a material change has occurred. ... by doing so the Registrar would be giving effect to and extending much needed protection to vulnerable transgendered individuals and giving effect to the spirit, purport and object of the Constitution."<sup>119</sup>*

Because the High Court established that this is a material change, the person will receive a new identity document as per section 16 of the *National Registration Act*. Once

the Registrar has effected the change of sex/gender in the National Register, the Registrar needs to issue a new identity document.

The High Court, in *ND v Attorney General of Botswana and Another* emphasised that a person's gender identity is self-identified:

*State-issued identity documents which indicate a person's gender/sex reflect the person's self-defined gender identity.<sup>120</sup>*

## Best practice in gender recognition laws

As the evidence at the beginning of this research brief has shown, many Batswana currently cannot access legal gender recognition. This is despite the current legislative framework of Botswana, which, allows legal gender recognition if implemented in the spirit of the *ND v Attorney General of Botswana and Another* judgment. Even though the *National Registration Act* of 1986 provides the legal framework for administrative procedures that allow people to change their gender marker, the anecdotal evidence from the community consultations showed that this is currently not implemented.<sup>121</sup> Furthermore, the current legislative framework makes a distinction between the legal basis and administrative procedures for changing one's name (under the *Births and Deaths Registration Act*) and changing one's gender marker (under the *National Registration Act*).

It will be beneficial for the Government of Botswana to develop a law that clearly outlines the principles underlying legal gender recognition and the administrative process necessary for people who want to change their name and/or gender marker. Laws that specifically focus on and guarantee the right to legal gender recognition are called gender recognition laws. The High Court judgment of *ND v Attorney General of Botswana and Another* has mandated that legal gender recognition should be possible in Botswana, so that the constitutional rights of all Batswana, including of

<sup>120</sup> *Id.*, para 80 (underlined for emphasis).

<sup>121</sup> Consultations with individuals who identify as transgender, gender non-conforming or gender diverse, as well as with organisations advocating for the rights of transgender, gender non-conforming and gender diverse people, took place in preparation for the development of this research brief in Gaborone on 5 and 6 October 2019, in collaboration with LEGABIBO.

<sup>118</sup> *ND v Attorney General of Botswana and Another*, MAHGB-000449-15, 29 September 2017.

<sup>119</sup> *Id.*, para 90.

Batswana who identify as transgender, are respected and protected. In order to do so, the High Court judgment mandates the State to:

*"Take] all necessary legislative, administrative and other measures to ensure that procedures exist whereby all State-issued identity documents which indicate a person's gender/sex reflect the person's self-defined gender identity."<sup>122</sup>*

These legislative measures envisioned by the High Court of Botswana are congruent with a number of recently passed laws from other countries. The commonality between these laws and the High Court judgment is the emphasis on self-determination (in the words of the High Court judgment: "a person's self-defined gender identity"). This is a crucial principle, which is also recognised by the Yogyakarta Principles that were outlined in the previous section.

Examples from other countries point to the advantage of enshrining the right to gender recognition in law, in order to avoid administrative challenges arising when people try to change their name or gender marker. The aim of this section is to provide the Government of Botswana with examples of such laws, and to demonstrate the advantage of a gender recognition law in order to facilitate access to legal gender recognition, as mandated by the *ND v Attorney General of Botswana* judgment.

Argentina became the first country to allow adults to self-declare their gender identity and revise their official documents without prior approval from a medical professional or a judge. Since then, Colombia, Denmark, Ireland, Malta and Norway have passed similar laws that explicitly remove barriers to legal gender recognition. In each of these places, all that is required is a self-declaration and a simple administrative procedure.<sup>123</sup>

## Argentina

Argentina's *Gender Identity Law*<sup>124</sup> was passed in 2012 and has been widely lauded as a law that enables legal gender recognition based on self-determination.<sup>125</sup> The law outlines a person's fundamental right to their self-identified gender identity:

*"1 All persons have the right,*

*(a) To the recognition of their gender identity;  
(b) To the free development of their person according to their gender identity;  
(c) To be treated according to their gender identity and, particularly, to be identified in that way in the documents proving their identity in terms of the first name/s, image and sex recorded there."<sup>126</sup>*

Based on the principle of self-determination, the law states that -

*"All persons can request that the recorded sex be amended, along with the changes in first name and image, whenever they do not correspond with the self-perceived gender identity."<sup>127</sup>*

The law outlines that in order to change a person's gender marker or name, that person (provided they are over the age of 18) needs to submit a written request to change their birth certificate and identity document to the district office of the Bureau of Vital Statistics, the Government branch responsible for citizen registration. The request should be granted based on the person's self-identified gender identity, and the law prohibits any requirements for surgery, treatment or psychological or medical treatment:

*"In no case will it be needed to prove that a surgical procedure for total or partial genital reassignment, hormonal therapies or any other psychological or medical treatment has taken place."<sup>128</sup>*

The law prescribes that after the application is made -

*"the public officer will proceed - without any additional legal or administrative procedure required - to notify the amendment of the sex and the change of first name to the Civil Register corresponding to the jurisdiction where the birth certificate was filed so it will issue a new birth certificate incorporating the said changes, and to issue a new national identity card reflecting the amended sex and the new first name as now recorded."<sup>129</sup>*

<sup>122</sup> *ND v Attorney General of Botswana and Another*, MAHGB-000449-15, 29 September 2017, para 80.

<sup>123</sup> Howe, E., Frazer, S., Dumont, M. and Zomorodi, G. (2017).

<sup>124</sup> In Spanish: Ley de identidad de género, Law No. 26.743.

<sup>125</sup> Howe et al. (2017).

<sup>126</sup> The Argentinean Gender Identity and Health Comprehensive Care for Transgender People Act (Decree No. 773/12, of Gender Identity Act No. 26,743).

<sup>127</sup> The Argentinean Gender Identity and Health Comprehensive Care for Transgender People Act, section 3.

<sup>128</sup> The Argentinean Gender Identity and Health Comprehensive Care for Transgender People Act, section 4.

<sup>129</sup> The Argentinean Gender Identity and Health Comprehensive Care for

Thus, the law establishes a simple administrative process to modify a person's name and gender marker on official documents through the Civil Registry, without any abusive requirements of medical diagnosis, medical treatment, sterilization and divorce.<sup>130</sup> The law also guarantees this right for children under the age of 18, with relevant safeguards.

The law enshrines a person's right to be treated with dignity and stipulates that all public and private actors must respect a person's gender identity, including their self-identified name, regardless of whether this aligns with the information on their identity documents.

The law states that no existing rights or obligations are to be affected by changes to a person's name or gender marker, including those relating to family law, such as adoption. Furthermore, the law also establishes measures to protect the privacy of individuals who change their name and/or gender marker.

Beyond legal gender recognition, the law recognises that full self-determination may require people to access medical gender affirmation. The law establishes the right of all adults to access partial or comprehensive hormonal or surgical gender affirming treatment to adjust their bodies – should they wish to. The law specifies that this is part of a person's right to health, and that it can only take place on the basis of the person's informed consent. It further clarifies that no-one is required to undergo gender affirming medical treatment to access legal gender recognition.

## Malta

In 2015, Malta adopted the *Gender Identity, Gender Expression and Sex Characteristics Act*, a law on legal gender recognition based on a simple administrative process and without abusive requirements. The law creates a protected right to bodily integrity and physical autonomy for all people, as well as a right to gender identity, including the ability to legally change gender markers based on self-determination.

At the outset, the law stipulates that all citizens have the right to -

*"(1) (a) The recognition of their gender identity;*

*(b) The free development of their person according to their gender identity;*

*(c) Be treated according to their gender identity and, particularly, to be identified in that way in the documents providing their identity therein; and*

*(d) Bodily integrity and physical autonomy."<sup>131</sup>*

The Maltese *Gender Identity, Gender Expression and Sex Characteristics Act* clarifies that a change in gender marker to recognise a person's self-determined gender identity does not affect any other rights, legal relationships or legal obligations.

The process of the administrative change to gender marker and/or first name is similar to the Argentinian law. The change in registered gender marker and/or first name is based on a person's self-determination and can be requested from the Director of the Public Registry. The only necessary document is a declaration of one's gender identity made in front of a notary. The law specifies that no evidence other than the self-declaration is necessary:

*"The person shall not be required to provide proof of a surgical procedure for total or partial genital reassignment, hormonal therapies or any other psychiatric, psychological or medical treatment to make use of the right to gender identity."<sup>132</sup>*

The law also allows minors, through their legal guardian, to change their gender markers at a civil court.

Furthermore, the law prohibits any discrimination based on gender identity, gender expression, or sex characteristics and makes it unlawful for medical practitioners or other professionals to conduct any sex assignment treatment and/or surgical intervention on the sex characteristics of a child under the age of 18.<sup>133</sup>

<sup>131</sup> Gender Identity, Gender Expression and Sex Characteristics Act, 2015, section 1.

<sup>132</sup> Gender Identity, Gender Expression and Sex Characteristics Act, 2015, section 4.

<sup>133</sup> Gender Identity, Gender Expression and Sex Characteristics Act, 2015, sections 13 and 14.

Transgender People Act, section 6.

<sup>130</sup> United Nations (2016).

In South Africa, the *Alteration of Sex Description and Sex Status Act* No. 49 of 2003 was developed to enable transgender people to change the sex description that was captured on their birth certificate and other identity documentation in order to accurately capture their gender identity. It is useful to critically examine the Act and highlight some challenges that have emerged over the years of implementation, in order to highlight potential challenges for any country that seeks to develop its own gender recognition law.

Section 2 of the South African *Alteration of Sex Description and Sex Status Act* provides that:

*"Any person whose sexual characteristics have been altered by surgical or medical treatment or by evolvment through natural development resulting in gender reassignment, or any person who is intersexed may apply to the Director-General of the National Department of Home Affairs for the alteration of the sex description on his or her birth register."*

The Act specifies that an application for change of gender marker is only possible if a person's "sexual characteristics" have been altered. Sections 2(b) and (c) of the Act specify that applications need to be accompanied by a report from a medical practitioner that confirms "the nature and results of any procedures carried out and any treatment applied".<sup>134</sup>

Section 4 of the *Alteration of Sex Description and Sex Status Act* interfaces with the South African *Births and Deaths Registration Act*,<sup>135</sup> to enable people who have successfully applied to change their gender marker under the *Alteration of Sex Description and Sex Status Act* to receive a new birth certificate that corresponds to their gender identity. This was made possible by the insertion of a section into the *Births and Deaths Registration Act* that reads as follows:

*"(1) If the Director General grants an application or a magistrate issues an order [to change sex/gender markers], the Director General shall alter the sex description on the birth register of the person concerned."*

*(2) An alteration so recorded shall be dated and after the recording of the said alteration the person concerned shall be entitled to be issued with an amended birth certificate."*<sup>136</sup>

Whilst the passing of the *Alteration of Sex Description and Sex Status Act* was celebrated as an important step towards ensuring equal rights for transgender people in South Africa, in the years since the Act has been implemented, important shortcomings and challenges have been pointed out. A thorough analysis conducted by the South Africa Legal Resources Centre together with the non-governmental organisation Gender Dynamix highlights the following challenges:<sup>137</sup>

- The briefing paper cautions that the requirement to have undergone medical gender affirmation places often insurmountable barriers for people wishing to change their gender marker. Furthermore, the wording of the Act is frequently misinterpreted to mean that surgery had to have taken place. Being able to obtain letters from medical professionals is often impossible because access to gender affirming treatment is low in South Africa. The briefing paper by the Legal Resources Centre recommends that any requirement linked to medical treatment should be removed from the Act. This would also be in line with international best practices and principles.
- The briefing paper highlights a lack of capacity and/or willingness by the Department of Home Affairs to receive and process applications under the Act. As a result, people's applications to change their gender marker are frequently rejected or delayed for years. The briefing paper recommends that all civil servants who receive and process applications under the Act receive training with respect to the Act itself, as well as values clarification training to ensure that applicants and applications are treated non-judgmentally and non-discriminatory.
- The briefing paper cautions that because name changes and gender marker changes are legislated by different laws, applicants often cannot apply for them at the same time. This is despite the fact that both name and gender marker change constitute aspects of legal gender recognition and should happen at the same time to avoid an identity document where name and gender marker are incongruent. Having an identity document with a female first name but a male gender marker, for example, would still expose

<sup>134</sup> Alteration of Sex Description and Sex Status Act 49 of 2003, section 2.

<sup>135</sup> Births and Deaths Registration Act, 1992.

<sup>136</sup> Alteration of Sex Description and Sex Status Act 49 of 2003, section 4.

<sup>137</sup> Deyi, B. et al (2015).

the document holder to scrutiny, discrimination and disadvantage, because their gender identity remains unclear from their identity document.

Compared to the current international best practices, the Act falls short on the issue of self-determination by requiring medical evidence for an application. The briefing paper highlights how this creates significant hurdles for people wishing to change their gender marker. This highlights the importance of respecting the principle of self-determination in legislating legal gender recognition. The South African experience also cautions us that it is crucial to provide regulations for legislation, and to ensure that the people implementing the legislation have the training and the capacity to do so without judgment or discrimination. Lastly, the South African experience shows the necessity of legislating legal gender recognition in its entirety – comprising of both gender marker change and name change – so that the vulnerabilities of transgender people who have identity documents that are not in line with their gender identity is not unnecessarily prolonged because of administrative delays.

## Non-binary gender markers

Not all people identify with the binary gender identities of woman or man. For gender non-conforming people, as well as non-binary people, the gender markers 'female' or 'male' do not match their gender identity. In order to respect and protect the constitutional rights of gender non-conforming people, as well as non-binary people, it is thus necessary to administratively create an option to record non-binary gender in the registration and documentation of personal particulars.

Some countries allow individuals to choose a third option or no gender on their legal identity documents.<sup>138</sup> In New Zealand, for example, trans and intersex individuals can change the gender indicated on their passports through self-declaration and choose "M" (male), "F" (female) or "X" (indeterminate/ unspecified). In Nepal, citizens can opt for a third gender category, marked as "O," on passports and identification papers.

Under the Argentinian *Gender Identity Law*, people have obtained birth certificates and identity documents without an indication of sex/gender. Arguing that their

non-binary gender identity does not align to either of the two options given ('female' or 'male'), issuing the identity document without a gender marker was the solution that matched their gender identity.<sup>139</sup> In the case in question, when applying for a new identity document under the *Gender Identity Law*, the applicant identified their gender as 'none'. In doing so, they referred to the definition of gender in Article 2 of the *Gender Identity Law*:

*"Gender identity is understood as the internal and individual way in which gender is perceived by persons, that can correspond or not to the gender assigned at birth, including the personal experience of the body. This can involve modifying bodily appearance or functions through pharmacological, surgical or other means, provided it is freely chosen. It also includes other expressions of gender such as dress, ways of speaking and gestures."<sup>140</sup>*

Accordingly, their birth certificate and identity documents were amended to reflect 'none' as their gender.

<sup>138</sup> Howe, E. et al. (2017).

<sup>139</sup> Pagina 12, 2 November 2018.

<sup>140</sup> The Argentinian Gender Identity and Health Comprehensive Care for Transgender People Act, 2012, section 2.

# Recommendations

Legal gender recognition is necessary to ensure that all Batswana, including Batswana who identify as transgender, can fully and meaningfully participate in the civil, political, economic and social life of Botswana. Making it possible for transgender people to change their name and gender marker on their birth certificates and identity documents is critical to ensure protection of their constitutional rights, including their right to privacy, right to human dignity, right to freedom from inhuman and degrading treatment, and right to freedom from discrimination. Legal gender recognition is directly linked to the legislative and administrative processes of a country. Our recommendations are targeted at the Department of Civil and National Registration under the Ministry of Nationality, Immigration and Gender Affairs.

## To the Department of Civil and National Registration under the Ministry of Nationality, Immigration and Gender Affairs (MoNIG)

The Department of Civil and National Registration under the Ministry of Nationality, Immigration and Gender Affairs is responsible for implementing the administrative procedures to change names and gender markers under the *National Registration Act* (for change of gender marker) and the *Births and Deaths Registration Act* (for name changes).

### **Develop regulations for legal gender recognition under the National Registration Act of 1986**

In the *ND* judgment, the High Court of Botswana has clarified that gender marker changes should occur under the *National Registration Act* of 1986, as a gender change is a material change according to section 16 of the Act. In order to ensure that all persons wishing to do so can change their gender marker, the Department should develop regulations that confirm the legal and administrative process of changing one's gender marker through the procedures of the *National Registration Act*, as mandated by the High Court judgment.

- Develop regulations that specify the administrative procedure to change one's gender marker. These

regulations need to ensure that requests to change one's gender marker are based on the principle of self-determination and are in line with the High Court judgment and international best practices and legal principles. This means that:

- Gender marker change is done under the procedure outlined in section 16 of the *National Registration Act*.
- No documentary evidence of a person's gender identity can be requested besides the person's self-declaration. No medical or other evidence of a person's gender identity is needed. A person self-identifies their gender identity.
- There is no need for a person to have undergone any kind of gender affirming treatment before changing their gender marker. No medical or other evidence of any kind of treatment is needed.
- Regulations follow the international legal principles (the Yogyakarta Principles) outlined in this research brief.
- During the development of regulations, there is meaningfully engagement and consultation with the transgender and gender diverse community throughout the process, through civil society organisations and individuals.
- Develop a standard form through which a change of gender marker can be requested under the *National Registration Act*.
- Ensure that applications for gender marker changes can be submitted at all offices of the Department of Civil and National Registration.
- Align the regulations for gender marker change under the *National Registration Act* with procedures under the *Births and Deaths Registration Act*, so that the marker on birth certificates can also be changed at the same time, under the same procedure and without necessitating a court order. This might require an amendment to the *Births and Deaths Registration Act* – see, for example, section 4 of the South African *Alteration of Sex Description and Sex Status Act*.
- Provide training for employees and civil servants of the Department of Civil and National Registration on the new regulations to ensure that they are able to correctly advise persons on how to change their gender marker and implement the regulations correctly.
- Provide values clarification training for employees and civil servants of the Department of Civil and National Registration so that they have the capacity to provide non-judgmental and non-discriminatory services to persons who wish to change their gender marker.

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