Barriers to Gender-Affirming Health Care in Children and Adolescents in South Africa

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SUMMARY

South Africa has lagged behind other countries in offering gender-affirming health care (GAHC) until recently. The Southern African HIV Clinicians Society (SAHCS) published the guidelines for the management of GAHC in October 2021. As a result, GAHC is a fairly new and unique element in South Africa's health-system response. It is, therefore, still difficult for the South African transgender population to access adequate and sensitised GAHC. This is particularly due to the continued marginalisation, prejudice and barriers this population faces in health-care facilities, especially in the public-health sector. This article aims to explore the challenges experienced by the transgender community in accessing GAHC in South Africa. Challenges include a lack of sufficiently trained health-care personnel and inadequate facilities, including systems in place to support them and their families. This article delineates the challenges of accessing GAHC in South Africa and provides some practical recommendations to improve it.

KEYWORDS: children, access to health care services

1 INTRODUCTION

South Africa, unlike a great number of its counterparts on the African continent, accepts sexually and gender-diverse individuals. Its progressive laws[1] state that anyone who wishes to change their gender may do so legally, with or without having undergone surgery.[2] Those who wish to change their gender are afforded the same rights and privileges as any other

1 S 2(1) of the Alteration of Sex Description and Sex Status Act 49 of 2003.

2 Theron "When a Progressive Constitution Is Not Enough, and Other Challenges" Presentation given in July at the 13th conference of the International Association for the Study of Forced Migration, Kampala, Uganda (2011) https://genderdynamix.org.za/wp-content/uploads/2013/04/When-the-Constitution-is-Not-Enough.pdf?x91330 (accessed 2023-02-23).

South African citizen.[3] Spencer, commenting on the provision of gender-affirming care in South Africa, refers to seven South African public hospitals providing gender-affirming care. These hospitals are the Groote Schuur Hospital in Cape Town, Chris Hani Baragwanath Hospital in Johannesburg, Helen Joseph Hospital in Johannesburg, Steve Biko Academic Hospital in Pretoria, Charlotte Maxeke Hospital in Johannesburg, Greys Hospital in Pietermaritzburg, and Universitas Academic Hospital in Bloemfontein. Three of these hospitals, namely Chris Hani Baragwanath Hospital, Steve Biko Academic Hospital and Groote Schuur Hospital, provide endocrinology, psychiatric and surgical services at the same facility.[4]

One may argue that the effective realisation of the right of persons to access health-care services is inhibited by the limited number of state facilities providing this form of care. All seven hospitals are based in urban areas and are not spread across all provinces.[5] This means that individuals based mainly in rural areas, including provinces where gender-affirming care is not available, have to travel unreasonable distances to access gender-affirming care from these hospitals.[6] Spencer argues further that despite the availability of psychosocial support, hormone therapy and gender-affirming surgical interventions in the private sector, they are generally not covered by medical-aid schemes and/or health insurance.[7] The range of obstacles that transgender persons may face when trying to access gender-affirming care points to a violation of their constitutionally protected rights, notably the rights to equality, dignity and access to health-care services.

It must be noted that gender-affirming care in South Africa accords with the international standards of the World Professional Association for Transgender Health's (WPATH) and with the National Health Act (NHA)[8] in relation to its status in medical and ethico-legal practice.[9] WPATH makes it

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3 Nel "South Africa Can and Should Provide Leadership in Advancing Understanding of Sexual and Gender Diversity on the African Continent" 2014 44 *South African Journal of Psychology* 145–148 https://doi.org/10.1177/0081246314530834 (accessed 2023-02-23).

4 Spencer, Meer and Müller "'The Care Is the Best You Can Give at the Time': Health Care Professionals' Experiences in Providing Gender Affirming Care in South Africa" 2017 12 *PloS One* e0181132 https://doi.org/10.1371/journal.pone.0181132 (accessed 2023-02-23).

5 *Ibid*.

6 *Ibid*.

7 *Ibid*.

8 61 of 2003.

9 See Coleman, Bockting, Botzer, Cohen-Kettenis, DeCuypere, Feldman, Fraser, Green, Knudson, Meyer, Monstrey, Adler, Brown, Devor, Ehrbar, Ettner, Eyler, Garofalo, Karasic, Lev, Mayer, Meyer-Bahlburg, Hall, Pfaefflin, Rachlin, Robinson, Schechter, Tangpricha, Van Trotsenburg, Vitale, Winter, Whittle, Wylie and Zucker "Standards of Care for the Health of Transsexual, Transgender, and Gender-Nonconforming People, Version 7" 2012 13 *International Journal of Transgenderism* (hereafter referred to as WPATH SOC7) 165–232. See also Coleman, Radix, Bouman, Brown, De Vries, Deutsch, Ettner, Fraser, Goodman, Green, Hancock, Johnson, Karasic, Knudson, Leibowitz, Meyer-Bahlburg, Monstrey, Motmans, Nahata, Nieder, Reisner, Richards, Schechter, Tangpricha, Tishelman, Van Trotsenburg, Winter, Ducheny, Adams, Adrián, Allen, Azul, Bagga, Başar, Bathory, Belinky, Berg, Berli, Bluebond-Langner, Bouman, Bowers, Brassard, Byrne, Capitán, Cargill, Carswell, Chang, Chelvakumar, Corneil, Dalke, De Cuypere, De Vries, Den Heijer, Devor, Dhejne, D'Marco, Edmiston, Edwards-Leeper, Ehrbar, Ehrensaft, Eisfeld, Elaut, Erickson-Schroth, Feldman, Fisher, Garcia, Gijs, Green, Hall, Hardy, Irwig, Jacobs, Janssen, Johnson, Klink, Kreukels, Kuper, Kvach, Malouf, Massey, Mazur, McLachlan, Morrison,

clear that its standards of care are intended as a guide to good clinical practice; therefore, "individual health professionals may modify them".[10]

South Africa's national guidelines for gender-affirming care are the SAHCS GAHC.[11] As part of the executive summary, the guidelines are as follows:

> "This guideline has been developed primarily with the intention of centering and amplifying voices of [transgender and gender diverse (TGD)] individuals in order to facilitate access to healthcare that is sensitive, skilled and respectful. We recognise that there are significant gaps in the knowledge and skills of healthcare providers, and there is a lack of understanding of the unique experiences faced by TGD persons. The prevailing sentiment that many healthcare providers hold around TGD individuals, informed by ignorance and conditioning within social and societal structures, are malevolent towards this community, and often include harmful assumptions and generalisations. We believe that healthcare providers have an ethical obligation to interrogate these notions, and we promote an attitude of respect for diversity that upholds human rights."[12]

Prior to the SAHCS GAHC in 2019, the Psychological Society of South Africa (PsySSA) developed practice guidelines for professionals working in the field of sexual and gender diversity.[13] The PsySSA also has

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Mosser, Neira, Nygren, Oates, Obedin-Maliver, Pagkalos, Patton, Phanuphak, Rachlin, Reed, Rider, Ristori, Robbins-Cherry, Roberts, Rodriguez-Wallberg, Rosenthal, Sabir, Safer, Scheim, Seal, Sehoole, Spencer, St. Amand, Steensma, Strang, Taylor, Tilleman, T'Sjoen, Vala, Van Mello, Veale, Vencill, Vincent, Wesp, West and Arcelus "Standards of Care for the Health of Transgender and Gender Diverse People, Version 8" 2022 23 *International Journal of Transgender Health* https://www.tandfonline.com/doi/pdf/10.1080/26895269.2022.2100644 (accessed 2023-02-20) (hereafter referred to as WPATH SOC8).

10 WPATH SOC7 104.

11 Tomson, McLachlan, Wattrus, Adams, Addinall, Bothma, Jankelowitz, Kotze, Luvuno, Madlala, Matyila, Padavatan, Pillay, Rakumakoe, Tomson-Myburgh, Venter and De Vries "Southern African HIV Clinicians Society Gender-Affirming Healthcare Guideline for South Africa" 2021 22(1) *South African Journal of HIV Medicine* a1299 https://doi.org/10.4102/sajhivmed.v22i1.1299 (accessed 2023-02-20) (hereafter referred to as SAHCS GAHC). The scope of the SAHCS GAHC is to "[p]rovide evidence-informed best practice recommendations to enable South African healthcare providers, including psychosocial and allied healthcare professionals, and to offer quality, affirming services to TGD clients." Further, to "[p]rovide a support to TGD clients when accessing healthcare services". See Tomson *et al* 2021 *South African Journal of HIV Medicine* 3.

12 Tomson *et al* 2021 *South African Journal of HIV Medicine* 3.

13 PsySSA "Sexual and Gender Diversity Position Statement" (2013) http://www.psyssa.com/documents/PsySSA_sexuality_gender_position_statement_2013.pdf (accessed 2023-02-18). PsySSA's statement on sexual and gender diversity was adopted on 24 September 2013. It affirms the following: "1. Respect the human rights of sexually and gender diverse people, and are committed to non-discrimination on the basis of sexuality and gender, including, but not limited to, sexual orientation, gender identity, and biological variance; 2. Subscribe to the notion of individual self-determination, including having the choice of self-disclosure (also known as 'coming out') of sexual orientation, gender diversity, or biological variance; 3. Acknowledge and understand sexual and gender diversity and fluidity, including biological variance; 4. Are aware of the challenges faced by sexually and gender diverse people in negotiating heteronormative, homonormative, cisgendered (see section 'Glossary'), and other potentially harmful contexts; 5. Are sensitised to the effects of multiple and intersecting forms of discrimination against sexually and gender diverse people, which could include discrimination on the basis of gender; sexual orientation; biological variance; socio-economic status, poverty, and unemployment;

comprehensive affirmative practice guidelines regarding sexual and gender diversity concerns.[14] The PsySSA aims to support the well-being of and facilitate the recognition of human rights for all sexually and gender-diverse people by applying its knowledge as a tool to achieve its aims.[15] McLachlan and Nel correctly observe that these guidelines cannot be restricted to the field of trans health care, as they are "becoming an important guide for not only psychological professionals but also other health care professionals".[16] The year 2020 saw the establishment of an organisation referred to as the Professional Association for Transgender Health South Africa (PATHSA).[17]

race, culture, and language; age and life stage; physical, sensory, and cognitive–emotional disabilities; HIV and AIDS; internally and externally displaced people and asylum seekers; geographical differences such as urban/rural dynamics; and religion and spirituality; 6. Have an understanding of stigma, prejudice, discrimination and violence, and the potential detrimental effect of these factors on the mental health and well-being of sexually and gender diverse individuals; 7. Recognise the multiple and fluid sexual and gender developmental pathways of all people from infancy, childhood, and adolescence into adulthood and advanced age; 8. Understand the diversity and complexities of relationships that sexually and gender diverse people have, which include the potential challenges (a) of sexually and gender diverse parents and their children, including adoption and eligibility assessment; (b) within families of origin and families of choice, such as those faced by parental figures, caregivers, friends, and other people in their support networks, for example, in coming to terms with the diversity, non-conformity, and/or minority status of their sexually and gender diverse significant other; and (c) for people in different relationship configurations, including polyamorous relationships. 9. Adhere to an affirmative stance towards sexual and gender diversity in policy development and planning, research and publication, training and education (including curriculum development, assessment, and evaluation of assessment tools), and intervention design and implementation (including psychotherapeutic interventions); 10. Support best practice care in relation to sexually and gender diverse clients by (a) using relevant international practice guidelines in the absence of South African-specific guidelines; (b) cautioning against interventions aimed at changing a person's sexual orientation or gender expression, such as 'reparative' or conversion therapy; (c) opposing the withholding of best practice gender-affirming surgery and treatment and best practice transgender healthcare as outlined by the WPATH; and (d) encouraging parents to look for alternatives to surgical intervention in the case of intersex infants, unless for pertinent physical health reasons. 11. Are, if it be the case, aware of their own cultural, moral, or religious difficulties with a client's sexuality and/or gender identity, in which case they should disclose this to the client and assist him or her in finding an alternative psychology professional should the client so wish; and 12. Are committed to continued professional development regarding sexual and gender diversity, as well as to promoting social awareness of the needs and concerns of sexually and gender diverse individuals, which includes promoting the use of affirmative community and professional resources to facilitate optimal referrals."

14 Victor, Nel, Lynch and Mbatha "The Psychological Society of South Africa Sexual and Gender Diversity Position Statement: Contributing Towards a Just Society" 2014 44 *South African Journal of Psychology* 292–302.

15 Psychological Society of South Africa (PsySSA) *Practice Guidelines for Psychology Professionals Working With Sexually and Gender-Diverse People* (2017) 6 http://www.psyssa.com (accessed 2023-02-23).

16 McLachlan and Nel "Que(e)ring Models of Accessing Gender Affirming Healthcare in the Southern African Context" Paper presented at the World Professional Association for Trans Gender Health Bi-Annual Symposium, Buenos Aires, Argentina (2018).

17 The Professional Association for Transgender Health South Africa (PATHSA) 2020 [cited 2021 Aug 21] https://web.archive.org/web/20230111044937/https://pathsa.org.za/resources/Documents/2021-05-11T151824%20Approved%20Constitution%20with%20reference%20number.pdf (accessed 2023-02-25). PATHSA, in its position statement, takes a clear and consistent position on gender-affirming healthcare for children and adolescents. It provides as follows:

PATHSA is an interdisciplinary organisation advocating for the dignity, equality and access to health care of sexually and gender-diverse people. Its objectives are as follows:

> "a) Facilitate networks and foster supportive environments for health professionals working with and for trans and gender diverse people.
> b) Develop, advocate for and promote best practices and clinical resources for gender affirming health care.
> c) Encourage, promote, conduct and disseminate research, which is done in a respectful way towards the community, to expand knowledge and deepen understanding about trans and gender diversity.
> d) Advocate for institutional, policy, and legislative change by utilizing our collective knowledge and expertise.
> e) Provide education on holistic gender-affirming healthcare promoting the health, wellbeing, and supporting the self-actualisation of trans and gender diverse people.
> f) Develop leadership skills amongst trans and gender diverse health professionals and promote indigenous perspectives.
> g) To disseminate awareness around power dynamics that are typically inherent to all healthcare seeker/provider interactions involving people who are part of the trans and gender-diverse communities, to acknowledge the damage that has been done by such dynamics, and to insist that gender-affirming clinicians must take steps to dismantle these typical power hierarchies.
> h) Generally, to do such other things as may be incidental or conducive to the attaining of the above objectives."[18]

2 DIAGNOSIS OF GENDER DYSPHORIA IN CHILDREN

Before the SAHCS guidelines, South Africa, like many parts of the world, required individuals who sought treatment to obtain approval from mental-health professionals before they could undergo hormonal or surgical intervention. These medical professionals included a psychotherapist, a counsellor, a family therapist or a diagnostician/assessor.[19] Both the WPATH SOC8 and PATHSA guidelines acknowledge that evaluation and support of transgender youth must be conducted by suitably skilled mental-health practitioners. Both sets of guidelines are aligned regarding the issue that gender-diverse children should be put on hormone blockers after having reached Tanner Stage 2, which marks the beginning of physical development. The purpose of hormone blockers is to delay the further physiological development of the child. The guidelines do not force patients to seek a referral by medical professionals before accessing gender-affirming care; instead, a more individualised assessment of the patient's

"PATHSA regards gender affirmation of transgender children and adolescents as evidence based, internationally recognised and in the best interest of the child and adolescent." See also De Larch "Founding of Professional Association for Transgender Health South Africa (PATHSA), South Africa" (6 October 2020) https://transintersexhistory.africa/6-october-2020-founding-of-professional-association-for-transgender-health-south-africa-pathsa-south-africa/ (accessed 2025-05-22).

18 *Ibid.*

19 WPATH SOC7 23.

best interests is considered.[20] The guidelines recognise that transitioning can be different for each transgender individual.[21]

3 LEGAL AND ETHICAL REQUIREMENTS

Legal and ethical requirements expect medical practitioners to furnish potential patients with adequate information to make an informed decision and provide proper informed consent.[22] Informed consent is an integral part of the psychotherapy process. This implies that although individuals may still need to provide a written report from a mental-health professional to access gender-affirming care, this must be done in terms of an informed consent model. Snyder and Barnett contend that the model of informed consent should be:

> "[P]romoting client autonomy and self-determination, minimizing the risk of exploitation and harm, fostering rational decision-making, and enhancing the therapeutic alliance."[23]

This model, therefore, requires a medical professional to inform a patient about the potential benefits and risks of the proposed treatments in detail, including what is yet unknown regarding these treatments, and to provide alternative gender-affirming care to the patient, where relevant and indicated.[24] Therapy is not required to initiate a medical transition, but psychological services are beneficial and, as such, are encouraged to address any concerns that may arise during the process or that arise as a result of transitioning.[25] A challenge with psychotherapy is that it is expensive and consequently not affordable to all transgender patients.

4 CHALLENGES IN ACCESSING GAHC

The cost implications place unnecessary and unfair hurdles on some transgender individuals. As such, the informed consent model could be perceived as a gatekeeping model. Tabenkin and Gross explain gatekeeping as:

> "the authority to decide upon referrals to specialists, to implement the diagnostic workup and patient management in the primary care clinics, to consider finances when deciding about medical care, and to co-ordinate the actions of other caregivers, thus guaranteeing continuity of care."[26]

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20 SAHCS GAHC 31.

21 SAHCS GAHC (10) provides that "[e]ach individual has unique needs, and the gender affirming process is rarely linear".

22 SAHCS GAHC 13.

23 Snyder and Barnett "Informed Consent and the Process of Psychotherapy" 2006 41 *Psychotherapy Bulletin* 37–42.

24 PsySSA *Practice Guidelines for Psychology Professionals Working With Sexually and Gender-Diverse People* (2017) 53–54.

25 *Ibid*.

26 Tabenkin and Gross "The Role of the Primary Care Physician in the Israeli Health Care System as a 'Gatekeeper': The Viewpoint of Health Care Policy Makers" 2000 52 *Health Policy* 73–85 https://doi.org/10.1016/S0168-8510(00)00070-1 (accessed 2023-02-27).

Campbell and others correctly observe that limited funding and resources continue to present considerable public-health challenges in South Africa.[27] These contribute substantially to malfunctioning and inefficient health care. Consequently, the current waiting period for gender transition surgical interventions is estimated at between 15 and 20 years.[28] These extremely lengthy waiting periods are but one of the many unique challenges that South African transgender and gender-diverse persons experience. In addition, many South Africans face extreme poverty and unemployment, which further hamper their efforts to access treatment. Muller notes that poor access to South African health-care services may be attributed to the country's economic disparities. He explains the situation as one:

> "[w]here the vast majority of the population depend on health services in the under-resourced and overburdened public sector [...] in this highly unequal system, sexual and gender minority people face the general challenges of service and supply unavailability, long waiting times, and a lack of specialized personnel and services, but also encounter homo- and transphobic discrimination and prejudice on top of these other barriers."[29]

Moreover, most South African medical-aid schemes do not cover gender-affirming care costs.[30] The main cost drivers in gender-affirming care include drug costs, diagnostics and monitoring (where applicable), hospitalisation during surgical interventions, and support services. It is the author's submission that one way to overcome the challenge regarding costs is for the Department of Health to update its prescribed minimum benefits (PMB) list[31] to include trans-affirming care.[32] The term "prescribed minimum benefits" is defined in the regulations as follows:

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27 Campbell, Fresán, Addinall, Böhmke, Grobler, Marais, Wilson, Stein, Reed and Robles "Experiences of Gender Incongruence and the Relationship Between Social Exclusion, Psychological Distress, and Dysfunction Among South African Transgender Adults: A Field-Study for ICD-11" 2018 30 *Annals of Clinical Psychiatry* 168–174.

28 *Ibid*.

29 Müller "Scrambling for Access: Availability, Accessibility, Acceptability and Quality of Healthcare for Lesbian, Gay, Bisexual and Transgender People in South Africa" 2017 17 *BMC International Health and Human Rights* 10.

30 Human Sciences Research Council (HSRC) "Policy Guidance: Improving Access to Gender-Affirming Healthcare for Transgender Women" (28 September 2022) https://hsrc.ac.za/news/impact-engagement/policy-guidance-improving-access-to-gender-affirming-healthcare-for-transgender-women/ (accessed 2023-03-02).

31 The Medical Schemes Act 131 of 1998, (Medical Schemes Act) effective from January 2000, provided for the definition of Prescribed Minimum Benefits (PMB), which stipulate a package of services or care that a medical scheme must provide for in its benefit design. It regulated medical-scheme coverage for certain defined health conditions in terms of prescribed minimum benefits (PMBs), which were introduced into the health care sector on 1 January 2004. Annexure A to the regulations defined the PMBs in terms of some 270 diagnosis-treatment pairs and was published initially on 20 October 1999 (the 1999 regulations) with subsequent amendments. See "Amendment to the General Regulations Made in Terms of the Medical Schemes Act, 1998 (Act 131 of 1998)" GN 540 in *GG* 23379 of 2002-04-30. See also Rayner "Prescribed Minimum Benefits or Minimum Pre-Scribed Benefits?" 2004 94 *South African Medical Journal* 623–624.

32 Department of Health "Regulations in Terms of the Medical Schemes Act, 1998" GN R1262 in *GG* 20556 of 1999-10-20. Further regulations were published on 5 June 2000 and 30 June 2000. (Hereafter, the regulations, as amended, are referred to as the Medical Schemes Act Regulations.) See also Fish, McLeod, Rothberg, Eekhout, Pels, Innocenzi and

"'Prescribed minimum benefits' mean the benefits contemplated in section 29(1)(*o*) of the Act, and consist of the provision of the diagnosis, treatment and care costs of–

(a) The Diagnosis and Treatment Pairs listed in Annexure A,

subject to any limitations specified in Annexure A; and

(b) Any emergency condition."[33]

Section 29 of the Medical Schemes Act provides as follows:

"(1) The Registrar shall not register a medical scheme under section 24, and no medical scheme shall carry on any business, unless provision is made in its rules for the following matters:

… (*o*) The scope and level of minimum benefits that are to be available to beneficiaries as may be prescribed."[34]

In terms of regulation 7,[35] the benefits contemplated in section 29(1)(*o*) of the Act "consist of the provision of the diagnosis, treatment and care costs" of the Diagnosis and Treatment Pairs listed in Annexure A to the Regulations.[36] It must, however, be noted that psychotherapy treatment is

Mubangizi "The Costing of Existing Prescribed Minimum Benefits in South African Medical Schemes in 2001" 2002 5. The regulation provides:

"[t]he objective of specifying a set of Prescribed Minimum Benefits was given in the 1999 Regulations as:

(i) To avoid incidents where individuals lose their medical scheme cover in the event of serious illness and the consequent risk of unfunded utilisation of public hospitals.

(ii) To encourage improved efficiency in the allocation of Private and Public health care resources".

33 Reg 7 of the Medical Schemes Act Regulations.

34 S 29(1)(*o*) of the Medical Schemes Act. See also reg 7 of the Medical Schemes Act Regulations.

35 Medical Schemes Act Regulations.

36 HSRC https://hsrc.ac.za/news/impact-engagement/policy-guidance-improving-access-to-gender-affirming-healthcare-for-transgender-women/. Reg 8 of the 1999 (pre-amended) Medical Schemes Act Regulations dealt with PMBs for the medical conditions listed in Annexure A. It provided as follows:

"(1) From the date of commencement of these regulations, the prescribed minimum benefits that medical schemes must offer in terms of the Act consist of the provision of treatment for all the categories of Diagnosis and Treatment Pairs listed in Annexure A subject to any limitations specified in Annexure A.

(2) Any benefit option that is offered by a medical scheme must reimburse in full, without co-payment or the use of deductibles, the diagnostic, treatment and care costs of the prescribed minimum benefit conditions specified in Annexure A in at least one provider or provider network which must at all times include the public hospital system.

(3) Cover in the public hospital system must include all the costs of diagnosis, treatment and care for the prescribed minimum benefit Diagnosis-Treatment Pairs in Annexure A to a level and entitlement that is not different in terms of quality and intensity to the services provided to publicly funded patients.

(4) Medical schemes may offer enhanced options to their members through additional cover for any specific entitlements: Provided that diagnosis, treatment and care under the prescribed minimum benefits is provided.

(5) The options referred to in subregulation (4) may include the use of alternative providers or provider networks and could incorporate member co-payments, or enhanced options for other benefits that fall outside of the prescribed minimum benefits or both.

available at state-funded health services such as clinics and hospitals, although the waiting period in these state-run institutions may be lengthy.

Another challenge faced by transgender and gender-diverse persons is that many clinicians and other health-care professionals, such as psychologists, may have limited training and experience in providing care for gender-diverse individuals.[37] Transgender education in both psychological and clinical settings is lacking, and as such, professionals who interact with a patient may be unaware of the sensitivity required when treating a transgender person.[38]

The discussion above has alluded to the difficulties experienced by transgender and gender-diverse persons who wish to access gender-affirming surgery. These difficulties are multifaceted and, thus, are not

(6) If cover for a prescribed minimum benefit as defined in Annexure A under an enhanced option is exhausted while the patient still requires diagnosis; care or treatment for that prescribed minimum benefit, that patient may be transferred to a lower cost provider or provider network, but the medical scheme must continue to be fully liable for all costs incurred in delivering the prescribed minimum benefit care that is required.

(7) A member or dependant shall not lose his or her entitlement to any prescribed minimum benefit, regardless of any enhanced option they may choose or as a result of any condition associated with that enhanced option.

(8) Medical schemes may employ appropriate interventions aimed at improving the efficiency and effectiveness of health care provision provided that every option offered by a medical scheme must at least provide full cover for prescribed minimum benefits in at least the public hospital system.

(9) These regulations must not be construed to prevent medical schemes from employing techniques such as the designation of preferred providers, requirements for Pre-Authorization and the application of Treatment Protocols: Provided that in the case of Pre-Authorization a medical scheme must not refuse authorization for the delivery in a public hospital of standard treatment for a prescribed minimum benefit as defined in Annexure A.

(10) Every Medical Scheme must make provision in its rules for the reimbursement of the cost of care that is considered to fall within the Prescribed Minimum Benefits prescribed under these Regulations within all the membership options that the medical scheme offers.

(11) Medical schemes must refer to these Regulations in their rules and such reference may not be a full reproduction of these Regulations.

(12) Medical schemes must specify in their rules whether they restrict the provision of the prescribed minimum benefits under specific membership options to a named network of providers.

(13) The Registrar must determine whether a medical scheme's rules are consistent with the provisions of the Act and these Regulations before approving such rules.

(14) Disputes and complaints between a member or a provider and the medical scheme in relation to minimum prescribed benefits must be dealt with in terms of Chapter 10 of the Act".

[37] PsySSA *Practice Guidelines for Psychology Professionals* 56. See also Wilson, Marais, De Villiers, Addinall and Campbell "Transgender Issues in South Africa, With Particular Reference to the Groote Schuur Hospital Transgender Unit" 2014 104(6) *South African Medical Journal* 449.

[38] Müller "Teaching Lesbian, Gay, Bisexual and Transgender Health in a South African Health Sciences Faculty: Addressing the Gap" 2013 13 *BMC Medical Education* http://dx.doi.org/10.1186/1472-6920-13-174 (accessed 2023-02-28).

limited only to obstacles in accessing medical services.[39] Hughto describes the structural barriers to trans patients' lack of access to care as follows:

> "Structural barriers to transgender healthcare include high uninsured rates or lack of coverage for transgender-related services, inadequate training of physicians on transgender-sensitive care, and limited access to providers who offer transgender-related care."[40]

The argument advanced in the literature is that there is a lack of access to trans-inclusive care. This is linked to a lack of providers with expertise in transgender medicine.[41] Transgender treatment is not taught in conventional medical curricula; as such, some health professionals lack knowledge about the concerns and medical needs of the transgender community.[42] This lack of required specialist knowledge contributes greatly to transgender individuals having difficulties in accessing quality care. Some have reported experiences of verbal and physical harassment in several settings, including medical offices and hospitals.

As indicated above, WPATH considers gender-affirming care necessary because it promotes the overall well-being of trans persons.[43] Access to health-care services includes considering the consequences of the cost barrier of gender-affirming care for trans individuals. This lack of affordability often leads to transgender persons skipping health care because of considerable financial obstacles based on the high costs involved. Research shows that the majority of South Africans do not have medical insurance; and so are not in a position to afford the high costs of private hospital care.[44] Private medical treatment is often not achievable for indigent and working-class trans persons within South Africa. They often have no choice but to depend on already overburdened public-health facilities, which also affects the quality of health care that they may expect.[45]

PATHSA has taken a stance that it will support transgender and gender-diverse persons, especially in applications regarding the role of medical aid in covering the costs of gender-affirming surgery. The most obvious reason is that gender-affirming surgeries are medically necessary and are not

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39 Nkoana and Nduna "Engaging Primary Health Care Providers in Transgender Community Health Care: Observations from the Field" 2012 8 *New Voices in Psychology* 120–129.

40 Hughto, Reisner and Pachankis "Transgender Stigma and Health: A Critical Review of Stigma Determinants, Mechanisms, and Interventions" 2015 147 *Social Science and Medicine* 222–231 https://doi.org/10.1016/j.socscimed.2015.11.010 (accessed 2023-02-18).

41 Van Heesewijk, Kent, Van de Grift, Harleman and Muntinga "Transgender Health Content in Medical Education: A Theory-Guided Systematic Review of Current Training Practices and Implementation Barriers & Facilitators" 2022 27 *Advances in Health Sciences Education* 817–846 https://doi.org/10.1007/s10459-022-10112-y (accessed 2023-03-17).

42 Vance, Halpern-Felsher and Rosenthal "Health Care Providers' Comfort With and Barriers to Care of Transgender Youth" 2015 56 *Journal of Adolescent Health* 251–253 https://doi.org/10.1016/j.jadohealth.2014.11.002 (accessed 2023-02-20).

43 WPATH SOC8 S6.

44 Stats SA "General Household Survey, 2016" (31 May 2017) https://www.statssa.gov.za/ (accessed 2023-02-20) Table 7.

45 Nkoana and Nduna 2012 *New Voices in Psychology* 121.

merely cosmetic procedures.[46] It is therefore recommended that medical cover should include gender-affirming treatment and should align with the cover provided to other medical patients. Furthermore, it should be explicitly clear what coverage benefits are included in the different insurance plans and/or the defined exclusion clauses. This will provide a reasonable basis for the denial of transition-related services that are considered cosmetic or experimental. In addition, as is submitted above, the Department of Health's PMB list should be updated to include transgender health care.

Although there are state hospitals that provide gender-affirming health care as an essential service, the waiting periods are unacceptably long. As argued above, it is submitted that all the impediments preventing transgender and gender-diverse persons from accessing relevant transgender care, including gender-reassignment surgery, constitute unjustifiable limitations on the rights of trans persons.

5 THE ALTERATION OF SEX DESCRIPTION AND SEX STATUS ACT 49 OF 2003

Despite its dark history, South Africa is frequently lauded as having one of the most progressive constitutions in terms of the advancement of human rights. The South African Constitution[47] is the only one in Africa offering constitutional protection against discrimination based on sex, gender and sexual orientation.[48] The Constitution advances and protects the rights of sexual and gender minorities within the country. Furthermore, it allows trans persons the same legal rights as cis-gendered individuals. The protection of the rights of trans persons is also evident in the promulgation of the Alteration of Sex Description and Sex Status Act,[49] which aims to protect the rights of trans persons seeking legal gender recognition. In terms of the Act, it is not mandatory that a person applying to change the gender marker should have undergone gender reassignment. The provisions of section 2(2)(*b*) suggest that a person who has had medical treatment to alter their hormonal patterns for the purpose of gender change can also apply to change their gender marker.[50] However, applicants who have not undergone surgery have been turned away by officials at the Department of Home

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46 PATHSA "Letter of Motivation for Medical Aid Payment for Gender-Affirming Surgery" (16 September 2022) https://pathsa.org.za/News/12921932 (accessed 2023-02-22).

47 Constitution of the Republic of South Africa, 1996.

48 Statista Research Department "Countries With Laws Against Discrimination Based on Sexual Orientation 2020" (9 January 2023) https://www.statista.com/statistics/1269887/countries-laws-against-discrimination-based-sexual-orientation/ (accessed 2023-04-23). See also European Parliamentary Research Service "LGBTI in Africa Widespread Discrimination Against People With Non-Conforming Sexual Orientations and Gender Identities" (May 2019) https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI(2019)637949 (accessed 2023-04-22) 1. It provides as follows: "Some African countries have partly decriminalised LGBTI persons or given them better protection. However, across the continent – with the notable exception of South Africa – such persons are still far from fully enjoying the same rights as other citizens."

49 49 of 2003 (Alteration Act).

50 S 2(2) of the Alteration Act.

Affairs.[51] This is mostly a result of an incorrect understanding and application of the Act. Consequently, applicants may sometimes wait two years or longer to get a response.[52] The Births and Deaths Registration Act,[53] read together with the Alteration Act, provide for the amendment of personal information. Section 27A of the Births and Deaths Registration Act empowers the Director-General to alter the sex description of the applicant on condition that an application is "made in the prescribed manner". The sex description may also be altered by the Director-General when a magistrate has issued an order in terms of section 2 of the Alteration Act.

Research has shown that gender incongruence can manifest from early childhood onward. Some children, depending on the varying degrees of their responses to their situation, may express discomfort with their assigned gender and manifest strong cross-gender interests from as early as age three.[54] These children may also express a desire to have the genitalia of the opposite sex. The Alteration Act defines "gender reassignment" as:

> "[a] process which is undertaken for the purpose of reassigning a person's sex by changing physiological or other sexual characteristics, and includes any part of such a process."[55]

The wording of the section suggests that medical processes in general, and psychiatry, are promoted to achieve the reassignment goal. Levine and others observe that, previously, many physicians and psychiatrists were sceptical and critical of using surgery and hormone therapy. This is because they perceived transgenderism to be a psychological distress and/or delusional condition in need of psychotherapy and "reality testing".[56] Modern clinical practice, however, assists LGBTQIA+ patients in living their lives according to their own natures and desires. As Levine and others explain, despite this, some professionals "continue to treat youth with gender-affirmative interventions despite lingering doubts".[57]

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51 Sanasie "Transgender SA Woman Speaks Out About Prejudice and Public Humiliation" *News24* (27 June 2016) https://www.news24.com/news24/video/southafrica/news/watch-a-transgender-life-in-south-africa-20160627 (accessed 2023-04-23). See also Matthyse, Payne, Mudarikwa, Smit, Camminga and Rossouw "Keeping the Promise of Dignity and Freedom for All: A Position Paper on Legal Gender Recognition in South Africa" (Gender DynamiX and Legal Resources Centre 2020) 69 https://lrc.org.za/wpcontent/uploads/Position-paper-on-legal-gender-recognition.pdf (accessed 2023-04-23). The paper reflects as follows: "In some instances, trans and gender diverse persons have been sent from one official to another or one Home Affairs office to another reflecting uncertainty, active obstruction or unwillingness on the part of officials."

52 Matthyse *et al* "Keeping the Promise of Dignity and Freedom for All" 59.

53 51 of 1992.

54 Levine "Reflections on the Clinician's Role With Individuals Who Self-Identify as Transgender" 2021 50 *Archives of Sexual Behavior* 3531 https://doi.org/10.1007/s10508-021-02142-1 (accessed 2023-02-23).

55 S 1 (definition clause) of the Alteration Act.

56 Yarbrough *Transgender Mental Health* (2018).

57 Levine, Abbruzzese and Mason "Reconsidering Informed Consent for Trans-Identified Children, Adolescents, and Young Adults" 2022 48 *Journal of Sex and Marital Therapy* 709 https://doi.org/10.1080/0092623X.2022.2046221 (accessed 2023-04-27).

The Alteration Act provides for a legal name change as well as changes to gender markers on legal documents after transition.[58] It makes provision for the amendment of a person's gender in the population registry. The new gender marker will thus be reflected on birth certificates, smart ID cards and passports. Section 2 of the Alteration Act[59] stipulates that only three categories of people are eligible to apply for the alteration of their gender marker. These are persons: (i) whose sexual characteristics have been altered by surgical or medical treatment; (ii) whose sexual characteristics have been altered through natural development resulting in gender reassignment; and (iii) persons who are intersexed. Section 2 of the Alteration Act, read with section 27A of the Births and Registrations Act,[60] provides that the transition must relate to an identified gender that will be opposite to the gender that was assigned at birth. Further, an application must provide proof that the applicant has been medically altered, or alternatively, that they were born with a condition resulting in conflicting or ambiguous biological gender markers, that is, being intersexed. Two medical reports are required in such cases: one by the medical practitioner who performed the procedure or medical treatment, or by a medical practitioner who has experience in such procedures or treatments, and a report by a second medical practitioner who has independently examined the application to establish the applicant's gender.[61]

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[58] S 1 of the Alteration Act. See also s 24(1) of the Births and Deaths Registration Act 51 of 1992, which provides as follows: "Any parent of a minor, or a person of age, may apply in the prescribed manner to the Director-General for the alteration of his or her forename under which his or her birth is registered, and the Director General may alter such forename accordingly in the prescribed manner."

[59] S 2 of the Alteration Act provides:

"(1) Any person whose sexual characteristics have been altered by surgical or medical treatment or by evolvement 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.

(2) An application contemplated in subsection (1) must– (a) be accompanied by the birth certificate of the applicant; (b) in the case of a person whose sexual characteristics have been altered by surgical or medical treatment resulting in gender reassignment, be accompanied by reports stating the nature and results of any procedures carried out and any treatment applied prepared by the medical practitioners who carried out the procedures and applied the treatment or by a medical practitioner with experience in the carrying out of such procedures and the application of such treatment; (c) in every case in which sexual characteristics have been altered resulting in gender reassignment, be accompanied by a report prepared by a medical practitioner other than the one contemplated in paragraph (b) who has medically examined the applicant in order to establish his or her sexual characteristics; …"

[60] S 27A of the Births and Registrations Act provides as follows:

"(1) If the Director-General grants an application or a magistrate issues an order in terms of section 2 of the Alteration of Sex Description and Sex Status Act, 2003, 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 so-called alteration the person concerned shall be entitled to be issued with an amended birth certificate".

[61] S 2 of the Alteration Act.

The Alteration Act has, however, been criticised for being "inherently medicalised".[62] It requires a medical diagnosis and an intervention as preconditions for sex description alteration, although the vast majority of transgender and gender-diverse individuals cannot afford such gender-affirming care. Owing to the associated costs, the Act may not benefit transgender individuals who lack equitable access to medical and surgical care. The Act is further criticised for its failure to recognise fluid or non-conforming identities.[63]

6 THE POSSIBLE EFFECT OF IMPLEMENTING NATIONAL HEALTH INSURANCE

Shortly after the dawn of democracy and the coming into effect of the Constitution, every person's right of access to health-care services was prioritised.[64] In order to achieve this constitutionally protected right, the government had to revise existing laws and policies, as well as introduce new laws and policies with the objective of transforming the health system to give effect to the constitutional imperatives regarding access to health-care services. Supporting documents included the 1994 National Health Plan,[65] the 1997 White Paper for the Transformation of the Health System in South Africa,[66] and the National Health Act, 2003.[67]

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62 HSRC *Policy Guidance: Improving Access to Gender-Affirming Healthcare*.

63 *Ibid*.

64 S 27(1) of the Constitution.

65 African National Congress "A National Health Plan for South Africa" (30 May 1994) https://www.anc1912.org.za/policy-documents-1994-a-national-health-plan-for-south-africa/. The foreword states: "The challenge facing South Africans is to design a comprehensive programme to redress social and economic injustices, to eradicate poverty, reduce waste, increase efficiency and to promote greater control by communities and individuals over all aspects of their lives. In the health sector this will involve the complete transformation of the national health care delivery system and all relevant institutions. All legislation, organisations and institutions related to health have to be reviewed with a view to attaining the following:

- ensuring that the emphasis is on health and not only on medical care.
- redressing the harmful effects of apartheid health care services.
- encouraging and developing comprehensive health care practises that are in line with international norms, ethics and standards.
- emphasising that all health workers have an equally important role to play in the health system and ensuring that teamwork is a central component of the health system.
- recognising that the most important component of the health system is the community and ensuring that mechanisms are created for effective community participation, involvement and control.
- introducing management practises that are aimed at efficient and compassionate health care delivery.
- ensuring respect for human rights, and accountability to the users of health facilities and the public at large.
- reducing the burden and risk of disease affecting the health of all South Africans."

66 Department of Health "White Paper for the Transformation of the Health System in South Africa" GN 667 in *GG* 17910 of 1997-04-16. The Preface states: "We advance a wide range of policies that will fundamentally transform our health care delivery system. Some significant steps have already been taken in this direction, but a lot still needs to be done. We intend to decentralise management of health services, with emphasis on the district

The South African government introduced its first Policy Paper on National Health Insurance (NHI) to help with improving access to health care for lower-income citizens.[68] In the White Paper, NHI is defined as:

> "[a] health care financing system that is designed to pool funds to actively purchase and provide access to quality, affordable personal health services for all South Africans based on their health needs, irrespective of their socioeconomic status. NHI is intended to move South Africa towards Universal Health Coverage (UHC) by ensuring that the population has access to quality health services and that it does not result in financial hardships for individuals and their families."[69]

NHI seeks to bridge existing health inequalities and aims to make affordable health care available to all South Africans regardless of their financial circumstances. The goal is to achieve universal health coverage for all South African citizens. This goal was launched in 2012 and is estimated to be completed by 2026.[70]

The reference to the term "universal coverage" is in line with the World Health Organization (WHO) Constitution, which envisages "[t]he highest attainable standard of health as a fundamental right of every human being". It further supports Vision 2030 of the National Development Plan, which aims to reduce inequality in the health sector by 2030.[71] By implication, it seeks to achieve equitable access to health care, regardless of a person's income. Accordingly, people should be protected from the financial hardships of paying for health services, and this should be applied in a non-biased and non-discriminatory manner. The words "based on their health needs" implies that meeting health-care needs has special importance. In this regard, Kutzin concludes that:

> "[u]niversal coverage with the health insurance function may be defined as physical and financial access to necessary healthcare of good quality for all persons in a society. It implies protection against the risk that if expensive (relative to an individual's or family's means) healthcare services are needed, services of adequate quality will be physically accessible, and the costs of these services will not prevent persons from using them or impoverish their families."[72]

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health system – increase access to services by making primary health care available to all our citizens; ensure the availability of safe, good quality essential drugs in health facilities; and rationalise health financing through budget reprioritisation."

67 Ch 2 of the Act provided a detailed discussion of this Act.

68 Department of Health "National Health Insurance in South Africa" Policy (Green) Paper GN 34523 in *GG* 554 of 2011-08-12 https://www.greengazette.co.za/documents/national-gazette-34523-of-12-august-2011-vol-554_20110812-GGN-34523.pdf (accessed 2023-03-19).

69 Department of Health "National Health Insurance for South Africa: Towards Universal Health Coverage" (2017) https://www.gov.za/documents/national-health-act-national-health-insurance-policy-towards-universal-health-coverage-30 (accessed 2023-03-20).

70 Slabbert and Labuschaigne "Legal Reflections on the Doctor-Patient Relationship in Preparation for South Africa's National Health Insurance" 2022 15 *South African J Bioethics Law* 31.

71 National Planning Commission *National Development Plan 2030: Our Future – Make it Work* (2011) 339.

72 Kutzin *Towards Universal Health Care Coverage: A Goal-Oriented Framework for Policy Analysis* (2000) 2.

It should be noted that the South African health-care system is still fragmented and needs to be de-fragmented.[73] It is, however, evident that in order to achieve equitable universal coverage, health-care services must be accessible to all, be shown to be necessary, and accommodate individuals' different health needs, including their financial circumstances.

The implementation of NHI presents an opportunity to flag the situation of transgender persons, including their challenges in accessing health-care services relevant to their unique situation. The National Department of Health recently developed the NHI Service Benefits Framework, which details the conditions, services and care pathways captured in existing national clinical policy and the minimum or average required resources associated with their delivery.[74] It is important that gender-affirming care interventions be included in the NHI's Benefits Service Network.

7 CONCLUSION

Transgender and gender-diverse persons require high-quality, lifelong access to a wide scope of transgender-competent health care. It is, therefore, important to find a gender-affirming health-care provider who is experienced and competent in transgender and gender-diverse fields. A qualified assessment is beneficial in a variety of situations, as the child concerned and their family, coupled with clinicians, may come up with an appropriate and well-informed intervention.

Gender-affirming care should also not be constrained by access barriers such as exorbitant costs. As medical schemes remain an integral part of South African health care, they must prioritise a gender-affirming model of care. This affirming model should be integrated into their PMBs, at least pending the implementation of NHI. NHI needs to make provision for gender-affirming health care in its comprehensive benefits. The NHI's Service Benefits Framework should also include a treatment pathway for transgender individuals, including transgender children. Regarding state-funded gender-affirming care, the challenge is to maintain sustained funding, which could assist in strengthening the health systems. Existing insufficient resources in supplies, infrastructure, materials and staff should be addressed as a matter of priority and urgency, together with strategies to increase health funding. Consequently, there is a need to introduce innovative approaches to allocating more health funds for continuous improvement in value to patient. One may only hope that an ostensible lack of political will to consider the rights of transgender persons in the health-care context will not compromise the already dire position of these vulnerable groups.

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[73] Maphumulo and Bhengu "Challenges of Quality Improvement in the Healthcare of South Africa Post-Apartheid: A Critical Review" 2019 42 *Curationis* 1 https://doi.org/10.4102/curationis.v42i1.1901 (accessed 2023-02-13).

[74] Tucker, Chalkidou and Pillay "Establishing the NHI Service Benefits Framework: Lessons Learnt and Stakeholder Engagement" 2019 1 *South African Health Review* https://journals.co.za/doi/epdf/10.10520/EJC-1d2aad4a4c (accessed 2023-04-21) 43.