

# Did the CPA Shut the Bathroom Doors for Transgender and Non-Binary People? A Critical Legal Reflection of Section 9(2) of the CPA

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## Abstract

The *Consumer Protection Act* 68 of 2008 (CPA) introduced a variety of consumer rights that are intended to protect consumers in their engagement with suppliers. Amongst these rights is the consumer's right to equality in the consumer market. Section 8 of the CPA sets out practices that are considered to be prohibited discriminatory marketing practices; while section 9 of the CPA provides instances that constitute reasonable grounds for differential treatment in certain circumstances. In particular, section 9(2) of the CPA provides that a supplier may provide and designate facilities that are separate but equal for the exclusive use of each gender. Alternatively, the supplier is permitted to offer access to a facility to one gender exclusively. Over the years, the LGBTQI+ community has increased awareness around gender stereotypes; and stressed that not all persons conform to a binary-gender allocation. Therefore, the question that arises is whether section 9(2) of the CPA, in permitting the designation of facilities to exclusively one gender, is unfairly discriminating against transgender and non-binary persons and is therefore unconstitutional. To the extent that the provision is constitutional, the paper considers whether the continued practice of having gender-segregated bathrooms to the exclusion of transgender and non-binary persons is constitutional.

## Keywords

Consumer protection; reasonable differentiation; section 9(2) of the *Consumer Protection Act* 68 of 2008; gender; separate facilities; inclusion; transgender; non-binary; equality; constitutionality.

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## 1 Introduction

The *Consumer Protection Act 68 of 2008* (CPA) was introduced as a groundbreaking piece of consumer protection legislation in South Africa. It not only sought to broadly provide consumers with protection from various types of prejudicial conduct on the part of suppliers, but it also affords consumers a series of fundamental consumer rights and seeks to ensure that vulnerable consumers are protected.<sup>1</sup> Key amongst these is the first fundamental right to equality in the consumer market.<sup>2</sup> This fundamental right also echoes the constitutional right to equality as provided for under section 9 of the *Constitution of the Republic of South Africa* (the Constitution).<sup>3</sup> In terms of section 9 of the Constitution, everyone is considered "equal before the law" and is entitled to the equal protection and benefit of the law.<sup>4</sup> To give effect to the realisation of the constitutional right to equality, all persons must be afforded "the full and equal enjoyment of all rights and freedoms."<sup>5</sup> The achievement of equality is a core constitutional tenet in the Republic of South Africa, and its embodiment in the consumer law context is the key focus area of this paper.

Despite the right to equality that is embodied in the CPA and the Constitution, transgender and non-binary persons do not appear to experience equal protection from the law in so far as their use of bathroom facilities is concerned. This paper analyses section 9(2) of the CPA, which provides for reasonable differentiation by suppliers in certain circumstances. For the sake of completeness, this provision is quoted below:

It is not a contravention of section 8 for a supplier to reasonably-

- (a) provide and designate separate but substantially equivalent facilities for the exclusive use of persons of each gender; or

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<sup>1</sup> Chapter 2 of the *Consumer Protection Act 68 of 2008* (hereafter the CPA). Also see s 3 of the CPA.

<sup>2</sup> Part A of ch 2 of the CPA.

<sup>3</sup> *Constitution of the Republic of South Africa*, 1996 (hereafter the Constitution).

<sup>4</sup> Section 9(1) of the Constitution.

<sup>5</sup> Section 9(2) of the Constitution. Also see McGregor 2013 *US-China Law Review* 107.

- (b) offer to supply or provide access to a facility exclusively to persons of one gender.

A facility is defined broadly in the CPA to include

any premises, space or equipment set up to fulfil a particular function, or at, in, or on which a particular service is available.<sup>6</sup>

Common examples of facilities that might be subject to the exclusive use of each gender include bathrooms, changerooms, saunas or steam rooms.<sup>7</sup> The focus of this paper is on gender-segregated public bathrooms (also commonly known as public toilets or ablution facilities).

As a backdrop the paper will set out: (i) key terms; (ii) a brief background on gender-segregated bathrooms; (iii) a discussion on transgender and non-binary persons as vulnerable consumers under the CPA; (iv) the right to equality under the CPA (read together with section 9 of the Constitution and Chapter 2 of the *Promotion of Equality and Prevention of Unfair Discrimination Act* 4 of 2000 (PEPUDA)); and (v) the potential rationale behind section 9(2) of the CPA. A constitutional assessment of section 9(2) of the CPA will follow. Accordingly, the aim of this research is to consider the constitutionality of section 9(2) of the CPA with a specific focus on the interests of transgender and non-binary persons. Only to the extent that the provision passes constitutional muster, the paper will proceed to consider whether the practice of suppliers maintaining gender-segregated bathrooms is constitutional in a free and democratic South Africa that promotes equality before the law.

## 2 Key terms

For the purposes of facilitating a coherent discussion, it is critical to first set out the key terms that are used in this paper. First, "transgender" is an umbrella term for persons whose gender identity, gender expression or behaviour does not conform to that typically associated with the gender to which they were assigned at birth. "Trans" is sometimes used as shorthand for "transgender".<sup>8</sup> "Gender identity" refers to people's internal knowledge of their gender.<sup>9</sup> "Gender expression" is how people present their gender on the outside. That might include behaviour, clothing, hairstyle, voice or body characteristics.<sup>10</sup> People are considered to be "cisgender" or "cis" for short,

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<sup>6</sup> Section 1 of the CPA.

<sup>7</sup> Also see Eiselen "Section 9" 9-5.

<sup>8</sup> Advocates for Trans Equality 2023 <https://transequality.org/issues/resources/understanding-transgender-people-the-basics>. See also Snyman and Rudman 2022 *Stell LR* 61-62.

<sup>9</sup> Advocates for Trans Equality 2023 <https://transequality.org/issues/resources/understanding-transgender-people-the-basics>.

<sup>10</sup> Advocates for Trans Equality 2023 <https://transequality.org/issues/resources/understanding-transgender-people-the-basics>.

if their gender identity matches the gender they were assigned at birth.<sup>11</sup> Some transgender people do not identify with one gender exclusively. Their gender identity may combine both female and male elements, for instance, or they may not identify with either gender. These transgender people are often described as being "non-binary". Another term that is sometimes used to describe people in this category is "genderqueer".<sup>12</sup> Despite the fact that the meaning of the term "transgender" also includes non-binary people, this paper uses both terms to indicate and emphasise that the accommodations argued for in this paper should cater for transgender people who identify with the binary genders and transgender people who are non-binary.

### 3 Background on gender-segregated bathrooms

Initially, public bathrooms were available only to men.<sup>13</sup> In the United States of America, from the nineteenth century, laws were enacted in various states for the introduction of gender-segregated bathrooms.<sup>14</sup> The main reason for the introduction and development of gender-segregated bathrooms was to protect women and, at times, child workers in the workplace.<sup>15</sup> However, at the time, this protection was geared primarily towards the white feminine body.<sup>16</sup> Further reasons for the introduction of gender-segregated bathrooms included: (i) the provision of clean, sanitary and adequate bathroom facilities for factory workers;<sup>17</sup> (ii) the protection of worker privacy;<sup>18</sup> and (iii) the protection of the "social morality" that was established in the early nineteenth century.<sup>19</sup> The development of gender-segregated bathrooms also occurred in around the nineteenth century in European society.<sup>20</sup>

In the South African context, pre-colonial communities such as the Zulu people initially dug holes in which to bury their personal waste.<sup>21</sup> Their

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<sup>11</sup> Advocates for Trans Equality 2023 <https://transequality.org/issues/resources/understanding-transgender-people-the-basics>. See Sloth-Nielsen 2021 *LDD* 93-95.

<sup>12</sup> Advocates for Trans Equality 2023 <https://transequality.org/issues/resources/understanding-transgender-people-the-basics>.

<sup>13</sup> Patel 2017 *Agenda* 52.

<sup>14</sup> Kogan 2007 *Michigan Journal on Gender and Law* 39.

<sup>15</sup> Kogan 2007 *Michigan Journal on Gender and Law* 41. Also see Jones and Slater 2020 *Social Review Monographs* 835.

<sup>16</sup> Patel 2017 *Agenda* 52.

<sup>17</sup> Kogan 2007 *Michigan Journal on Gender and Law* 41.

<sup>18</sup> Kogan 2007 *Michigan Journal on Gender and Law* 41.

<sup>19</sup> Kogan 2007 *Michigan Journal on Gender and Law* 41.

<sup>20</sup> Patel 2017 *Agenda* 52.

<sup>21</sup> Mbatha, Wilson and Buckley 2008 <https://wisa.org.za/document/zulu-indigenous-practices-in-water-and-sanitation-preliminary-field-research-on-indigenous-practices-in-water-and-sanitation-conducted-at-ulundi/> 4.

sanitation practices later evolved into pit toilets with half-built walls.<sup>22</sup> At no stage were these structures gender segregated. Gender-segregated bathrooms were subsequently imposed on indigenous communities in South Africa through colonialism as well as apartheid.<sup>23</sup> The apartheid laws that were introduced into South African society went further in separating public bathrooms on the basis of race too.<sup>24</sup>

Gender-segregated public bathrooms are now accepted as a norm in societies across the world, including South Africa.<sup>25</sup> However, there is an abundance of literature that illustrates how gender-segregated public bathrooms can also be a place where transgender and non-binary persons experience violence.<sup>26</sup> There are also significant, often overlooked, meanings that attach to architectural spaces and spatial planning. For instance, Kogan submits that:

Architectural space has been taken for granted, considered to be a neutral, empty stage on which the real plot of the human drama unfolds. Social relations matter; the spaces in which these relations take place are often ignored as mere backdrops of little significance. Critical architectural theory attempts to remedy this oversight. Theorists including Leslie Kanés Weisman, Aaron Betsky, Daphne Spain, and Joel Sanders have argued that the spatial arrangements of our buildings and communities reflect and reinforce our understandings of sex and gender, and help to define and police the sexual hierarchies that exist in our culture.<sup>27</sup>

In the South African context, it is also critical to consider the impact of gender-segregated public bathrooms as being rooted in forms of violence that are intersectional, such as class and race.<sup>28</sup> As rightfully argued by Patel—

A degendering approach devoid of intersectional considerations would be overly simplistic. This is because it would essentially lift the transgender politics of the Global North and apply it uncritically to African contexts. To do

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<sup>22</sup> Mbatha, Wilson and Buckley 2008 <https://wisa.org.za/document/zulu-indigenous-practices-in-water-and-sanitation-preliminary-field-research-on-indigenous-practices-in-water-and-sanitation-conducted-at-ulundi/> 4.

<sup>23</sup> Patel 2017 *Agenda* 52.

<sup>24</sup> Patel 2017 *Agenda* 53.

<sup>25</sup> See generally Steyn 2012 *SAJEMS* 222; Herman 2013 *Journal of Public Management and Social Policy* 65; Patel 2017 *Agenda* 52; Bagagli, Chaves, and Fontana 2021 *Frontiers in Sociology* 1; Jones and Slater 2020 *Social Review Monographs* 834; Kogan 2007 *Michigan Journal on Gender and Law* 1.

<sup>26</sup> Herman 2013 *Journal of Public Management and Social Policy* 65; Patel 2017 *Agenda* 52; Bagagli, Chaves, and Fontana 2021 *Frontiers in Sociology* 1; Jones and Slater 2020 *Social Review Monographs* 834; Kogan 2007 *Michigan Journal on Gender and Law* 1.

<sup>27</sup> Kogan 2007 *Michigan Journal on Gender and Law* 8. Also see Patel 2017 *Agenda* 57; Bagagli, Chaves, and Fontana 2021 *Frontiers in Sociology* 1-2.

<sup>28</sup> Patel 2017 *Agenda* 53-54.

so would be a striking disregard of the South African context, which historically necessitates significant consideration of the effects of colonisation.<sup>29</sup>

The intersectionality between gender, race and class is a fitting consideration when analysing the constitutionality of gender-segregated bathrooms in the context of transgender and non-binary persons in South Africa and is considered in further detail below.<sup>30</sup>

#### **4 Transgender and non-binary persons as vulnerable consumers**

Studies have shown that transgender and non-binary persons experience various forms of violence and abuse when using gender-segregated bathrooms. This spans from physical violence to verbal harassment for using the "wrong" bathrooms.<sup>31</sup> Members of the transgender community sometimes try to avoid this violence by not using bathrooms outside of their homes – which has an impact on their education, their employment and even their access to healthcare.<sup>32</sup> As alluded to above, the violence experienced by transgender and non-binary persons is intersectional in that those who are part of low-income and/or black communities experience more violence in gender-segregated bathrooms than their wealthier and/or white counterparts.<sup>33</sup> This is particularly relevant in the consumer protection context, given that the CPA seeks to protect consumers who are considered to be vulnerable.<sup>34</sup>

In this regard section 3 of the CPA, in relevant parts, provides that one of its purposes is to promote and advance the socio-economic welfare of consumers in South Africa by:

- (1) reducing and ameliorating any disadvantages experienced in accessing any supply of goods or services by consumers -
  - (i) who are low-income persons or persons comprising low-income communities;
  - (ii) ...
  - (iii) who are minors, seniors or other similarly vulnerable consumers.

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<sup>29</sup> Patel 2017 *Agenda* 53-54; Jones and Slater 2020 *Social Review Monographs* 834.

<sup>30</sup> See the discussion in para 4 below.

<sup>31</sup> Herman 2013 *Journal of Public Management and Social Policy* 67; Patel 2017 *Agenda* 56-61; Bagagli, Chaves, and Fontana 2021 *Frontiers in Sociology* 1, 8; Jones and Slater 2020 *Social Review Monographs* 834.

<sup>32</sup> Herman 2013 *Journal of Public Management and Social Policy* 66. Also see Elkind 2007 *Journal of Constitutional Law* 920-922, 928, Writing in the American context, which contextualised the blatant discrimination faced by transgender concerning bathroom access.

<sup>33</sup> Herman 2013 *Journal of Public Management and Social Policy* 72; Patel 2017 *Agenda* 56-61.

<sup>34</sup> Section 3(1)(b) of the CPA.

Therefore, transgender and non-binary persons who are also low-income earners or form part of low-income communities are automatically among the vulnerable consumers that the CPA seeks to protect.<sup>35</sup> It is further argued that transgender and non-binary persons would fall within the wider scope of "other similarly vulnerable persons" along with minors and seniors. Barnard submits that the elderly are considered to be vulnerable given their "declining decision-making skills and social isolation."<sup>36</sup> Minors, on the other hand, lack the legal capacity to enter into transactions without the consent of their parents or guardians.<sup>37</sup> In both instances, the age of minors and seniors respectively makes them vulnerable and more susceptible to various forms of unconscionable conduct or even abuse by suppliers. As mentioned above, transgender and non-binary persons experience abuse and violence owing to their gender. Like gender, age is a ground on which persons may not be discriminated against in terms of the Constitution and PEPUDA.<sup>38</sup> Accordingly, transgender and non-binary persons should also fall within the wider scope of vulnerable consumers contemplated in section 3(1)(b)(iii) of the CPA, given that they are subject to certain abuses on the basis of their gender as a prohibited ground.

The importance of categorising such persons as vulnerable is that section 4(3) of the CPA provides that where a provision "can reasonably be construed to have more than one meaning", then the court is required to prefer a meaning that: (i) "best promotes the spirit and purposes of the CPA"; and (ii) "will best improve the realisation and enjoyment of consumer rights generally and particularly vulnerable consumers as per section 3(1)(b) of the CPA." This is a relevant consideration for the purposes of the constitutional assessment of section 9(2) of the CPA below.<sup>39</sup>

## 5 Right to equality under the CPA

### 5.1 General

Van Eeden and Barnard highlight that the extent of the regulation of unfair discrimination in the CPA is twofold. On the one hand, it is regulated comprehensively in terms of Part A of the CPA as will be elaborated upon shortly.<sup>40</sup> The CPA also addresses retaliatory discrimination in terms of section 68 of the CPA.<sup>41</sup> The latter is not necessarily on the basis of a prohibited ground and refers to an adverse prejudicial or discriminatory

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<sup>35</sup> See s 3(1)(b)(i) of the CPA.

<sup>36</sup> Barnard 2015 *International Journal of Consumer Studies* 224.

<sup>37</sup> Heaton *South African Law of Persons* 92.

<sup>38</sup> See the discussion under para 5.3 below. Also see Barnard 2015 *International Journal of Consumer Studies* 225 with regard to age being a prohibited ground.

<sup>39</sup> See para 7 below.

<sup>40</sup> Van Eeden and Barnard *Consumer Protection Law* 192.

<sup>41</sup> Van Eeden and Barnard *Consumer Protection Law* 192.

response by the supplier when consumers take steps to enforce their rights under the CPA.<sup>42</sup> The retaliatory discrimination as envisaged in section 68 of the CPA does not fall within the scope of this paper and is therefore not discussed further. The focus of this discussion will be on Part A of the CPA, which comprises of sections 8 to 10 of the CPA, read together with the relevant provisions of the Constitution and PEPUDA. The equality court has exclusive jurisdiction to hear matters falling within the scope of this Part of the CPA.<sup>43</sup>

## **5.2 Protection against discriminatory marketing**

Section 8 of the CPA provides consumers with protection against discriminatory marketing practices. It regulates equality not only in the context of the promotion of goods and services but also in the context of the supply thereof.<sup>44</sup> Subject to section 9 of the CPA, section 8 prohibits a supplier from unfairly:

- (i) excluding any persons (or categories of persons) from accessing goods or services that are offered by the supplier;<sup>45</sup>
- (ii) granting any persons (or categories of persons) exclusive access to goods or services provided by the supplier;<sup>46</sup>
- (iii) giving priority to any persons (or categories of persons) in the supply of its goods or services;<sup>47</sup>
- (iv) supplying a quality of goods or services that is different to any persons (or categories of persons);<sup>48</sup>
- (v) charging different prices to any persons (or categories of persons) for any goods or services;<sup>49</sup>
- (vi) providing preferential, exclusive or priority supply of goods or services to a targeted community, district, population, or market segment;<sup>50</sup> or

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<sup>42</sup> Section 68 of the CPA. Also see Barnard and Kok 2015 *THRHR* 6.

<sup>43</sup> Section 10(1) of the *Promotion of Equality and Prevention of Unfair Discrimination Act* 4 of 2000 (hereafter PEPUDA).

<sup>44</sup> See s 1 of the CPA, definition of "market", which reads as follows: "when used as a verb, means to promote or supply any goods or service". Also see Van Eeden and Barnard *Consumer Protection Law* 195.

<sup>45</sup> Section 8(1)(a) of the CPA.

<sup>46</sup> Section 8(1)(b) of the CPA.

<sup>47</sup> Section 8(1)(c) of the CPA.

<sup>48</sup> Section 8(1)(d) of the CPA.

<sup>49</sup> Section 8(1)(e) of the CPA.

<sup>50</sup> Section 8(1)(f) of the CPA.



(vii) excluding a specific community, population, market segment or district from any goods or services that are provided by the supplier.<sup>51</sup>

This unfair treatment envisaged in section 8 of the CPA should be based on one or more of the prohibited grounds for unfair discrimination provided for in section 9 of the Constitution or Chapter 2 of PEPUDA. These grounds are discussed in further detail below.<sup>52</sup>

Section 8(2) of the CPA further prohibits unfair discrimination on the grounds set out in section 9 of the Constitution or Chapter 2 of PEPUDA during the process of:

- (a) assessing the ability of the person to pay the cost, or otherwise meet the obligations, of a proposed transaction or agreement;
- (b) deciding whether to enter into a transaction or agreement, or to offer to enter into a transaction or agreement;
- (c) determining any aspect of the cost of a transaction or agreement to the consumer;
- (d) interacting with the consumer-
  - (i) in the supplier's place of business, or
  - (ii) in the course of displaying or demonstrating any goods, testing or fitting any goods, or negotiating the terms of a transaction or agreement;<sup>53</sup> or
- (e) selecting, preparing, packaging or delivering any goods for or to the consumer, or providing any services to the consumer;
- (f) proposing or agreeing to the terms and conditions of a transaction or agreement;
- (g) assessing or requiring compliance by the person with the terms of a transaction or agreement;
- (h) exercising any right of the supplier under a transaction or agreement in terms of this Act or applicable provincial consumer legislation;
- (i) determining whether to continue, enforce, seek judgment in respect of or terminate a transaction or agreement; or
- (j) determining whether to report, or reporting, any personal information of such person.

The abovementioned protections that are afforded to consumers in terms of section 8(1) and (2) also importantly extend to consumers that are juristic persons or associations, to prevent instances where such entities might experience unfair discrimination on the basis of the natural persons associated with that juristic person.<sup>54</sup> The courts may still consider any other

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<sup>51</sup> Section 8(1)(g) of the CPA.

<sup>52</sup> See para 5.3 below.

<sup>53</sup> Section 8(2)(d) of the CPA.

<sup>54</sup> Section 8(3) of the CPA.

conduct between the supplier and consumer that is not specifically listed in section 8 and whether that conduct constitutes unfair discrimination within the context of the Constitution and PEPUDA.<sup>55</sup>

### **5.3 Prohibited grounds of discrimination**

As mentioned above, discrimination against consumers is prohibited on the basis of the grounds set out in section 9 of the Constitution and Chapter 2 of PEPUDA. In terms of the Constitution, these grounds are listed under section 9(3) of the Constitution as follows:

race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

PEPUDA was enacted to give effect to section 9(4) of the Constitution, which prohibits discrimination by any person. In terms of PEPUDA, "discrimination" refers to conduct that can be perpetrated *inter alia* through the law or a practice, that directly or indirectly imposes a certain disadvantage on a person or withholds advantages from a person, based on one or more prohibited grounds.<sup>56</sup> PEPUDA goes further to define "prohibited grounds" as being inclusive of all the grounds listed under section 9(3) of the Constitution. However, it goes further to also include a person's HIV/AIDS status as a prohibited ground, along with:

any other ground where discrimination based on that other ground—

- (i) causes or perpetuates systematic disadvantage;
- (ii) undermines human dignity; or
- (iii) adversely affects the equal enjoyment of a person's rights and freedoms in a serious manner that is comparable to discrimination on a ground.<sup>57</sup>

Interestingly, while some of the prohibited grounds contemplated in PEPUDA are defined, such as sex, pregnancy, HIV/AIDS status, marital status and age, the term "gender" remains an undefined term in the legislation. The principles of statutory interpretation dictate that in such instances an undefined term will be subject to its ordinary grammatical meaning.<sup>58</sup> A term like "gender" easily becomes subject to societal limitations, such as viewing it through a binary lens. This topic is expanded on further below.<sup>59</sup>

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<sup>55</sup> Section 8(4) of the CPA.

<sup>56</sup> Section 1 of PEPUDA.

<sup>57</sup> Section 1 of PEPUDA.

<sup>58</sup> *Chisuse v Director-General, Department of Home Affairs* 2020 6 SA 14 (CC) para 47.

<sup>59</sup> See further discussion under para 7.2 below.

Chapter 2 of PEPUDA broadly addresses the prohibition, prevention and elimination of unfair discrimination, harassment and hate speech. It prevents and places a general prohibition on unfair discrimination by the state or any person against any other person.<sup>60</sup> It also further elaborates on the prohibition of unfair discrimination by any person based on race,<sup>61</sup> gender,<sup>62</sup> disability,<sup>63</sup> hate speech, harassment and the "dissemination and publication of information that unfairly discriminates."<sup>64</sup> Of particular relevance to this paper is the prohibition of unfair discrimination on the basis of gender as contemplated in section 8 of PEPUDA. The section provides an open list of instances of discrimination on the basis of gender that are prohibited. It also specifically lists:

- (h) the denial of access to opportunities, including access to services or contractual opportunities for rendering services for consideration, or failing to take steps to reasonably accommodate the needs of such persons.

It is argued that the common failure of suppliers to accommodate the needs of transgender and non-binary persons in gender-segregated bathrooms is an example of discrimination.<sup>65</sup>

#### **5.4 Presumption of unfairness**

There is a presumption that any differential treatment that has been established in terms of section 8 is unfair discrimination unless it can be established that it is fair.<sup>66</sup> It is also possible for the court to draw an inference that there is unfair discrimination on the part of the supplier, (i) if the supplier has taken part in conduct contemplated in section 8 that constitutes differential treatment when considered in comparison to the treatment given to another consumer;<sup>67</sup> (ii) if the differential treatment seems to be based on a prohibited ground;<sup>68</sup> and (iii) if the supplier has failed or refused to offer an alternative reasonable and justifiable explanation for the difference in treatment.<sup>69</sup> Therefore, once the consumer has established the existence of conduct in section 8 of the CPA that is based on a prohibited ground as contemplated in section 9 of the Constitution or Chapter 2 of PEPUDA, the burden of proof shifts to the supplier to justify the differential treatment.

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<sup>60</sup> Section 6 of PEPUDA.

<sup>61</sup> Section 7 of PEPUDA.

<sup>62</sup> Section 8 of PEPUDA.

<sup>63</sup> Section 9 of PEPUDA.

<sup>64</sup> Sections 10-12 of PEPUDA.

<sup>65</sup> See further discussion under para 7.4 below.

<sup>66</sup> Section 10(2)(a) of the CPA.

<sup>67</sup> Section 10(2)(b)(i) of the CPA.

<sup>68</sup> Section 10(2)(b)(ii) of the CPA.

<sup>69</sup> Section 10(2)(b)(iii) of the CPA.

The position under the Constitution differs slightly from that in PEPUDA, but as Barnard and Kok submit this distinction is not controversial as the Constitution is the minimum benchmark, whereas PEPUDA grants more protection by not placing a heavy burden on the applicant.<sup>70</sup> In this regard the authors submit in terms of the Constitution that section 9 litigation prescribes that the presumption of unfair discrimination will arise if the applicant can prove differentiation on the basis of one of the prohibited grounds listed in section 9(3) of the Constitution.<sup>71</sup> Then the burden shifts to the respondent to prove that the discrimination was fair.<sup>72</sup> If the discrimination was not based on a prohibited ground, then the onus is on the applicant to prove that the discrimination did, in fact, occur and, further, that it is on the basis of

attributes and characteristics which may have the potential to impair the fundamental human dignity of persons ... or adversely affect them in a comparably serious manner.<sup>73</sup>

On the other hand, PEPUDA merely requires that the applicant establish discrimination on a *prima facie* basis, which does not burden the applicant with having to carry a full onus of proof.<sup>74</sup> There is also no significant distinction between whether the grounds are listed or not, in so far as the *prima facie* case of discrimination under PEPUDA is concerned.<sup>75</sup> The grounds become important when considering the fairness of the discrimination. This occurs only once it is established that discrimination did indeed take place. Where the discrimination is on a ground specifically listed under paragraph (a) of the definition of "prohibited grounds", then it is considered to be unfair unless the respondent can prove that the discrimination is fair.<sup>76</sup> On the other hand, if the discrimination was based on the wider scope of grounds provided for under paragraph (b) of the definition of "prohibited grounds", then the discrimination is unfair if one or more of the conditions in paragraph (b) of the definition is met, unless the respondent can prove that the discrimination is fair.<sup>77</sup> The manner of the determination of whether the discrimination is fair or not is set out in section 14 of PEPUDA.<sup>78</sup>

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<sup>70</sup> Barnard and Kok 2015 *THRHR* 16.

<sup>71</sup> Barnard and Kok 2015 *THRHR* 14.

<sup>72</sup> Section 13(2)(a) of PEPUDA.

<sup>73</sup> Barnard and Kok 2015 *THRHR* 15.

<sup>74</sup> Section 13(1) of PEPUDA; Barnard and Kok 2015 *THRHR* 16.

<sup>75</sup> Barnard and Kok 2015 *THRHR* 16.

<sup>76</sup> Section 13(2)(a) of the CPA.

<sup>77</sup> Section 13(2)(b) of the CPA.

<sup>78</sup> Section 14 of PEPUDA reads as follows:

"(1) It is not unfair discrimination to take measures designed to protect or advance persons or categories of persons disadvantaged by unfair discrimination or the members of such groups or categories of persons.

### 5.5 Reasonable grounds for differential treatment

Section 9 of the CPA makes provision for reasonable grounds for differential treatment in specific circumstances. In this regard section 9 of the CPA provides that it is not a contravention of section 8 of the CPA for a supplier to limit its engagements with an unemancipated minor or assign certain facilities to persons who are either minors or seniors. This extends to allowing the supplier to:

- (i) refuse to provide certain goods or services to an unemancipated minor without the consent of their parents or guardian – in order to comply with public regulations or to protect the health, safety and welfare of the minor;<sup>79</sup>
- (ii) refuse to enter into, continue or renew an agreement with an unemancipated minor;<sup>80</sup>
- (iii) designate the use of a facility or service to be exclusively used by minors or adults who have attained a specific age or at least 60 years or above;<sup>81</sup>

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- (2) In determining whether the respondent has proved that the discrimination is fair, the following must be taken into account-
    - (a) The context;
    - (b) the factors referred to in subsection (3);
    - (c) whether the discrimination reasonably and justifiably differentiates between persons according to objectively determinable criteria, intrinsic to the activity concerned.
  - (3) The factors referred to in subsection (2)(b) include the following-
    - (a) Whether the discrimination impairs or is likely to impair human dignity;
    - (b) the impact or likely impact of the discrimination on the complainant;
    - (c) the position of the complainant in society and whether he or she suffers from patterns of disadvantage or belongs to a group that suffers from such patterns of disadvantage;
    - (d) the nature and extent of the discrimination;
    - (e) whether the discrimination is systemic in nature;
    - (f) whether the discrimination has a legitimate purpose;
    - (g) whether and to what extent the discrimination achieves its purpose;
    - (h) whether there are less restrictive and less disadvantageous means to achieve the purpose;
    - (i) whether and to what extent the respondent has taken such steps as being reasonable in the circumstances to-
      - (i) address the disadvantage which arises from or is related to one or more of the prohibited grounds; or
      - (ii) accommodate diversity."

<sup>79</sup> Section 9(1)(a) of the CPA.

<sup>80</sup> Section 9(1)(b) of the CPA.

<sup>81</sup> Section 9(1)(c) of the CPA.

- (iv) advertise or provide goods or services at discounted prices purely on the basis that the consumer is either a minor or an adult who had attained a specific age.<sup>82</sup>

As mentioned above, the provision most relevant to this paper is section 9(2) of the CPA, which provides that it is not considered to be a contravention of section 8 for the supplier to provide and designate separate but equivalent facilities for the exclusive use of persons of each gender.<sup>83</sup> Alternatively, a supplier may offer to provide access to a facility exclusively for the use of one gender.<sup>84</sup>

It is also not considered to be a contravention of section 8 for a supplier to market any goods or services in a way that implies or expresses preference for a particular group of consumers who are distinguishable based on the prohibited grounds in terms of section 9 of the Constitution. This is specifically in instances where the goods or services concerned are reasonably intended to satisfy the interests or needs that are common or are a unique characteristic of that particular group of consumers.<sup>85</sup>

Again, section 9 does not limit the authority of the court to assess whether the conduct is indeed reasonable and whether any conduct that is not reasonably justified in terms of the exceptions listed in section 9 constitutes unfair discrimination in terms of the Constitution or PEPUDA.<sup>86</sup> Alternatively, the courts can also consider whether any conduct contemplated in section 8 of the CPA was fair in the circumstances of the particular case.<sup>87</sup>

## 6 Rationale behind section 9(2) of the CPA

As mentioned above, section 9(2) of the CPA allows a supplier to reasonably: (i) provide and designate a separate yet equivalent facility for the exclusive use of persons of each gender;<sup>88</sup> or (ii) offer to provide access to a facility exclusively for the use of one gender.<sup>89</sup> Therefore, "reasonableness" is a core test that is applied in the context of this provision. Eiselen submits that reasonableness is a subjective measure that requires "a factual enquiry into the specific circumstances in each case."<sup>90</sup> Eiselen further submits that reasonableness requires "a balancing of interests of the consumer not to be discriminated against" and "the interests of the supplier

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<sup>82</sup> Section 9(1)(d) of the CPA.

<sup>83</sup> Section 9(2)(a) of the CPA.

<sup>84</sup> Section 9(2)(b) of the CPA.

<sup>85</sup> Section 9(3) of the CPA.

<sup>86</sup> Section 9(4)(a) of the CPA. Also see Van Eeden and Barnard *Consumer Protection Law* 199.

<sup>87</sup> Section 9(4)(b) of the CPA.

<sup>88</sup> Section 9(2)(a) of the CPA.

<sup>89</sup> Section 9(2)(b) of the CPA.

<sup>90</sup> Eiselen "Section 9" 9-3.

to make the specific differentiation based on business needs or established customs."<sup>91</sup>

The key ground for permissible differential treatment under this provision is gender.<sup>92</sup> While the Memorandum of Objects of the Consumer Protection Bill, 2008 refers to the exclusive use of bathroom facilities by a particular gender as being a ground for reasonable differentiation, it does not provide any rationale for this arriving at this opinion.<sup>93</sup> The rationale of the provision was also not an aspect that was debated during the parliamentary debates on the Consumer Protection Bill, 2008.<sup>94</sup> Therefore, the legitimate purpose of the provision is unclear, and section 9(2) of the CPA appears to be merely a maintenance of the cis-gendered status quo.

It may be argued that the separation of facilities based on gender might be justifiable on the basis of the high prevalence of gender-based violence, particularly in South Africa.<sup>95</sup> Even so, it is not justifiable to exclude a category of persons who are transgender or non-binary when considering the inclusion of facilities in the built environment. In this light, Martin and Brouard submit that—

[It is] critical to acknowledge women's concerns regarding the prospect of sexual assault in using gender-inclusive bathrooms. It's equally crucial to challenge the notion that bodies assigned male at birth are inherently violent and that safety can only be guaranteed through gender-specific or sex-segregated bathroom arrangements.

Studies from Australia, the US and the UK have suggested that gender-inclusive facilities do not compromise safety or privacy.

In fact, they serve as catalysts for social change, challenging binary constructs and debunking the notion of inherent male violence. Reducing violence to a specifically gendered body overlooks the complex social psychology of violence, which is rooted in gendered power asymmetries, control and dehumanisation.<sup>96</sup>

Without underplaying the vulnerability of women and children in South Africa, the male body should not be weaponised to silence transgender and non-binary experiences. Furthermore, a study conducted in the US indicates that there was no evidence of a change in privacy or safety as a

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<sup>91</sup> Eiselen "Section 9" 9-3.

<sup>92</sup> WHO 2023 [https://www.who.int/health-topics/gender#tab=tab\\_1](https://www.who.int/health-topics/gender#tab=tab_1).

<sup>93</sup> Clause 4.1. of the memorandum of objects of the Consumer Protection Bill, 2008.

<sup>94</sup> See People's Assembly 2008 <https://www.pa.org.za/hansard/2008/august/21/proceedings-of-the-national-council-of-provinces-2>; People's Assembly 2008 <https://www.pa.org.za/hansard/2008/november/11/proceedings-of-the-national-council-of-provinces-2>; People's Assembly 2008 <https://www.pa.org.za/hansard/2008/september>.

<sup>95</sup> See Govender 2023 *South African Family Practice Journal* 1-2. Also see Hasenbush, Flores and Herman 2019 *Sexuality Research and Social Policy* 70.

<sup>96</sup> Martin and Brouard 2023 <https://theconversation.com/bathrooms-are-political-how-gender-inclusive-toilets-can-combat-indignity-and-violence-207447>.

result of the gender inclusive public rules.<sup>97</sup> It also ought to be borne in mind that in as much as women and children experience violence, transgender persons are often victims of violence, including murder.<sup>98</sup> Accordingly, any potential solution that addresses the plight of women's safety on the one hand must be properly balanced on the other hand with the violent lived experiences of transgender and binary persons.

The practice of having gender-segregated public bathrooms that do not accommodate transgender and non-binary persons does not seem to fall within the "reasonableness" requirement of section 9(2). First, it unfairly discriminates against transgender and non-binary consumers by subjecting such consumers to various forms of violence in non-inclusive gender bathrooms.<sup>99</sup> This results in such consumers not experiencing equal treatment and having their human dignity impaired. Secondly, non-inclusive gendered bathroom spaces cannot be justified by a business need. Finally, to the extent that such spaces are maintained due to established customs, it is argued that these customs ought to be challenged to give effect to a more inclusive society, as envisaged by the Constitution. Therefore, the practice of having non-inclusive, gender-segregated bathrooms appears to fall foul of the reasonableness requirement in section 9(2) of the CPA and the value and right to equality as envisaged in the Constitution. A consideration of the constitutionality of section 9(2) of the CPA is considered with greater scrutiny below.<sup>100</sup>

## **7 Constitutionality of section 9(2) of the *Consumer Protection Act***

Given that the existence of gender-segregated bathrooms *prima facie* falls foul of the value and right to equality as guaranteed by the Constitution, the constitutionality of section 9(2) of the CPA ought to be assessed in detail. This assessment requires an analysis of the proper interpretation of section 9(2) of the CPA, considering the meaning of gender and the distinction between gender and gender identity in the context of the guiding principles of constitutional law.

### **7.1 Proper interpretation of section 9(2) of the CPA**

As a starting point of the interpretation exercise, the proper meaning of section 9(2) of the CPA must be ascertained. Once that is done the second leg of the interpretation exercise is to establish whether that meaning is

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<sup>97</sup> Hasenbush, Flores and Herman 2019 *Sexuality Research and Social Policy* 78.

<sup>98</sup> Human Rights Campaign Foundation 2017 [https://assets2.hrc.org/files/assets/resources/A\\_Time\\_To\\_Act\\_2017\\_REV3.pdf?\\_ga=2.169705377.1254005855.1537971386-49886542.1537543082](https://assets2.hrc.org/files/assets/resources/A_Time_To_Act_2017_REV3.pdf?_ga=2.169705377.1254005855.1537971386-49886542.1537543082).

<sup>99</sup> See the discussion under para 4 above.

<sup>100</sup> See para 7 below.



consistent with the Constitution.<sup>101</sup> These principles were restated by the Constitutional Court in *Chisuse*, where that court held that:

In interpreting statutory provisions, recourse is first had to the plain, ordinary, grammatical meaning of the words in question. [I]n legal interpretation, the ordinary understanding of the words should serve as a vital constraint on the interpretative exercise, unless this interpretation would result in an absurdity. As this Court has previously noted in *Cool Ideas*, this principle has three broad riders, namely:

- (a) that statutory provisions should always be interpreted purposively;
- (b) the relevant statutory provision must be properly contextualised; and
- (c) all statutes must be construed consistently with the Constitution, that is, where reasonably possible, legislative provisions ought to be interpreted to preserve their constitutional validity. This proviso to the general principle is closely related to the purposive approach referred to in (a).<sup>102</sup>

As has been stated above, section 8 of the CPA protects consumers against discriminatory marketing by suppliers.<sup>103</sup> Section 9 provides for reasonable grounds for differential treatment in specific circumstances which will be in line with the CPA.<sup>104</sup> In terms of section 9(2)(a) of the CPA, a supplier is free to provide and designate any of its separate facilities for the exclusive use of persons of each gender. Section 9(2)(b) entitles the supplier to "provide access to a facility exclusively to a person of one gender."

To properly interpret this provision we must define the words "exclusive" and "gender". The ordinary meaning of "exclusive" is something that is

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<sup>101</sup> *Chisuse v Director-General, Department of Home Affairs* 2020 6 SA 14 (CC) (hereafter *Chisuse*). This position was earlier reiterated by the Supreme Court of Appeal in *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 4 SA 593 (SCA) (hereafter *Endumeni*) para 18, where the court held that: "Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation."

<sup>102</sup> *Chisuse* para 47.

<sup>103</sup> See the discussion under para 5.2 above.

<sup>104</sup> See the discussion under para 5.5 above.

limited to only one person or group of people.<sup>105</sup> The CPA, therefore, allows suppliers to designate facilities mentioned in this provision for the use only of one gender. The definition of gender is not as straightforward as the definition of exclusive and requires a separate and more detailed discussion.

## **7.2 The meaning of "gender" in the context of the CPA**

To have a proper understanding of the meaning of "gender", one needs to first understand the meaning of "sex" so that the two meanings can be compared. The word "sex" can be described as a classification of people as male or female based on bodily characteristics such as genitals and internal reproductive organs, and less frequently based on their chromosomes.<sup>106</sup> The World Health Organisation (WHO) defines "gender" as:

[The] characteristics of women, men, girls and boys that are socially constructed. This includes norms, behaviours and roles associated with being a woman, man, girl or boy, as well as relationships with each other. As a social construct, gender varies from society to society and can change over time.<sup>107</sup>

In terms of the WHO definition of gender, gender is generally understood to be binary by those who see gender to be a result of one's sex.<sup>108</sup> In the binary definition of gender, there are only two options available: you can be either a man (if younger, a boy) or a woman (if younger, a girl). However, the view that gender and sex are binary has long been subjected to criticism.<sup>109</sup> For example, the binary meaning of sex has been criticised due to its failure to provide for people born intersexed or of indeterminate sex.<sup>110</sup> A major shortcoming in the binary meaning of gender is that it excludes other gender identities.<sup>111</sup>

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<sup>105</sup> See Cambridge Online Dictionary 2024 <https://dictionary.cambridge.org/dictionary/english/exclusive>.

<sup>106</sup> This is the definition that is normally given to sex by a number of sources. This definition is from the Draft Identity Management Policy published by the Department of Home Affairs for public comment. The policy can be accessed in GN 1425 in GG 44048 of 31 December 2020.

<sup>107</sup> WHO 2023 [https://www.who.int/health-topics/gender#tab=tab\\_1](https://www.who.int/health-topics/gender#tab=tab_1). Also see Sloth-Nielsen 2021 *LDD* 93-95.

<sup>108</sup> Keyes 2018 [https://ironholds.org/resources/papers/agr\\_paper.pdf](https://ironholds.org/resources/papers/agr_paper.pdf) 1-22.

<sup>109</sup> Butler 1988 *Theatre Journal* 520-531; Keyes 2018 [https://ironholds.org/resources/papers/agr\\_paper.pdf](https://ironholds.org/resources/papers/agr_paper.pdf) 1-22; King 2022 *Frontiers in Toxicology* 1-3. Also see Snyman and Rudman 2022 *Stell LR* 65; *KOS v Minister of Home Affairs* 2017 6 SA 588 (WCC) para 20 and the authorities relied on in fn 22 of the judgment.

<sup>110</sup> Keyes 2018 [https://ironholds.org/resources/papers/agr\\_paper.pdf](https://ironholds.org/resources/papers/agr_paper.pdf) 1-22; King 2022 *Frontiers in Toxicology* 1-3. See also Snyman and Rudman 2022 *Stell LR* 65; *KOS v Minister of Home Affairs* 2017 6 SA 588 (WCC) para 20 and the authorities relied on in fn 22 of the judgment.

<sup>111</sup> Keyes 2018 [https://ironholds.org/resources/papers/agr\\_paper.pdf](https://ironholds.org/resources/papers/agr_paper.pdf) 1-22; King 2022 *Frontiers in Toxicology* 1-3.

The Yogyakarta Principles are principles dealing with the application of international human rights law to sexual orientation and gender identity. They have been endorsed by prominent human rights activists.<sup>112</sup> The Yogyakarta Principles define "gender identity" as

[E]ach 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>113</sup>

A person's gender identity may be male, female, neither or both; i.e., non-binary or genderqueer.<sup>114</sup> Although the definition provided by WHO sees gender only in the binary, to the exclusion of other identities, that definition rightly admits that what constitutes gender can change over time.

As times change, the meaning of gender is and will continue to change to provide for other gender identities beyond being a woman or a man. In what can be described as a reflection of the changing times, the Cambridge Online Dictionary attempts a definition of gender in terms of:

a group of people in a society who share particular qualities or ways of behaving which that society associates with being male, female, or another identity.<sup>115</sup>

Another meaning that the same dictionary gives to that word is that it can also mean:

the condition of being a member of a group of people in a society who share particular qualities or ways of behaving which that society associates with being male, female, or another identity.<sup>116</sup>

These meanings reflect that gender is capable of being inclusive of gender identities beyond the binary male or female. The comprehensive non-binary definition of gender does not conflate the meaning of gender with the meaning of sex and provides for other gender identities.

It is worth noting, however, that the legal definition of gender in South Africa has always been understood to be binary.<sup>117</sup> Furthermore, that legal

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<sup>112</sup> Yogyakarta Principles 2006 <https://yogyakartaprinciples.org/principles-en/official-versions-pdf/> (hereafter Yogyakarta Principles).

<sup>113</sup> Yogyakarta Principles 6.

<sup>114</sup> Yogyakarta Principles 6.

<sup>115</sup> Cambridge Online Dictionary 2023 <https://dictionary.cambridge.org/dictionary/english/gender>.

Cambridge Online Dictionary 2023 <https://dictionary.cambridge.org/dictionary/english/gender>.

<sup>117</sup> See *Births and Deaths Registration Act* 51 of 1992, where only people with the he and she pronouns can be registered on the Birth and Death registry. In the *Alteration of Sex Description and Sex Status Act* 49 of 2003, sex and gender are seen as binary. In *KOS v Minister of Home Affairs* 2017 6 SA 588 (WCC) fn 10 of that judgment, Binns-Ward J observed that "Sex/gender classification in terms of the

definition incorrectly conflates gender with sex.<sup>118</sup> However, this anomaly is slowly being addressed, as can be seen in the cases of *KOS v Minister of Home Affairs*<sup>119</sup> and *September v Subramoney*.<sup>120</sup> The same move of recognising gender as separate from sex and giving gender a broader meaning can also be seen in the Draft Identity Management Policy published by the Department of Home Affairs for public comment.<sup>121</sup> That policy document's definition of gender is broad enough to include gender identities other than man or woman.<sup>122</sup> This indicates that there has been a move in the South African legal position to give gender a broader meaning than that which limits gender to only two options. To understand "gender" as the term is used in section 9(2) of the CPA, this study adopts a broader definition of gender that includes other gender identities. This approach is also supported by a South African non-profit organisation, Gender Dynamix, that was established to focus on the transgender and broader gender-diverse community.<sup>123</sup>

### 7.2.1 *The interplay between gender and gender identity*

As discussed above, the broader definition of gender includes the fact that gender encompasses other gender identities. Gender identity is not only limited to being transgender or other gender identities beyond the binary. If people identify with the binary sex they were assigned at birth, such people are considered to be cisgender and that would be their gender identity. The various gender identities people identify with fall under the broader definition of gender. In *September v Subramoney*, the applicant, who had approached the court to compel the Department of Correctional Services officials to allow her to express her gender identity as a transgender woman, had argued that she was being discriminated against due to her being transgender.<sup>124</sup> The applicant also argued that transgender identity falls

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Identification Act currently operates on a binary model. Everyone is either male or female."

<sup>118</sup> Barnes *Right to Legal Gender Recognition* 129 observed that: "The legislative framework is predominantly focused on a binary and medicalised understanding of the sex and gender categories which is problematic in that it contradicts the foundational values system set out in the Constitution by working with narrow definitions that exclude various other groups such as transgender children."

<sup>119</sup> *KOS v Minister of Home Affairs* 2017 6 SA 588 (WCC).

<sup>120</sup> *September v Subramoney* 2019 4 All SA 927 (WCC) (*September v Subramoney*).

<sup>121</sup> GN 1425 in GG 44048 of 31 December 2020.

<sup>122</sup> In terms of that policy document (GN 1425 in GG 44048 of 31 December 2020), gender means: "socially constructed roles, behaviours, and personal characteristics that a given society considers appropriate for men, women, and others. People whose gender is neither man nor woman may describe themselves as being in an intermediate state between man and woman, being both man and woman, being neither or belonging to another gender altogether."

<sup>123</sup> See Gender Dynamix 2023 <https://www.genderdynamix.org.za/organisational-profile>.

<sup>124</sup> *September v Subramoney* para 9.

under the protected ground of gender because gender "includes transgender identity".<sup>125</sup> The Court determined whether transgender was a listed ground under gender in section 9 of the Constitution and PEPUDA.<sup>126</sup> Despite the Court's relying on a definition of gender that can also be "used more broadly to denote a range of identities that do not correspond to established ideas of male and female",<sup>127</sup> it still found transgender not to be a listed ground.<sup>128</sup> The Court did not give reasons for arriving at this conclusion and opted to base its finding on other constitutional provisions.<sup>129</sup> This contribution admits that there is scholarship that treats or advocates that gender identity be regarded as a standalone ground in which discrimination is prohibited.<sup>130</sup> However, this conclusion can be avoided by viewing gender in the broader terms argued for here.

It is submitted that an argument to the effect that the gender identity of transgender people should be a standalone prohibited ground might further alienate transgender and non-binary people. This is because such an argument may be interpreted as an assertion that transgender and non-binary people do not have a gender but only gender identity. Scholars calling for the recognition of the third gender are in actual fact calling for gender to be given a broader meaning.<sup>131</sup>

### 7.2.2 A contextual consideration of "gender" as used in section 9(2)

Giving gender a broader meaning is not the end of the matter. It ought to be borne in mind that

interpretation is a unitary process, in which the triad of text, context, and purpose are considered at once, with none having greater significance than the other.<sup>132</sup>

The meaning given to the word "gender" should be properly contextualised in accordance with the CPA as a whole and its purpose.<sup>133</sup> One of the purposes of the CPA is to introduce a break from our discriminatory past. The preamble of the CPA recognises that apartheid and discriminatory laws of the past have burdened the nation with social inequality, among other things. The drafters of the CPA therefore deemed it necessary to develop and employ innovative means to fulfil the rights of historically disadvantaged

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<sup>125</sup> *September v Subramoney* para 103.

<sup>126</sup> See heading before *September v Subramoney* para 104.

<sup>127</sup> *September v Subramoney* paras 108-109.

<sup>128</sup> *September v Subramoney* para 122.

<sup>129</sup> *September v Subramoney* paras 122, 157-164.

<sup>130</sup> See Sloth-Nielsen 2021 *LDD* 90-120.

<sup>131</sup> See Sloth-Nielsen 2021 *LDD* 90-120.

<sup>132</sup> See minority judgment of Theron J in *Van Zyl v Road Accident Fund* 2022 3 SA 45 (CC) para 130. See also *University of Johannesburg v Auckland Park Theological Seminary* 2021 6 SA 1 (CC) para 65.

<sup>133</sup> *Endumeni* para 18; *Cool Ideas 1186 CC v Hubbard* 2014 4 SA 474 (CC) para 28.

persons and to promote their full participation as consumers. The CPA strongly opposes unfair discrimination in its purpose and wording. The CPA does this for instance by allowing any person mentioned in section 20(1) of PEPUDA to institute proceedings before the equality court.<sup>134</sup> The CPA also permits a court to draw an inference that a supplier has discriminated unfairly if the differential treatment appears to be based on a prohibited ground of discrimination.<sup>135</sup>

Bearing in mind the non-discriminatory context of the CPA, assigning a binary meaning to the word gender would exclude people who identify as transgender, or identify themselves otherwise. Such an approach would also not give effect to the promises made in the CPA, as consumers whose gender identity cannot be accommodated within the binary meaning of gender would be deprived of full participation in the consumer market. Not accommodating transgender and non-binary people within the context of gender-segregated bathrooms is an infringement of the right to the dignity of transgender people, especially those who are non-binary.<sup>136</sup>

In terms of the Constitution, legislation must be interpreted in a manner that promotes the spirit, purport and objects of the Bill of Rights.<sup>137</sup> This constitutional approach to interpretation is also consistent with section 4(3) of the CPA. Accordingly, assigning a broader meaning to the word gender in the context of section 9(2) of the CPA is necessary to promote the objectives of the CPA and protect transgender and non-binary people as vulnerable consumers. Furthermore, adopting a broader meaning of gender that is not restricted to the traditional binary idea of gender is consistent with the overall context of the CPA. Accordingly, a contextual and purposive approach to interpretation requires the adoption of a broad meaning of gender.

### 7.2.3 *Reasons to avoid a narrow interpretation of "gender"*

For the sake of completeness one could also consider what the consequences of a contrary interpretative approach would be. In this regard, assigning a narrow binary meaning to the word gender, as used in section 9(2) of the CPA, would result in discrimination within the context of section 9(3) of the Constitution, because it would exclude non-binary people from its application. The discrimination brought about by the binary meaning of gender in section 9(2) of the CPA would be unfair as, in terms of section 9(5) of the Constitution, discrimination based on the grounds listed in section 9(3) of the Constitution is to be presumed unfair unless it can be

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<sup>134</sup> Section 10(1)(a) of the CPA.

<sup>135</sup> Section 10(2)(b)(ii) of the CPA. Also see the comprehensive discussion under para 5.4 above.

<sup>136</sup> See s 10 of the Constitution.

<sup>137</sup> Section 39(2) of the Constitution.

established that the discrimination is fair. Once discrimination is found to be unfair in terms of section 9 of the Constitution, such a conclusion will not be saved by section 36 of the Constitution because there is no basis to justify the limitation of the right to equality in this manner.

Accordingly, a binary definition of gender would lead to section 9(2) of the CPA's being unconstitutional due to its being inconsistent with section 9 of the Constitution. Even if gender identity, which is not a listed ground in section 9(3) of the Constitution, were to be considered as the preferred ground for discrimination, section 9(2) would still be unconstitutional on analogous grounds. In terms of *Harsken v Lane*<sup>138</sup> gender identity would be deemed analogous to the prohibited grounds because discrimination on grounds of gender identity impairs the fundamental dignity of transgender persons and non-binary people. It can further be argued that gender identity would fall within the broader prohibited ground that is envisaged in PEPUDA as discussed above.<sup>139</sup> Such adverse results can and should be avoided.

### **7.3 Constitutional status of section 9(2) of the CPA**

According to the Constitutional Court, if a statutory provision is capable of more than one reasonable interpretation, one of which would lead to constitutional invalidity and the other not, the interpretation which avoids constitutional invalidity should be preferred, provided such interpretation is not unduly strained.<sup>140</sup> An interpretation that favours a broad meaning of gender does not unduly strain the interpretation of section 9(2) of the CPA and should be preferred.<sup>141</sup> Therefore, section 9(2) of CPA is consistent with the Constitution because when the word "gender" is given a broader meaning it does not unfairly discriminate against transgender or non-binary people. This conclusion is still sound even though there are some

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<sup>138</sup> *Harsken v Lane* 1998 1 SA 300 (CC) para 46.

<sup>139</sup> See the discussion under para 5.3. above.

<sup>140</sup> *De Beer v North-Central Local Council and South-Central Local Council (Umhlatuzana Civic Association Intervening)* 2002 1 SA 429 (CC) (hereafter *De Beer*) para 24; *Chisuse* paras 52-55. In *Van Zyl v Road Accident Fund* 2022 3 SA 45 (CC) para 130, Theron, in her minority judgment, admitted this point and held that: "It is trite that interpretation is a unitary process, in which the triad of text, context, and purpose are considered at once, with none having greater significance than the other. This process can, of course, deliver a variety of interpretations which, to varying extents, are reasonably supported by the text, context and purpose of the impugned provision. Section 39(2) of the Constitution requires that, of the reasonable interpretations or, put differently, of the interpretations that are not unduly strained, the one that best promotes the spirit, purport and objects of the Bill of Rights is adopted."

<sup>141</sup> *De Beer* para 24.

provisions, like the standing provision of the CPA,<sup>142</sup> which are couched in binary terms.<sup>143</sup>

In *KOS v Minister of Home Affairs* the state admitted that issues of gender presented in that matter were novel and had not been considered by the Department before those issues had been raised in its engagement with Gender DynamiX.<sup>144</sup> It should be admitted that certain phrases in our law will reflect gender as a binary concept due to our history, where gender was accepted to be binary. However, section 9(2) of the CPA is perfectly capable of bearing a meaning that makes provision for all the other gender identities beyond the binaries.

Therefore, section 9(2) of the CPA has not shut bathroom doors in the faces of transgender and non-binary people. However, this conclusion is not the end of the matter, because most suppliers use binary gender-segregated facilities, including bathrooms. This alludes to the adoption of a narrow interpretation of gender as used in section 9(2) of the CPA, i.e. a restricted binary meaning of gender. As such, it is necessary to investigate whether suppliers' conduct of having gender-segregated bathrooms is aligned with the equality clause in the Constitution.

#### **7.4 Are suppliers shutting bathroom doors on transgender and non-binary people**

If a person were to randomly visit any of one of our big shopping malls in South Africa in the year 2024, that person would be faced with at least four bathrooms. This exercise does not require empirical research. The most prevalent bathrooms are bathrooms for men and women. In some instances there are gender-neutral bathrooms for all people and gender-neutral

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<sup>142</sup> Section 4 of the CPA reads as follows:  
"Realisation of consumer rights

(1) Any of the following persons may, in the manner provided for in this Act, approach a court, the Tribunal or the Commission alleging that a consumer's rights in terms of this Act have been infringed, impaired or threatened, or that prohibited conduct has occurred or is occurring:

(a) A person acting on *his or her* own behalf;  
(b) an authorised person acting on behalf of another person who cannot act in *his or her* own name;  
(c) a person acting as a member of, or in the interest of, a group or class of affected persons;  
(d) a person acting in the public interest, with leave of the Tribunal or court, as the case may be; and  
(e) an association acting in the interest of its members." (Own emphasis.)

<sup>143</sup> Section 4 of the CPA, as quoted above, mirrors s 38 of the Constitution. In s 38 of the Constitution, the persons who may approach a court are - "anyone acting in their own interest" ... but that language is not adopted by s 4 which gives standing to "A person acting on his or her own behalf". The standing provision uses binary gender whereas s 38 is gender-neutral.

<sup>144</sup> *KOS v Minister of Home Affairs* 2017 6 SA 588 (WCC) para 60.



bathrooms that cater for people with disability. In some instances facilities are also made available for parents to attend to their children (baby rooms). In some shopping complexes there are additional facilities for prayer rooms for people of the Islamic faith.<sup>145</sup> However, absent gender-neutral bathrooms, there are generally no bathrooms for people who are non-binary or of other gender identities.

As has been pointed out above,<sup>146</sup> a binary view of gender amounts to unfair discrimination against people who are transgender or non-binary. In terms of section 6 of PEPUDA, neither the state nor any person may unfairly discriminate against any person. This conduct is therefore prohibited. The conduct of suppliers also falls foul of section 8 of PEPUDA, which prohibits the denial of a service based on gender.<sup>147</sup> The prevalence of gender-segregated bathrooms and the lack of gender-neutral bathrooms

harms transgender and gender non-conforming people, some of whom may not conform to reified expectations of how men and women will look and act.<sup>148</sup>

A study was conducted on gender-segregated bathrooms in Washington DC, USA.<sup>149</sup> The study found that transgender and gender non-conforming persons have encountered several stresses in the form of verbal abuse and physical abuse, and that such discrimination has had an impact on their ability to obtain healthcare and education, and to attend public events.<sup>150</sup> This was similarly found in a study completed in Cape Town, Western Cape.<sup>151</sup> The real-life impact of this challenge in the South African context is reflected by the steps taken by the Department of Basic Education in its draft Guidelines for the socio-educational inclusion of Diverse Sexual Orientation, Gender Identity, Expression and Sex Characteristics (SOGIESC Guidelines).<sup>152</sup> Clause 7.12 of the SOGIESC guidelines caters for bathrooms and change room facilities. In this regard, the SOGIESC guidelines provide that schools—

should provide non gender-specific toilets and change rooms with individual stalls or cubicles that can provide privacy for all users. The key considerations apply to all learners' safety, dignity and privacy, Under no circumstance shall a learner be required to use a single-use facility because they identify with a

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<sup>145</sup> Muslim Travel Guide 2023 <https://muslimtravelguide.com/salaah-facilities-in-gauteng-shopping-centres/>.

<sup>146</sup> See the provision quoted under para 5.3 above.

<sup>147</sup> See the provision quoted under para 1 above.

<sup>148</sup> Herman 2013 *Journal of Public Management and Social Policy* 66.

<sup>149</sup> Herman 2013 *Journal of Public Management and Social Policy* 71.

<sup>150</sup> Herman 2013 *Journal of Public Management and Social Policy* 71.

<sup>151</sup> Patel 2017 *Agenda* 51.

<sup>152</sup> EELC date unknown <https://eelawcentre.org.za/wp-content/uploads/guidelines-for-the-sogiesc-schools.pdf> (hereafter SOGIESC Guidelines).

non-heteronormative sexual orientation, are transgender or are gender nonconforming.<sup>153</sup>

The SOGIESC guidelines proceed to recommend that labels applied to such facilities be appropriate and sensitive and that learners ought to be allowed to self-identify in order to make it easier for them to easily access a toilet or change rooms of their choice.<sup>154</sup> Traditionally gendered bathrooms repeatedly treat gender non-conforming people who do not express binary gender identities as different.<sup>155</sup> This makes the initial steps taken by the Department of Basic Education very significant and emphatic of the fact that this challenge is not one that affects only the Western world or developed countries.

However, it would be impractical for consumers to take every supplier that does not have bathrooms that accommodate transgender and non-binary people to the equality court in terms of section 10 of the CPA. This would be a piecemeal approach to a matter that would be best addressed by a law of general application. Approaching the equality court will not solve the non-inclusive nature of gender-segregated bathrooms. Instead, given that this conundrum has been created by the lack of a definition of gender in the CPA, this is an aspect that should fall to the State to resolve. Through the Draft Identity Management Policy and SOGIESC Guidelines the State has shown a desire to be inclusive in dealing with transgender and non-binary people. In the Draft Identity Management Policy gender is given not a binary meaning but a broader meaning such as this study has argued for.<sup>156</sup> This progressive move should also be reflected in the CPA and is discussed in further detail below.<sup>157</sup>

## 8 Conclusion and recommendation

In conclusion, a close constitutional analysis of section 9(2) of the CPA demonstrates that the provision is capable of an interpretation that saves it from constitutional invalidity. Therefore, section 9(2) of the CPA, given the wider and unstrained interpretation of gender, is constitutional and valid. However, the conduct of suppliers that maintain gender-segregated bathrooms which are separated on the basis of the narrow binary meaning of gender is not aligned with the constitutional right and value of equality.

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<sup>153</sup> Also see Smillie *et al Saturday Star* 4.

<sup>154</sup> Clause 7.12 of the SOGIESC Guidelines.

<sup>155</sup> Brown, Maseko and Sedibe 2020 *Agenda* 3.

<sup>156</sup> The policy (GN 1425 in GG 44048 of 31 December 2020) defines gender as "socially constructed roles, behaviours, and personal characteristics that a given society considers appropriate for men, women, and others. People whose gender is neither man nor woman may describe themselves as being in an intermediate state between man and woman, being both man and woman, being neither or belonging to another gender altogether."

<sup>157</sup> See para 8 below.

This is an aspect that ought to be rectified by the legislature through the addition of an inclusive meaning of the term "gender" in the CPA, with the view to protecting the interests of transgender and non-binary persons.

Chapter 5 of PEPUDA, which includes sections 24-29, is aimed at the promotion of equality. However, the commencement date of this chapter is yet to be proclaimed.<sup>158</sup> Despite that fact, the provisions in these chapters offer great assistance in this matter. Sections 24 and 25 require the State to promote equality. In terms of section 28 of PEPUDA, the State should take special measures to promote equality concerning gender, among other things. The State and its organs are given a mandate to eliminate discrimination on the grounds of race, gender and disability and to promote equality in respect of race, gender and disability.<sup>159</sup> The State is required to perform this role by reviewing laws, policies and practices to eliminate all discriminatory aspects thereof and enacting appropriate laws to eliminate discrimination on the grounds of gender, among other things.<sup>160</sup>

Despite finding that section 9(2) of the CPA is constitutional, the lack of a definition of gender has brought about confusion about the meaning to be attributed to the word. Without such a definition in the CPA, section 9(2) leaves room for uncertainty as to the scope of the genders that are catered for in the use of the term "gender". This is something that the legislature must clarify so that when reference is made to exclusive facilities for "each gender", there is also an obligation that is placed on suppliers to have appropriate bathrooms for transgender and non-binary people.

The State should, as obliged by Chapter 5 of PEPUDA, include a progressive and appropriate definition of gender that will include people who are transgender or non-binary. The State can look to statutes like the New York City Commission on Human Rights Legal Enforcement Guidance on Discrimination on the Basis of Gender Identity or Expression: Local Law,<sup>161</sup> for an appropriate legal definition of gender. In terms of that statute:

Gender includes actual or perceived sex, gender identity, and gender expression including a person's actual or perceived gender-related self-image, appearance, behavior, expression, or other gender-related characteristic, regardless of the sex assigned to that person at birth.

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<sup>158</sup> Section 7(2) of the Constitution compels the state to "respect, protect, promote and fulfil the rights in the Bill of Rights." Chapter 5 of PEPUDA gives this provision flesh in relation to the right to equality, among other rights in the Bill of Rights.

<sup>159</sup> Section 28(3)(a)(i) of PEPUDA.

<sup>160</sup> Section 28(3)(b)(i) of PEPUDA.

<sup>161</sup> *New York City Commission on Human Rights Legal Enforcement Guidance on Discrimination on the Basis of Gender Identity or Expression: Local Law No 3 (2002)*; NYC Admin Code § 8-102(23).

As was mentioned earlier, the Draft Identity Management Policy defines gender broadly and its definition provides that gender means:

socially constructed roles, behaviours, and personal characteristics that a given society considers appropriate for men, women, and others. People whose gender is neither man nor woman may describe themselves as being in an intermediate state between man and woman, being both man and woman, being neither or belonging to another gender altogether.<sup>162</sup>

Any of these broad definitions will ensure the inclusion of transgender and non-binary people in the definition of gender. Once a broad definition of gender is adopted or any other definition that goes beyond the binary meaning of gender, suppliers will be compelled by section 9(2) of the CPA to make provision for bathrooms and other facilities for transgender and non-binary people. Admittedly, our built environment is still constructed in a binary and cis-gendered manner that does not acknowledge transgender and non-binary persons. However, the addition of other bathrooms to cater for transgender and non-binary people can be achieved despite the cost implications.

In the interests of (i) ensuring that the vulnerability of women and children in South Africa is not undermined; and (ii) that a safe "public-private" space for transgender and non-binary persons is provided, it is recommended that transgender people should be allowed to use the bathrooms that correspond with the gender they identify with and that the provision of gender-neutral bathrooms be considered as a compulsory fixture for public bathroom facilities for those who identify as non-binary. However, it would be prudent for stakeholders such as policymakers, the Commission for Gender Equality, suppliers with bathroom facilities, women's rights groups and the LGBTIQ+ rights groups to engage further to determine the workability of the solution with a view to creating a more inclusive public bathroom space.<sup>163</sup> Accommodating transgender and non-binary persons in public bathroom spaces is aligned with promoting the right to equality of all persons in South Africa, regardless of their gender identity.

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<sup>162</sup> Draft Identity Management Policy (GN 1425 in GG 44048 of 31 December 2020) 3.

<sup>163</sup> In its research report on *The Impact of the Proposed National Identity System on Transgender, Gender Diverse, and Intersex People in South Africa*, Gender Dynamix criticised "progressive" legal developments that happen without them because such developments tend to do more harm than good. Gender Dynamix 2022 <https://drive.google.com/file/d/1c832zbKZQ-SmyzFdKKFV9pp-T9rSbnEV/view>. Bottoman 2021 *Journal of Educational Studies* 167. Bottoman, writing in the context of bathroom access in schools makes this observation: "While transgender females desired to use the female bathrooms, the transgender males did not desire to use the male bathrooms. So, in essence, not all transgender learners necessarily desire to make use of gender-corresponding bathroom facilities."

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## List of Abbreviations

CPA	Consumer Protection Act 68 of 2008
EELC	Equal Education Law Centre
LDD	Law, Democracy and Development
LGBTQI+	Lesbian, Gay, Bisexual, Transgender, Queer or Questioning, Intersex, and includes other sexual identities such as pansexual, asexual and omnisexual
PEPUDA	Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000
SAJEMS	South African Journal of Economic and Management Sciences
SOGIESC	Sexual Orientation, Gender Identity, Expression and Sex Characteristics
Stell LR	Stellenbosch Law Review
THRHR	Tydskrif vir Hedendaagse Romeins-Hollandse Reg / Journal of Contemporary Roman-Dutch Law
WHO	World Health Organisation