

JOINT WORKING GROUP

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Introduction

The Joint Working Groupⁱ (JWG) extends its thanks to the Human Rights Council for the opportunity to make our contribution through this submission as part of the Universal Periodic Review of South Africa, 2008.

The work of the JWG is based on ensuring the protection, promotion and fulfilment of the provisions of the Constitution of the Republic of South Africa Act 108 of 1996, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and the African Charter on Human and People's Rights.

This submission focuses on two key issues that continue, 10 years after the adoption of our progressive Constitution, to detract from the realisation of our rights as lesbian, gay, bisexual, transgender, intersex (LGBTi) people in South Africa:

1. High rate of hate crimes and other human rights violations, including rape, sexual assault and murder of LGBTi people, particularly black lesbian women, and impunity of the perpetrators of hate crimes and other violations against LGBTi people
2. High rate at which young black lesbian women and black gay men are forced out of school due to stigma, discrimination, hate speech and crime by peers and educators in schools

Constitutional and Legal Framework

Since 1994, a steady process of law reform has resulted in the repeal of laws that discriminated on the basis of gender identity and sexual orientation, as well as the enactment of laws and policies that positively affirm the rights of LGBTi people to the full protection and benefit of the law. In addition, a process of strategic litigation within the organized LGBTi sector, through the court system, ensured that a robust body of jurisprudence on LGBTi rights has been built up in the context of a constitutional democracy. These gains have ensured that *formal* equality for lesbian and gay people has largely been achieved.

In spite of this legislative framework and the protections it embodies, the daily lived realities of lesbian, gay, bisexual, transgender and intersex people in South Africa reflect the harsh reality that systemic sexism, homophobia and other forms of discrimination remains largely unchanged. The progressive clauses which we hold up as an example of the standards we as South Africans set for ourselves, in general, and in relation to LGBTi rights in particular, in a post apartheid South Africa still are not demonstrated in the extent to which LGBTi people access justice in our daily lives.

This situation is reinforced by state failure in two main areas:

- ***Failure by omission***

Lack of a proactive strategy, systems to monitor and evaluate the allocation of resources to ensure implementation by political leaders and government officials to both reinforce these standards in the social and public domain and to ensure that each Department and sector can develop these standards into practices that ensure the state protects, promotes and fulfils such standards. The South African Constitution imposes an obligation on the State to fulfil socio-economic rights, including the section 27 right of individuals to access adequate health care. In one constructive development, the sexual and reproductive health and rights framework is slowly taking hold in the minds of policy and decision makers and amongst service providers. However, the links between sexual and reproductive health and rights and the rights of LGBTi people is not understood and acted upon.

Whilst there are numerous challenges in the health system that impact on all health care systems, users and consumers, women in particular experience impacts of the failures in the South African health system, particularly in terms of the ability of that system to deliver quality reproductive and sexual health care while protecting rights. LGBTi people have further difficulties within the health system, and are subjected to overlapping forms of discrimination, for instance if a client is Black and a lesbian, she may be subjected to discrimination that others would not. Health care workers are often both ignorant and violating of the rights of LGBTi people in general and our health needs, especially sexual and reproductive rights, in particular. The access of lesbian women to contraceptives, termination of pregnancy and non judgemental sexual health services is a case in point. Discriminatory delivery in relation to the needs of LGBTi people with regard to the reproductive and sexual health and rights 'package' offered to heterosexual people within the health system represents a huge gap in government health programming and delivery.

- ***Failure by commission***

National level

There are numerous examples of how high profile leaders contribute towards the already high levels of violations by making or not challenging discriminatory or offensive statements. These serve to fuel, reinforce and help justify homophobia, marginalisation and stigmatisation, often contributing to human rights violations including hate crimes, physical assault, sexual assault and even death. These statements also undo the impact and influence of positive statements and intentions of other political leaders and decision makers.

International level

The failure to demonstrate the necessary political will and commitment by the leadership insofar as LGBTi rights are concerned within the country has also been extended to our international

relations and foreign policy. This country has, in the last few years slowly lost moral ground in terms of how key officials and leaders have, or have not, ensured that the values of our Constitution are articulated and the appropriate influence exerted on other countries to protect, promote and fulfil the rights of LGBTi people. This failure comes in the face of gross violations of the rights of LGBTi people on the continent and elsewhere and in the global South. This silence and the omissions have more recently been shifted to active policy positions where South Africa has supported the blocking or rolling back of progressive moves by other countries within UN institutions to advance the rights of LGBTi people. In this respect the following should be noted:

- South Africa abstained on a no-action motion to strike out the Brazilian resolution on sexual orientation and human rights in the CHR.
- South Africa voted against an application for UN ECOSOC accreditation to NGOs working on issues of sexual orientation and gender identity
- South Africa declined to join a joint statement on behalf of 54 states at the Human Rights Council condemning violence and other human rights violations on the grounds of sexual orientation and gender identity

Key concerns of the Joint Working Group

1. Hate crimes and other human rights violations: violations of the right to safety and security

There is a high rate of hate crimes and violations targeted against LGBTi people, particularly black lesbians, in South Africa. These range from hate speech to physical abuse and assault, rape and other forms of sexual violence and murder. Hate crimes constitute extreme expressions of prejudice through violent criminal acts that are committed against people, property, organisations or society because of the group to which they belong or identify with. Sexual orientation-based hate crimes are extreme expressions of homophobia through violent criminal acts (such as rape, assault, or damage to property) committed against people, their property, or organisations because of their actual or perceived sexual orientation.¹

Sexual assault and even murder motivated by homophobic prejudice is a particularly common problem, especially for black lesbian and bisexual women. The Institute for Democracy in South Africa (IDASA) reported on research that shows that lesbians are at increased risk of being raped or violently attacked. Studies have shown that lesbians face violence twice as much as heterosexual women".² They are frequently targeted precisely because of their sexual orientation.

³ Eliason, M.J. 1996. *Institutional barriers to health care for lesbian, gay and bisexual persons*. New York: National League for Nursing Press.

² Tonya Graham with Sarah Kiguwa, *Experiences of Black LGBT Youth In Peri-Urban Communities in South Africa* (IDASA, 2004), p. 15.

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Many lesbian and bisexual women interviewed reported either rape or attempted rape, most often by a person or people they knew. Gang rape was also common. The most frequently cited excuse given for lesbian rape was that the man needed to 'show her' she was a woman.⁵

The murders of lesbian and HIV and AIDS activists Sizakele Sigasa and Salome Masooa on 7th July 2007 are a case in point.

Gay and bisexual men are also increasingly and frequently targeted for rape, usually at the hands of men they identify as straight.⁶ Despite most of these violations being reported to the police, few of these investigations have led to formal charges, prosecutions and convictions. This failure reinforces and feeds a culture of impunity and is already probably contributing towards the growing prevalence of violations and hate crimes against black lesbian women and other LGBTi people.

³ Eliason, M.J. 1996. *Institutional barriers to health care for lesbian, gay and bisexual persons*. New York: National League for Nursing Press.

⁴ Tonya Graham with Sarah Kiguwa, *Experiences of Black LGBT Youth In Peri-Urban Communities in South Africa* (IDASA, 2004), p. 15.

⁵ *Ibid.* p. 5.

A further concern is that the national rape statistics do not disaggregate the prevalence of sexual violence in terms of sexual orientation. In the context of the rising levels of violence against our community, this is of concern. In recent years, this form of hate crime against lesbian women been referred to by some as “corrective rape”, which articulates the intention of some of the men who are perpetrators of hate crime to fix or convert lesbian women to heterosexuality. Our analysis is that the motives extend beyond ‘conversion’ or ‘fixing’ of lesbian women. It is a deliberate and conscious act of punishment for the affront that this sexual orientation poses to heterosexual men. It is also in our opinion, an effort to set an example for other lesbian women as to what could happen to them, hence using sexual violence as a form of sexual control.⁷ States have accountability to prevent and address these patterns of abuse, and to punish perpetrators.

Furthermore, the police and criminal justice policy frameworks do not provide for specific recording of the hate motivated crime, and the lack of specific hate crimes legislation further reinforces the police unresponsiveness to such crimes.

The criminal justice system is clearly lacking both in terms of systems and mechanisms to ensure that violations of the rights of LGBTi people are addressed with the specificity and appropriateness this demands. Furthermore, the lack of knowledge and skills of police officials, and Department of Justice officials and judges, on matters related to sexual orientation and gender identity, is a serious concern that can result in secondary violations in the service chain.

2. Forcing out of school⁸: violations of the right to education

The experiences of the members of the JWG working with young LGBTi people and supported by the ‘Level of Empowerment studies’⁹ indicate the following situations faced by young LGBTi people in South Africa, for which the government should also be held accountable, particularly in terms of threats to rights to education and information, and to be free from discrimination:

- Victimization is widely experienced at school
- High rate at which students are forced out of school
- High levels of homophobia in a strongly patriarchal context
- Widespread negative representations of LGBTi people

⁶ *Ibid.*, p. 16.

⁷ Forum for the Empowerment of Women: The Rose Has Thorns Campaign: Hate Crime against black lesbians in South Africa [ongoing documentation and research]

⁸ Forum for the Empowerment of Women: Keep us in Campaign – Dropping out or forced out? : Young Black lesbian women and the right to Education in South Africa [ongoing documentation]

⁹ Levels of Empowerment among Lesbian, Gay, Bisexual and Transgender [LGBT] People in KwaZulu-Natal, South Africa, OUT Wellbeing, 2005

- There is a continuum of discrimination: exclusion, marginalisation, baiting¹⁰ [which includes verbal abuse, insults and hate speech] as well as physical assault and sexual violence, including rape.

According to the Levels of Empowerment studies, these circumstances have impacted on the wellbeing, the right to education and general access to justice and rights of young LGBTi people in school in the following ways: decrease in self-esteem, increase in thoughts of and attempts at suicide, increase in alcohol use.

The emotional and mental impact on the individual learner severely detracts from her or his ability to learn, to concentrate and to focus. The constant fear and anticipation of negative reactions and responses and other violations – including unpunished violence in schools - forces the student out of the education system. This continues a cycle of marginalisation and stigmatisation as the learner is then out of school with an inadequate level of education and skill, and unable to access employment or engage in other economic activity and livelihood. This in turn leads to further vulnerability. The failure of education professionals and government officials to acknowledge and address sexual orientation within the curriculum ensures that this situation is sustained.

RECOMMENDATIONS

These recommendations are consistent with various internationally-agreed human rights instruments, including Concluding Comments and Observations by various treaty bodies. South Africa is a party to many of these instruments and mechanisms. In addition, these recommendations are informed by the "Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity", [2007] which articulate the international obligations of States to respect the human rights of all persons, irrespective of sexual orientation and gender identity.

The South African Government should demonstrate its commitment to the human rights of all people, including lesbian, bisexual, and transgender and intersex people, by taking the following actions:

- 1) Develop, in partnership with the JWG and other stakeholders, a strategy to ensure that the progressive constitutional and legislative framework is systematically translated into national and local programmes and services to progressively strengthen and increase access by LGBTi people to the right to safety and security**

¹⁰ Written Out: How Sexuality is Used to Attack Women's Organizing: Rothschild C. International Gay and Lesbian Human Rights Commission and Centre for Women's Global Leadership, 2005

- 1) **Pass hate crimes legislation to protect the right to peace, safety and security of all people, including lesbian, gay, bisexual, transgender and intersex people**
- 2) **Develop, as a matter of urgency, a strategy and allocate resources to ensure that the criminal justice system is sensitised, trained and that the appropriate mechanisms to ensure that LGBTi people are able to access justice to address violence and other violations based on their unique needs and realities**
- 3) **Plan, allocate resources for and sustain a public education on the rights of LGBTi people**
- 4) **Engage with traditional and religious leaders to ensure that messaging, interventions and the national transformatory process respect, fulfil and protect the rights of LGBTi people**
- 5) **Sanction all political leaders who, through statements and actions, reinforce homophobia in our society**
- 6) **Develop, as a matter of urgency, a strategy, allocation of resources to engage in an ongoing process with school governing bodies and educators to ensure that schools are both safe spaces and places of learning for LGBTi students**
- 7) **Ensure that the national framework for the respect, protection, fulfilment of the sexual and reproductive rights of LGBTi people are integrated into the health system at all levels, particularly at a local level with health care workers**
- 8) **Ensure that the issues, needs and rights of LGBTi people to HIV and AIDS, STI and TB prevention, care and support and treatment are addressed and resourced in consultation with the organised LGBTi sector**

ⁱ The Joint Working Group, established in 2003, is a national network of over 15 organisations of and for lesbian, gay, bisexual, transgender and intersex people (hereinafter referred to as LGBTi people) in South Africa representing the organised LGBTi sector, acting and speaking in the interest of our respective and diverse constituencies. We exist to advance and promote the rights of LGBTi people through constructive dialogue and collaboration, social mobilisation, public education to strengthen positive expressions, advocacy and research.