

WE ARE ALL HUMAN

**Everyone has a sexual orientation,
gender identity and expression**

DO NOT LOOK FOR AN EXCUSE TO HATE!



Information sheet on sexual orientation, gender identity and expression (SOGIE)



BACKGROUND

Human rights are inherent to all human beings, are not privileges and do not have to be earned. In South Africa, these rights are provided for in the Bill of Rights in Chapter 2 of the Constitution of the Republic of South Africa, 1996.

The Constitution recognises equality as a value which informs basic rights, it also protects the right to equality in Section 9. Section 9 prohibits discrimination on the basis of amongst others, gender, sex and sexual orientation, and applies to the State and private parties alike. The Promotion of Equality and Prevention of Unfair Discrimination Act of 2000 (the Equality Act) is the law derived from the Constitution which makes it unlawful to unfairly discriminate against anyone on the prohibited grounds of gender, sex and sexual orientation. The law also prohibits harassment, hate speech and the dissemination and publication of unfair discriminatory information on the basis of these prohibited grounds.

Protection of rights on the basis of sex and sexual orientation is also recognised internationally. In 2006, in Yogyakarta, Indonesia, a group of human rights experts comprising of the United Nations (UN) High Commissioner for Human Rights, several UN Special Rapporteurs and members of National Human Rights Institutions (NHRI), developed a set of international law principles in relation to sexual orientation and gender identity, which are known as The Yogyakarta Principles.

The Yogyakarta Principles recognise that all human rights are universal, interdependent, indivisible and interrelated; that all humans are born free and equal in dignity and rights; and that sexual orientation and gender identity are integral to every person's dignity and humanity and must not be the basis for discrimination or abuse.¹

In 2014, the African Commission on Human and People's Rights (ACHPR) adopted Resolution 275 on Protection against Violence and other Human Rights Violations against Persons on the basis of their real or imputed Sexual Orientation and Gender Identity to advance the rights of lesbian, gay, bisexual, transgender, intersex and queer (LGBTIQ) persons.

Despite the legal protections, the reality is that most LGBTIQ persons face discrimination and violence on the basis of their real or perceived Sexual Orientation, Gender Identity and Expression (SOGIE).

¹ <http://www.amnesty.org/en/sexual-orientation-and-gender-identity>

This discrimination takes various forms within communities, organisations and formations in society; and may sometimes be obvious or unconscious, covert or may actually be in policies or manifest in the discriminatory implementation of policy. Such discrimination tends to impact most severely on black, poor and rural LGBTIQ persons due to race, class, level of formal education, geographical location and economic status. Commonly, overt discrimination is noted where people are bullied, intimidated, called derogatory names and subjected to sexual assaults and physical violence that can result in death.

In South Africa there are approximately 900 000 people who identify as part of the broad LGBTIQ community.² This is a conservative figure as many people may not have been accounted for due to fear of discrimination on their part, as well as the sensitive nature of the subject matter. While States strive to achieve stronger respect for human rights, it appears that the rate of people who support violence against the LGBTIQ community is increasing.³ This 'anti' sentiment is evidenced by the high prevalence of physical and sexual attacks in townships against black lesbians, which are often carried out as a misguided form of "corrective rape", under the guise of trying to 'cure' lesbians of their sexual orientation.

The South African Human Rights Commission (SAHRC) notes that the violation of the right to equality comprises the highest proportion of complaints reported to it, but that complaints relating to discrimination based on gender, sex, and sexual orientation make up a disproportionately low number of equality related complaints.⁴

A major concern relates to the challenges that LGBTIQ persons face in accessing justice within the criminal justice system when violations occur. While incidents of abuse are anecdotally widespread, police crime statistics indicate low levels of reporting on such offence, and secondary victimisation as a barrier to accessing justice requires probing. In the case of *Qwelane v SAHRC*⁵ evidence was presented that, after a black lesbian woman was raped, South African Police Service officials (SAPS), had responded to her attempt to lay a charge by callously commenting that "lesbians are boys and boys cannot be raped" - a stark example of secondary victimisation by the police.

The National Task Team on Gender and Sexual Orientation-based Violence (NTT)⁶, has been set up to develop a National Intervention Strategy. The NTT has established a Rapid Response Team, comprising of representatives of the Department of Justice and Constitutional Development, the National Prosecuting Authority, the SAPS and civil society organisations; after it noted that the "deprioritisation, marginalisation, exclusion and targeted victimisation by public institutions intended to provide services and protection ... for LGBTI persons ... result in victims' fear to report crimes."⁷ The Rapid Response Team works to ensure the fast tracking of pending hate crimes within the criminal justice system.

² SA Institute for Race Relations: Centre for Risk Analysis- Fast Facts Monthly Nov 2017 and Human Sciences Research Council and The Other Foundation: "Progressive Prudes: a Survey of Attitudes Towards Homosexuality and Gender Non-Conformity in SA" 2016

³ The 2015 Gauteng City Region Observatory Quality of Life Survey, estimates that 14 percent of Gauteng residents support violence against members of the LGBTIQ community, which reflects an increase from 13 percent in 2013 on the same sentiment.

⁴ NANHRI & SAHRC In-Country Meeting on Sexual Orientation, Gender Identity & Expression Report, 2018

⁵ *Qwelane v The South African Human Rights Commission* (36314/13) [2014] ZAGPJHC 334.

⁶ Set up by the Department of Justice and Correctional Services

⁷ National Intervention Strategy for Lesbian, Gay, Bisexual, Transgender, and Intersex (LGBTI) Sector, available on <http://www.justice.gov.za/vg/lgbti/NIS-LGBTIProgramme.pdf>.

SOME IMPORTANT TERMS AND DEFINITIONS ON SOGIE



It is often challenging to select and use appropriate and inclusive terminology to describe and classify individuals on the basis of their sexual orientation, gender identity and expression; as the terminology evolves. Usage of inappropriate language may be insensitive and hurtful to the LGBTIQ community, and may also lead to further marginalisation and alienation. The following select terms⁸ have been accepted, but are broadly framed to be inclusive and mindful of each person's uniqueness:

A

SEX refers to a person's biological status and is typically categorized as male, female or intersex. Indicators include hormones, chromosomes, gonads, internal reproductive organs and external genitalia;

B

SEXUAL ORIENTATION is the emotional, romantic and sexual attraction of someone to the same sex or the opposite sex or to both sexes. Sexual orientation is a person's sexual identity in relation to the sex of the person they are attracted to. Some people may identify as pansexual, queer or questioning in terms of their sexual orientation outside of the gender binary of male and female only;

C

INTERSEX refers to a person whose biological characteristics do not match society's traditional definition of sex and gender. For some, this condition is clear from birth while others do not discover that they are intersex until puberty or later;

D

GENDER refers to the attitudes, feelings and behaviours that a given culture associates with a person's biological sex. Behaviour that is compatible with cultural expectations is referred to as gender-normative, whilst behaviours that are viewed as incompatible with these expectations constitute gender non-conformity (GNC);

E

TRANSGENDER is an umbrella term that incorporates differences in gender identity, wherein one's assigned biological sex does not match their felt identity. This umbrella term includes persons who do not feel they fit into a dichotomous sex structure through which they are identified as male or female. Individuals in this category may feel as if they are in the wrong gender, but this perception may or may not correlate with a desire for surgical or hormonal reassignment;

F

GENDER IDENTITY is a person's own inner sense of being either male or female, or both, or neither, or transgender. A person's gender identity may or may not correspond to the person's body or designated sex at birth or how society sees them, but is based on how you identify yourself; and

G

GENDER EXPRESSION is the way that a person expresses his or her gender or identity; for instance, through clothing, behaviours and social activities.

⁸ <https://www.apa.org/pi/lgbt/resources/sexuality-definitions>

PROTECT YOUR HUMAN RIGHTS

Help by the South African Human Rights Commission (SAHRC)

The SAHRC is an independent national human rights institution created in Chapter 9 of the Constitution to support constitutional democracy through promoting, protecting and monitoring the attainment of everyone's human rights in South Africa without fear, favour or prejudice. The South African Human Rights Commission Act 40 of 2013 sets out the powers and functions of the SAHRC.

What is the SAHRC Doing on SOGIE Rights?

As a national human rights institution, the SAHRC works through multiple levels to protect the right to equality. It monitors human rights in the country, educates and creates awareness, and investigates violations of human rights. The SAHRC conducts its work by engaging with experts, civil society organisations, organs of State, Parliament, regional and international structures. It also works closely with other institutions created in terms of the Constitution, such as the Commission on Gender Equality.

While the SAHRC may, in the execution of its mandate, resolve disputes constituting a violation of a human right through conciliation, negotiation or mediation, it may litigate on its own accord, and on behalf of a person or class of persons. In the litigation by the SAHRC against Jon Qwelane, a former ambassador of South Africa to Uganda, the court found that the SAHRC was correct in finding the statements by Qwelane constituted hate speech. Qwelane had published derogatory statements about members of the LGBTIQ community in an article in a large South African newspaper. The courts again affirmed SOGIE rights in the matter of Nare Mphela⁹ in Limpopo's Seshego Equality Court. The SAHRC highlighted victimisation in spaces such as the school environment in this matter, and the trauma suffered by the transgendered learner, resulting in a ruling in favour of the learner.

In efforts to secure wider awareness and practical solutions to end discrimination and violence the SAHRC worked in collaboration with other bodies to host an African Regional Conference on SOGIE rights. The need for concerted efforts to promote SOGIE rights¹⁰ resulted more recently in the SAHRC working through the Network for African National Human Rights Institutions (NANHRI), to convene an in-country meeting of delegates representing government departments, civil society and Chapter 9 institutions, to address SOGIE related issues. The meeting assessed the country's progress and persisting challenges regarding SOGIE related issues; discussed societal and community based threats and challenges faced by the LGBTIQ community and identified the main issues to be addressed in the future. The SAHRC thematic discussion paper on SOGIE based violence documents serious concerns which have emerged in the course of its interventions and proposes recommended actions toward eradicating unfair discrimination, violence and stigmatisation of LGBTIQ persons.¹²

⁹ Nare Mphela and Others v Limpopo Provincial Department of Education LP 1415/0047.

¹⁰ Foundation for Human Rights' Report: African Regional Seminar on Violence and Discrimination based on Sexual Orientation, Gender Identity and Expression, 2016

¹¹ NANHRI & SAHRC In-Country Meeting on Sexual Orientation, Gender Identity and Expression, November 2017

¹² SAHRC Thematic Discussion Paper on SOGIE based violence and discrimination in South Africa, February 2018.

There remains a need to continue to:

- Build capacity and increasing sensitisation of different role players in protecting the rights of LGBTIQ persons in South Africa;
- Encourage a coordinated approach between government, Chapter 9 institutions and civil society in responding to the discrimination and hate crimes experienced by persons with diverse sex, sexual orientation, gender identity and expression;
- Create and implement inclusive policies;
- Strengthen and support the NTT;
- Report on LGBTIQ matters through all platforms, and
- Actively and vigilantly monitor all aspects of life including the provision of, and access to basic services such as health, education, law enforcement agencies, and places of worship and in the employment sector.

THE ROLE OF GOVERNMENT

All organs of State must comply with the Constitution as the supreme law of the country. As such, the government must take steps to ensure that all people within the country, including members of the LGBTIQ community attain access to, and enjoy their rights. The steps government must take include special measures to improve access to justice, eradicate violence and crime, and review policies, systems, procedures which perpetuate discrimination, by ensuring that:

Sustained efforts are implemented to inform social cohesion

Information is made available in an easily accessible, easy to understand and inclusive manner

Effective systems are established to monitor, record and report hate-motivated acts of violence

Effective investigation and prosecution of perpetrators and redress for victims of such violence is provided

Asylum laws and policies recognize that persecution on account of one's sexual orientation or gender identity may be a valid basis for an asylum claim

Torture, cruel, inhumane and degrading treatment of LGBTIQ persons in detention is prohibited and punished, and to ensure that victims are provided redress

Appropriate sensitisation training to public officials, particularly officers within the criminal justice system/sector is provided



ACKNOWLEDGEMENT

The Network of African National Human Rights Institutions (NANHRI)

NANHRI is a regional umbrella body that brings together 44 National Human Rights Institutions across Africa. The Network seeks to support and strengthen National Human Rights Institutions (NHRIs) in Africa by promoting their compliance with the United Nations Paris Principles. The Secretariat based in Nairobi, Kenya helps to facilitate coordination and cooperation between the African NHRIs by linking them with other key human rights actors at the regional and international levels.

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