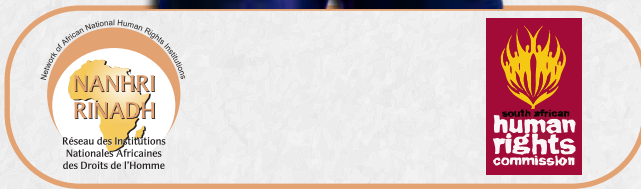


NANHRI & SAHRC

IN - COUNTRY MEETING ON
SEXUAL ORIENTATION, GENDER IDENTITY AND EXPRESSION





THE NETWORK OF AFRICAN NATIONAL HUMAN RIGHTS INSTITUTIONS

&

THE SOUTH AFRICAN HUMAN RIGHTS COMMISSION IN - COUNTRY MEETING ON SEXUAL ORIENTATION, GENDER IDENTITY AND EXPRESSION

29 – 30 NOVEMBER 2017
JOHANNESBURG, SOUTH AFRICA



The Network of African National Human Rights Institutions (NANHRI)

The Network of African National Human Rights Institutions (NANHRI) is a not-for-profit- organization and regional umbrella body that brings together 44 National Human Rights Institutions (NHRIs) in Africa. NANHRI, whose Secretariat is based in Nairobi, Kenya, is registered under Kenyan laws as an independent legal entity. It has been operational since 2007.

The Network works towards the establishment and strengthening of the NHRIs in Africa. It also facilitates coordination and cooperation amongst NHRIs and links them with other key human rights actors at the regional and international level. It supports these institutions through capacity building to meet their objective of protecting and promoting human rights at the national level.

Vision

A continent with effective NHRIs; contributing to an enhanced human rights culture and justice for every African.

Mission

To support, through national, regional and international co-operation, the establishment and strengthening of NHRIs to more effectively undertake their mandate of human rights promotion, protection, monitoring and advocacy.

Values and Guiding Principles

To achieve its mission and vision, NANHRI is committed to the following: -

Transparency, Accountability, Openness, Cooperation, Professionalism and Gender Equality



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We wish to thank the Deputy Chairperson of the African Commission on Human and Peoples' Rights (ACHPR), Commissioner Lawrence Mute, who also serves as the Special Rapporteur on the Right to Freedom of Expression, for his presence and informative contributions throughout the duration of the meeting. We further wish to thank the SAHRC Deputy Chairperson, Commissioner Priscilla Jana, for her continued support toward the expansion of SOGIE rights in South Africa, and Adv. Pansy Tlakula, former Chairperson of the ACHPR for sharing her thoughts and experience in advancing SOGIE rights on the continent.

We further express our gratitude and appreciation to all panelists and participants, emanating from civil society, government departments and Chapter 9 institutions, for their presentations and generous contributions toward the robust discussions that made the meeting successful.

Importantly, the SAHRC and NANHRI Secretariat would like to recognise and appreciate the efforts put in by their staff for organizing the meeting and producing this report.

NANHRI is a regional membership organization presently bringing together 44 African NHRIs. It works towards the establishment and strengthening of the NHRIs in Africa as well as to facilitate coordination and cooperation amongst and between them, and with other key human rights actors at the regional and international level. It also provides practical assistance and support to these institutions for them to meet their objective of protecting and promoting human rights within their jurisdictions.



Glenton Matthyse from Gender Dynamix said Religion plays a major role as to why LGBTI members are still discriminated against today



Ms Vernet Napo (right) from the Commission for Gender Equality, Dr Shanelle Van & Der Berg Pandelis Gregoriou (both SAHRC) as one of the panelists tackling SOGIE-based discrimination in South Africa.



Panelists presenting includes Sibongile Ndashe (second right) from the Initiative for Strategic Litigation in Africa, Wendy Isaack from Human Rights Watch and Carrie Shelver from Coalition of African Lesbians

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ACRONYMS

ACHPR	African Commission on Human and Peoples' Rights
AU	African Union
CGE	Commission for Gender Equality
CAL	Coalition of African Lesbians
CSO	Civil Society Organisation
DoJ&CD	Department of Justice and Constitutional Development
GALA	Gay and Lesbian Memory in Action
GDx	Gender Dynamix
HRW	Human Rights Watch
ISLA	Initiative for Strategic Litigation in Africa
LGBT	Lesbian, Gay, Bisexual, Transgender
NANHRI	Network of African National Human Rights Institutions
NHRI	National Human Rights Institution
NIS	National Intervention Strategy
NOC	National Operations Center
NTT	National Task Team
RRT	Rapid Response Task Team
SADC	Southern African Development Community
SAHRC	South African Human Rights Commission
SALC	Southern African Litigation Center
SAPS	South African Police Service
SOGIE	Sexual Orientation, Gender Identity and Expression

Executive Summary

In June 2011, the United Nations Human Rights Council (UNHRC) adopted the first resolution on human rights, sexual orientation and gender identity, which was led by South Africa. Subsequently in May 2014, the African Commission on Human and Peoples' Rights (ACHPR) adopted Resolution 275 on the 'Protection against Violence and other Human Rights Violations on the basis of their real or imputed Sexual Orientation or Gender Identity'. In March 2016, the SAHRC co-hosted the first African Regional Seminar on Finding Practical Solutions to ending violence and discrimination based on Sexual Orientation, Gender Identity and Expression (SOGIE). The Seminar culminated in the signing of the Declaration on Practical Solutions on Ending Violence and Discrimination against Persons Based on Sexual Orientation, Gender Identity and Expression (Ekurhuleni Declaration). An important recommendation emanating from the Seminar was for National Human Rights Institutions (NHRIs) to utilise their mandate for monitoring, promoting and protecting human rights to develop plans of action to take the process forward in their respective countries beyond the Seminar.

Despite the constitutional recognition and statutory protections afforded to lesbian, gay, bisexual, transgender and gender non-conforming (LGBT/GNC) persons in South Africa, LGBT/GNC persons continue to face numerous challenges, including gender or sexual orientation-based discrimination and hate crimes; difficulties accessing justice when these violations occur; and the prevalence of traditional gender roles which perpetuate stereotyping and marginalisation of vulnerable groups.

In response to these challenges, the SAHRC, in partnership with the Network for African National Human Rights Institutions (NANHRI), convened a meeting of over 50 delegates representing government departments, civil society stakeholders and Chapter 9 institutions, to address SOGIE-related issues in Johannesburg, South Africa.

Informed by the Ekurhuleni Declaration, the objectives of the meeting included:

- Documenting the country's progress and persisting challenges regarding SOGIE-related issues;
- Discussing societal and community based threats and challenges faced by LGBT / GNC persons;
- Encouraging a coordinated approach between government, Chapter 9 Institutions and civil society in responding to the discrimination and hate crimes experienced by persons with diverse sexual orientation, gender identity and expression;
- Identifying the main issues to be addressed in future to feed into the ongoing development of the SAHRC's strategy on SOGIE rights;
- The production of a report and the development of advocacy and educational materials; and
- Capacity building and sensitization training of different role players of their role in protecting the rights of LGBT / GNC persons in South Africa.

Key outcomes of the meeting, particularly as they relate to the SAHRC, include:

- **Regional Interventions** – The SAHRC should engage more robustly with regional bodies, including the ACHPR, African Union and NHRIs on the continent to further promote and protect the rights of LGBT / GNC individuals on the continent.
- **Strategic Litigation and Complaints Handling** – Beyond using litigation as a means of resolving individual complaints, the SAHRC should work closely with lawyers, social movements and civil society actors, working in both the domestic and regional contexts, to ensure that litigation interventions build on existing jurisprudence to further expand SOGIE rights.
- **Policy Interventions and Research Outputs** – The SAHRC should collaborate with civil society actors to ensure that a streamlined approach is adopted regarding policy interventions impacting on SOGIE rights. In addition, the SAHRC should proactively engage with civil society actors and academics to ensure that all SOGIE-related research reports and recommendations emanating therefrom are relevant and impactful toward the advancement of SOGIE rights.
- **Criminal Justice** – The SAHRC should actively engage with South African Police Service (SAPS) to fast-track the development of systems to disaggregate data required to monitor the investigation and resolution of SOGIE-based hate crimes.
- **Sensitization Training** – the SAHRC should actively engage in sensitization training with relevant State departments, including members of the judiciary, particularly with respect to how the use of language in behavior, policies and judgments can perpetuate the marginalisation and exclusion of LGBT / GNC persons.



A woman with her hair in a bun, wearing a vibrant, multi-colored patterned dress, stands at a wooden podium. She is gesturing with her right hand raised. The podium has a microphone and a glass of water on top. A name tag is pinned to her dress. The background is a plain wall with a door to the right. The entire image has a reddish-orange tint.

1.0 SUMMARY OF PROCEEDINGS

DAY 1



1.0 SUMMARY OF PROCEEDINGS – DAY 1

Welcome and opening remarks

The Deputy Chairperson of the SAHRC, Commissioner Priscilla Jana opened the meeting by welcoming all delegates, and affirming the significance of the meeting in light of the SAHRC's constitutional mandate to protect and promote the recognition of human rights. Despite the Constitution of the Republic of South Africa, 1996 (Constitution) being among the most progressive in the world, recognising explicitly the rights of LGBT persons, severe rights violations are experienced by LGBT persons. Moreover, when seeking redress, and in reporting these violations such persons face secondary victimisation in their own communities and police stations.

The reality of the experience of LGBT persons precipitated the need to bring together groups from different backgrounds, with influence over domestic and regional spheres in the SOGIE space, to settle on a clear way forward to translate South Africa's legal protections into more tangible protections for some of the most vulnerable persons in the country.

Keynote address

The keynote address was delivered by Adv. Pansy Tlakula, former Chairperson of the ACHPR, who commended the NANHRI and the SAHRC for convening the meeting. Adv. Tlakula acknowledged the work undertaken by NANHRI in taking the lead to ensure the implementation of the Declaration on Practical Solutions to ending violence and discrimination against persons based on Sexual Orientation, Gender Identity and Expression (Ekurhuleni Declaration). The Ekurhuleni Declaration was adopted in 2016 at the First African Regional Seminar on Finding Practical Solutions for Addressing Violence and Discrimination Based on Sexual Orientation, Gender Identity and Expression, inspired by the historic 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, adopted by the ACHPR.

The Ekurhuleni Declaration contains a multi-pronged, comprehensive and practical plan of action which, amongst others, urges the African Union (AU), the ACHPR, Regional Bodies, NHRIs and Civil Society Organisations (CSOs) to advance the rights of LGBT persons.

Adv. Tlakula charged delegates with giving serious consideration as how best to engage the AU and its organs with a human rights mandate in a constructive and non-confrontational dialogue on the meaning of some of the Articles of the African Charter on Human and Peoples' Rights (African Charter). Taking into consideration the prescripts of the African Charter, which include, inter alia, the right to enjoy the rights and freedoms therein without any distinction of any kind - such as race, sex, gender or other status, the right to equality and equal protection of the law, the right to dignity and freedom - such a dialogue would have to address the basis upon which it can be said that the

rights entrenched in the African Charter extend to all individuals, to the exclusion of LGBT persons.

While there is little doubt that much is being done to advance LGBT rights on the African continent, a lot more remains to be done. In order to effectively address violence, discrimination and other human rights violations against LGBT persons, challenges that hamper progress must be identified and strategies to address these challenges developed.

Adv. Tlakula closed her address by affirming to those still struggling to accept the rights of LGBT persons, to remember that human beings are human beings, irrespective of our sexual orientation, gender identity or expression.

Overview and objectives

Marie Ramtu, Program Officer at NANHRI, gave a brief description about NANHRI and its role in the SOGIE project. The role of NANHRI as an umbrella body for NHRIs in Africa which provides capacity strengthening support for its members was explained.

Following the adoption of Resolution 275, NANHRI initiated a project to strengthen the capacity of civil society and relevant stakeholders to protect the rights of LGBTQI+ persons. The SOGIE project, which was started in December 2016 with five African NHRIs (Ghana, Kenya, Malawi, Uganda and South Africa), commenced with staff from these countries undertaking online training which was subsequently followed up by a face-to-face training in Nairobi, Kenya in March 2017. The outcome of the training was to have each country organise its own in-country training on SOGIE and human rights.

The objective of the project was to build the capacity of NHRI staff to respond to SOGIE-related violence and discrimination, and improve collaborative efforts between NHRIs and CSOs in responding to SOGIE-related violations and discrimination. It is anticipated that staff can also reconcile work/ professionalism with cultural/personal beliefs.



Regional Strategies to Tackle SOGIE-Based Violence And Discrimination

The panel presentations were opened by the Deputy Chairperson of the ACHPR, Commissioner Lawrence Mute, who drew up a set of considerations to address when advancing the agenda of human rights violations against people on the basis of their sexual orientation, gender identity and expression.

These include the need for rights claimants, or those undertaking advocacy on behalf of rights claimants, to consider the bigger picture and realise the conceptualisation of SOGIE rights as human rights. It is also crucial to assess where and from whom you are seeking help. Tailoring the approach to salient dynamics would depend on whether you are approaching a technical body, or a political body. Finally, the Commissioner reiterated the universality of the African Charter, which protects all persons from violations of their rights. The African Charter has been signed and ratified by a number of countries, including South Africa. Activists, human rights defenders, and civil society stakeholders therefore need to be in a position to hold their respective governments fully accountable to their commitments.

Speaking to the use of litigation to advance SOGIE rights across the continent, Sibongile Ndashe of the Initiative for Strategic Litigation in Africa (ISLA) highlighted that approaches to the law itself can have the implication of contributing toward SOGIE-based violence in Africa. There has been significant prioritisation of decriminalisation as a means of advancing related rights, such as spousal benefits or access to health care, for example, without addressing the root causes that lead to violence or the multiple ways in which SOGIE-based violence manifests. ISLA has devised an incremental approach to hold states accountable and to develop jurisprudence that makes linkages to the various ways that sexual rights are violated. The approach allows local courts and African human rights mechanisms to highlight the linkages between “everyday” issues such as freedom of association, consent and privacy in ways that are gradual, and thus less likely to be divisive. For example, in the Ugandan case of *Jacqueline Kasha & Others v Rolling Stone Ltd and Another*, the court established that irrespective of sexual orientation, the “outing” of the applicants in Rolling Stone magazine, and the magazine’s calls to “hang” the identified homosexuals, violated their inherent rights to privacy, dignity and protection from inhuman treatment. With the goal of incrementally building rights, and minimizing the potential harmful effects of the law, ISLA promotes partnerships between legal experts and social movements as critical to striking the balance between much needed expertise possessed by lawyers, and the crucial knowledge possessed by grassroots activists of the extent of discrimination. This approach is thus cognizant of how law is interpreted and implemented, and whom it affects.

Wendy Isaack from Human Rights Watch (HRW) presented research findings contrasting the respective positions of Ghana and Nigeria, with respect to the protection of LGBT persons against violence and discrimination. Ghana was presented as a country of contradictions. While Ghana

criminalises “unnatural carnal knowledge” in its Criminal Offences Act, the law is rarely, if ever, enforced, and unlike several of its neighbors, Ghana has not taken steps in recent years to stiffen penalties against consensual same-sex conduct or to expressly criminalise sexual relations between women. Moreover, at least two government agencies, the Ghana Police Force and the Commission on Human Rights and Administrative Justice (CHRAJ), have reached out to LGBT people and taken proactive steps to help ensure their protection. However, LGBT persons in Ghana continue to be subjected to the most brutal violence from their communities because of their sexual orientation and gender identity. The retention of the provision pertaining to “unnatural carnal knowledge” in section 104(1)(b) of its Criminal Offences Act - commonly referred to as the anti-gay law – is often seen as tacit state approval of discrimination, and even violence, on the basis of real or imputed sexual orientation and gender identity. The law also fuels a social environment in which there is pervasive violence against lesbian, bisexual and gender non-conforming women in the home and LGBT people more generally in communities where they live. LGBT Ghanaians interviewed by HRW said that the combination of the criminalization of adult consensual same-sex conduct and the profoundly religious and socially conservative Ghanaian context has an insidious effect on their individual self-expression. Ghana is a liberal democracy, with a constitution that guarantees fundamental human rights to all its citizens, has a relatively responsive police force, and an independent national human rights institution; however, the government has consistently rejected calls by United Nations bodies, including the Human Rights Council during the Universal Periodic Review of Ghana’s human rights record, to repeal the law against “unnatural carnal knowledge.” Despite positive initiatives from the CHRAJ and from some individuals within the Ghana Police, the government is thus far failing to adequately protect LGBT persons from violence. HRW has since petitioned the ACHPR to put pressure on the Ghanaian government to protect persons from such grotesque forms of violence, and approaches by HRW to assist Ghana in implementing the necessary measures have been met with positive responses.

In Nigeria, the passing Same-Sex Marriage Prohibition Act, 2013 (SSMPA) prompted a series of instances of mob violence, arbitrary mass arrests, detention and extortion against LGBT people by some police officers and members of the public. The SSMPA not only punishes same sex marriage, but also prohibits same sex cohabitation, and imposes harsh prison sentences on anyone who associates with organisations that purport to promote the rights of LGBT persons. Moreover, the SSMPA contravenes basic tenets of the Nigerian Constitution, including respect for dignity and prohibition of torture. It also goes against several regional and international human rights treaties which Nigeria has ratified, including the African Charter, the International Covenant on Economic, Social and Cultural Rights (ICESCR), and the International Covenant on Civil and Political Rights (ICCPR). Human rights treaties impose legal obligations on Nigeria to prohibit discrimination; ensure equal protection of the law; respect and protect rights to freedom of association, expression, privacy, and the highest attainable standard of health; prevent arbitrary arrests and torture or cruel, degrading, and inhuman treatment; and exercise due diligence in protecting persons, including LGBT individuals, from all forms of violence, whether perpetrated by state or non-state actors. In November 2015, the ACHPR urged the Nigerian government to review the SSMPA in order to

prohibit violence and discrimination on the basis of sexual orientation and gender identity and ensure access to HIV prevention, treatment, and care services for LGBT individuals. What has been most disheartening, however, has been a perceived lack of interest shown by the Nigerian Human Rights Commission to engage with HRW in relation to LGBT matters, including the SSMPA.

Carrie Shelver of the Coalition of African Lesbians (CAL), noted how in addition to laws criminalizing same-sex conduct, some jurisdictions also contain provisions that place additional restrictions and penalties on the 'promotion of homosexuality' and in other contexts refuse registration of organisations working on SOGIE-related issues. The current approaches, strategies and interventions of governments and CSOs to promote the rights of LGBT persons include focusing on health care (and HIV/AIDS in particular) and gender-based violence as entry points to advance SOGIE rights. National organisations are increasingly utilizing the regional and international human rights spaces to raise concerns that are not being addressed at all or addressed satisfactorily domestically. However, the emphasis on legal and policy reform has had the implication of less resources and attention being allocated to knowledge production and the building of social movements. In addition, the hierarchy of rights and violations within and among various population groups has resulted in some rights of some groups in some locations being viewed as more important than others. There also appears to be a failure in addressing the intersectional and lived realities of how different groups experience human rights violations, and the multiple forms of vulnerabilities within the LGBT community - such as race, ethnicity, gender, class and geographical location – resulting in many LGBT individuals being excluded from the gains made by the broader LGBT community.

Discussion

The discussion centered on the need to take the recommendations put forward by the panelists a step further by engaging with policy-makers who have the power to implement interventions directed toward providing greater protection to LGBT persons. While it is important from a strategic point of view for human rights activists to engage in these discussions among themselves, it is necessary to take these discussions further and initiate effective dialogue with our governments. In particular, the SAHRC as an NHRI must actively engage with regional bodies such as the ACHPR and the African Union to ensure that African governments protect the rights of NHRI individuals. Moreover, in light of its constitutional mandate to promote and protect the rights of LGBT individuals in South Africa, the SAHRC

Tackling SOGIE-Based Violence In South Africa

Matthew Clayton of The Triangle Project led the presentations on how best to tackle SOGIE-based violence in South Africa, highlighting the need to have a detailed understanding of the problem before deciding on what strategies to adopt in response. The lack of statistical information was highlighted as one of the major obstacles to presenting an accurate picture of the current state of affairs pertaining to the rights of LGBT persons. For example, in instances where a lesbian woman is murdered due to her sexual orientation, the statistic is simply recorded as one of ‘murder’. Similarly when a trans woman is beaten on the basis of their gender identity, the statistic is recorded as one of ‘assault’. This dearth of disaggregated data results in the inability to obtain information on crime statistics that is required to better understand the root causes of the problem. The capturing and recording of the reports is only part of the problem though, as the main obstacle to understanding the true state of SOGIE-based violence is the lack of reporting by LGBT victims due to the high levels of distrust toward the South African Police Service (SAPS), where secondary victimization in the form of discrimination is likely to occur. This is especially troubling considering the extreme forms of SOGIE-based violence in South Africa, which is unique and disassociated from other factors widely understood as drivers of crime in the country. Proposals were put forward to introduce robust hate crimes legislation; a well-funded criminal justice system that follows through with reported hate crimes; and a police service that is not only properly trained but is also held accountable to its failure to provide victims of SOGIE-based violence the protection they need.

The Department of Justice and Constitutional Development (DOJ&CD), represented by Busisiwe Dhlamini, provided an overview of the strides South Africa has made in terms of developing legislation and policy – namely, Prevention and Combating of Hate Crimes and Hate Speech Bill - that serves to promote and protect the rights of LGBT persons, including SOGIE-based violence. The DOJ&CD has established a National Task Team (NTT) to develop a National Intervention Strategy (NIS) on LGBT issues, with the aim of countering the violence perpetrated on people on the basis of their sexual orientation and gender identity. The NIS follows a multi-sectoral approach, which includes government and civil society organisations (CSOs) in addressing violence against LGBT persons through four programme areas, namely: Prevention, Response, Training, and Monitoring and Evaluation at a national level. The ultimate aim is for national, regional and municipal policies, strategies, plans, budgets and legislation to have an integrated, mainstreamed approach to eradicating hate crimes. A Rapid Response Team (RRT) was also established to urgently track the pending cases committed against LGBTI persons which are in the criminal justice system, as well as to respond as soon as possible, to reported cases of violence. The RRT comprise the SAPS, National Prosecuting Authority (NPA), DoJ&CD and representatives from CSOs. Progress has been made by the RRT to ensure the fast tracking of the pending hate crimes cases within the criminal justice system. Key learnings to be taken from the ongoing process include the need to put in place proper finance and funding mechanisms to support multi-sectoral collaborations; the need to mobilise political leadership and senior officials to become the key drivers of change; as well as ensuring continuous communication and consultation within and across the sector.

Discussion

Most of the discussion centered on the lack of disaggregated data, and on what can be done to fill the gap created by not having the information available to inform interventions. It was proposed that SAPS take the initiative in this regard, with participants suggesting that SAPS needs to implement more efficient systems for recording crime reports and statistics, and making those publicly available. The National Operations Center was also mentioned in response to the question of disaggregated data, which was established for the purposes of comprehensive data collection and administration. It was resolved that while there were a plethora of challenges created by the gap in disaggregated data, it was important to find solutions and prioritise work that needs to be done based on the resources that are currently available.

SOGIE-Based Discrimination In South Africa

Pandelis Gregoriou, representing the SAHRC, opened the presentations of the day's last panel by highlighting the SAHRC's constitutional mandate to promote respect for human rights and a culture of human rights; to promote the protection, development and attainment of human rights; and to monitor and assess the observance of human rights in South Africa. The violation of the constitutional right to equality, which prohibits discrimination on the listed grounds of gender, sex and sexual orientation, comprises the highest proportion of complaints reported to the SAHRC (14%). Of these equality-related complaints, discrimination based on gender, sex, and sexual orientation seem to make up a disproportionately low number, comprising only 47 of the total (705) equality complaints received in the 2016-2017 financial year. The implication is that a number of such violations go unreported, largely due to the secondary victimisation that has characterised the handling of SOGIE-based discrimination.

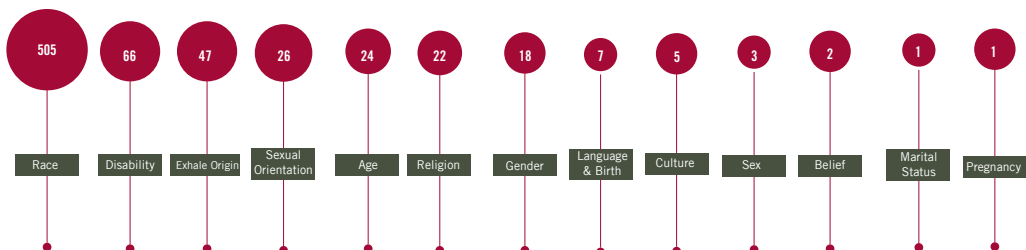
HUMAN RIGHTS COMPLAINTS RELATED TO INEQUALITY

“ The SAHRC's mandate with respect to equality is **not confined to** discrimination based solely on race. ”

The SAHRC is constitutionally mandated to monitor and act against discrimination on the grounds of: race, gender, sex, pregnancy, marital status, ethnic or social origin, color, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.



“ Given our past history of racial segregation, oppression and institutionalised discrimination, inequality in South Africa is highly correlated with race. ”



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 is also empowered to litigate on its own accord, or on behalf of a person or class of persons. One such instance involved legal proceedings initiated against Jon Qwelane, a former ambassador of South Africa to Uganda, who was accused of making derogatory statements about members of the LGBT community in an article published in a large South African newspaper. He was subsequently found guilty of hate speech, with the court ordering him to provide an unconditional and published apology to the LGBT community. It was necessary to acknowledge that while the SAHRC has made significant progress in the execution of its mandate, there have been challenges. These include limited resources and capacity in the context of executing the protection mandate of the SAHRC; the use of tools to address the systemic issues of unfair discrimination which members of the LGBT community face; as well as pervasive public prejudice against the LGBT community.

The Commission for Gender Equality (CGE), represented by Vernet Napo, highlighted some of the systemic issues undermining gender equality in South Africa, identifying patriarchy as the source of the country's fettered understanding of gender dynamics, while cultural beliefs, traditions and religious beliefs have also perpetuated patriarchal power inequalities. The CGE reported that while its SOGIE-related work has not been properly institutionalised, its programmes and interventions are directed toward the broader umbrella of promoting and protecting gender and minority rights. It is under these auspices that the CGE's Public Education and Information (PEI) department works with CSOs in each of the nine provincial offices, ensuring also that when community workshops on gender are held, officers facilitate the importance of the rights of the LGBT persons. The CGE has served as *amicus curiae* in a number of cases, including the Nare case against the Limpopo DOE, where the CGE worked with the SAHRC's Limpopo office to make several recommendations to the authorities regarding measures to be put in place to remedy the discrimination faced by Nare and other transgender learners. Another example of the CGE's legal contribution is the case of Laubscher N.O. v Duplan and Another regarding same-sex partners and the right to inherit. Accordingly, the CGE noted its authority to monitor the Equality Courts, established to advance substantive equality in South Africa as per the Constitution. In the course of this work it has been determined that the Equality Courts are fraught with challenges. These include the Equality Courts being inaccessible for persons seeking to lodge complaints, with challenges ranging from the Equality Courts' clerks tending to subject LGBT persons to secondary victimization, in addition to the more institutional issues of a lack of resources and appropriate expertise, such as the availability of Magistrates who have been properly trained on discrimination and the various aspects of the right to equality.

Discussion

One of the main threads to inform the discussion was around the role of the SAHRC in engaging the courts and conducting sensitivity training on SOGIE issues. There tends to be a conflation of the most basic SOGIE terminology, such as the distinction between sexual identity and sexual orientation, and courts need to be sensitive to the nuances of language in order to better understand the rights afforded to LGBT persons. The issue of LGBT refugees' rights in South Africa was also raised, with the implication being that they are targeted by the Department of Home Affairs due to their undocumented status, which consequently prevents LGBT refugees from living freely in the country that has purportedly granted them asylum status. The question thus arose of how the SAHRC may leverage its relationship with government to intervene in such cases, and partner with civil society in using advocacy to address challenges faced on the ground.



Panelists tackling the issues of SOGIE, religion and culture are:- Gift Kgomo (SAHRC) on the left, Reverend Nokuthula Dhladla (centre) & Keval Harie from Gay and Lesbian Memory in Action (right).



Participants:- Estian Smit (left) & George Barasa (right) interacting during question session on Day 1 of SOGIE

A woman with glasses is speaking at a podium. A microphone is positioned in front of her, and a glass of water is on the podium to her left. The background consists of light-colored curtains. The entire image has a yellowish tint.

2.0

Summary of Proceedings

DAY 2

Recap Session

The second day of proceedings was opened by Kathleen Hardy of the SAHRC, who noted that there are important regional similarities and differences in the challenges faced by SOGIE movements. One fundamental similarity is the perception, at both a private and state level, that all rights are extended to all people to the exclusion of non-normative people. Notwithstanding these similarities, lawyers, NHRIs and activists should avoid using a “one size fits all” strategy as methodologies and narratives about SOGIE on the continent need to be challenged. Flexible, context specific and responsive strategies need to be adopted in order to advance the rights of LGBT persons. The work on SOGIE has thus far happened in silos, with NHRIs performing their mandated function while lawyers and social movements push a different agenda. It is important that synergy and collaboration happens, with a view of realising that it is important that the movement articulate its expectations of NHRIs. An emerging trend is that the most successful litigation and advocacy occurs when lawyers are embedded in the movement. However NHRIs continue to have limited engagement with social movements, which has slowed down the pace of advancing SOGIE rights because the litigation strategies pursued by NHRIs have become outdated. This is largely because NHRIs continue to work at the level of the individual and seek redress for particular people as opposed to a class of persons. Therefore the need for NHRIs to engage actively with civil society in strategic litigation becomes apparent. The SAHRC communicated its desire to become a positive ally that is both accountable to parliament and to social movements. The overwhelming response was to have increased collaboration between the SAHRC, social movements and other NHRIs on the continent.

Outcomes that should stem from this meeting include:

- The need for closer engagement, knowledge transfer and collaboration between NHRIs, social movements and lawyers.
- The need to shift litigation strategies from focusing on individuals to those that focus on classes of people and stem from social movements themselves.
- A dialogue should be held with NHRIs, key population groups and other stakeholders to establish sustainable ways of working together.

Strategies for the Legal Recognition of Gender Identity and Expression

The panel sought to share experiences on the strategies that have worked regionally in the realization of variant gender identities and expressions. One of the main objectives of this panel was to engage in a dialogue on what is expected of the SAHRC as an NHRI.

Tashwill Esterhuizen of the Southern African Litigation Centre (SALC) opened the presentations by affirming the universality and indivisibility of human rights. People of variant gender identities and expressions should therefore not be discriminated against and denied their rights arbitrarily. Notwithstanding, the issue of changing gender markers for transgender individuals remains difficult as there continues to be resistance to this form of administrative action across the continent. Transgender people struggle to get identity documents that reflect their expressed gender. This significantly impedes their right to human dignity and undermines their access to routine services and work. There is increasing evidence that suggests that transgender and gender non-conforming persons are targeted for violence because of their gender identity and/ or chosen gender expression. This violence occurs at both the social and institutional level. An example is trans women being jailed with cis men and thus being subjected to sexual assault and rape, while trans men are subjected to corrective rape. The institutional dynamics of violence are bolstered by the existence of penal codes that perpetuate and promote stereotypes that increase the vulnerability of LGBT people and form the basis on which trans people are denied the correct documentation. These laws also have the “knock on effect” of curtailing the right to freedom of association. Despite these challenges there have been several encouraging developments on the continent. In Zimbabwe a trans woman was charged with criminal nuisance for using the women’s bathroom and dressing like a woman. She was subjected to humiliating examinations to verify her gender. The case against her was ultimately removed from the roll, and she has since pursued a case of damages against the State and the police service for infringement on her dignity and privacy. The court of appeal in Botswana has recognised the change in gender markers, arguing that the decision was tied to recognition of rights to dignity and freedom of expression. The court emphasised that the State and society have a duty to uphold the dignity of an individual despite the opposing views that different sectors of society have.

The presentation by Glenton Matthyse of Gender Dynamix (GDx) gave insights into the importance of using the appropriate language and understanding even the most subtle linguistic nuances within the SOGIE space. It was proposed that there needs to be a shift away from biological and socially constructed understandings of gender, to understandings based on self-construction and self-determination.

Building on this, law and policy relating to SOGIE needed to move away from cis-normative and heteronormative framing that had the propensity to conflate issues of gender identity and expression with sexual orientation.

Discussion

Many of the questions coming out of the discussion concerned the issue of language. Noting that the language used has evolved at a great pace. At times even greater than the discourse and strides being made with respect to advancing SOGIE rights. How can society remain on track with the constant linguistic evolution? There were suggestions that LGBT discourse tends to have a largely western and academic conceptualisation of SOGIE issues, which, although valid in the right contexts, has the effect of alienating many African communities who are already struggling to understand and identify with such issues. The question of introducing and using language that is inclusive of African communities was therefore recognised as critical, with the need to start off with advocacy materials that speaks to the linguistic nuances and needs of affected communities.

The importance of maintaining consistency in language for the purpose of law-making and policy formulation was emphasised. Laws and policies need to be given the scope to be reflective of the current state of affairs, and not be rendered redundant by updates in language.

Right of Access to Education for Transgender Learners

Joshua Sehoole of Iranti led the panel presentations by recounting the story of a 10 year old transgender learner in the Limpopo province who wore trousers to school. He was humiliated and given degrading punishment of walking in a jersey and underwear all day (the Nare case). Such has been the suffering of gender diverse learners, who are disproportionately impacted by school uniform codes. The Nare case is an example of what transgender learners have to endure in many South African schools. The principal in that case had orchestrated bullying, isolation, outing and discrimination against the learner, creating a dangerous learning environment for the learner. While the national guidelines do have the potential to protect LGBT learners and their rights, it tends to be ineffectively applied. Practices which relate to uniform should not impede the right to access education or impede on the constitutional rights to privacy and dignity. The discrimination is rooted in many school guidelines, which still maintain LGBT phobias in their approach to refusals by learners to abide by binary uniform standards as a disciplinary issue. Such guidelines introduce a binary from the onset, in the way they decide what clothing is “for boys and for girls”. This strikes at the core of the right to freedom of expression and the principle of self-determination. It was proposed that South Africa look at the Argentinian Gender Identity Act which actively provides for the dignified treatment and special protections for children’s right to dignity. South Africa needs to look at implementing strategies that ensure learners have access to a competent learning environment where their emotional and mental wellness is not compromised. To this end learners need to have access to psychosocial support from properly trained educators who are aware of the sensitivities associated with young learners’ gender identity and expression.

The SAHRC, represented by Victor Mavhidula, affirmed that there remain high levels of SOGIE-based discrimination despite a strong legal framework of rights protection. Equality courts in the country are tasked with adjudicating matters relating to discrimination as defined in the Constitution. Equality Courts therefore need to take a more proactive and functional role in understanding and adjudicating SOGIE-based discrimination, especially as it relates to children, who are the most vulnerable. Institutions such as Equality Courts, Magistrates, and government departments need to undertake sensitivity training to ensure that their rulings are reflective of the discourse on discrimination on the grounds of sexual orientation and gender identity. In this regard, the SAHRC itself has played a stronger role in questioning responses from government and holding it accountable for its failures, with specific references to the Department of Basic Education and the Department of Higher Education, both of whom are charged with handling the government's education portfolios.

Glenton Matthyse of GDx reported on how LGBT youth are disproportionately prone to mental health issues, which has been shown to be a direct consequence of societal pressure and rejection. Institutional homophobia and transphobia make it increasingly difficult for LGBT learners to succeed in the classroom. Heteronormative curricula and class room settings damage trans learners, and create an environment where a learners feel invisible or silenced. While social attitudes need to be shifted, law reform and policy development, as well as a complete review of curricula are critical to improving the experience of trans learners in South African schools.

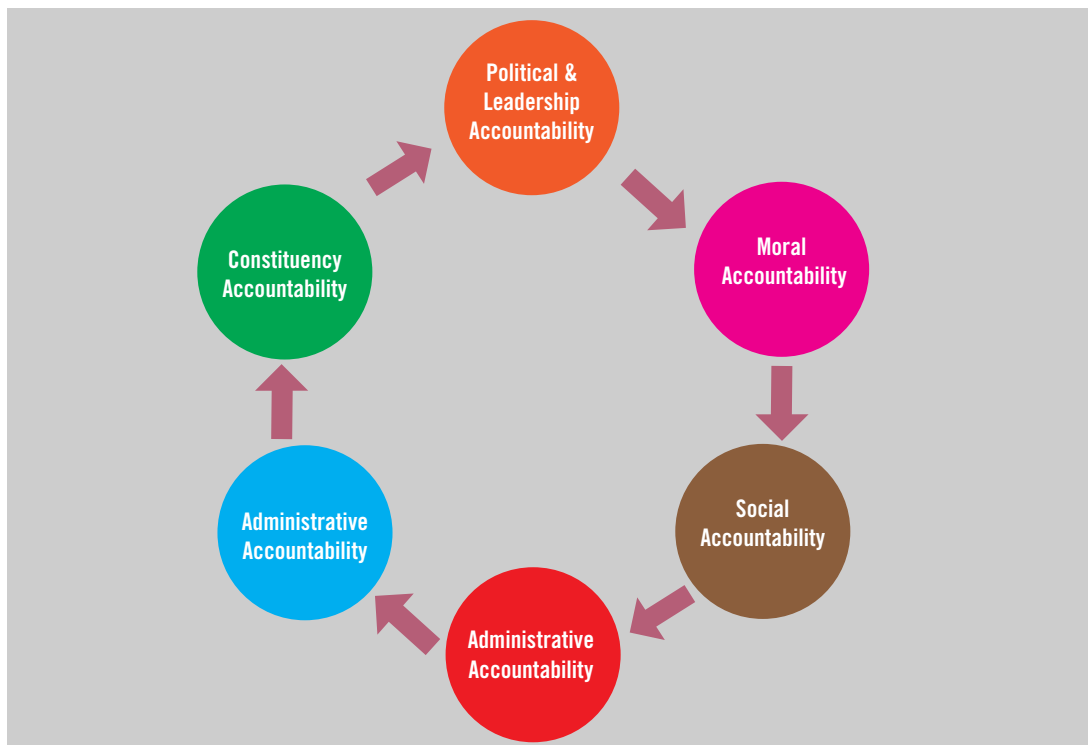


Diagram: Multiple actors are accountable for trans and gender diverse exclusion, marginalization, discrimination, harassment and violence in educational settings.

Discussion

The discussion was opened with the question on how to balance the rights to freedom of expression and self-determination for learners against the rights of educators who are tasked with the responsibility of maintaining discipline in schools. The immediate response to this was that, while educators and schools are entitled to their beliefs and have the responsibility to instill discipline within the school, uniforms should not deny learners' the right to access education. The enjoyment of learners' constitutionally entrenched rights to education and freedom of expression cannot be limited at the discretion of educators. There needs to be a diversion from considering LGBT issues in schools as disciplinary ones. These are issues that strike at the core of human rights discourse, and it is time they are considered as such.

SOGIE, Religion and Culture

The final panel at the meeting dealt with the interaction of SOGIE issues with religion and culture, focusing specifically on strategies to combat SOGIE-based religious and cultural discrimination and exclusion. Reverend Nokuthula Dhladla explained that this is an issue which churches have resolved to discuss due to the excessive violence and discrimination suffered by persons in the LGBT community. Materials have been developed on the role of churches in the context of violence against LBGT groups, with the purpose of training church leaders. While the process is ongoing and there continue to be challenges, the space for dialogue on religion and LGBT rights has been opened up, which represents significant strides compared to the previous status quo.

Keval Harie of the Gay and Lesbian Memory in Action (GALA) posed the question of how to create spaces for young, gay and black youth in African communities. These spaces need to be safe and allow for the voices of marginalised individuals to be preminent in the narrative. While religion is deeply private and protected by the Constitution, both the State and religious institutions tend to use religion to divert attention from important conversations around SOGIE-based discrimination.

Discussion

The discussion kicked off with questions around the position of lesbians within the Muslim community. The assertion is that they are more oppressed than gay men, and are silenced due to the inherently patriarchal nature of the Islamic faith. Acknowledging that queer persons have always been able to move within their cultures and religions, the discussion moved to whether activism leaves any room for LGBT persons to be reconciled with their religious beliefs? In the context of Christianity, it was suggested that preachers need to undergo theological training to further understand the development of scriptures within their context

A woman with short blonde hair, wearing glasses and a vibrant, multi-colored beaded necklace, is speaking into a microphone. She is seated at a table with several water bottles and glasses. Another person is visible in the background, looking down. The entire image has a reddish-pink tint.

3.0 Annex 1 & 2

ANNEX 1 – RECOMMENDED PLAN OF ACTION

Pursuant to the Regional Seminar held in March 2016, NHRIs were requested to develop an institutional plan for activities and interventions relating to SOGIE work. The plan of action is intended to speak to the issues identified in the Ekurhuleni Declaration that require urgent attention from NHRIs and State intervention to promote and protect the rights of LGBT-GNC individuals in South Africa. These key areas of concern include: the role of State and non-State actors in addressing SOGIE-based violence and discrimination; changing perceptions and creating awareness; violence and discrimination in educational institutions and settings; economic justice; health and psychosocial support; victimisation in the criminal justice system and in border control systems; legal support for survivors of violence and discrimination, and their families; and accurate data on incidence of violence and discrimination based on sexual orientation, gender identity and expression. Based on the key areas of concern highlighted in the Ekurhuleni Declaration, the SAHRC's Plan of Action is a multi-faceted programme incorporating activities undertaken across the institution and intended to be a 'living' document and will be updated on an ongoing basis.

Current strategies/actions that are being employed within the SAHRC to respond to SOGIE-related violence and discrimination

1. Selected staff have been sensitised on SOGIE-related issues, and an in-country meeting has been hosted to further understand contemporary issues affecting the LGBT / GNC community.
2. The SAHRC continues to participate in the National Task Team on Gender and Sexual Orientation-based Violence Perpetrated against Lesbian, Gay, Bisexual, Transgender and Intersex Persons.
3. Ongoing complaints handling through Provincial Offices and the identification of potential matters for Strategic Impact Litigation.
4. Development of a school principal's guide in protecting the rights of LGBT learners and training.
5. Engagement with the Department of Basic Education (DBE) and other relevant stakeholders on school codes of conduct (including uniform regulations and the protection of privacy). Initial meetings are taking place with a view of hosting a public dialogue and identifying other strategic interventions. Further engagement with the DBE on the infusion of human rights (including SOGIE rights) into the school curriculum.
6. The production of a Thematic Concept Paper on SOGIE-based violence and discrimination, with a particular focus on transgender persons and secondary victimization of SOGIE-based violence victims.
7. Stakeholder engagement with the Centre for Human Rights about the possible inclusion of SOGIE-based theme into the National Schools Moot Court Competition and / or the African Human Rights Moot Court Competition.

8. Engagement with the Department of Justice on proposed legislation and policy relating to equality and non-discrimination.
9. Launch of the Unfair Discrimination in the Workplace Report (which includes unfair discrimination against LGBTI and gender non-conforming persons), and monitoring the implementation of recommendations emanating from the report.
10. Internal discussions on increased internal awareness to promote SOGIE rights (including inter alia Women's Day and Movember for men celebrations).

Innovative suggestions emanating from the in-country meeting

1. **Regional Interventions** – The SAHRC should engage more robustly with regional bodies, including the ACHPR, African Union and NHRIs on the continent to further promote and protect the rights of LGBT individuals on the continent.
2. **Strategic Litigation and Complaints Handling** – Beyond using litigation as a means of resolving individual complaints, the SAHRC should work closely with lawyers, social movements and civil society actors, working in both the domestic and regional contexts, to ensure that litigation interventions build on existing jurisprudence to further expand SOGIE rights. Similarly, and where appropriate, all complaints handling mechanisms available to the SAHRC, such as alternative dispute resolution, should be utilised in a manner that advances SOGIE rights beyond the individual complainant.
3. **Advocacy Materials** – The SAHRC should work in partnership with civil society actors to ensure that all advocacy materials aiming to promote SOGIE rights, and reduce stigma and discrimination, is presented in a manner that contains SOGIE-appropriate language and is relevant to the lived experiences of LGBT / GNC persons and the communities in which they live.
4. **Policy Interventions and Research Outputs** – Noting the constrained resource environment that exists within State institutions, the SAHRC should collaborate with civil society actors to ensure that a streamlined approach is adopted regarding policy interventions impacting on SOGIE rights. In addition, the SAHRC should proactively engage with civil society actors and academics to ensure that all SOGIE-related research reports and recommendations emanating therefrom are relevant and impactful toward the advancement of SOGIE rights.
5. **Criminal Justice** – In light of the existing Memorandum of Understanding (MOU) between the SAHRC and the South African Police Service (SAPS), the SAHRC should actively engage with SAPS to fast-track the development of systems to disaggregate data required to monitor the investigation and resolution of SOGIE-based hate crimes. The SAHRC should further incorporate sensitization training within the MOU with a view of addressing the occurrence of secondary victimization which frequently occurs when victims report crimes to the SAPS.
6. **Sensitization Training** – the SAHRC should actively engage in sensitization training with relevant State departments, including members of the judiciary, particularly with respect to how the use of language in behavior, policies and judgments can perpetuate the marginalisation and exclusion of LGBT / GNC persons.

Propose strategies/actions that the SAHRC can undertake to increase/improve the response to SOGIE-related violence and discrimination. Outline objectives, activities, identify other actors and timelines.

Objective	Activities	Actors	Timeline (monitoring)
<p>Objective 1</p> <p>Establish a committee of experts comprising lawyers, civil society actors, activists and academics to advise the SAHRC Deputy Chairperson, Commissioner Priscilla Jana on the Equality Portfolio and SOGIE related work.</p>	<p>Host one Section 11 Committee meeting, as provided for in the SAHRC Act, 2013.</p>	<p>SAHRC Commissioners’ Programme Civil Society Actors Academics Lawyers</p>	<p>January - March 2018</p>
<p>Objective 2</p> <p>Promote SOGIE rights at a regional level.</p>	<p>Engage with the existing network of Southern African Development Community (SADC) NHRIs to promote SOGIE rights within their respective jurisdictions, ACHPR and the AU.</p> <p>Robustly engage with the AU in particular concerning its approach to SOGIE-related issues.</p>	<p>SAHRC Commissioners’ Programme DOJ&CD Department of International Relations and Cooperation (DIRCO) SADC NHRIs ACHPR AU</p> <p>SAHRC Commissioners’ Programme DOJ&CD; DIRCO AU NANHRI</p>	<p>Ongoing</p> <p>Ongoing</p>

Objective	Activities	Actors	Timeline (monitoring)
Objective 3 Impactful strategic litigation and complaints handling.	Actively engage with relevant civil society actors, Chapter 9 institutions and social movements regarding all SOGIE-related complaints lodged with the SAHRC.	SAHRC Legal Services at Head and Provincial Offices CGE	Ongoing
Objective 4 Advocacy Materials.	Develop advocacy materials in consultation with relevant civil society actors, Chapter 9 institutions and social movements to promote the advancement and protection of SOGIE rights.	SAHRC Advocacy and Communications Unit CGE DoJ&CD	January – March 2018
Objective 5 Strategic Policy Intervention and Research Outputs.	Actively engage with relevant civil society actors, Chapter 9 institutions, social movements, lawyers and academics regarding all SOGIE-related policy interventions and research.	SAHRC Research Unit SAHRC Commissioners’ Programme CGE	Ongoing
Objective 6 Criminal Justice.	Settle terms of MOU with the SAPS and advocate for the establishment of disaggregated data systems and SOGIE sensitization training.	SAHRC Commissioners’ Programme SAPS	Ongoing
Objective 7 Sensitization Training.	Develop training materials for State and non-State actors regarding SOGIE rights.	SAHRC Advocacy and Communications Unit DOJ&CD CGE DBE	Ongoing

Outline steps to have the proposed plan adopted and implemented by the SAHRC.

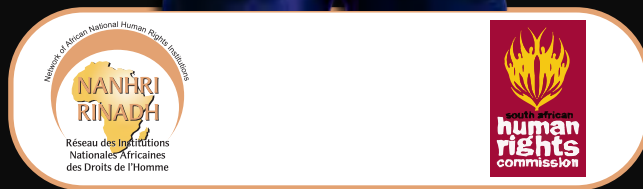
1. Debriefing session with the Commissioners
2. Approval by Commissioners
3. Include in Strategic planning and development of Annual Work plan
4. Allocation of funds

ANNEX 2 – PROGRAM

DAY 1: Violence and Discrimination based on SOGIE	
08:30	Registration
09:00	Welcome and Opening Remarks, Adv. Priscilla Jana – SAHRC Deputy Chairperson
09:15	Keynote Address, Adv. Pansy Tlakula - former Chairperson of the African Commission on Human and People’s Rights
09:30	Overview and objectives, Marie Ramtu - NANHRI Program Officer
09:45	<p>Panel 1: Regional strategies to tackle SOGIE-based violence and discrimination</p> <ul style="list-style-type: none"> • Comm. Lawrence Mute, Deputy Chairperson of the African Commission on Human and People’s Rights • Sibongile Ndashe, The Initiative for Strategic Litigation in Africa • Wendy Isaack, Human Rights Watch • Carrie Shelver, Coalition of African Lesbians • Moderator: Thandiwe Matthews, SAHRC
10:45	Discussion
11:15	Tea
11:30	<p>Panel 2: Tackling SOGIE-based violence in South Africa</p> <ul style="list-style-type: none"> • Matthew Clayton, Triangle Project • Busisiwe Dhlamini, Department of Justice • Moderator: Dr. Shanelle van der Berg, SAHRC
12:30	Discussion
13:00	LUNCH
14:00	<p>Panel 3: SOGIE-based discrimination in South Africa</p> <ul style="list-style-type: none"> • Pandelis Gregoriou, SAHRC • Vernet Napo, Commission for Gender Equality • Moderator: Dr. Shanelle van der Berg, SAHRC
14:45	Discussion
15:15	Tea
15:30	Wrap Up & Way Forward – Thandiwe Matthews & Gift Kgomoosotho, SAHRC
16:30	END

DAY 2: Promoting, Advancing and Expanding SOGIE rights

09:00	Welcome Remarks and Recap, Kathleen Hardy, SAHRC
09:30	<p>Panel 1: Strategies for legal recognition of gender identity</p> <ul style="list-style-type: none"> • Tashwill Esterhuizen, Southern African Litigation Centre • Glenton Matthyse, Gender Dynamix • Moderator: Thandiwe Matthews, SAHRC
10:30	Discussion
11:00	Tea
11:15	<p>Right of access to education for transgender learners</p> <p>Panel 2: Transforming school admissions policies, codes of conduct and curricula</p> <ul style="list-style-type: none"> • Joshua Sehoole, Iranti • Victor Mavhidula, SAHRC • Glenton Matthyse, Gender Dynamix • Moderator: Eden Esterhuizen, SAHRC
12:15	Discussion
12:45	LUNCH
13:30	<p>SOGIE, religion and culture</p> <p>Panel 3: Strategies to combat SOGIE-based religious and cultural discrimination and exclusion</p> <ul style="list-style-type: none"> • Reverend Nokuthula Dhladla • Keval Harie, Gay and Lesbian Memory in Action • Moderator: Gift Kgomo, SAHRC
14:30	Discussion
15:00	Wrap Up & Way Forward – Thandiwe Matthews, SAHRC
16:00	END



NANHRI & SAHRC

IN - COUNTRY MEETING ON
SEXUAL ORIENTATION, GENDER IDENTITY AND EXPRESSION