**INPUTS FROM THE DOJCD FOR THE REPORT OF THE INDEPENDENT EXPERT ON PROTECTION AGAINST VIOLENCE AND DISCRIMINATION BASED ON SEXUAL ORIENTATION AND GENDER IDENTITY ON**

***“PROTECTION AGAINST VIOLENCE AND DISCRIMINATION BASED ON SEXUAL ORIENTATION AND GENDER IDENTITY, IN RELATION TO THE HUMAN RIGHTS TO FREEDOM OF EXPRESSION, ASSOCIATION AND ASSEMBLY”***

**INTRODUCTION:**

1. South Africa has a complex and diverse history regarding the human rights of LGBTIQ+ people. The legal and social status of LGBTIQ+ people in South Africa has been influenced by a combination of traditional South African morals, colonialism and the lingering effects of apartheid and the human rights movement that contributed to its abolition ***(****viz* ***“Progressive Prudes, A survey of attitudes towards sexuality and gender non-conformity in South Africa” – The Other Foundation).***
2. The violence and discrimination faced by the LGBTIQ+ community is rooted in historical and systemic discrimination linked to intolerance in some religious, cultural and traditional beliefs and South Africa’s colonial and apartheid past.
3. Many countries around the world still criminalize consensual homosexual conduct between adult men, and often between adult women. A report by Amnesty International states that “more than half those countries have these laws because they once were British colonies.”[[1]](#footnote-1)
4. A more recent report by Amnesty International states that *“of the 69 countries that criminalize same-sex relations, 33 are in Africa.  In most cases, these laws are remnants of*[*colonial rule*](https://www.hrw.org/report/2008/12/17/alien-legacy/origins-sodomy-laws-british-colonialism) *and the vague wording of these prohibitions, such as “carnal knowledge against the order of nature” resonate with the decorum of that era. Although the examples are few, there has been some progress over the last year on the protection of LGBT rights in Africa.”[[2]](#footnote-2)*
5. This is also true in the case for South Africa, as most British colonial administrators introduced laws prohibiting "unnatural acts". In addition, more than 350 years of colonialism and apartheid dominated the South African legal system that reflected the values of the colonial and apartheid rules. Colonial and apartheid rule not only marginalised indigenous or customary law but in the process of interpretation, legislation was given a slant which facilitated colonial and apartheid rule.
6. The Union of South Africa formed in 1910 and brought together the previously separate colonies of the Orange Free State, Transvaal, Natal and the Cape to form the Union of South Africa. The English and the Afrikaners entrenched White power and privilege at the expense of all Black South Africans. During colonialism and Apartheid, most of the policies and legislation were intended to suppress the human rights of the majority of citizens in South Africa, viz Group Areas Act (1950) which was aimed to eliminate mixed neighbourhoods in favour of racially segregated ones.
7. Sexual intercourse between men was historically prohibited in South Africa as the common law crime of “sodomy” and “unnatural sexual offence”, inherited from Roman - Dutch law, amongst others. One of South Africa's most notorious anti-gay laws was introduced after a police raid on a gay party in a suburb of Johannesburg in 1966. Amendments to the Immorality Act resulted in the infamous "three men at a party clause", which criminalised any "male person who commits with another male person at a party any act which is calculated to stimulate sexual passion or give sexual gratification". A "party" was defined as "any occasion where more than two persons are present". A 1969 amendment to the Immorality Act thus prohibited men from engaging in any erotic conduct when there were more than two people present.
8. Ever since colonization, Christianity has played a role in shaping South African society. Many denominations of Christianity rejected homosexuality since it was deemed in the Bible to be unnatural and a sin, thus opposition towards homosexuality in South Africa stems from religious tradition. Christian based education began during the 1730s with arrival of German missionaries. British missionary schools were the primary source of education for Africans and through these schools, Christianity and its message of sexual purity were able to spread. Missionaries had a cultural impact as well, through their alteration of norms and people's perception towards sexuality and the shaping of morality. Dutch Reform Calvinism became a major foundation of apartheid and nationalist Afrikaner ideology. According to this religious ideology, homosexuality was unnatural and immoral.
9. According to some sources there is evidence that pre-colonial African societies accepted homosexuality on a situational basis. Lesbianism also occurred in polygamous households, but there is scarce information concerning lesbian activity during pre-colonial and even during the contemporary times. However, missionaries were quick to repress such behaviour. A caveat concerning African society's views towards homosexuality, was that gay acts were condoned, while lesbianism was condemned.[[3]](#footnote-3)
10. There was no freedom of association in the apartheid era in South Africa, with neighbourhoods, schools, amenities, public transport and even churches being divided on the basis of race. Inter-racial relationships and marriages were also prohibited. Freedom of expression was also extremely limited. Apartheid created a society of secrecy and censorship, with many books and writers being banned under security laws. The apartheid government also controlled the press, with a number of laws preventing journalists to write on topics such as the liberation struggle, banned organisations and so forth and/or to publish any information deemed “subversive” or potentially inciting racial hostility. Raids, torture, intimidation, the imposition of fines and imprisonment were all part of South Africa’s lack of freedom of expression.

**SUGGESTED QUESTIONS:**

1. *Does your country have any laws, policies, or practices that, explicitly or implicitly, ban, restrict or make more challenging the exercising of freedom of expression by civil society organisations or activists advocating for LGBT persons’ human rights?*
2. *This could include, but is not limited to, laws on the so-called propaganda of homosexuality, morality policies or codes, censorship of media content, restrictions on school curriculum, censorship of any content or scenes, censorship of literature, printed materials, blocking of sites or social media platforms, persecution of artists and authors working with the topic, etc.*

**REPLY:**

1. No, there are no such laws, policies or practices.
2. The South African Constitution and, in particular, Chapter 2 (the Bill of Rights) protects the rights to freedom of expression. Section 16 of our Constitution provides that –

*“(1) Everyone has the right to freedom of expression, which includes –*

1. *freedom of the press and other media;*
2. *freedom to receive or impart information or ideas;*
3. *freedom of artistic creativity; and*
4. *academic freedom and freedom of scientific research.*

*(2) The rights in subsection (1) does not extend to –*

*(a) propaganda for war;*

*(b) incitement of imminent violence; or*

*(c) advocacy of hatred that it based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.”*

1. In addition thereto, section 9 of the Constitution provides that neither the State nor any person may unfairly discriminate, directly or indirectly, against anyone on one or more of the grounds of race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
2. South Africa also has additional legislative provisions such as those provided for in the Promotion of Equality and Prevention of Unfair Discrimination Act, 2002 (Act 4 of 2000) (“PEPUDA”). PEPUDA provides explicit protections against violence and discrimination. PEPUDA extended the grounds against which no discrimination could take place to include HIV or AIDS status and Intersex.
3. South Africa also has dedicated Equality Courts, which are established to ensure that reported cases of alleged unfair discrimination are dealt with to ensure justice for all. In the Equality Court, unlike in a normal criminal court, if the alleged discrimination is based on a prohibited/listed ground (as those listed above) such as e.g. sexual orientation, then the onus is not on the applicant, but on the respondent to prove that the discrimination was fair. The introduction of Equality Courts came about in an attempt to give effect to the spirit of our Constitution, in particular the promotion of equal enjoyment of all rights and freedoms by every person.
4. A further important development to note is the development of the **Prevention and Combating of Hate Crimes and Hate Speech Bill**. The Bill aims to give effect to South Africa’s obligations in terms of the Constitution and international human rights instruments concerning racism, racial discrimination, xenophobia and related intolerance, in accordance with international law obligations.
5. It provides for the offence of hate crime and the offence of hate speech and the prosecution of persons who commit those offences and also provides for appropriate sentences that may be imposed on persons who commit hate crime and hate speech offences. The Bill creates a category of crimes called hate crimes and as well as create the offence of hate speech and will put in place measures to prevent and combat these offences.
6. The Bill provides that a crime will be a hate crime if any recognised offence under any law, such as for example, assault or murder (this will be commonly referred to as the “underlying offence”) is motivated by prejudice or intolerance on the basis of one or more characteristics, or perceived characteristics, of the victim, a family member of the victim or the victim’s association with or support for a group of persons who share the said characteristics. These characteristics are listed in the Bill.
7. The Bill also introduces the offence of hate speech. Any person who intentionally publishes, propagates, or advocates anything or communicates anything to one or more persons in a manner that could reasonably be construed to demonstrate a clear intention to be harmful or to incite harm; and promote or propagate hatred, based on a number of specific grounds would be guilty of the offence of hate speech. These grounds include **albinism, ethnic or social origin, gender, HIV and AIDS status, nationality, migrant or refugee status or asylum seekers, race, religion, sex or sexual orientation, gender identity or expression or sex characteristics**.
8. The Bill aims to reduce the limitation of freedom of speech, as anything said as bona fide artistic creativity, performance or expression, academic or scientific inquiry or media reporting, or the interpretation and proselytising or espousing of any religious tenet, belief, teaching, doctrine or writing will not be regarded as hate speech unless it very clearly incites others to violence. With regard to these categories the line that cannot be crossed is where the speech advocates hatred that constitutes incitement to cause harm, based on one or more of the grounds. Harm goes beyond being merely offended, as “harm” would be any emotional, psychological, physical, social, cultural or economic detriment that objectively and substantially undermines the human dignity of the targeted individual or groups.
9. The Bill has been passed by both Houses of Parliament and was sent to the President for assent in December 2023. South Africa is confident that, once enacted, this new legislation will assist in the promotion and protection of persons SOGIESC rights and will prevent discrimination and violence directed at LGBTIQ+ persons.
10. Civil society organisations and activists are a vital part of democracy in South Africa and we have a vibrant and dynamic civil society. Civil society and non-government organisations are free to exercise their right to freedom of expression through the media, social media, engagements with Government as well as multi-lateral organisations.
11. Government views civil society as a key partner in the promotion and protection of SOGIESC rights and has therefore established a National Task Team on Gender and Sexual Orientation-Based Violence Perpetrated Against LGBTI Persons (the NTT) in 2013. The NTT is constituted by government departments, state institutions supporting constitutional democracy and civil society organisations that specialise in SOGIESC and human rights matters. This is a forum where civil society organisations hold robust engagements with government regarding areas that require urgent interventions.
12. In 2023 a decision was taken to broaden the mandate and the focus of the NTT and to revise the National Intervention Strategy (NIS) on SOGIESC matters. Cabinet approved both these interventions in August 2023.
13. The newly proposed focus of the NIS on SOGIESC matters will entail the establishment of a Deputy Minister’s committee, led and chaired by our Department’s Deputy Minister, and comprising of other Deputy Ministers from Police, Correctional Services, Home Affairs, International Relations, Social Development, Basic Education, Higher Education and Health which will discuss and provide guidance on SOGIESC matters and ensuring cohesion with regard to Government’s participation in international structures on SOGIESC matters.
14. The revised NIS includes transgender and intersex persons and the NTT must elevate the challenges faced by transgender and intersex people, as well as gender non-conforming people. The NTT was initially established to focus specifically on violence against LGBTI people, but there is clearly a pressing need to widen the scope of the work of the NTT to focus more broadly on all aspects relating to the human rights of LGBTIQ+ people and not only on incidents of violence against them. This widening of the focus will ensure that the NTT’s work deals with all matters pertaining to sexual orientation, gender identity, gender expression and sex characteristics so as to ensure holistic interventions and to conform to international standards.
15. *If there are no such laws or policies, have there been attempts or incentives in the last ten years (2013-2023) to introduce such explicit or implicit restrictions, either nationally or locally? If so, who were the actors/groups/individuals or organizations behind these attempts, and what is the current situations?*

**REPLY:**

No

1. *Does your country have any laws, policies, or practices that, explicitly or implicitly, ban, restrict or make more challenging the exercising or freedom of association and freedom of peaceful assembly by civil society organizations or activists advocating for LGBT persons’ human rights?*
2. *Those can include – but are not limited to – explicit bans on registration of organizations working on LGBT persons’ human rights or related topics, procedures making the registration impossible or almost impossible, obstacles for applying for and receiving funding (foreign or otherwise), ignoring or indirectly encouraging attacks and threats on LGBT-related events and using such attacks as a justification for banning peaceful marches/protests, refusing to guarantee the protection of the peaceful protests by State security forces, etc.*

**REPLY**

1. No, as section 18 of the Constitution states that “Everyone has the right to freedom of association.”
2. Given that the civil society organisations played a key role to mobilize and fight against the Apartheid regime in South Africa, the democratic Government of South Africa has ensured civil society organisations enjoy public space to practice their right to freedom of expression. This is done through advocacy and robust engagements in the media, social media, engagements with government, Parliament, judiciary and via multi-lateral organisations.
3. Furthermore, civil society in the country are free to seek and engage with any Development Partners to financially support their advocacy work.
4. Government, through the Department of Social Development and the Department of Health, is providing funding assistance to civil society organisations for the implementation of their advocacy and lobbying programmes, through enabling national legislation (such as e.g. the Nonprofit Organisations (NPO) Act 71 of 1997).
5. South Africa has a very active and vibrant civil society. For example, the first Pride event in Africa was held in Johannesburg in October 1990 and civil society organisations have since commemorated Pride Month on an annual basis, with the cooperation and support from government.
6. Civil society organisations continue to organise local, provincial, national and regional conferences and events to share experiences, with government’s support and participation.
7. *If there are no such laws or policies, have there been attempts or incentives in the last ten years (2023-2023) to introduce such explicit or implicit restrictions, either nationally or locally? If so, who were the actors/groups/individuals or organizations behind these attempts and what is the current situation?*

**Reply:** No

1. *Are there practices, procedures, groups or actors, societal and political trends, incentives, civil society and constituency mobilization, laws, bills or policies, which you have not mentioned above but that already affect or are likely to affect in the future, directly or indirectly, the exercising of the human rights to freedom of expression, association and/or peaceful assembly by LGBT people, activists and civil society organizations in your country, nationally or locally?*

**Reply:**

A few of the smaller political parties in Parliament oppose SOGIESC rights. One of the new parties formed to contest the elections later this year is the MK Party, lead by former President Jacob Zuma. This party is openly homophobic and it may impact on the freedoms experienced by members of the LGBTIQ+ communities if this party does well in the elections. Other than that, some Christian denominations are openly homophobic. The Muslim Judicial Council recently issued a fatwa against people having gay or lesbian sex.

1. *Given that laws and policies regulating internet use, access and content can have especially restrictive effects on the protection of human rights of LGBT persons, are there laws, policies and practices which appear neutral or otherwise not specifically addressed to LGBT or SOGI issues, which nonetheless have discriminatory effects on the exercising of the human rights to freedom of expression, association and/or peaceful assembly by LGBT people, activists and civil society organizations in your country, nationally or locally?*

**Reply: No**

1. This Alien Legacy, The Origins of "Sodomy" Laws in British Colonialism, Dec 2008 ([This Alien Legacy: The Origins of "Sodomy" Laws in British Colonialism | HRW](https://www.hrw.org/report/2008/12/17/alien-legacy/origins-sodomy-laws-british-colonialism)) [↑](#footnote-ref-1)
2. [Progress and Setbacks on LGBT Rights in Africa — An Overview of the Last Year | Human Rights Watch (hrw.org)](https://www.hrw.org/news/2022/06/22/progress-and-setbacks-lgbt-rights-africa-overview-last-year) [↑](#footnote-ref-2)
3. [The History of LGBT legislation | South African History Online (sahistory.org.za)](https://www.sahistory.org.za/article/history-lgbt-legislation) [↑](#footnote-ref-3)