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

***COLONIALISM AND SEXUAL ORIENTATION AND GENDER IDENTITY***

**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.
7. During colonialism and Apartheid, most of the policies and legislation were intended to suppress the human rights of the majority of the citizens in South Africa, viz Group Areas Act (1950) which was aimed to eliminate mixed neighbourhoods in favour of racially segregated ones.
8. 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 bizarre and 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.
9. 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.
10. 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)

**PROGRESS MADE BY SOUTH AFRICA SINCE ITS TRANSITION TO DEMOCRACY**

1. The first Pride event in Africa was held in Johannesburg in October 1990.
2. On 27 April 1994 the Interim Constitution came into force and included a clause explicitly prohibiting discrimination on the basis of sexual orientation.
3. The South African Constitution, 1996, brought about a positive change to the South African legal system by creating a constitutional democracy, based on human rights and freedoms. Section 9 of the 1996 Constitution of the Republic of South Africa stipulates:

*“(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.*

*(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.*

*(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour,* ***sexual orientation****, age, disability, religion, conscience, belief, culture, language and birth.*

*(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.*

*(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.”*

1. South Africa was the very first country in the world to prohibit discrimination based on sexual orientation. In the matter of *National Coalition for Gay and Lesbian Equality v Minister of Justice*[[4]](#footnote-4) the Constitutional Court held that the common law offence of sodomy was declared to be inconsistent with the Constitution and thus invalid. In addition, section 20A of the Sexual Offences Act, 1957 was declared to be inconsistent with the 1996 Constitution. The Court stated that -

*“The criminalisation of sodomy in private between consenting males is a severe limitation of a gay man’s right to equality in relation to sexual orientation, because it hits at one of the ways in which gays give expression to their sexual orientation. It is at the same time a severe limitation of the gay man’s rights to privacy, dignity and freedom. The harm caused by the provision can, and often does, affect his ability to achieve self-identification and self-fulfilment. The harm also radiates out into society generally and gives rise to a wide variety of other discriminations, which collectively unfairly prevent a fair distribution of social goods and services and the award of social opportunities for gays.”[[5]](#footnote-5)*

1. The South African Constitution and the Bill of Rights, as well as legislative provisions such as the Promotion of Equality and Prevention of Unfair Discrimination Act of 2000 (PEPUDA), provide explicit protections against violence and discrimination. In the Equality Court, unlike in criminal court, if the alleged discrimination is on a prohibited ground, viz sexual orientation, then the onus is not on the applicant, but on the respondent to prove that the discrimination was fair.
2. 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.
3. We have a Constitution that is often hailed as one of the most progressive in the world, Section 9, the Equality clause in our Constitution and we have a progressive legislative framework.
4. South Africa has also legislated against discrimination on the grounds of sexual orientation in the workplace. In 1999, the South African government introduced the Domestic Violence Act that classifies a same-sex relationship as a ‘domestic relationship’, in other words, thus qualifying to receive legal protection in terms of this Act.
5. South Africa has legalised same-sex marriages through the Civil Union Act, 2006 which came into force on 30 November 2006. Both joint and step adoption by same-sex couples are legal.
6. In South Africa, intersex persons are permitted through the Alteration of Sex Description and Sex Act of 2003 to undergo a sex change.
7. Significant progress was made with the introduction of the Bill on Combating Hate Crimes, Hate Speech and Unfair Discrimination which is currently before Parliament. The Bill is a result of intense research and will introduce the concept of hate crime to South African criminal law and makes hate speech a crime.
8. The draft Official Identity Management Policy of 2020 which enable an inclusive digital population register that is secure, accurate and confidential.
9. The draft School Uniform Policy and Guidelines which ensures that practices related to school uniform do not impede access to education in any manner and do not infringe any constitutional rights of persons.
10. Government initiated engagements with key government departments and institutions to establish the National Task Team on Gender and Sexual Orientation-Based Violence Perpetrated Against LGBTI Persons (the NTT).The NTT is constituted by government departments, chapter 9 institutions and civil society organisations that specialise SOGIESC and human rights matters.
11. The review of the National Intervention Strategy (NIS), which was launched in 2014, to a 5 year Strategy. The recently reviewed 5 year NIS on SOGIESC matters is an opportunity to use the NTT to also respond to GBVF in ways that expand access to broader human, socio-economic, civil and political rights to LGBTIQ+ people in South Africa amongst others.
12. The revised NIS focuses on the following areas:
    * Strengthening of human, technical and financial capacity of the Secretariat/s to effectively monitor the implementation of the activities o the revised NIS.
    * Prevention Programmes to address violence and unfair discrimination on the grounds of SOGIESC, targeting faith-based organisations, traditional leaders, human rights organisations, public officials and institutions.
    * Improved response by the criminal justice system to support survivors of hate crimes, GBVF, hate speech and unfair discrimination including monitoring of reported and pending hate crime cases within the criminal justice system.
    * Capacity building of officials at service points and service providers in order to address secondary victimization faced by victims of hate crimes and unfair discrimination.
    * Effective coordination of established structures to implement the activities of the revised NIS.
    * Research, monitoring and evaluation.

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)
4. (CCT11/98) [1998] ZACC 15; 1999 (1) SA 6 [↑](#footnote-ref-4)
5. Par 36 [↑](#footnote-ref-5)