

Respecting the rights of LGBTI people in the context of business activities

Submission of Outright International to the Working Group on Business and Human Rights in response to the Working Group's call for input for the Working Group's report on respecting the rights of LGBTI people in the context of business activities: fulfilling obligations and responsibilities under the UNGPs

Introduction

Outright International works for better lesbian, gay, bisexual, transgender, intersex and queer (LGBTIQ) lives. Outright is dedicated to working with partners around the globe to strengthen the capacity of the LGBTIQ human rights movement, document and amplify human rights violations against LGBTIQ people, and advocate for inclusion and equality. Founded in 1990, with staff in over a dozen countries, Outright works with the United Nations, regional human rights monitoring bodies, governments, humanitarian and development institutions, and civil society partners. Outright holds consultative status at the United Nations, where it also serves as the secretariat of the UN LGBTI Core Group.

This submission is in response to the call for input for the Working Group's (WG) report on respecting the rights of LGBTIQ people in the context of business activities. Though the analysis in this submission focuses on LGBTIQ people as workers, the concepts are also applicable to LGBTIQ people as they play other roles in the economy such as consumer, renter, and user of financial services

A growing body of evidence makes clear that LGBTIQ people face exclusion from the workplace by businesses in the private sector on the basis of their sexual orientation, gender identity or gender expression, and sex characteristics. Several global systematic reviews of social science literature have cataloged discrimination against LGBTQ people in all phases of employment.¹ Correspondence studies measure an employer's discriminatory treatment of

¹ Ozeren, Emir, "Sexual Orientation Discrimination in the Workplace: A Systematic Review of Literature." *Procedia - Social and Behavioral Sciences* 109 (January 2014): 1203–15.

LGBTQ people by sending employers matched pairs of equally qualified resumes in response to publicly posted vacancy announcements – the only difference being an indication of the employee’s sexual orientation or gender identity on one of the resumes. A combined analysis of 18 different correspondence studies (representing more than 50,000 resumes sent to employers in OECD countries over twenty years) found that gay men had 39% lower odds of receiving a positive response and lesbian women had 32% lower response rate.² An international review of wage and income surveys showed that, for example, gay men had income earnings penalties as high as 30.6%, bisexual men as much as 8.5%, bisexual women of 7%, and transgender women 20.1%.³ Studies based on convenience samples of intersex people reveal that nearly thirty percent of intersex people report discrimination in the workplace,⁴ and intersex people face unemployment at a rate that is 12% higher than the general population.⁵

When a business takes an adverse action against an employee because they are LGBTIQ, several human rights are impacted, most centrally the right to work. Additionally, employment discrimination can impact the right to the highest attainable standard of health in at least two ways. First, it directly limits access to health benefits and can therefore impair

<https://doi.org/10.1016/j.sbspro.2013.12.613>; Drydakis, Nick, “Sexual Orientation and Earnings: A Meta-Analysis 2012–2020.” *Journal of Population Economics* 35, no. 2 (2022): 409–40.

<https://doi.org/10.1007/s00148-021-00862-1>; Nicholas Drydakis, *The Economics of Being LGBT. A Review: 2015–2020*, IZA Discussion Papers No. 14845, (Institute for Labor Economics: Bonn, 2021); Tarikul Islam, Tarik Raihan, Md. Aftab Uddin, “Sexual Harassment at Workplace: A Systematic Review of Literature,” *Business Perspective Review* 2, no. 2 (2020): 1–14, <https://doi.org/10.38157/business-perspective-review.v2i2.128>; Lloren, Anouk, and Lorena Parini. “How LGBT-Supportive Workplace Policies Shape the Experience of Lesbian, Gay Men, and Bisexual Employees.” *Sexuality Research and Social Policy* 14, no. 3 (2017): 289–99. <https://doi.org/10.1007/s13178-016-0253-x>.

² Nicholas Drydakis, *The Economics of Being LGBT. A Review: 2015–2020*, 2–9.

³ Flage, Alexandre, “Discrimination against Gays and Lesbians in Hiring Decisions: A Meta-Analysis.” *International Journal of Manpower* 41, no. 6 (2020): 671–91, <https://doi.org/10.1108/IJM-08-2018-0239>.

⁴ Suen, Yiu Tung, Randolph C.H. Chan, and M. V.Lee Badgett, “The Experiences of Sexual and Gender Minorities in Employment: Evidence from a Large-Scale Survey of Lesbian, Gay, Bisexual, Transgender and Intersex People in China.” *China Quarterly* 245 (2021): 142–64. <https://doi.org/10.1017/S0305741020000429>.

⁵ Tiffany Jones, Bonnie Hart, Morgan Carpenter, Gavi Ansara, William Leonard, and Jayne Lucke, *Intersex: Stories and Statistics from Australia*, (Cambridge: Open Book Publishers, 2016) 220.

health. Second, being subjected to a discriminatory act, in itself, impacts health outcomes.⁶ Job termination is also associated with multidimensional poverty, which increases the likelihood of food and housing insecurity.

This submission examines the UN Guiding Principles on Business and Human Rights (UNGPs) in the context of these and other human rights violations faced by LGBTIQ people. As the WG call for inputs says: “The UNGPs make a key contribution to the implementation of human rights safeguards in the context of business activities.” The structure of the UNGP framework is based on three pillars which will be addressed in this submission in the following order: (1) the corporate responsibility to respect human rights; (2) the State’s duty to protect citizens against human rights abuses from business; and (3) the need for victims’ access to effective remedies when their human rights are violated.

Pillar One: Corporate Responsibility

Outright applauds the efforts of the WG and the Office of the High Commissioner for Human Rights (OHCHR) to articulate and give visibility to the corporate responsibility to respect human rights. In this regard, the UNGPs have sought to frame human rights standards within currently operating business frameworks. For example, the UNGPs endorse a risk management perspective and advocate linking human rights due diligence activities to due diligence activities that businesses already carry out on a regular basis. The Standards of Conduct for Business (Standards of Conduct) echo this approach.⁷

We note that this approach faces challenges. Customarily, business risk assessments seek to identify potential risks of business activities on those who have an interest in the success of the business, namely customers, suppliers, workers, and investors. These risks are weighed against potential economic impact. Assessment of human rights risks employs a different logic, including an assessment of potential impacts on the human rights of all people.

⁶ Martin Plöderl and Pierre Tremblay, “Mental Health of Sexual Minorities. A Systematic Review,” *International Review of Psychiatry* 27, no. 5 (2015): 367–85.

⁷ “Companies should conduct due diligence to identify, prevent, mitigate and account for, any actual or potential negative impact on the enjoyment of human rights by LGBTI people that they have caused or contributed to or which are directly linked to their operations, products and services, and business relationships.” UN Office of the High Commissioner for Human Rights, *Tackling Discrimination against Lesbian, Gay, Bi, Trans, & Intersex People, Standards of Conduct for Business*, (UN OHCHR, 2017), 9.

Additionally, human rights violations should not be deemed acceptable as a result of economic trade-offs. Accordingly, framing human rights obligations in business frameworks may not always produce the sought-after result.

Nonetheless, by framing human rights obligations within well-accepted business activities, the UNGPs and the Standards of Conduct seek to overcome the fact that the UNGPs are explicitly voluntary. The UNGPs a pathway for businesses to engage the issue of LGBTQ discrimination that might not have existed before. The Standards of Conduct articulate a clear set of solutions. For institutions that have little or no experience determining human rights obligations, such clarity can ease the adoption of supportive measures within a business context.

While the realization of human rights remains the goal of Outright International, we recognize that the business and economic case for inclusion helps change minds and lead to changes that can be, at a minimum, coincident with measures to fulfill human rights obligations. Research in three European countries with low levels of public acceptance for lesbian, gay, and bisexual (LGB) people shows that those who are informed about the economic costs of discrimination against LGB people are 1.5 times more likely to support equal rights.⁸ A survey of corporate leaders conducted by Outright in 2022 found that the economic and business case motivates corporations to look beyond their own policies and practices and seek fair and inclusive laws in the economic environment in which they operate.⁹

We note that other high-profile efforts to encourage corporate human rights compliance have produced successful results. LGBTIQ corporate indices establish benchmarking tools used to produce high-profile evaluations of how businesses treat employees, consumers, and investors. Examples include the Human Rights Campaign Corporate Equality Index (US), Stonewall's Workplace Equality Index (U.K.), Fulcrum's Ukrainian Corporate Equality Index (Ukraine), the Forum's South African Workplace Equality Index (South Africa), and *Presente's* Diversity and Equality Diagnostic (*Empresas Presente: Diagnóstico de Diversidad y Equidad - Peru*).

⁸ Aksoy, C.G., Carpenter, C.S., & De Haas, R., *Reducing sexual-orientation discrimination: Experimental evidence from basic information treatments*, IZA Discussion Paper No. 14998. (Institute for Labor Economics: Bonn, May, 2022).

⁹ Outright International, *A Four-Step Guide to Supporting Global LGBTIQ Causes Through Corporate Philanthropy* (Outright International, May 1, 2022), 20.

We recommend that the WG

- Continue to create framing and analysis of human rights obligations that can be integrated into already-existing business activities.
- Continue to produce high-profile publications, platforms, and events that provide businesses with a supportive forum to engage with human rights standards.
- Work closely with LGBTIQ-led NGOs, such as those that produce LGBTIQ corporate indices, to leverage and increase their effectiveness.

Pillar Two: State Responsibility

Business efforts to support and include LGBTIQ people as they participate in the economy needs to be complemented by the second pillar of the UNGPs, namely, the use of state power to protect people against human rights abuses by other members of the public. Outright joins the many LGBTIQ organizations and individuals that have called for the adoption of legal prohibitions of discrimination in the workplace, either as a prong of comprehensive non-discrimination legislation or through other protective laws and policies.¹⁰

We recommend that the WG emphasize the need for States to fulfill their own human rights due diligence obligations by implementing practices to understand how businesses support or violate the human rights of LGBTIQ people. As explained by the Independent Expert on Sexual Orientation and Gender Identity (IE SOGI), the principle of human rights due diligence, from which the UNGP draws its corporate due-diligence analysis, “requires States to ... take measures to understand and eliminate cultural stigmatization and other social causes of violence and discrimination.” The due diligence principle obligates a State to act “when the State knows, or has reasonable grounds to believe, that abuses are being perpetrated.”¹¹

Currently, very few States collect data about the nexus of business activity and LGBTIQ lives, and even fewer collect data that would reveal human rights violations. Collecting nationally

¹⁰ See, for instance, UCTRANS and Outright International, *Discrimination at Every Turn: The Experience of Trans and Gender Diverse People in Eleven Caribbean Countries*, 2022, <https://outrightinternational.org/our-work/human-rights-research/discrimination-every-turn>.

¹¹ UN Office of the High Commissioner for Human Rights, *Data collection and management as a means to create heightened awareness of violence and discrimination based on sexual orientation and gender identity, Report of the Independent Expert on protection against violence and discrimination based on sexual orientation*, (UN OHCHR, May 14, 2019), A/HRC/41/45, 5.

representative data on a regular basis requires State resources, administrative infrastructure, and an appropriate legal framework. While States are increasingly collecting data regarding other vulnerable and disadvantaged groups such as women, people with disabilities, racial minorities and indigenous people, very few States are able to answer the following basic questions with regard to the population of LGBTIQ people or to any subgroup within the “umbrella” of LGBTIQ:

- How do wages and income of LGBTIQ people compare to non-LGBTIQ people? Are LGBTIQ people employed at similar rates?
- Do LGBTIQ people participate in the same labor markets, at the same rates, as their non-LGBTIQ counterparts?
- Do LGBTIQ people face job turnover, occupational segregation, workplace disability, and career path promotion at rates that are equal or disparate from non-LGBTIQ people?

According to a 2016 Human Development Report, lesbian, gay, bisexual, transgender and intersex people are “largely invisible in data” on human development indicators.¹² Currently, less than a handful of UN Member States collect nationally representative data on these issues. According to a 2023 presentation by UNDP staff and consultants about the UNDP Inclusion Index, no such representative data exists in any low or middle-income country. Neither the UN Statistical Division, the UN Statistical Commission, nor any UN body or any international intergovernmental body has issued any global guidance or standards for gathering such data. The lack of official statistical data by the State encourages negation – the belief that LGBTIQ people do not exist or that if they do, discrimination against them is not a serious issue. This belief creates a vicious circle: As the IE SOGIE put it, “[i]n a context of negation, perpetrators feel motivated and enabled to suppress or punish diversity. Invariably, any data gathered will be unreliable, unsystematic and biased; all State measures to address violence and discrimination, be it public policy, access to justice, law reform or administrative actions, will be therefore hindered by this fact.”¹³

¹² UNDP, *Human Development Report 2016: Human Development for Everyone* (UNDP, 2016) 95, https://sustainabledevelopment.un.org/content/documents/25212016_human_development_report.pdf (accessed 7 November 2022).

¹³ UN Office of the High Commissioner for Human Rights, *Data collection and management as a means to create heightened awareness of violence and discrimination based on sexual orientation and gender identity, Report of the Independent Expert on protection against violence and discrimination based on sexual orientation*, (UN OHCHR, May 14, 2019), A/HRC/41/45, 14.

We recommend that the WG

- Promote the need for data collection by States, where it can be done safely, ethically, and in compliance with the human rights of LGBTIQ people¹⁴
- Work with other UN bodies to facilitate this data gathering by UN member states.

Pillar Three: Grievance and Remedy

While due diligence, data collection, and adoption of legal norms will help protect the human rights of LGBTIQ people, these measures may be insufficient. As the UNGP states, “Unless States take appropriate steps to investigate, punish and redress business-related human rights abuses when they do occur, the State duty to protect can be rendered weak or even meaningless.”¹⁵ Accordingly, the UNGP’s third pillar calls for victims to have access to remedies for human rights abuses.

There is increasing research regarding the number of countries whose governments have adopted prohibitions on employment discrimination. However, Outright International is not aware of efforts to globally assess the adequacy of enforcement mechanisms related to these legal standards. On the contrary, Outright International continues to encounter individuals who were unable to obtain remedy under these laws. Though many national human rights institutions articulate national standards of non-discrimination, they commonly lack powers to enforce remedy or even compel evidence and testimony from businesses. Where non-discrimination provisions are embedded in criminal codes, LGBTIQ workers often rely on the willingness of a State prosecutor who may themselves be biased against LGBTIQ people. Ministerial-level policies may not provide a victim with the ability to initiate court action.

Too often, such laws operate as *de facto* voluntary guidelines. The cost of violating such laws may be viewed as a risk and possibly an acceptable one. Rather, such laws should be seen as real mandates not to discriminate. Accordingly, Outright International recommends that the WG articulate standards of grievance and remedy as intended by the UNGPs. Such an

¹⁴ Outright International affirms the observations of the IE SOGI that data collection should only occur where it can be done safely, ethically, and in compliance with the human rights of LGBTIQ people. Ibid, p. 7-10. The IE SOGI recognized the existence of well-accepted practices that can help insure data collection efforts are safe and ethical. Ibid, p. 14.

¹⁵ UN Office of the High Commissioner for Human Rights, Guiding Principles on Business and Human Rights, (UN OHCHR, 2011), Principle 25, Commentary.

articulation would encourage State compliance by more clearly setting out what constitutes acceptable grievance and remedy measures. For businesses, these standards would help clarify the regulatory framework in which businesses operate, easing the process of aligning business activities with human rights norms.

Outright International urges the WG to consider three essential components to grievance and remedy – complaint, adjudication, and remedial authority – though this list is by no means exhaustive.

First, LGBTIQ workers must be able to initiate the complaint process themselves, without reliance on the discretion of a governmental body or official. The complaint should be admissible based on a potential showing that the business violated a legal or administrative prohibition against discrimination. The prohibition should specifically include direct and indirect discrimination, hold the employer liable for discriminatory acts committed by employees in the workplace, and include narrow provisions exempting positive actions from liability. For LGBTIQ workers in jurisdictions where the State's enforcement mechanisms are impacted by the same anti-LGBTIQ bias the worker is trying to remedy, it is essential that the victims themselves have the ability to initiate the complaint.

Second, enforcement mechanisms should include a quick, time-limited procedure for the admissibility of individual cases and should provide the possibility of shifting the burden of proof from the plaintiff to the defendant, requiring the defendant to disprove allegations of discrimination once a *prima facie* case has been established by the complainant. It is essential that the adjudication process include investigatory mechanisms to compel the business, through the use of sanctions or negative inference, to provide evidence and testimony. Though such adjudicative powers are necessary to confront all acts of non-discrimination, they are particularly important for LGBTIQ workers where evidence of discrimination may not be direct. Frequently, such workers are brought into the workplace on the assumption that they are heterosexual, cisgender, and endosex. When employers realize LGBTIQ workers are who they are, employers create pretextual reasons that can be tested through the examination of testimony, documentary, or other evidence.

Finally, the adjudicative body should have the authority to impose remedial measures that remedy past discrimination and deter future discrimination. Remedies should include a return to the *status quo ante* (all negative consequences of a discriminatory act are removed, as if the harmful act had not occurred), compensation for past harm suffered, the possibility for publication of the decision, and measures to improve practices of the employer such as training and monitoring.

We recommend that the Working Group

- Articulate the elements of adequate grievance and remedy mechanisms under the UNGP.
- Undertake a global assessment of the mechanisms to enforce non-discrimination protections.