

[Home](#) [About](#) [Resources](#) [Newsroom](#) [Legislation](#) [Courts](#) [Contacts](#) [Links](#)

SPEECHES - 2014

Address by the Deputy Minister of Justice and Constitutional Development, the Hon JH Jeffery, MP, at a Human Rights Day Policy Dialogue Event of the Southern African Liaison Office, held at the Burgers Park Hotel, Pretoria, 25 March 2014

Programme Director,
Board Members of SALO
Members of the SALO Reference Group
Members of the management team of SALO
Ladies and Gentlemen

Thank you for the invitation to the Dialogue event. I am always impressed at the work that SALO does in contributing to building peace and security through facilitating dialogue and consensus nationally, regionally and on the continent and it is therefore a pleasure for me to be part of this Dialogue.

The Dialogue today is on LGBTI rights. There is no denying that South Africa is a world leader on this issue, with us being the very first country in the world to prohibit discrimination based on sexual orientation. We have a Constitution that is often hailed as one of the most progressive in the world. We have an equality clause in the Constitution which is a cornerstone of South Africa's constitutional system. We have a progressive legislative framework. We have also legislated against discrimination on the grounds of sexual orientation in the workplace.

Many of you will, no doubt, be familiar with the legislative framework. In 1999, we 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. The Promotion of Equality and Prevention of Unfair Discrimination Act of 2000, in fulfilment of section 9 (4) of the Constitution to enact national legislation to promote equality and prevent unfair discrimination, provides for, amongst others, the establishment of Equality Courts in an attempt to give effect to the spirit of the Constitution, in particular the promotion of equal enjoyment of all rights and freedoms by every person. We have legalised same-sex marriages and both joint and step adoption by same-sex couples. In South Africa, intersex persons are permitted through the Alteration of Sex Description and Sex Act of 2003 to undergo a sex change.

Amnesty International in its 2013 report named "Making love a crime: Criminalization of same-sex conduct in Sub-Saharan Africa" called South Africa "a country which is exemplary in, and should be applauded for, its active commitment to including protections against discrimination on grounds of sexual orientation and gender identity in its constitution and for seeking to persuade neighbouring countries to do the same."

South Africa is at the forefront of the dialogue on the issue of sexual orientation at a regional and international level. In 2011, South Africa introduced the first-ever resolution in the United Nations, in the Human Rights Council, entitled "Human Rights, Sexual Orientation and Gender Identity." Our objective in introducing this resolution was informed by our belief that an incremental approach would achieve better results than a confrontational approach.

The resolution requested the High Commissioner to produce a report which provided insight into the challenges faced by LGBTI persons. The report also provides some useful recommendations. A panel discussion emanating from Resolution 17/ 19 was subsequently convened by the Human Rights Council and South Africa chaired the panel discussion.

Reporting on the event, South African media reported that South Africa positioned itself firmly as a global leader in the protection of the rights of LGBTI people and played a key role in preventing a walkout of other African states. The historic debate, which is argued by some to have been "the most divisive yet in the history of the United Nations General Assembly's Human Rights Council", was sponsored by South Africa and Brazil.

South Africa has made great strides in ensuring the equality of LGBTI persons. And we are way ahead of other countries, or states of countries, when it comes to LGBTI rights. The United States Senate only passed their Employment Non-discrimination Act (or ENDA, as it's called) at the end of last year. It is the first time that the U.S. Senate approved legislation to protect LGBT employees from discrimination in the workplace. Recently some 80 000 French people marched in Paris against new laws which legalise same-sex marriage. Same-sex relationships are illegal in more than a third of countries around the world and punishable by death in five. According to Amnesty International, in Africa, homosexual acts are still a crime in 38 countries.

Let us pause for a moment and look at the African position and in particular South Africa's role. Our Government was recently criticised for, what some argue, not taking a strong enough position in relation to the anti-gay legislation in Uganda. For example, Professor Pierre de Vos writes - "South Africa in effect decided to remain quiet, hiding behind vague and general language that spectacularly fails to acknowledge the true effects of the bigoted laws passed in places like Uganda".

Let me address that issue. At a CSO Alliance Building workshop held in February this year with the LGBTI sector I said the following, which I'd like to repeat.

"South Africa is involved, and very actively involved, in trying to mediate or bring about a better understanding of the importance of the protection of gay rights. Our track record at the UN proves this. But it's also about the way we approach diplomacy. We don't practice what I like to call "megaphone diplomacy", in other words, standing on the rooftops and shouting "we condemn, we condemn" with a load-hailer, because we know that that approach achieves very little. We believe it is better to try to play a more mediating role."

The argument is a nuanced and sensitive one. For example as Mondli Makhanya writes in the City Press of 3 March, about what he calls "the public clamour for government to stand on top of Table Mountain with a megaphone and yell insults at Museveni."

He says: *"South Africa's stance on the matter was correct for several reasons. Firstly, we are already leading by example, having been a pioneer in enshrining gay rights in our Constitution and leapfrogging many mature democracies on legalising same-sex unions.*

Secondly, it is proper that a universal review of gay rights be conducted. It is opportunistic and unhelpful to single out Museveni for criticism when there are much worse offenders among the 80-odd countries where homosexuality is outlawed.

Thirdly, there is the factor of realpolitik. If South Africa had to scream at Uganda from the mountain tops, this country would erode its power in Africa.

By virtue of its size and economic muscle, South Africa has been able to make critical interventions in conflicts and other developments on the continent. Grandstanding ... would just be plain silly. It would provide powerful sound bites for a day but, in the short to long term, undermine South Africa's power.

South Africans need to realise that not every international issue requires megaphone diplomacy. There is a time and a place for loud condemnation and there is also a time and a place for strategic messaging. This time, Pretoria got it dead right."

Programme Director,

As a member of the African Union and, since January 2014 of the Human Rights Council, we need to engage first within the African Region before engaging others. It is for this reason that we announced in Geneva and other places, that we will convene an African Regional Seminar to discuss issues of violence and discrimination against LGBTI people. The Regional Seminar is intended to achieve the following:

- Present the High Commissioner for Human Rights' report;
- Generate dialogue on issues of violence and discrimination, through an inclusive process involving the LGBTI community;
- Raise awareness of the report of the High Commissioner's report, and
- Determine approaches for the African Region.

Our contribution through the Regional Seminar is part of an effort to continuously engage on this important issue. Within the AU system we also have our own regional mechanisms, established to promote and protect human rights, such as the African Commission on Human and Peoples' Rights. Civil society organisations enjoy observer status at the institutions and are invited to make submissions from time to time on a number of issues. I think the point to stress here is that there are existing platforms for advocacy and for civil society to play an important role, not only in South Africa, but also in the bigger region.

In our own country there is still much to be done. The Organisation for Refuge Asylum and Migration released a report called "Discrimination and Persecution of LGBTI Individuals in South Africa" and found that despite the legal

and constitutional protections available to LGBTI individuals in South Africa, discrimination and violence against LGBTI persons are still rampant. LGBTI men and women who are victims of sexual assaults and so-called "corrective" rapes often face harassment, ridicule, and intrusive lines of questioning from police officers when they report these crimes. Police investigations of these crimes against LGBTI individuals are also often inadequate.

The report continues to find that sometimes police officers themselves are the perpetrators of violence against LGBTI individuals. Most concerning is the fact that the report found that societal attitudes against the LGBTI persons are extremely poor, with 80% of South Africans believing that sex between two men or two women is "always wrong" and that homosexuality is "un-African."

In addition, it was found that young LGBTI South Africans often face discrimination and violent bullying at school, and many report being driven out of their homes by their families. LGBTI adults also often face discrimination in the workplace. These types of discrimination can result in difficulty obtaining adequate education, employment, and community support, which can lead to situations of poverty. The study also states that the risk of discrimination and violence is heightened when LGBTI persons do not conform to the strict gender norms of South African society or when they are activists for LGBTI equality or when they are members of a particular social class or marginalized racial group.

We know that there is only so much that one can do by way of legislation. You cannot pass a law that will guarantee that people change their attitudes and prejudices. We know that there is a gap or a disconnect between the legal position and reality. Despite increasing legislative recognition and protection afforded to the LGBTI persons, we sadly live in a society that is still strongly homophobic. There are still, sadly, people in our society who continuously question or condemn the cultural, religious or social legitimacy of homosexuality. Discrimination and violent attacks are often part of the daily life of LGBTI persons.

Steps are being taken to address this and we have made significant progress. The Minister of Justice and Constitutional Development established a National Task Team (NTT) to develop a National Intervention Strategy on LGBTI Rights in 2011. Following protracted debates amongst the institutions involved in this process, the Working Group of the NTT finally commenced its work in May 2013. The final revised Terms of References have been finalised and signed off by the NTT and Working Group. A work plan was also approved.

The National Task Team held its meeting on 18-19 September 2013 here in Pretoria and we can report on a series of interventions. In an effort to ensure representation of the LGBTI sector in the NTT, CSO alliance building workshops were held with all nine provinces. The nine provinces were divided among three workshops:

- Durban, 9 December 2013, for KwaZulu-Natal, Limpopo, Mpumalanga and the Eastern Cape
- Cape Town, 29-30 January 2014, for the Western Cape, the Northern Cape and Free State
- Johannesburg, 25-26 February 2014, for Gauteng and North West Province

The purpose of the workshops was to ensure provincial CSO representation on the National Task Team (NTT), to build solidarity among different sectors – among government departments and civil society, to understand local dynamics of violence against LGBTI persons and to report on existing criminal cases and the Rapid Response Strategy developed by the NTT.

Some of the Recommendations made at these workshops include, amongst others:

- To ensure that the NTT comprises of 2 representatives per Province, the purpose of which is to ensure rural and urban representation.
- Establish Provincial LGBTI Forums with the support of Regional Offices of the DoJ&CD.
- Improve communication among amongst stakeholders.
- Ensure issues of disability are integrated into the NIS.
- CSO's are to submit information to the Department of Justice and Constitutional Development on the LGBTI cases that organisations are working on.

A National Intervention Strategy (NIS), has been developed with inputs received from government departments and LGBTI organisations attending the CSO Alliance Building workshops. The next steps are of course to take it through the official channels within government. This is a key deliverable of the NTT and it is hoped we will be able to launch the strategy at the end of April 2014.

One of the main issues brought to my Ministry's attention was the issue of long - outstanding and pending LGBTI cases in the criminal justice system, therefore a Rapid Response Team on pending cases relating to gender and sexual orientation-based crimes in the criminal justice system was established. This team consists of Departments

of Justice and Constitutional Development, South African Police Services, Correctional Services, Social Development, National Prosecuting Authority and civil society organisations. Urgent resolutions were adopted to track progress regarding the above-mentioned cases as well as to urgently develop rapid response mechanisms within civil society networks so that the South African Police Services can be immediately alerted when a gender and sexual orientation-based crime takes place against an LGBTI person. To this end, we have agreed upon terms of reference, developed a short term manual tracking tool that allows us to monitor progress on cases. This team is fully functional and meets on a regular basis to map progress on the pending cases in the criminal justice system.

Many of you may be aware that the Minister of Justice and Constitutional Development has recently confirmed that government intends to introduce the concept of hate crimes into our criminal law. One of the key motivations for the proposed changes to the law, included in a draft policy framework, is the violent targeting of LGBTI persons based on their sexual orientation and gender identity, the so-called 'corrective rapes' and murder of lesbians and transgender men, especially in townships. Other motivators included a number of recent racist and xenophobic attacks as well as vandalism targeting religious institutions.

Hate crimes are defined as crimes motivated by prejudice, or based on discrimination, and perpetrated against a person or a group on the basis of their race, religion, national origin, sexual orientation or any other feature that renders them 'other' to the perpetrator. Because these are crimes of prejudice, they cannot be prevented and addressed in the same way as other violent crimes.

Our Department has made significant progress with the Policy Framework on Combating Hate Crimes, Hate Speech and Unfair Discrimination. The Policy Framework provides that various aspects of the current legal regime governing hate crimes, hate speech and other forms of discrimination reflect certain inadequacies.

The Policy Framework is a result of intense research into the development of legislation that will introduce the concept of hate crime to South African criminal law. It will make hate speech a crime and will provide for the development of measures to combat hate crimes, hate speech and unfair discrimination. The Policy Framework seeks to introduce a further category of newly-defined hate crimes in instances where the conduct would otherwise constitute an offence and where there is evidence of a discriminatory motive on the basis of characteristics such as race, nationality, religion, sexual orientation and the like. The Policy Framework has largely been finalised. The next step is to open it for public debate. What has not been resolved is who would best be placed to conduct that debate. Should it be the Department itself or bodies such as the Human Rights Commission or the SA Law Reform Commission? The debate will be contentious because of the element of hate speech and the balance that needs to be achieved between freedom of speech and prohibiting hate speech.

Programme Director,

In conclusion, we need to continuously send the message that LGBTI rights are human rights and that discrimination against LGBTI persons is no different from discrimination on the basis of race. Discrimination is discrimination and it will not be tolerated in a free, equal and democratic South Africa.

In a recent editorial in City Press called "Love in the Time of Democracy" it tells about a same-sex couple, Emilia Potenza and Lael Bethlehem, and their two adopted daughters, Lulu and Thembi. And the editorial reads: "The mums are white lesbians, their adopted daughters are black. Before 1994, this family would not have been allowed to exist." That is the difference democracy makes. The freedom to love is as fundamental as the freedom to breathe.

Those of us who were in the struggle, when we were detained, what kept us going was the ideal of a free and democratic South Africa and an equal society. That includes freedom and equality for all our people. As we celebrate Human Rights this month, let us all renew that commitment.

I thank you.

[Back](#) ◀

NEWSROOM

- [Home](#)

- [Speeches & Statements](#)

-

- [Conferences/Workshops](#)

- [Events](#)
- [Call for Public Comment](#)
- [Videos](#)

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