

Policy Brief

26 March 2019

# Policy Brief on “Consultation with Transgender People and Organisations”



*26 March 2019, Pretoria*

## Executive Summary

The rights of lesbian, gay, bisexual, transgender and intersex (LGBTI) persons and especially transgender persons are facing a huge challenge of constant violation in South Africa, Africa and elsewhere in the world. Transgender persons suffer from denial of their basic human rights, including various forms of social exclusion, stigmatising social attitudes that constitute a form of symbolic violence, as well as actual attacks from the public. There is a perception that transgender persons, or the LGBTI community in general practices and identities are affront to acceptable norms. In many of the African countries, lesbian, gay, bisexual, transgender and intersex (LGBTI) people’s sexual relations or sexuality education have been criminalised or perceived as psycho-medical aberrations (UNESCO 2016). While South

Africa is one has led the way in terms addressing the challenges faced by the LGBTI community, the country has been called upon to increase studies of sexuality that include narratives of sexual minorities.

Recently, one Human Rights Watch reports on the LGBTI rights in South Africa has noted that, “the economic and social position of lesbian, gay, bisexual, or transgender persons in South Africa has a significant impact on their experience ... for those who are socially and economically vulnerable, the picture is often grim”<sup>1</sup>. From these emerging observations, the South African government has adopted a national intervention strategy for LGBTI community and related minority groups. The initiative has been linked with other constitutionally informed initiatives like the Hate Speech and Hate Crimes Bill and the National Task Team (NTT), under the Ministry of Justice. The NTT aims to develop a National Intervention Strategy to end gender- and sexual orientation-based crimes, as well as an approved Intersectoral Implementation Plan to align parallel and complementary programmes in government and civil society.

The Southern African Liaison Office (SALO) on the 26<sup>th</sup> March 2019 convened a joint meeting among the transgender persons, their representative organisations and the government to a dialogue. The aim of the dialogue was to discuss initiatives to combat discrimination and violence against the transgender persons and listen to the on issues they want to be tackled by the South African government and the general public. The problems related to the LGBTI rights and policies in South Africa is where central to the conversation.

## Key Issues

### Transgender People are Underrepresented

In South Africa, the Equality Clause of the Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA of 2000) and the Women’s Empowerment and Gender Equality Bill (of 2013) have contributed to the struggle against LGBTI and women’s rights. There is a recognition in the South African constitution that articulates the fact that every individual has equal rights irrespective of their sexual orientation, gender identity, or gender expression. Yet the transgender community has maintained that it remains severely under represented and/or misrepresented. The stories and the views of the transgender community have been either suppressed or misrepresented in society at large. The media especially has been cited as central in the failure to represent the stories of the transgender people and this issue has created a lot of misconceptions regarding what it is to be a transgender person.

Politics and governance are central in informing policies and legislation, this is a platform where the voice of transgender persons remains limited if not non-existing. This poses a challenge as the continued victimisation of transgender rights requires urgent attention from policy makers. Discussions around transgender rights must include the transgender people, not be represented by other groups. Key to this representation is the need to voice a concern on the transgender people’s rights to change their names or gender markers in government documents.

The representation of transgender people would lead to the change in basic education curriculum and other related youth spaces. There are organisations that are trying to express the voice of transgender persons, yet the space for representations is currently limited to certain areas. Therefore, in order for the LGBTI community, and especially transgender persons to gain representation in this respect. South African government policy makers, schools, universities, mainstream media must work actively to include transgender voices in narratives. It is essential to normalise the idea that trans-people exist in the world. The lack of exposure to/ of trans-people, trans-identity, trans-narratives means that prejudice, misunderstanding about who they are, bigotry and by extension of violence will not end.

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<sup>1</sup> Human Rights Watch Report, 2011, South Africa <https://www.hrw.org/report/2011/12/05/well-show-you-youre-woman/violence-and-discrimination-against-black-lesbians-and>

## **Upholding the LGBTI Rights and the Constitution/ Equal Rights for Transgender Persons**

While the constitution of South Africa is powerful in addressing internal social issues, there must be legislative frameworks in place to protect the rights of transgender people who are seeking asylum. There needs to be an understanding of the South African constitution as a reflection of the international standards of human rights and law. The implementation of these laws should reflect the equality of the country's democratic system, this includes protecting LGBTI persons who are migrants. Asylum seekers are facing many LGBTI related issues. Some transgender people are not able to access gender affirming healthcare, change their gender-markers or receive the same protection as their South African counterparts. This is one of the major issues facing transgender people, and South Africa must take lessons from other countries who have made strides in gender transformation.

## **Violence and Extreme Discrimination**

Cases of violence and extreme discrimination against transgender persons have become a commonplace. Violence does not have to be simply a matter of physical violence, the issue also psychological violence and economic violence. Transgender people and LGBTI community at large face not only higher levels of violence than the average South African but much more brutal forms of violence we often find. The attacks on LGBTI persons and the so called 'corrective' rapes require national attention as they reflect a society that is not yet transformed.

Reports of rape, strangulation, mutilation, stoning is only some of the hate crimes that the transgender communities have been suffering at the hands of South African societies. Organisations like Iranti have had to document and deal with these issues, and report them so that the public can pay attention. Such pivotal organisations tell the stories of LGBTI South Africans on their brutality suffering from gender-based violence, and discrimination. These violations are especially pervasive in rural and peri-urban environments, where access to information is not as well integrated like in urban areas. It is worth noting that while some progress has been made in urban areas, there remains a major concern regarding the persistence of homophobic sentiments against the LGBTI community.

Every year the transgender murder monitoring project and international organisations releases numbers of transgender people who were lost in the preceding year, South Africa is always looks to be much safer when you compare it to Brazil or the United States but that is because of the lack of reporting. The country is in crisis when it comes to human rights violation and crimes against transgender people, it is just a matter of a lack of reporting. The bigger picture is largely obscured, this does not mean that the government does take initiative, rather education and awareness is lacking. The rapid response team is critical in the continuing work of government and civil society, to promote and protect the rights of transgender people. The team should create a platform where it reports on these murder cases and provide information and awareness for the general population.

## **Access to Health Care and Health Awareness**

Transgender community in South Africa struggles with the issue of health care and access to it. It is important that government and civil society organisation work together to promote access to health care for the transgender community. The public health system must be provided with information relating the health care of transgender persons. Discrimination against LGBTI persons in public health facilities has been highlighted as a cause for concern. Hence there has been a call for the department of health to engage with the LGBTI community. There are major complaints about community clinics and hospitals with regards to their treatment of the LGBTI persons when they go to seek medical help.

Prejudice and discrimination in the South African public health care is rife and society seems to hold the same prejudice against transgender people. This is shown in the lack of access to gender affirm care, including other various forms of

psychological support and care that is crucial for transgender persons. There is also an issue of unequal access to gender affirming healthcare, this relates to certain areas that do not cater for transgender persons, like rural areas. This issue needs attention as it affects a lot of transgender persons. Also, attention must be given to how public spaces can cater for the transgender people so that they can avoid victimization. There is a continuing debate on the issue of sex alteration surgery which gets conducted on babies when they are at a very young age. Intersex organizations said that this should not be happening, it should be left until the child is old enough to make his/her own decision. These health-related issues are central to the call for more transgender voices in decision making platforms and policy discussions.

### **Role of Education and Awareness**

Through education and information initiatives, it is very crucial that the South African government works with civil society groups, to unpack gender and sexuality related issues in order to gain a better understanding of the great implications of the continued violations of transgender people's rights. Men and women have performed significant gender roles in economic, political and social spheres of our societies, the same remains with the LGBTI community and an education on their issues is critical in trying to transform.

The role of education includes government officials. They also fail to understand transgender people and their needs. Government officials who work in crucial departments do not understand the pain that transgender people go through. This contributes to constant prejudice and discriminations in departments like home affairs, police and health. Public awareness and education on LGBTI and transgender people's rights is essential towards addressing the issue of social justice in South Africa. There are two imperative elements to social justice that transgender people are seeking, namely group focused priorities and issue focused priorities. Both of them derive from exclusion hierarchy and division. The point of trying to create an engagement between government, civil society and transgender groups must be to address these hierarchies and divisions. The problematic conduct of government officials or public officials is central to the challenge of hierarchy and divisions, hence reporting these conducts is critical.

There is a critical issue that relates to police and the media reports. South African police reports and the media will often misgender a victim of homophobic attack. They fail to relate the crime as simple as it is, hate crime. It is therefore essential that moving forward, education and awareness initiatives pay special attention to the role of police and the media. These two entities are the cornerstone of the fight for the promotion and protection of the rights of LGBTI persons in general and transgender people in particular. Education and awareness require that transgender people put forward the issues that affect them and what they want society to do in order to address those issues. Such initiative will help create policies for LGBTI people that reflects their actual needs.

### **Religious Rights and the Challenges They Present to the Transgender Community**

The inequalities and indignities that society today in relation to the LGBTI community are those that come from biblical proportions. Using religious arguments, home affairs officials have refused to solemnize a same sex relationship or gay marriage at times. This victimisation of the LGBTI community by government officials is unacceptable and policies must be in place to deal with them. There is a Civil Unions Bill that was passed in 2006 and this bill stipulates that officials should not be forced to marry same sex couples if it is against their religion. This means the official must indicate in advance and avoid offending same sex couples with discriminatory statements.

There are young trans-people that are kicked out of school because principals feel these transgender individuals are violating the school's religious standards. Government schools have some of the worst cases of homophobia, where children are kicked out of school because the school body says not in our school. Since the South African constitution is the supreme law of the country, public and private schools should uphold the constitution and stop violating the rights of transgender persons. At times even parents who have transgender children are faced with humiliation and victimisation by society. They go to church and the pastor is telling them that an LGBTI child is a demon. These statements are

discriminatory and prejudice and they affect both children and their parents. Religious prescriptions and rights should not be used to undermine the rights of other groups. That poses a huge challenge in society.

The Civil Union Bill has contributed to changing attitudes towards LGBTI groups in South Africa, even on the religious front there are promising shifts.

## **Recommendations**

### **Implementation and Application of Existing Policies and Laws is Key**

The broader issues of the LGBTI community such as transgender need implementation and application of policies and laws. These policies and laws should reflect the constitutional prescripts and match the international standards as articulated in the international justice system and the United Nations. The law should be implemented in such a way that it sees gender removed from the generalization of male and female to a broader picture that reflects the LGBTI community as well.

Entities like the rapid response team must be given the power that they need to track and monitor LGBTI rights violations. Policies, laws and legislation framework that seek to address gender transformation must be operationalised in departments like home affairs and health in order to preventing discrimination of people based on their gender or sexual orientation or any ground that the constitution prohibits. It is crucial also to expand on those laws and as well as the protection of transgender people as well as protecting services are essential to them, like health care. South Africa needs to institute public education initiatives to increase awareness in all sectors of society of the Equality Clause of the Constitution and principles of non-discrimination as stipulated in the constitution. This is the work that the rapid response team needs to take up, to ensure implementation of existing anti-discrimination laws and standards.

### **Debate on LGBTI and Transgender Persons Must Be Inclusive Of These Groups In All Levels**

Various government departments like the police, basic education, home affairs, health, department of women, social development and civil society bodies, including the National Prosecution Authority need to work with transgender communities in order to understand and address their concerns. Furthermore, transgender people must be given a platform to raise their issues through an engagement with government and civil society groups. Therefore, an inclusive dialogue that will cater for the needs of the LGBTI community in general and transgender persons in particular must be convened with urgency by the government.

### **The Role of the Media is Critical in Spreading Awareness of the Transgender Issue**

Much of the information and awareness campaigns rely on civil society and the media to identify the cases where there have been LGBTI rights violations and hate related crimes. Media is critical in providing credible reporting on the hate crime cases that involve transgender people (the LGBTI community). The general public depends on the promptness of the media to spread information and knowledge on the challenges faced by transgender person. The importance of equal rights is central to the agenda of gender transformation and social justice. The Rapid Response team that is monitoring the cases of crimes against LGBTI people should update the general public on the progress of those cases.

It is essential that gender-based violence is publicly condemned, this includes homophobic and transphobic violence

### **Lessons must be taken from already advanced countries on transgender Issues**

Countries like Sri Lanka's are making strides in terms of transgender issues. Another country is Australia, the country has a gender-x marker which can be used by non-binary people and that particularly is reflected on our passports. This is one

of the mechanisms that South-Africa could consider to ensure that all transgender non-binary people are able to move through the world in peace. Globally, these are important initiatives in protecting and promoting the rights of transgender people.

Beyond task teams and intervention strategies, there is work to be done, some of it led by government, but much of it needs civil society actors. These actors must hold government accountable in order to make the Equality Clause a reality rather than an ideal for the LGBTI community. This would have a positive effect on the dignity and opportunities of South Africans of all genders and sexualities, and could also start a conversation about humanness beyond gender and identity labels<sup>2</sup>.

### **The Suffering of Minority Groups Need to be Taken Seriously by Government and Other Stakeholders, Including the Private Sector**

South Africa's history is riddled with a painful past for minority groups and reparations are essential in order to transform the country from a social perspective. This suffering reflects the need to realise the linkages and the importance of human rights beyond the general knowledge, this specifically speaks to minority rights. It raises the importance of the right to equality for transgender persons and it needs to be advanced by all in the South Africans.

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*The analysis and recommendations included in this Policy Brief do not necessarily reflect the view of SALO or any of the donors or conference participants, but rather draw upon the major strands of discussion put forward at the event. Participants neither reviewed nor approved this document. The contents of the report are the sole responsibility of SALO, and can under no circumstances be regarded as reflecting the position of the donors who provided financial assistance for this policy dialogue session.*

#### **About the Southern African Liaison Office:**



The Southern African Liaison Office (SALO) is a South African-based not-for-profit civil society organisation which, through advocacy, dialogue, policy consensus and in-depth research and analysis, influences the current thinking and debates on foreign policy especially regarding African crises and conflicts.

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<sup>2</sup> Brouard, Pierre, 2015, 'Equality around sexual orientation and gender identity in South Africa – still a pipe dream?', [https://www.up.ac.za/news/post\\_2062005-equality-around-sexual-orientation-and-gender-identity-in-south-africa-still-a-pipe-dream](https://www.up.ac.za/news/post_2062005-equality-around-sexual-orientation-and-gender-identity-in-south-africa-still-a-pipe-dream)

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