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# PRIDE at work

A study on discrimination at work on the  
basis of sexual orientation and gender  
identity in South Africa



Gender,  
Equality  
and Diversity  
Branch

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A study on discrimination at work on the basis of sexual orientation and gender identity in South Africa

Based on the research undertaken by Nina Benjamin from the Labour Research Service (LRS) and Finn Reygan from the Gay and Lesbian Memory in Action (GALA)

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## Preface

Discrimination and violence against people of diverse sexual orientation and gender identity is a serious problem around the world. Lesbian, gay, bisexual and transgender (LGBT) workers face discrimination in the labour market throughout the employment cycle because of their perceived or actual sexual orientation. They may be denied access to employment, to training and promotion, and access to social security. Since LGBT workers are rarely well represented in government structures, or employers' and workers' organizations, their particular interests are rarely the subject of social dialogue or collective agreements. Consequently when they encounter discrimination, harassment or bullying, the avenues for workplace dispute resolution may be scarce.

The International Labour Organization is committed to eliminating discrimination in the world of work, promoting workplace diversity and achieving decent work for all women and men, including people of diverse sexual orientation and gender identity. The right to equal treatment and opportunities is primarily a workers' rights issue. However, promoting equality makes good business sense, as liberating employment practices from bias allows companies to improve their talent pool and increase their access to markets.

In order to deliver effectively upon its mandate to end discrimination in the world of work in all its forms, the ILO has been undertaking country-specific studies to identify the extent and forms of discrimination faced by LGBT workers at all stages of the employment cycle. The research analyses the legal framework to identify gaps and possibly discriminatory laws, the national social protection system and challenges as well as good practices implemented by government, and employer's and worker's organizations. This study was prepared in the context of the ILO's Gender Identity and Sexual Orientation: Promoting Rights, Diversity and Equality in the World of Work (PRIDE) project, with the generous financial support of the Government of Norway.

This report reflects the study's findings and recommendations from South Africa. Findings from the study indicate that, while there has been progress in many respects, much work has yet to be done in the country to make workplaces more welcoming and inclusive spaces for LGBT workers. While South Africa has taken the lead on a number of global initiatives in relation to LGBT rights, this research indicates that it remains difficult for LGBT workers in South Africa to find information on laws and policies that protect them against discrimination in the labour market and workplace. Many LGBT workers are unaware or misinformed about their rights or the procedures to follow when these rights have been violated. Trade unions and employers often lack this information and are confused about how to address LGBT workplace rights issues, because of the lack of clear policies or guidelines and the shortage of human and financial resources.

We hope that the experience, insights and recommendations set out in this report will not help advance LGBT rights in South Africa, but will also provide guidance and inspiration for other countries. The ILO stands ready to support constituents and other stakeholders in making equality and non-discrimination for all a reality. In the words of the ILO Director-General on the International Day Against Homophobia and Transphobia in 2014: The ILO is committed to “promoting decent work for all women and men, regardless of sexual orientation or gender identity. Decent work can only exist in conditions of freedom and dignity. It means embracing inclusion and diversity. It requires us to stand up against all forms of stigma and discrimination ...”

We would like to thank from the Nina Benjamin from the Labour Research Service (LRS) and Finn Reygan from the Gay and Lesbian Memory in Action (GALA) who have written the report that this study is based on. We would also like to thank Andrea Davila, Edward Lawton, Mari Schlanbush and Ingrid Sipi-Johnson at the ILO for their technical support in the realisation of this study.

Shauna Olney  
Chief  
Gender, Equality and Diversity Branch  
International Labour Organization

Joni Musabayana  
Deputy Director  
ILO Country Office for South Africa  
International Labour Organization

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## **Abbreviations**

AIDS - Acquired Immunodeficiency Syndrom

BCEA – Basic Conditions of Employment Act

BUSA – Business Unity South Africa

CCMA - Commission for Conciliation, Mediation and Arbitration

CONSAWU – Confederation of South African Workers’ Unions

COSATU – Congress of South African Trade Unions

FEDUSA – Federation of Unions of South Africa

GALA – Gay and Lesbian Memory in Action

GDP – gross domestic product

HIV - Human Immunodeficiency Virus

IBM – International Business Machines Corporation

ILO – International Labour Organization; International Labour Office

LGB – lesbian, gay and bisexual

LGBT – lesbian, gay, bisexual and transgender

LRS – Labour Research Services

NACTU – National Council of Trade Unions

NAMPAK – National Amalgamated Packaging

NEDLAC – National Economic Development and Labour Council

PLHIV – People Living with HIV

PRIDE – Promoting Rights, Diversity and Equality in the World of Work

SAHRC – South African Human Rights Commission

UN – United Nations

UNDP – United Nations Development Programme

USAID – United States Agency for International Development

## Terminology

**Lesbian** – a woman who is emotionally and sexually attracted to other women.

**Gay** – a man who is emotionally and sexually attracted to other men. (*Note: while the term “gay” is primarily used in relation to males, it can also refer to any person attracted to members of the same sex. Some lesbian women, for instance, may identify themselves as gay.*)

**Bisexual** – people who are emotionally and sexually attracted to both men and women.

**Transgender** – a condition where a person’s gender identity does not match that person’s sex assigned at birth.

**Intersex** – a condition where a person is born with a sexual anatomy, reproductive organs or chromosome patterns that do not fit the typical definition of male or female. This may be apparent at birth or become so later in life. An intersex person may identify as male or female or as neither.

**Homophobia** – the fear or hatred of those assumed to be lesbian, gay or bisexual and of anything connected to these persons and their communities.

**Butch** – masculine gender expression in women.

**Coming out** – openly acknowledging lesbian or gay sexual orientation.

**Cisgender** – an adjective for someone whose gender corresponds with their assigned sex.

**Cisnormativity (noun)/cisnormative (adj)** – the view that all people have a gender identity that is the same as their assigned sex.

**Heteronormativity (noun)/heteronormative (adj)** – the view that promotes heterosexuality as the normal or preferred sexual orientation.

### *Labour terminology*

**International labour standards** – agreements in the form of conventions at an international level between governments, business and labour on a minimum level of protection for workers. National governments are able to use the standards as a tool to guide the development and enforcement of labour legislation.

**Collective agreements** – Collective agreements emerge out of a process of bargaining between employers and employees. The collective agreement regulates the terms and conditions of employees in the workplace. Agreements may be set at company, industry or sector level.

**Gender division of labour** – work is divided into roles and activities that are socially determined on the basis of gender with the result that, for example, care work is seen as women’s work.

**Gender stereotyping in the workplace** – generalizations and assumptions about what a people are capable of based on their gender.

**NEDLAC (National Economic Development and Labour Council)** – where the government comes together with organized business, labour and community groupings on a national level to discuss and try to reach consensus on issues of social and economic policy through social dialogue.

**National trade union federations** – these include the Congress of South African Trade Unions (COSATU); Federation of Unions of South Africa (FEDUSA); National Council of Trade Unions (NACTU); and the Confederation of South African Workers’ Unions (CONSAWU).

# 1 Introduction – A Global Overview

The International Labour Organization (ILO) is committed to the elimination of discrimination in the world of work and to the achievement of decent work for all women and men. Until recently, discrimination against LGBT persons had not been a specific focus of the technical work of the ILO or the United Nations (UN) system at large. In 2013, however, the ILO initiated the Promoting Rights, Diversity and Equality in the World of Work (PRIDE) project aimed at addressing discrimination against LGBT people in the workplace. Preliminary research was conducted in nine selected countries, including South Africa, and initial results showed that, while legislation and national policies to protect LGBT employment rights may be in place, they are often poorly applied and discrimination and violence remain cause for real concern.

The PRIDE project aims to address this need through identifying the multiple types of discrimination facing LGBT persons in the workplace, disseminating the findings of such research, and working with constituents to promote rights, diversity and tolerance in the world of work. Discrimination against LGBT persons may occur for a variety of reasons, including the possibility that they express their identity and sexuality in ways that do not conform to behaviour and expectations traditionally associated with their sex. It is therefore a clear form of gender-based discrimination.

Overall, the research has found that the majority of LGBT workers choose to conceal their sexual orientation and gender identity in the workplace, which causes stress and can have negative consequences on productivity and career progression. Recent reports show that persons with alternative gender identities and sexual orientation frequently face incidents of prejudice, exclusion and persecution globally, for example as targets of hate crimes.<sup>1</sup> Several studies also suggest that some people with particular gender identities or sexual orientation experience more discrimination than others.<sup>2</sup>

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<sup>1</sup> “Anti-gay backlash threatens aid and rights in Africa,” in *The Guardian – Poverty Matters Blog*, 17 May 2011, Available at: <http://www.theguardian.com/global-development/poverty-matters/2011/may/17/homophobia-human-rights-malawi-uganda>.

<sup>2</sup> According to a study conducted in the United States in 2007, LGB respondents reported that 8–17 per cent were fired or denied employment, 10–28 per cent were denied a promotion or given negative performance evaluations, 7–41 per cent were verbally or physically abused or had their workplace vandalized, and 10–19 per cent reported receiving unequal pay or benefits, as a direct consequence of their sexual orientation. The rates for transgender persons were even higher (M.V. Lee Badgett, Holning Lau, Brad Sears and Deborah Ho, Williams Institute: “Bias in the Workplace: Consistent Evidence of Sexual Orientation and Gender Identity Discrimination,” June 2007, available at: <http://williamsinstitute.law.ucla.edu/research/workplace/bias-in-the-workplace-consistent-evidence-of-sexual-orientation-and-gender-identity-discrimination/>). Another study shows that lesbian women are discriminated against less than homosexual men (B. Elmslie and E. Tibaldi: “Sexual orientation and labour market discrimination”, in *Journal of Labor Research* (2007), Vol. 28, No. 3, pp. 436–453).

While certain countries have adopted legal provisions prohibiting discrimination against LGBT persons, many ILO member States have not, and most countries' anti-discrimination institutions do not specifically cover sexual orientation as part of their mandate. Moreover, at the time of writing 76 of the 187 ILO member States continue to criminalize same-sex sexual relations

LGBT workers face discrimination in the job market, both in terms of access to employment, refusal of employment, dismissals, or denial of training opportunities and promotions, and access to social security, because of their perceived or actual sexual orientation and gender identity (ILO, 2007, pp. 42–43). Moreover, there is increasing evidence of a pay gap between LGBT and non-LGBT workers (Drydakis, 2009, p. 366). LGBT workers who have same-sex partners rarely enjoy the same benefits as married couples, as in many countries these partnerships are not legally recognized (Benjamin et al., 2015). LGBT workers lack the right to include partners in company health insurance plans, medical leave guarantees and other benefits shared by other workers. LGBT workers may not be represented in government structures, employers' organizations and trade unions, and their particular interests are rarely the subject of social dialogue or set out in collective agreements. Consequently, when they encounter harassment and bullying, the avenues for workplace dispute resolution around such issues may be limited.

Recent developments within the UN have led to an increased focus on the prevalence of discrimination on grounds of sexual orientation and gender identities (Benjamin et al., 2015). On 17 June 2011, the UN Human Rights Council passed the first ever resolution affirming the right to non-discrimination of LGBT persons, regardless of their gender identity and sexual orientation, a resolution whose negotiation was led by South Africa.<sup>3</sup> The UN Secretary-General and the High Commissioner for Human Rights have spoken out to protect people from violence and discrimination on the basis of their sexual orientation.<sup>4</sup> The UN human rights treaty bodies have consistently held that States have a legal obligation under existing treaty provisions to protect people from violence and discrimination on the basis of their sexual orientation (United Nations Human Rights Office, 2014). In addition, the UN Political Declaration on HIV and AIDS: Intensifying Our Efforts to Eliminate HIV and AIDS adopted in June 2011 notes that “many national HIV-prevention strategies inadequately focus on populations ... at higher risk, specifically men who have sex with men” (UN, 2011). Paragraph 14(e) of the ILO HIV and AIDS Recommendation, 2010 (No. 200), calls on ILO member States to promote “the involvement and empowerment of all workers regardless of their sexual orientation and whether or not they belong to a vulnerable group”. In addition, the ILO Committee of Experts on the Application of Conventions and Recommendations has acknowledged the steps taken by a number of countries to include sexual orientation as a prohibited discrimination ground in Article 1(1) of the Discrimination Employment and Occupation Convention, 1958 (No. 111).

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<sup>3</sup> Human Rights Council resolution 17/19 on human rights, sexual orientation and gender identity (document A/HRC/RES/17/19).

<sup>4</sup> Yogyakarta Principles, available at: [http://www.yogyakartaprinciples.org/principles\\_en.htm](http://www.yogyakartaprinciples.org/principles_en.htm).

In a 2014 study commissioned by the United States Agency for International Development (USAID) and the Williams Institute (USAID/Williams Institute, 2014) on the relationship between LGBT inclusion and the economic development of emerging economies, the impact of social inclusion of LGBT people on economic development was analysed in 39 countries, including South Africa. The study indicates that the exclusion of LGBT people from full participation in society is a violation of human rights that has a harmful effect on economic development and that, conversely, LGBT inclusion strengthens a country's economy.

## **1.1 The South African context**

South Africa was the first country in the world to safeguard sexual orientation as a human right in its constitution in 1995, and following a 2005 decision of the Constitutional Court and subsequent vote in the National Assembly, there is full marriage equality. As outlined in Section 3, there are a number of laws and codes of practice that aim to give practical effect to LGBT workers' rights in the country, and in this respect it is unique in the African continent. However, as elsewhere, challenges for LGBT persons persist, in the workplace and elsewhere.

The legacy of apartheid is evident in the clear disparities that persist among population groups; in 2014, for example, white employees earned on average four times the median earnings of black employees. Unemployment in South Africa is largely concentrated among black Africans, young people, women, and those with less education and little work experience. In order to rectify this situation there is a clear emphasis in government policy to promote proactively promote equality. It is within this overall context that LGBT rights in South Africa sits.

As elsewhere the argument for equality and broad-based participation of all citizens is framed within both a human rights discourse, and one of its economic benefits. South Africa's National Development Plan aims to reduce unemployment and inequality by 2030 and the Industrial Policy Action Plan involves large-scale investment in infrastructure, small business and skills development with the aim of promoting broader participation by historically disadvantaged groups in the mainstream economy (KPMG, 2014). Tackling inequality and strengthening the participation of historically disadvantaged groups forms the cornerstone of these two key economic policies.

As in many high-income and middle-income countries there has been a growing shift from permanent full-time employment to temporary and outsourced forms of employment in South Africa. There is widespread unemployment and, for those who do have jobs, insecurity and fear of being retrenched. LGBT workers fear that coming out may exacerbate this situation and that they may face possible unemployment or the threat of being dismissed or retrenched. Such fears may of course be unfounded. However in an environment of precarious employment one is unlikely to take any action that may damage ones employment prospects.

## 2 Methodology

The PRIDE South Africa study aims to map the patterns of discrimination faced by LGBT people in the workplace. The research sought to identify discrimination faced by LGBT persons, the orientation in constitutional guarantees and legislative provisions on equality, and progress made in respect of practical measures to eliminate discrimination against LGBT workers under each of the four pillars of the ILO Decent Work Agenda.<sup>5</sup> It also sought to highlight good practices in addressing such discrimination and promoting equality for LGBT persons (ILO, 2008). To facilitate a degree of global comparison with other study countries, the research highlighted, where possible, such good practices and discrimination by sex, gender identity, social and economic group, sexual orientation and age group. The study also aimed to focus on LGBT people living with or affected by HIV, given the double discrimination that they may face based on real or perceived HIV status, along with their sexual orientation and gender identity.

Specifically the study aimed to:

- Describe the legal provisions of relevance to being LGBT in the workplace and their application, and record legal provisions protecting and promoting the rights of LGBT workers (fundamental principles and rights);
- identify how discrimination against LGBT workers is manifest, and good practice workplaces where diversity and tolerance for LGBT persons is promoted (employment promotion);
- consider to what extent social security services such as medical care, pension entitlements and other benefits are available to LGBT workers on the same terms as other workers;
- assess the extent of constituents' knowledge and technical capacity to raise LGBT issues in tripartite social dialogue forums, such as the National Economic Development and Labour Council (NEDLAC) and in collective bargaining processes (social dialogue);
- Consider the degree to which LGBT persons face challenges in relation to HIV/AIDS in the world of work due to their sexual orientation and gender identities.

A comprehensive literature review was carried out across the full range of the project objectives and the scope of investigation outlined above. This review, including current gaps in the evidence base, served as a guide for further engagement with LGBT opinion leaders and key actors during field research on discrimination faced by LGBT persons in the world of work in South Africa. Field research was also conducted and included:

- in-depth discussions with academics and the identification of LGBT representatives and of other opinion leaders in South Africa's LGBT networks;

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<sup>5</sup> The four pillars of the ILO's Decent Work Agenda are: fundamental principles and rights at work, employment promotion, social protection and social dialogue.

- interviews and discussions with key representatives of government, employers' and workers' organizations and civil society;
- interviews with potential good practice employers;
- focus group discussions with representatives of various lesbian, gay and transgender communities and two mixed focus group discussions with representatives from all LGBT groups;
- individual case studies of discrimination against LGBT persons.

### 3 Legal Review

The Constitution of South Africa of 1996 affirms within the Bill of Rights, Section 9(2) and (3), explicitly recognizes equal rights for all irrespective of their sexual orientation. Enshrined in these rights is the explicit understanding that all South Africans have a constitutional right to be treated fairly at work, including the right to fair labour practices and the right to equal treatment and non-discrimination. This position has been reaffirmed by the Constitutional Court in a number of judgments.

In addition to the constitutional guarantees, several legislative and policy frameworks in South Africa have established provisions to ensure equality of opportunity and treatment for LGBT persons. Statutes, policies, and codes of good practice relating to labour issues are negotiated through the tripartite National Economic and Development Labour Council (NEDLAC), involving government, workers, and employers. The Courts as well as the Commission for Conciliation, Mediation and Arbitration (CCMA) can provide redress to anyone who can prove a *prima facie* case of discrimination on the basis of their sexual orientation or gender identity. The Commission for Conciliation, Mediation and Arbitration (CCMA) is an independent dispute resolution body established in terms of the Labour Relations Act, 66 of 1995 (LRA).

There are a number of legal statutes of direct relevance to LGBT workers' rights in South Africa, namely:

#### *The Labour Relations Act, 1995 (Act 66 of 1995)*

The Labour Relations Act (LRA) gives effect to Section 27 of the Constitution, with the purpose of promoting economic development, social justice, labour peace, and the democratization of the workplace. Section 187 (1) (f) of the Act prohibits dismissal on the grounds of sexual orientation. Schedule 7, item 2 (1) (a) introduces the concept of residual unfair labour practices, concerning itself with the conduct of the employer, and specifically unfair discrimination. As a result of Schedule 7, all parties involved in labour relations are obliged to review and adapt their human resource management policies to prevent unfair discriminatory labour practices, that is to say they must be proactive in promoting and preventing equality, not simply reactive to when it occurs (Rheeder, J, 2012). And Section 86 (c) provides for the creation of “joint decision-making measures designed to protect and advance persons disadvantaged by unfair discrimination” (Republic of South Africa. 1995).

#### *The Employment Equity Act, 1998 (act 55 of 1999)*

The Employment Equity Act (EEA) seeks to achieve equity in the workplace through the elimination of unfair discrimination in employment practice and establishing basic conditions of

employment. The Act strives to redress demographic inequalities of the apartheid past through affirmative action. Section 6 of the Act explicitly prohibits unfair discrimination based on sexual orientation, stressing that discrimination based on sexual orientation must be viewed in all its manifestations in the workplace Republic of South Africa. 1998a. The EEA recognizes that discrimination based on sexual orientation can occur directly or indirectly, and it provides for appropriate procedures to deal with sexual harassment and prevent its recurrence. Through the development and implementation of policies and procedures aimed at establishing a workplace free of sexual harassment (Opperman, T, 2009, pp. 1-67).

*The Promotion of Equality and Prevention of Unfair Discrimination Act 2000 (act 4 of 2000)*

The Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA) gives effect to Section 9 (4) of the Constitution to prohibit unfair discrimination and promote equality. The main focus of this Act is to provide for the prevention, prohibition, and elimination of unfair discrimination, hate speech, and harassment. It also provides for the establishment of the Equality Courts. The Open Society Foundation notes that: “PEPUDA came into being following an instruction in the Constitution to introduce new laws to enforce equality.” (Open Society Foundation for South Africa, 2009, p.14). Section 10 of PEPUDA states that:

No one may publish, propagate, advocate or communicate words based on one or more of the prohibited grounds, against any person, that could reasonably be construed to demonstrate a clear intention to be hurtful; be harmful or to incite harm; promote or propagate hatred.... Provided that *bona fide* engagement in artistic creativity, academic and scientific inquiry, fair and accurate reporting in the public interest or publication of any information, advertisement or notice in accordance with section 16 of the Constitution, is not precluded by this section (Republic of South Africa, 2000b).

Additionally the section further emphasizes that any speech “that can be reasonably construed to have a clear intention to be harmful” merely because that person may belong to one of the listed groups can be construed to constitute hate speech (De Vos. P., 2010).

*Other relevant legislation*

There are a number of other laws and policies, which, while not of direct relevance to the world of work do form part of the national legislative framework which protects the rights of LGBT persons from discrimination in all facets of life. And the workplace does not exist in a vacuum. The Refugees Amendment Act of 2008 recognizes gender and sexual orientation as grounds for persecution and, thus, for seeking asylum in South Africa (Republic of South Africa. 2008). The Housing Rental Act of 1998 bars discrimination on all grounds as contained in the Equality Clause of the Constitution, including sexual orientation (Republic of South Africa. 1998b). The Promotion of Access to Information Act [PAIA] 2000 (Act 2 of 2000) gives effect to the constitutional right to access to any information held by the State or to any information

that is held by another person required for the exercise or protection of any rights (Republic of South Africa. 2000a). Section 30 (1) (b) “provides for limiting disclosure on the grounds of protecting physical or mental health or well-being...” (Republic of South Africa. 2000a, p. 27) Therefore, a person cannot be forced to disclose his/her sexual orientation in the workplace. The Medical Schemes Act No. 131 of 1998 prohibits unfair discrimination against an employee on the basis of HIV status or sexual orientation (Republic of South Africa, 1999). The Act also recognizes same-sex dependents as legal beneficiaries. Section 24-26 (e) of the scheme states, “the medical scheme does not or will not unfairly discriminate directly or indirectly against any person on one or more arbitrary grounds including race, gender, marital status, ethnic or social origin, sexual orientation, pregnancy, disability and state of health” (Republic of South Africa, 1999, p. 13).

The Women’s Legal Centre developed the ‘Sexual Harassment and the Amended Code of Good Practice on the Handling of Sexual Harassment in South Africa’ as a guide on dealing with sexual harassment in the world of work.<sup>6</sup> Evidence suggests that LGBT persons often face sexual harassment in the world of work because of their sexual orientation, the guide is a resource to both employers and employees in dealing with this problem (Dirsuweit, T, 2004).

#### *Municipal/Provincial Legislation and/or Workplace Policies and LGBT Workers*

Municipalities and provincial administrations, just like any employer in South Africa, are required by the Employment Equity Act to put in place diversity plans that are inclusive of LGBT persons and Employee Assistance Programmes (EAPs). Employers are expected to carry out annual diversity audits as part of organizational development. Although, local governments face serious shortages of skilled personnel and it is not always possible for it to carry out diversity audits, some municipalities have taken steps toward implementing non-discrimination measures. For example, eDumbe Municipality in KwaZulu-Natal and Stellenbosch Municipality in the Western Cape have developed Codes of Good Practice that explicitly refer to non-discrimination on the basis of sexual orientation. The Code of Good Employment Policy under the heading Sexual Orientation and the Employment Contract states that Gay and Lesbian employees shall not be treated differently from other employees simply because of their sexual orientation, and recognizing past prejudice and discrimination, that gay and lesbian employees shall be treated in a just and non-discriminatory manner.

#### *Selected court cases and rulings in sexual orientation and discrimination cases*

There have been several landmark rulings in the South African courts on the protection of the human rights of LGBT persons. A brief overview of some of the more significant of these cases serves to provide an insight into the evolution of LGBT workers’ rights in the country.

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<sup>6</sup> Naylor, N. and O’Sullivan, M. (Eds.) 2006. Sexual harassment and the amended code of good practice on the handling of sexual harassment in South Africa. Cape Town: Women’s Legal Centre.

- The case of *S v. Kampher*, 4 August 1997, in the Cape High Court ruled that the common-law crime of sodomy was incompatible with the constitutional rights to equality and privacy (Department of Justice, 1997). Furthermore, in May 1998, in the case of *National Coalition for Gay and Lesbian Equality v Minister of Justice*, the Johannesburg High Court ruled that the common-law crimes of sodomy, as well as Section 20A of the Sexual Offences Act, were unconstitutional (Department of Justice, 2000).
- In *Laangemaat v. Minister of Safety and Security*, 1998, a lesbian who worked for the South African Police Services wanted to add her partner to her medical aid as a dependent but had her application rejected because the Police medical aid scheme had no provision for same-sex partners. The High Court ruled in her favour arguing that denying her the right to register her dependent was discrimination based on sexual orientation. The ruling forced medical schemes to recognize same-sex dependents (Department of Justice, 1998).
- In *Satchwell v. the President of the Republic of South Africa and Other*, July 2002, the Constitutional Court ruled in favour of the applicant in that Sections 8 & 9 of the Judges Remuneration and Conditions of Employment Act 88 of 1989 were unfairly discriminatory against her sexual orientation by denying her spouse the same benefits as heterosexual couples (Department of Justice, 2002).
- In the case of *Fourie v. Minister of Home Affairs* on 1 December 2005 a same sex union was legally recognized for the first time (The Supreme Court of Appeal of South Africa, 2003).
- In the August 2008 case of *Strydom v. Nederduitse Gereformeerde Gemeente Moreleta Park* the Court found that the complainant had been unfairly discriminated on the grounds of his sexual orientation (The Equality Court 2008). The Court ruled that the unfair dismissal constituted a violation of the complainant's rights as enshrined in the Equality Clause of the Constitution of South Africa, Act 108.
- A significant Labour Court judgment involved *Ehlers v. Bohler-Uddeholm Africa (Pty) Ltd* in 2010 (The Labour Court of South Africa, 2009). The applicant is a transsexual who brought an unfair dismissal dispute to the court in terms of Section 187(1) (f) of the Labour Relations Act of 66 of 1995. The claimant argued that she had been unfairly dismissed based on her desire to undergo a sex change operation. The Court ruled in her favour as the dismissal had breached her Constitutional rights with reference to sexual orientation.

The issue of sexual violence and harassment is a concern for LGBT workers. Human Rights Watch (2011) defines gender-based violence in the workplace as:

Violence directed against a person on the basis of gender or sex...and can include sexual violence, psychological abuse, sexual exploitation, sexual harassment, harmful traditional practices and discriminatory practices based on gender (Human Rights Watch, 2011)

Workplace violence can occur outside the formal workplace. Overall, sexual violence and harassment are a cause of serious concern in South Africa and in the workplace are manifested as an abuse of power – usually by men – with the aim of sexually dominating or coercing an individual – usually women – into giving sexual favours. Sexual harassment is pervasive in South Africa.<sup>7</sup> The Department of Labour’s labour inspectorate has the responsibility to ensure that regulations protecting all workers are observed, including in relation to sexual harassment. A report from the 2011 National Inspectorate Conference, however, identified challenges including non-compliance with legislation, lack of visibility, lack of relevant competencies and the inadequate resourcing of labour inspectors (Nxawe, 2011). The findings of the National Inspectorate Conference are of particular concern for those employees who are most in need of protection against discrimination and violence in the workplace including women, young or older persons, and LGBT employees (Benjamin et al., 2015).

In terms of violence, Human Rights Watch found that South Africa has some of the highest rates of violence in the world and that “violence against lesbians, transgender men and gender non-conforming people occurs within the context of an epidemic of gender-based violence” (Human Rights Watch, 2011, p. 16). The Code of Good Practice against Sexual Harassment forms part of existing labour codes aimed at establishing common rules of conduct in a workplace.

The education sector has carried out significant work in the area of sexual and gender diversity in recent years, including work undertaken by the Department of Basic Education and by civil society organizations such as Gay and Lesbian Memory in Action (GALA). As a result, the issue of homophobic and transphobic bullying in schools has received much attention in recent years; a resource has even been developed by the Department of Basic Education specifically on this topic.

### **3.1 Implementation of the Law**

While the South African Constitution is repeatedly held up as a paradigm of constitutional excellence, the broad implementation of these values in practice remains incomplete. In terms of the workplace, policy in the post-apartheid context is premised on equality, inclusion and social protection. Nevertheless, as is the case more broadly in South Africa, the implementation of equality legislation as it relates to sexual orientation and gender

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<sup>7</sup> Labour Rights for Women campaign notes and press statements speak of the pervasive nature of sexual harassment in South African formal and informal workplaces.

identity in workplaces is piecemeal. While the policy context in South Africa is generally favourable towards minority inclusion and non-discrimination, participants in the study repeatedly highlighted the lack of any tangible implementation of affirming policy.

Several participants in the focus group discussions expressed doubt on whether this mechanism provided effective access to remedy:

The amount of effort it requires [going to a body like the Commission for Conciliation, Mediation and Arbitration (CCMA)]: it's a huge amount of time and an emotional drain. Sometimes you just want to say: "OK, to hell with you, I'm out" and just let go ... if I felt like it [reporting] would change anything! It just feels like there is no substantive training [on the issues]: does it really change your mindset or your practices that much? (Vavi, focus group discussion)

As a person who knows the Constitution, which is the rule of law, as a person who is familiar with labour regulations ... if I ever feel that my rights have been violated to an extent that I am dehumanized as an employee and a human being ... that is when I believe that I will approach the CCMA...The CCMA is a very lengthy process, it has financial complications, it is very time-consuming and my approach would be to try and see if the issue cannot be resolved internally. Failure to get the outcome that I want, that is when I would seek assistance in approaching the CCMA and obviously if you're a person who's got legal backing that would assist as well. (Mpho, focus group discussion)

Participants highlighted a number of factors that could support LGBT people in using the legal facilities available to them, which included having a support system:

If I experienced discrimination and I had a couple of colleagues who I felt were willing to back me up or encourage me or who experienced similar things, that would give a sense of togetherness. (Vavi, focus group discussion)

There was a general sense among participants, however, that going to the CCMA or having recourse to redress might not really change anything:

So to get back to my old workplace where I feel like if I get my job back and I am back in an environment where we have gone through this .... If there is no substantive training, does it really change your mindset or your practices that much? (Lydia, in-depth interview)

Also, while participants felt that much was made of knowing their rights, knowledge alone was not sufficient:

Even with knowledge I feel often disempowered and vulnerable. (Vavi, focus group discussion)

Other impediments to taking advantage of legal recourse included the high levels of unemployment in South Africa, which conditioned people to seek and hold on to employment regardless of discrimination, because of the level of dependency in the country:

I have met a couple of people who say: “I am getting paid every month so there is nothing I can do. Let me get paid because I have a family to take care of.” Many people feel it is pointless, it is lengthy: I will be sitting at home while I should be at work making money. As long as I am getting money at the end of the month and I am taking care of my family and my needs ... We feel disempowered sometimes. (Mpho, Male Focus Group 1)

It quickly became apparent in the course of the study – through the literature review, in-depth interviews and focus group discussions, and through the case studies – that while companies may often have anti-discrimination policies these rarely mention LGBT identities:

In South Africa people generally want to focus on racial and cultural diversity and then in terms of sexual identity or gender identity it is never something that is on a priority list: if it comes up it depends on who your boss is. (Mahlatse, Male Focus Group 1)

In terms of employment equity and redress of historical oppression, the categories of race, class and gender feature prominently but LGBT people are generally not taken into consideration as a disadvantaged and marginalized group in terms of redress.

## 4 Being LGBT at Work in South Africa

Overall, it is important to keep in mind that South Africa has extremely high levels of inequality, poverty and unemployment, which are more pronounced among young people and among black young people in particular. As a result, access to formal sector employment is a real challenge for many in the post-apartheid context. LGBT people, especially young LGBT people coming from the townships of South Africa, face the double challenges of unemployment and homophobia. In this regard, while the informal sector in South Africa is relatively small in comparison to that of other developing nations, it is of considerable importance in terms of the work opportunities it offers for LGBT people. The structural barriers to access to formal sector employment for LGBT people were highlighted by a number of participants in the study, who drew attention to the existence of such barriers relating not only to class, but also to sexual orientation and gender identity. This context of very high unemployment in general and among LGBT people in particular forms the background from which the following findings emerge.

### 4.1 Discrimination in the workplace and in securing employment

A number of key areas of concern were flagged by participants in the interviews and focus group discussions in relation to LGBT issues in the workplace. In the case of LGBT worker participants, these were often direct, first-hand experiences of the workplace. For their part, non-LGBT participants in the study were generally unaware of the challenges faced by LGBT workers. This suggests that LGBT issues are not on the radar of persons who are not directly affected by discrimination on the grounds of sexual orientation and gender identity.

#### 4.1.1 Dealing with stereotypes

LGBT workers spoke at length about the multiple stereotypes that they encounter in relation to their gender identity. These stereotypes ranged from the more superficial, such as the general sense that gay male workers would be fun-oriented, to the more serious, such as the apprehension that lesbian workers would be sexually predatory towards other female employees. In some instances, LGBT participants in the interviews and focus group discussions were able to disregard these stereotypes and not take them too seriously; in other cases, the LGBT stereotypes encountered in their workplaces greatly affected participants. For example, in relation to the stereotype of the predatory lesbian in the workplace, Phumi and Katlego both felt that they were constantly perceived as a sexual menace:

They think that because you are a lesbian you are going after them. (Phumi, Female Focus Group)

After they hear that you are gay they now think that - oh gay means that they must be sex pests: they are so into sex that this affects their attitudes and the way they do things they are too much. (Katlego, Male Focus Group)

This description illustrates why it is so difficult for lesbian and bisexual female workers to participate fully in workforce activities and integrate in the workplace. For example,

residential team-building exercises had the unforeseen effect of excluding lesbian workers, because female workers were reluctant or even refused to share accommodation with their lesbian co-workers. In such a situation, however, Nomsa had the courage and voice to use the experience as a way to raise awareness among her fellow workers:

I had to sleep alone as no one wanted to share with me. Some participants went to the extent of claiming that I raped them. This discrimination continued until I decided to challenge it. I pushed management to allow me to educate everyone on LGBT rights. (Nomsa, Female Focus Group)

This stereotype also affects gay men. Dumelang had a similar experience:

I remember the time we had the annual awards. I remember in my team we talked about how we would have to sleep over at the venue. My manager said very straight: “Dumelang I imagine that you would be comfortable in your own room...” and the entire room issue – it’s like a big elephant, who is sitting at the table that we don’t discuss. We all know what the manager was referring to but we did not discuss it. It was one of those things. (Dumelang, Male Focus Group)

Nomsa’s experience was a recurring theme throughout the study: that LGBT individuals who had the presence of mind and strength of character became responsible for challenging discrimination and educating their fellow workers. In such situations, given the lack of affirming policy implementation, leadership in relation to LGBT rights, and generally heterosexist workplace cultures, the onus was often on individuals to effect broader change within the organization in relation to LGBT participation.

The stereotyping of LGBT workers is multifaceted, complex and difficult to define in any neat way. For example, while lesbian women were depicted as sexual predators, it was also presumed by co-workers and employers that they would not fall pregnant and therefore were a better employment choice than heterosexual women. Correspondingly, participants reported that it was also frowned upon for lesbian women to request maternity rights, as this was not seen to fit with their lesbian identities.

Where gay men are concerned, participants reported that they were often stereotyped not only as sexually promiscuous but also as vibrant, energetic and knowledgeable. Again, gender and sexual minorities were depicted in stereotypical ways that made them either more or less attractive as employees and co-workers. Mpho’s boss was quite direct in this regard:

My boss once said to me: Mpho I know that gay people are active. They know a lot and I am hoping that you will demonstrate that and not be lacking with regard to your work and energy. (Mpho, Male Focus Group)

Gender norms around appropriate attire, along with norms relating to voice and body, were also a key obstacle preventing LGBT workers from being fully integrated into the workforce. For example, responses to Dumelang’s gender non-conformity left him open to judgment and negatively affected his success in the mining sector:

In my last job I worked as a financial advisor. That one was quite tricky because I would deal with clients, so some of my clients were mineworkers and apparently I have a squeaky voice, I sound like a lady so it was quite challenging having to talk to masculine men who work underground and you are trying to talk to them about future education plans. Already they judge you by the way you talk. I notice that my colleagues would have more business or sales compared to me. (Dumelang, Male Focus Group)

Stereotyping and negative responses to gender non-conformity were prevalent across work sectors, including the corporate world, mining sector and telecommunications. This bias detrimentally affected participants' ability to get on with the job. For example, Regoma's gender expression and attire drew a negative response from clients in the telecommunications sector:

I used to work for a cell-phone company, selling the services that the company provides. It was really so difficult because you stand there in the street trying to convince the clients that this network can bring this and that and they were like: "What can you tell me about my network that I use...? Go change yourself first and then you can tell me to change the network." I mean, really how can my relationships have anything to do with me convincing him or her to change their network? (Regoma, Male Focus Group)

#### 4.1.2 Workplace safety

The issue of safety in the workplace was of paramount importance for many of the LGBT participants in the study. They recounted either personal or other people's experiences of sexual harassment, derogatory statements, homophobia, along with general religious and cultural prejudices related to LGBT identities. Given the detrimental consequences of unsafe working environments on the physical, mental and psychological health and well-being of workers, the violence and bullying reported by LGBT workers is of serious concern and is evidence of a broad dearth of initiatives and interventions in South African workplaces to make these spaces safe, inclusive and welcoming environments for LGBT people. For many participants, feeling safe in the workplace required the absence not just of overt discrimination, but also of the pernicious effect of pervasive and invisible norms. For example, for Vavi, the practice of discrimination and verbal harassment rooted in homophobia was so pervasive that it was perceived as the norm:

People utter slurs but it becomes so accepted that it doesn't feel like it is a personal attack. Right, so it always feels like you understand it because it is a slur but it doesn't feel like it's an attack or that it's homophobic, in a sense of the "angry" attack way. (Vavi, Female Focus Group)

For Lerato, sexual harassment took the form of a lurid and persistent focus on the part of mainly male colleagues regarding the sexuality of women who have sex with women:

They always wanted to find out how we have sex and that kind of thing. (Lerato, Female Focus Group)

The sexualized nature of this harassment was a recurrent theme in participants' reports and gives an indication of the high levels of sexual violence, particularly against lesbian and

gender-alternative women, in South Africa. In the context of the workplace, this sometimes played out in terms of what is known as the sex-for-favours dynamic which receives widespread media coverage nationwide. This was the case for Pelisiwe and the effects of this sexual harassment were devastating in terms of her mental health and well-being:

They ask for sexual favours: when a man approaches me he wants to have sex with me so that he can give me a job. It is like you are insulting me, it's like you are destroying my life because I did not choose to live like this. The sexual part: it's suicidal and you feel naked, you are not yourself, and you are lost. It is part of an abuse that you have never experienced before. It is like somebody took something that is special and precious. It's like somebody has killed your mother in front of you. It is like that and you are empty inside. (Pelisiwe, Female Focus Group)

What is important to note in Pelisiwe's experience is that the sexual violence occurs during the victim's attempts to obtain employment. Both the existing research and the reports by participants indicate that the barriers and obstacles to employment are to be found not only in the workplace but occur as the LGBT individual attempts to obtain employment, as was the case with her. Even when the LGBT individual's safety is compromised in the workplace, however, there is often little clarity on the procedures involved in reporting harassment or violence. When a complaint is lodged, this may also have negative repercussions for the complainant in terms of unresolved tensions in the workplace. In Vavi's case this all resulted in a situation where the workplace was no longer felt to be a safe space:

I go to human resources and lay a complaint but even if I am still at work and I have laid the complaint and he [the perpetrator] gets a warning, there's tension. There will be tension based on whoever feels is the right side to take so someone might not be openly homophobic but they might support the idea of homophobia. You don't feel like this is a safe place, whether it is a safe place or not. (Vavi, Female Focus Group)

The issue of high levels of violence against LGBT people, and particularly lesbians, was forefront in participants' mind, including Bongiwe from one of the trade unions:

I can tell you before we started [working on LGBT issues] other people didn't even want to talk about gays and lesbians. At least now you are able to talk about it. They call them my people...For instance when we deal with 16 days of activism [on violence against women and children], one of our messages is to talk about the killing of lesbians, the hate crime. It's something that we are addressing. Even during our Women's Day celebrations, a key message that we tell our members is that amongst us we have women who identify as lesbians and that we are discriminating and that we need to work together. Because one thing for sure that I'm looking at on a broader level is to have a partnership, have a discussion and a dialogue with the Police Union and see how we can work towards these issues of hate crime especially because on many occasions when they go and report they are not taken seriously. It's like it is not happening and that's why some of the cases just go unsolved because from the beginning when the case is reported there's no seriousness. (Bongiwe, In-Depth Interview)

### 4.1.3 Working you out of the job

Participants spoke at length about being worn down by constant discrimination, prejudice and bias in the workplace. Many articulated a planned and sustained approach by employers and co-workers of gradually eroding their sense of belonging and self-confidence. This involved employers gradually building up a case against an LGBT employee so that there was eventually an evidence trail of fabricated accusations. This meant that, by the time a case reached the CCMA, the LGBT employee had already begun to lose confidence as a result of unremitting attacks in the workplace. The method used by the employers in particular constituted a slow process of undermining the LGBT employee by picking up on countless small things around which to develop a case. Participants felt that employers were generally aware that direct discrimination could get them in trouble and, as a result, they tended to find more subtle ways to remove an LGBT employee. In-depth interviews with legal resource centre representatives indicated that, by the time an LGBT employee lodged a complaint or asked for legal advice, the opportunity had already been lost to counter-respond to a long list of subtle and undermining actions on the part of the employer. As a result, they advised that LGBT employees keep a record of everything that occurred so as to have clear evidence in the case of appealing to the CCMA. For some participants in the study, such as Matti, this was not something that they knew they needed to do at the time:

Then how I got dismissed at work, most of the smallest things, my late coming, not because I was gay...how she got rid of me it was by checking the small things that she picked up on...she collected all the smallest things. (Matti, Male Focus Group)

This was also the reality for Dumelang, whose employer gradually built a case against him:

For me there were [trade] unions but I was never part of the union. If I had something, then I would say it myself and I would tell the area manager. I remember the time I went for a hearing because of my performance and they said: "No, this is just a performance review." I said: "No, you are just building up a case to get rid of me." So I would tell them straight up that I am no fool. Management does talk; they talk in the corridors. Sexuality is a big deal at the workplace. (Dumelang, Male Focus Group)

### 4.1.4 Dress code

Dress code, along with freedom in relation to workplace attire that affirmed the LGBT worker's identity, was a key factor in participants' sense of belonging, safety and inclusion in the workplace. Participants shared numerous examples of clothes and appearance, in particular those affirming an alternative gender, being used to alienate and marginalize LGBT workers in the workplace to the point of dismissal. For example, Mpho shared the story of his friend who agreed to a compromise in his gender expression and attire so as to accommodate the gender norms of the school in which he worked:

A friend of mine shared a story with me. He is a teacher, or rather an educator, and he's into drag. On his second day of work he was called into the principal's office and the principal said: "Thabiso, I understand that you are gay and so on but I would like

to request that you tone down a little bit.” The nails were manicured and painted and everything. He told me that he was okay with the idea because the principal tried to engage with him making him understand that – as he said – “because now you are in a professional setup and you are dealing with different personalities. So I’m not saying that you should completely cut your nails and hair and everything but just tone down a bit”. (Mpho, Male Focus Group)

The heteronormative demands of the workplace were manifest in everything from clothing choices to body movement as Vavi outlined:

It’s embedded in this idea of how to be professional. It’s in tiny things: when you’re presenting don’t use so many hand movements. One day I come looking like this and another day I come looking like that. Another day I come looking like this and that just doesn’t always sit right. From personal experience, I’ve always felt the need when I’m being formal to “fem up”. Whether in a professional or a non-professional environment, it’s because when I’m being formal this means to “fem up”. (Vavi, Female Focus Group)

Heteronormative dress codes also functioned as a barrier to employment for LGBT people in that non-normative gender expression through clothing could complicate the initial job interview setting. For example, Lebo, a lesbian who chooses to be masculine in dress and manner, known as “butch”, remarked how, in interviews, they would ask about her dress, and Phiwe felt that the whole issue of dress code, hiring and interviewing was most challenging for butch lesbians who do not ascribe to typical notions of femininity in either appearance or behaviour: “...for fems it is not usually a problem. I dress feminine, I put on my make-up and it is not a problem until I say that I am a lesbian. But when it comes to a butch person it is difficult.” Phumi also put it succinctly: “You are a chick but you are wearing men’s clothes”.

The requirement to pass themselves off as heteronormative was one that participants also took on so as to gain access to employment. In Lydia’s case this strategy entailed presenting herself in a gender-conforming way initially and then, once on the job, disclosing her true identity:

It does not mean that dressing up in order to get a job is a sign of weakness. I just think that it is easier to fight the system from within. If you need a job you will do anything to get it. I think as LGBT people we need a strategy, we can dress up for the interview and only disclose who we are after a few months of employment (Lydia, Female Focus Group)

Similarly, Dumelang talked about “dropping the bomb” at a later date:

When I go for interviews or my first interaction with someone I would like to think I put on a straight front so I come across as a straight guy. That is what I do most of the time and then later on when I am more comfortable then I let my hair loose. I will first assess the situation: is it convenient for me to go over the top? It has a lot to do with

comfort. We, most of the time, customize ourselves or mould ourselves for the public to accept us and then later on we drop the bomb. (Dumelang, Male Focus Group)

The cost of conforming to heteronormative workplace cultures can also be severe and sometimes participants believed that it was better to be open and upfront about themselves and their identity:

You lose the hair, lose the make-up, put on the suit and the job is yours. He [a friend] was literally heartbroken because he really wanted to work in this particular organization. It was his dream job and it was literally everything that he wanted but he had to lose himself, his true self to get the job; [A colleague then said], “Listen, this is who you are and if the company really wants you they will take you as you are and it’s on them to accept you as you are. If you are going to have the weave, the hair, the make-up then do it and be yourself. If they can’t accept you then it’s their loss.” After a while he got a job and then they accepted him just the way he was and he was very happy that he was steadfast and his true self to stay and remain himself then to lose himself for a particular position or a job. (Katlego, Trans Focus Group)

#### 4.1.5 Coming out

As is the case for LGBT people globally, coming out is a key moment both for the individual and the surrounding community in South Africa. Given that workers spend a large part of their day in the workplace, the question of whether or not to come out is an important one for many LGBT workers. The thought of coming out in the workplace elicited varying reactions from participants, including fear, a desire to conceal, and concern over its implications in terms of employment. For example, Michael reported that coming out in his workplace would directly jeopardize his future work prospects:

In my workplace private lives are not really discussed. When I ask a private question I am not out in the workplace and generally it seems people’s assumption is that I am straight. I am not going to offer something because I do think it would affect my career prospects. I do think it would affect the way people interrelate in the office and there is no one in the office who is openly gay at my company of a few hundred people. So I think it makes sense for me to just not discuss my private life and just do my work. You can hear the way people speak about a certain subject, there is certainly ignorance about diversity and I am sure that affects people’s decisions when they are hiring, (Michael, Male Focus Group)

While coming out may be the affirming thing to do in terms of personal identity, it is not always the most strategic decision in a homophobic workplace. In Phiwe’s case, her decision to come out elicited a particularly negative response from co-workers:

Immediately after coming out things started changing in a serious way and everybody was on my case and watching every move that I make. They would also not have known that I am lesbian until I decided to talk about it. I was different from them and then one day I was picked up by my partner at work and the next morning a guy in the corridor said: “Can I have your number? You know what you are doing is not right and maybe you need a man to change what you are doing.” (Phiwe, Female Focus Group)

Phiwe's story reflects the enduring and common belief in South Africa among the general population that a lesbian woman's sexual orientation can be changed by having sex—consensual or not—with a man. As a result of these possible experiences and realities, Katlego decided to be somewhat more circumspect:

So in terms of work they didn't know. I wouldn't say that I hid it but I didn't advertise it as the same time. I didn't feel like it was anybody's business. (Katlego, Trans Focus Group)

Overall, while participants' reports indicated that coming out put them at greater risk of sexual harassment and other forms of discrimination in the workplace, they were also clear that having other LGBT people who were out and visible in the workplace assisted in creating more favourable conditions. In the same vein, a number of participants, including Lydia and Matti, spoke about the value of having other LGBT colleagues, particularly in management positions:

I got a learnership and do not have challenges because my employer is gay and I have two other homosexual employees in the programme. (Lydia, Female Focus Group)

There was no discrimination around LGBT people because there were people also like me within the company. When they pulled out of the company things changed. (Matti, Male Focus Group)

Overall, the process of coming out was one of constant negotiation for participants that included fear and concern over people's possible reactions in the workplace as Vavi experienced:

I think I have always experienced a sense of fear in coming out. Not the fear of coming out but the fear of the right reaction. I think especially the first month, it is always trying to gauge the environment right: will I be comfortable in coming out? (Vavi, Female Focus Group)

#### **4.1.6 Lack of leadership**

Participants repeatedly argued that one of the impediments to LGBT equality and to overcoming discrimination was the lack of leadership. Given that sexual orientation and gender diversity, while receiving increasing media coverage in South Africa, remain sensitive – and in some cases taboo – topics, leaders may often be reticent about supporting awareness of such issues and reluctant to disseminate factual information about sexual and gender diversity. As a result, organizations across South Africa often do not encourage their management to take a stand on issues related to sexual and gender diversity in a way that they do in relation to issues of race or class. This vacuum in leadership was highlighted by participants throughout the study.

#### **4.1.7 Leadership on race and class and neglect of sexual and gender diversity**

Respondents expressed the following views on the lack of leadership regarding gender diversity and related issues:

In my company there is certainly no one doing anything to champion rights of sexual identities, gender identities, although it knows about it - we did have diversity training. It's an ongoing thing, it focuses on gender and race exclusively ...you don't want to identify yourself and possibly face discrimination by saying the other things that need to be considered as well so I didn't say anything. Also a couple of the policies, there were times where I wanted to say something – for example, there was a court judgement about paternity leave ...there was a gay couple who had a court judgement they won and they were given full entitlement to full maternity leave allowance that a company would grant to women – yet, there are always legal updates sent to our legal department when there are prominent judgements and there was nothing on this. I don't think our policy is in line with that court judgement, what's the update, how does it impact our work place? I am not sure if it would be wise for me to ask that question. The dress code with corporate is very strict for both males and females and I have never seen someone who is non-conforming who has pushed that dress code. (Michael, Male Focus Group)

You find that in strict corporate places – be it banks, law firms and the like, LGBT people generally want to be in the background and until someone stands up and says no, when you were doing this policy did you think of this and that.... If you say something then you know you are subliminally setting yourself out, limiting yourself and your growth and then people choose to be silent. (Mahlatse, Male Focus Group)

Someone might not be openly homophobic but they might support the idea of homophobia. What they couldn't say [openly at work], they say when they're with their friends or with snappy little remarks. Then, for example, Paul says it [homophobic remark] and even though they won't say directly anything against you, they will rally behind Paul. Now Paul has become the new buddy and you are now isolated on the side. (Vavi, Female Focus Group)

I know my rights and I have a strong personality, so it is very difficult for me to be taken advantage of. (Dumelang, Male Focus Group)

I would leave the company, I've worked for a company that was really racist and you just realize that it's either you fight or you leave and sometimes with fights some people really have really deep-rooted beliefs. If it was from an individual obviously I'm a bit confrontational so I would sit you down and listen, it's not OK that one-two-three has happened and if it was a structural discrimination in the way that the culture of the company is mature, it's masculine, you know, its discriminatory, I would leave, I would really just leave the company. (Katlego, Trans Focus Group)

The study found a number of exceptions to this lack of leadership, most notably the company IBM, whose leadership on promoting LGBT rights was clear and as a result had a very LGBT-friendly workplace. In fact IBM was one of the very first companies globally to include sexual orientation as part of its commitment to nondiscrimination, which it did in 1984. Thirteen years later IBM extended domestic partner benefits to gay and lesbian employees. And in 2001, IBM became the first Fortune 500 company to create a sales team specifically for GLBT customers (See Chapter 8) .

#### 4.1.8 Transgender workplace experiences

The workplace experiences of transgender people were a particularly significant aspect of the study and participants—both transgender and non-transgender—had much to say about the challenges faced by transgender and gender-alternative workers. One of the main challenges cited by participants was the lack of information on transgender rights in the workplace in South Africa. In particular, Busi from GenderDynamix, a transgender organization based in Cape Town, highlighted the lack of information for workers who are making the transition. She pointed out that, while GenderDynamix has developed basic, general guidelines for employees in terms of transitioning in the workplace, these guidelines have mostly been used with human resources consultants with little interaction or uptake from the trade unions, which are a key constituency in this area.

Another specific challenge in the South African context relates to black economic empowerment; the process of transforming workplaces to redress historical inequity so as to make them more demographically representative. One of the challenges arising in relation to transgender employees is that employers may believe that transitioning from female to male in particular will lead to the loss of the company's black economic empowerment accreditation:

So a person might enter a workspace as female and then during their course of their employment there they will then transition to male. They change their IDs or they change their identity documents and what usually happens—or there seems to be a misunderstanding or an intentional misunderstanding on the employer's part—is that an employer might say to the employee who is transgender that, since they were female when they entered the workforce, now they need to reapply for the position because now they're male. This is obviously illogical because in essence it's the same person that you're hiring—they have the same qualifications—it's just a question of gender and name change. What we've found is that this arises because it affects their black economic empowerment accreditation. (Busi, In-Depth Interview)

Another challenge faced by transgender workers relates to the very narrow way in which non-discrimination is understood, so that gender identity does not form part of non-discrimination policies. In this sense, gender is understood in a very normative way as being about men and women, therefore sexual orientation and gender identity are conflated with the presumption that they can both be addressed in the same way. Transgender workers' bodies were also the target of voyeuristic fascination and workplaces were settings where it was acceptable to comment on transgender workers' bodies in a way that was recognized as sexual harassment.

I think objectively speaking a person would say: “That's sexual harassment.” But I'm sure that in sexual harassment training that's not included so people are only aware of it once somebody complains and there's no prior education; there's no preventative education in the workplace for instance. (Busi, In-Depth Interview)

The use of language was also key to transgender workers' inclusion and full integration into the workplace. Language, however, also functioned as a tool of exclusion, in that pronouns were used to marginalize the identity of transgender people and police the boundaries of gender normative expression in the workplace:

Another issue is one of pronouns in the workspace, so for instance if you get hired and your identity document says that you are male but you express a very feminine way of being, your payslip will say mister, your name badge might say mister or indicate a masculine pronoun. What we're finding is that some employers are willing to make that accommodation and some employers are simply refusing. They say: "This is how our system works. We hired you as a man. We cannot change the system." So it makes it a very hostile space for a trans person who is transitioning and sometimes it doesn't matter whether they've changed their ID or not: an employer will stick to the previous pronoun. So that's clearly a question of discrimination and unfair treatment but it gets complicated because people do not want to rock the boat because it's very hard for trans persons to find employment to begin with. (Busi, In-Depth Interview)

Legal representation is also an issue of concern for transgender workers because it is not automatic and not permissible at the conciliation and mediation phases at the CCMA and, for a transgender worker who feels discriminated against, having no support can be very challenging. In this regard, rule 25 of the CCMA rules provides that in an arbitration hearing a party may appear in person or be represented by a legal practitioner, a director or fellow employee, office-bearer or official of the party's registered trade union or registered employer's organization. If the dispute being arbitrated is about the fairness of a dismissal, however, and a party has alleged that the reason for the dismissal relates to the employee's conduct or capacity, legal representation is not automatic. Legal practitioners are only allowed in the proceedings if the commissioner and all other parties consent; or the commissioner concludes that it is unreasonable to expect a party to deal with the dispute without legal representative. This has particular implications for transgender workers:

A CCMA case concerned an employee that had to reapply because the employer said: "When we hired you, you were female and now that you're male it messes with our black economic empowerment accreditation so you have to reapply for this position." Unfortunately, we advised the employee to go to the CCMA and follow that process and because in the CCMA legal representation at a particular level is not permitted, we can't be there as legal representative of any kind but we do offer advice and a sort of support. If the person wants the advice then we encourage them to always come to us and we can always write something up for them. But no cases that we know of have been to the CCMA so a lot of people tend to be fearful that even if I use these processes every person that I deal with will be discriminating against me. A lot of people come because of a perception that they will be discriminated against. (Busi, In-Depth Interview)

The lack of possibility for legal representation in transgender cases has implications for their just outcomes:

How do you prepare for the CCMA if you don't know what the Commissioner's going to be like? You don't know the Commissioner's level of transphobia, you don't know the Commissioner's level of homophobia. I think the CCMA is probably quite progressive but you still have that fear. So you want to be equipped and have a lawyer. How do you find a lawyer, in the Yellow Pages? It becomes quite an intimate

relationship, I think because you're feeling exposed, so to get the right lawyer can be a very psychologically draining process. Because lawyers, like everybody else, don't tell you on day one that they're completely transphobic, you only realize after a few sessions. So that's lawyers and then I think the access to law, the whole concept of their equality court is great, but there's not enough supporting consultation. The enhanced role of clerks and the fact that you don't need an advocate and all that junk but between the two, how do you get somebody who just gives you a little bit of reassurance, a bit of explanation, a bit of this is how it works, this is what you do next? You need to get this paperwork, you can download the PDF from the web and then you find there's a 14-page document to lodge at the equality court. It's a truly frightening experience because you already have that outside infringed person type of mentality which, even if you didn't think you had at the beginning of your transition, you do later. (Cammy, Trans Focus Group)

Where the CCMA is concerned, if a successful outcome in the case of transphobia is a cash settlement this might also be of limited use to a transgender worker who may not easily find work again. Of particular relevance for transgender workers is the issue of transitioning, specifically in relation to uniform, where there is a focus on the image of the company. Participants spoke of the importance of social transition among transgender workers, referring to a number of changes including those of name change; use of different pronouns; transformations in physical appearance, such as in clothing and hair; use of the appropriate bathroom; and general changes related to the worker's social role and living situation:

For instance gender-neutral toilets in the workspace: making it a policy that a workspace must make available a gender-neutral toilet or gender-neutral toilets. Locker-room changes for instances, gender-neutral locker-rooms in the workspace, having that as an option. So underlying all of these things and all of these issues is the normative assumption that the workforce is divided between males and females and therefore you can regulate it along male and female lines. So those are some of the issues that come up for transpersons specifically. (Busi, In-Depth Interview)

Given the multiple challenges that transgender workers face, the role of activism and support groups was highlighted as particularly important:

We have a regular [transgender] discussion group which is a safe space and you can discuss anything. You can get basic support; you can get a hug. You can get somebody to give you some concrete information from the network. In addition, what we're starting to do, build a network of supportive persons in all industries, services and functions within the community. We talk about having some sort of advocacy function. We're a network and we keep communication with each other. (Madoli, Trans Focus Group)

Transgender participants were also adept at reading workplace environments so as to navigate these transphobic spaces and spoke of the general lack of real collegiality and support:

I graded people into four categories because in a workplace you don't get people who are actively supportive. They're polite, they get the pronouns right, they get your name right, all that type of junk but nobody's going to stick their neck out too far. There

isn't that much morality at management levels at larger businesses. So where you would potentially have a fifth category of an active ally: I'm sorry it doesn't exist and what you get is a semi-passive ally. They're still an ally in some respects, some of them decent people, but they're still semi-passive. Then you get the neutrals who get it right occasionally, get it wrong occasionally but don't have a distinctive opinion. So you get the positive neutrals and the negative neutrals. The positive neutrals don't go out to make their point. The negative neutrals have their opinion and will say one thing to your face and another thing behind your back and then you just get the bigots. So it's sad you don't get active allies. (Cammy, Trans Focus Group)

#### **4.1.9 Patterns of discrimination: intersections**

The colonial legacy, apartheid urban planning, and continuing inequality in South Africa mean that intersections in terms of race, class and gender are key determinants in accessing employment. In this sense, the majority of black South Africans are also working class and, within this broader frame, young black women are marginalized and young black lesbian women and transgender men in particular bear the brunt of patriarchy, poverty and discrimination, which undermine the possibilities for access to employment. The nature and reach of men's dominance of leadership positions in South Africa is such that the women's and feminist movements are not particularly strong and the union movement tends to perpetuate rather than challenge the status quo. Nevertheless, the unions also have a key role to play in challenging sexism and homophobia at national, regional and provincial levels. And it ought to be stated that there was unambiguous support from trade unions, employers' and the government for this research and for the publication of this report. Both the research and the publication of this report were formally sanctioned by NEDLAC.

Culture and religious arguments are also often used for exclusionary purposes so that, for example, the argument is often made that same-sex desire is "un-African" and "un-Christian". Cultural arguments in particular often employ a revisionist historical understanding to deny legitimacy to sexual and gender minorities in an attempt to roll back rights for LGBT people, including in relation to employment.

The present study identifies race and sexual orientation as two intersecting stereotypes. For example, Vavi as a young black lesbian woman spoke of the existing concerns of many South Africans in relation to the risk created by racism in the workplace, which in her case were also compounded by her lesbian identity:

I often feel disempowered and vulnerable and when I enter a new environment I feel I have to suss it out. For black people in South Africa in a work environment there is always a sense of vulnerability, a sense of disempowerment, a sense of responsibility. If I'm unemployed and I still have a family to take care of, all of that puts you in place where you are more vulnerable and you are more dissuaded from taking action. If you feel that this could cause conflict you put it aside or just try to talk nicely...anything to avoid this real conflict. At the end of the day that might put you in a position where you find yourself with no pay cheque. (Vavi, Female Focus Group)

Mahlatse spoke of the way in which consciousness around race and racism does not always translate into an awareness or desire to know about discrimination on the basis of sexual orientation and gender identity. He spoke about the complexities of dealing with both LGBT issues and race:

I could encounter homophobia as well as racism and then it seems as if all the few black people are part of this team and want to just manage the race issues but white people in the team were more receptive to me being gay than the black people. So I don't think there are patterns: it's more an individual thing and also a corporate-culture thing. (Mahlatse, Male Focus Group)

The intersectional nature of race, sexuality and age was one that younger participants said had a heavy impact on their lives, including Phiwe:

It is difficult having a job as a young person but when it comes to being gay or lesbian, it is even more difficult. There were also issues about me heading that position as a young black woman and so I would dispute something I did not understand and we would have an argument. At the end of the day I found myself without a job and I felt shattered. (Phiwe, Female Focus Group)

#### 4.1.10 Good practice workplaces

A good practice workplace could broadly be defined as an inclusive workplace that is free from stigma and bias and that enables and values the contribution of each employee; where all employees are encouraged to contribute their full potential regardless of their race, gender identity, sexual orientation and other considerations. In this context, LGBT employees feel free to reveal all aspects of their identity, if they so wish. Creating a good practice workplace could include a range of processes, such as conducting training events to educate employees on how to be inclusive of LGBT people in the workplace; ensuring that specific needs of LGBT employees are catered for; ensuring that workplace policies and procedures are sensitive and inclusive; and, more generally, creating a culture that encourages people to be open about their sexual orientation or gender identity. With these broad criteria in mind the research team identified five different workplaces that are attempting to create a more inclusive workplace environment.

##### *International Business Machines Corporation (IBM)*

IBM is a global leader in terms of ensuring that the affirmation of the rights of LGBT employees in its workplaces. It is the largest global technology and consulting firm with more than 400,000 employees serving clients in 170 countries. In 1984, IBM included sexual orientation in its equal opportunity policy. In 2002, this global policy was extended to include gender identity and expression. IBM has maintained a 100 per cent ranking on the United States human rights campaign corporate equality index for the six consecutive years and its LGBT executives are able to be open about their sexuality and function as role models and mentors for LGBT employees. Through leadership development programmes, top-performing LGBT employees have the opportunity to be considered for promotion to executive positions.

In 2011, IBM hosted the first African LGBT Business and Human Rights Forum, which brought together a number of corporations and non-governmental organizations with the

objective of raising awareness within the business community of the legal, social and economic aspects of LGBT diversity and sharing examples of best practices for achieving workplace equality. The company has a database to share information, so that if a PRIDE event is coming up, employees can be notified. Many people on the database are active but there are people who choose to remain anonymous. Participants spoke of the LGBT-inclusive workplace at IBM:

I actually came out at IBM before I could even come out to my mom. I knew she knew, but it was the elephant in the room, that no one wanted to address, at all. So I was actually shocked: I didn't know when I joined IBM about the LGBT policies. So when I joined I had a really good manager then who came to me and said: you know there's this programme and they welcomed me and I went to socials and I was like wow! People even get married, I didn't even know, none of my friends are married so it was a new experience for me. That gave me courage to go back to my mom two years later and actually start discussing – we are still discussing it, even today. I wouldn't have done the stuff that I've done, especially for the community as well, had I not been at IBM, that's 100 per cent sure. (Thandi, In-Depth Interview)

IBM employees spoke about the inclusive and affirmative induction process at IBM, which set the tone for all employee engagement in the organization:

A three-day induction: there is no discrimination, there are no cultural issues, we're all one and IBM has a policy going back ... IBM respects you as a person and your rights, your religion, your freedom to express yourself as you need to. You are an individual in IBM, without fear of intimidation or the threat of discrimination. You are a person. (Daisy, In-Depth Interview)

Those first three days, that's when you learn. If you came in and you were against gay people, you're going to find out within those three days that, OK, when I come through the door I leave my disagreements outside and I'm going get a chance to talk about it. (Thandi, In-Depth Interview)

IBM promotes a very clear and specific internal workplace culture with a particular emphasis on ethics and business conduct, which is reflected in the organization's policies in such a way that business comes to be seen as good practice. Within this context, worker well-being, including LGBT worker well-being, is prioritized:

I honestly think it was because of the culture that they ended up creating the policy, because, I know, the guys that I work with: I'm 100 per cent sure they probably don't even know about the policy. Maybe they know the policy is there, but they don't know what's in the policy and frankly they don't care. I'm there, I'm working, IBM culture is bringing us together and that's where it ends for them. Lesbian or not, I'm there and we work together. The policy keeps evolving as well because now we have a lot of transgender people, we have people transitioning, even here at IBM. So each year they go and sit and they review the policy depending on what new issues came about this year. (Thandi, In-Depth Interview)

Employee well-being is central to the IBM approach:

First, happy employees are equals, we're out there and we work day and night for IBM so it's the quickest way to get results. If I'm unhappy and I'm hiding in the corners then the chances are I'm going to loaf around and I'm not going to do half the work I do right now. I'm not going to put in as much effort, why should I? (Thandi, In-Depth Interview)

In terms of the key issue of benefits, same-sex partners can be on the company's medical aid even if they are not formally married. Similarly, same-sex partners and families are recognized beneficiaries for pensions and provident funds. Where the key issue of family responsibility leave is concerned, an employee with a same-sex partner who becomes pregnant is given the equivalent to paternity leave. In terms of fostering an appreciation for diversity, there are specific programmes within the company, including diversity groups with group leaders. This extends to programmes for senior leadership that foster an appreciation and valuing of diversity and leads to a situation where LGBT senior management can feel free to be open about their gender identity:

We have about 43 out executives and I'm talking vice-president level in the company. So if I were to get promoted one day and become a vice-president, I'll form part of that out executive committee. Some people come from outside IBM and become executives and they form part of that programme as well. They're basically champions for LGBT rights within the company so we call them our champions. (Thandi, In-Depth Interview)

IBM also has business resource groups, among which there is a group for LGBT employees. These groups are under the responsibility of the human resources department and new employees are informed about them during their induction. The groups hold monthly meetings and socials and LGBT people who wish to remain anonymous and not to be revealed as LGBT at the workplace can participate in anonymous calls:

They try and make it a time, a central time for everyone to be able to attend. You don't have to say who you are, no one is interested, you just get on the call and then of course the domestic partner benefits as well. (Thandi, In-Depth Interview)

As part of the process, LGBT employees offer to mentor managers and are paired with specific managers so as to assist them in understanding LGBT issues:

We have so many managers signing up that we don't have enough LGBT people to mentor them. They really want to learn and not just because they have someone in the team. Some have kids and you mentor someone and you find out: "You know, I have a teenager and I can see that my child is gay or lesbian and I don't know what to say", so it goes even beyond just being at IBM. (Thandi, In-Depth Interview)

There is a strong focus on LGBT leadership development within the company, which is driven by the LGBT executives who become mentors. This process of

development also builds the capacity LGBT employees to deal competently with homophobia and transphobia outside the company:

How do they handle clients who are prejudiced? Sometimes I'll go to a company and I find that the person I'm dealing with is against LGBT people. How do I handle that and still get the deal done for IBM? You learn those skills from them. (Thandi, In-Depth Interview)

Part of the diversity mandate within the company extends to sponsoring LGBT events, such as the Johannesburg, Soweto and Ekurhuleni PRIDE marches. There is also internal support for employees who are in the process of transitioning:

IBM's policy allows for flexi-hours and a person that is transitioning is going to be passing through a lot of medical upheaval and difficulties. They're on hormones and it's a succession of operations in the whole transitioning phase. So IBM's policy and work-life balance policy allows for the person, if they're having a bad day, to work from home or if they're ill and can't work these hours or in pain then they put in the hours that they can. For example, we had a person at IBM who was undergoing operations and their pain level during the day was horrific but they found that at midnight they were sitting up fine, the pain meds kicked in, and they got up and did the job. IBM allows this very flexible policy and it's nice; as long as the manager understands what you're going through they'll typically work with you through that to give you as much support as needed. One person did this whole transition and it was very, very difficult for the person because of the behaviour and the huge amount of hormone levels that they were given during the transition phase. There was also an "Open and Honest" policy where, as her manager, I could sit her down and say: "Let's do it this way" and together we could face the world, so you're not on your own. (Deirdre, In-Depth Interview)

The global reach of IBM means that the company, while not abandoning its LGBT policies, has to negotiate local contexts across the African continent and continue to provide a safe working environment for LGBT employees:

I mean because, with IBM moving into other African countries as well, the policy doesn't change. They don't say: "Oh, since we're in the Congo and in the Congo it's illegal to be gay or lesbian, let's scrap the LGBT policy." They work with the governments and obviously can't tell the government in that country what to do but they can try and influence them and say: "We do things like this." Like in South Africa you find that it's a safe haven for you to be at work because you know that you are protected by this policy. It's difficult, yes, when you leave the company and go home, as there are all these problems and issues, but while you are in IBM, within the IBM premises, you are protected and you're safe and the policy stands regardless of what's happening in the country and what the policies for the country are. (Thandi, In-Depth Interview)

### *Anglo American*

Anglo American was founded in 1917 and is one of the world's largest mining companies, operating in five continents. In South Africa, the company mines, processes and

markets platinum, thermal energy, coal, diamonds and iron ore. In 2014, 72,000 people were employed by Anglo American. Anglo American has a proud history of dealing with HIV/AIDS and become one of the first employers in Africa to say no to pre-employment screening for the illness (Anglo American, 2015a). In 2008, Anglo American was the first private sector employer to provide free antiretroviral treatment for its employees. Anglo American is South Africa's largest private sector employer and has 3,081 women working in underground operations. Mining is still a very male-dominated industry and there are reports of high levels of sexual harassment with many female miners under pressure to offer sexual favours to their male colleagues (Business Day, 2015).

The head of Transformation and Regulatory Affairs at Anglo American offered some insight into her experience as a lesbian in the company. To Lindiwe, the ideal workplace is a place where every single employee feels comfortable, safe and free to come to work every day as they are:

The problem is, many people feel it is risky to disclose their true selves, fearing discrimination, bigotry and unfair treatment. This happens because people simply don't know what they don't know, and tend to fill this empty space with hearsay, old wives' tales and general ignorance ... Organizations are generally a microcosm of society... But most people feel the need to conform when at work. I worry about people hiding themselves on a daily basis. They might not be living up to their full potential. Why hide your disability, your sexual orientation or anything that makes you different from anyone else? If everyone was free to be themselves, there would be far-reaching positive consequences for any business. I believe that there is a strong case for embracing diversity. This is why we at Anglo American are focusing on this important aspect. (Anglo American, 2015b)

In 2011, the corporate division of Anglo American launched the "Knowing Me, Knowing You" diversity initiative. The objective was to create awareness and foster an environment that respects and celebrates people's differences:

We need to create and nurture an environment where people are aware of, understand and appreciate the differences in one another as an essential ingredient to attaining real employment equity. This is one of the key ways employees, and ultimately businesses, can reach their full potential. (Anglo American, 2015b)

### *Kelly Group*

Kelly Group is a brand within the greater Adcorp Group and the largest workforce management company in South Africa. Kelly Group is commonly referred to as a "labour broker". Labour brokers are different from recruitment agencies in that labour brokers handle almost all aspects of the worker's employment – including interviews, recruitment, human resources, administration, payroll and transport – whereas recruitment agencies are only responsible for sourcing candidates for employment. In essence, rather than a company hiring a worker, it hires a labour broker who hires the worker instead.

The Kelly Group's maternity protection policy recognizes same-sex relationships. The Group acknowledges that a number of staff members are in same-sex relationships and it has made a commitment to extend benefits, in particular those of parental rights, to all staff members, including those in same-sex relationships:

We have several females in same-sex relationships and the bottom line is that two of them have actually had children in the period as well and we recognized the maternity period in terms of adoption, the parental rights of the other partner ... As for adoption by male and female couples and same-sex couples – in the case of adoption, the primary caregiver of the adopted infant shall be that staff member who is entitled to this category of leave and shall be referred to herein as “employee”. Use of the feminine pronoun should be read as to mean both male and female staff members where appropriate. (Kelly Group – Policies and Procedure: Maternity Leave Policy; copy of maternity leave policy received from Bev Jack)

We have had individuals in same-sex relationships who, through fertility treatment, have, had children ... but most employee benefits really work on spouses from a formal relationship. Not all of our staff, however, in these relationships are in a formal, legal marital situation. They are in partnerships and we certainly recognize partnerships as well. It is a formal partnership and we will extend and make sure that they have the equivalent cover as well. That is why I said this not only applies in terms of gay and lesbian relationships but to our African females as well, who may not be in a legal marital situation ... But the bottom line is we are very aware of dealing with people and the individual's rights in the workplace. (Bev Jack, In-Depth Interview)

The company also ensures that its medical scheme recognizes same-sex relationships. Having a non-discriminating workplace is seen as critical to the success of the business and this is extended to both the internal and external workforce. As a company hiring out labour it faces the challenge that it cannot always control the environment into which its workers are being sent. If any form of discrimination happens at the site of the client that has hired workers, Kelly Group is responsible as the employer for ensuring that appropriate grievance procedures and disciplinary measures are carried out. The individual is encouraged to disclose any grievance to Kelly Group as the employer. As the labour market intermediary they focus on finding a fit between the employee being hired out and the client. If the client is not happy, however, they are not required to give reasons but Kelly Group has the imperative to be an employer of choice and therefore pays a great deal of attention to ensuring that both the employee and employer feel comfortable.

Labour brokering is an ever-growing part of the South African labour market. In the South African context, COSATU, the largest trade union federation, has been vocal in calling for a ban on labour brokers, arguing that labour brokers contribute to South Africa being one of the countries with the worse income inequalities in the world. In March 2015, the SAHRC released its first report into human rights abuses in the local business sector, revealing that businesses in South Africa generally have a lack of awareness of their obligations in respect of human rights, or their contraventions of legislation relating to discrimination, working conditions, occupational safety and the rights of migrant labour (Mail and Guardian, 2015). In this context, as a large

company working in the labour-brokering sector, Kelly Group is playing a leading role in recognizing the advantages to companies of ensuring that LGBT employees feel respected and valued by creating more inclusive workplace benefits.

## 5 Discrimination in access to social protection

The Unemployment Insurance Fund (UIF) established by the Unemployment Insurance Act, No. 63 of 2001 legislates for payment of unemployment benefits to unemployed employees, and for the payment of illness, maternity, adoption, and dependent's benefits related to the unemployment of such employees.<sup>8</sup> Though the Act does not mention sexual orientation as a prohibited ground for discrimination, jurisprudence implies that any LGBT worker who is denied his or her unemployment benefits on the basis of sexual orientation or gender identity can approach the courts for recourse. For example, in the case of *Satchwell v. the President of the Republic of South Africa* case, cited in Chapter 3, the court ruled that the claimant was unfairly discriminated against by denying her same-sex spouse the same benefits as would be awarded to heterosexual couples (Department of Justice, 2002). The high court order of unconstitutionality was based on Section 9(3) of the Constitution which "prohibits unfair discrimination on the grounds of sexual orientation and marital status." The government acknowledged in the Constitutional Court, that "same-sex partners are entitled to found their relationships compatibly with their sexual orientation and added that the restrictive legal meaning of the word 'spouse' not only offends against same-sex partners but also against heterosexual partners in permanent life-lasting relationships." (Department of Justice, 2002).

One of the surprising findings emerging from the study was the general lack of focus on workplace benefits for LGBT workers. LGBT workers themselves rarely mentioned the presence or lack of same-sex benefits and, when the topic was raised by the researchers in both the in-depth interviews and focus group discussions, it gained little traction.

Overall, there was a general lack of knowledge in relation to social benefits for LGBT workers' partners. Benefits and the rights to redress in workplaces appeared only to become important for participants when a serious example of discrimination occurred. It appeared that, in the absence of substantial discrimination, there is a pervasive culture of silence and of not rocking the boat, presumably so as to hold on to employment in contexts with extremely high levels of unemployment. For example, nominations for provident funds or medical aid usually only became an issue after people had signed a contract and then discovered that their particular sexual orientation or gender identity were not covered, as was the case for Nkuni:

Provident fund nomination forms allow for a space for childcare but LGBT is not covered so if I cannot include my partner I would have to leave my money to my mother. (Nkuni, Female Focus Group)

Family leave was also an extremely contentious issue for many LGBT workers, as it is very limited and generally excludes same-sex family configurations. As a result, while heterosexual and cisgender workers are able to take leave to respond to family demands, LGBT workers were, in fact, excluded from these benefits and entitlements.

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<sup>8</sup> Republic of South Africa. 2001. Unemployment Insurance Act (Act 63 of 2001). Pretoria: Government Printers.

In this regard, the Basic Conditions of Employment Act – the legislation governing working conditions – continues to be shaped around the normative model of the heterosexual couple where it is the mother who remains responsible for the nurturing of the new-born baby and returns to work after four months of maternity leave. By law the father has no distinct paternity leave provisions but rather a compressed three days of family responsibility leave. The Act stipulates that the three days per annum of family responsibility leave may be used when the employee's child is born; the employee's child is sick; or upon the death of the employee's spouse or life partner, parent, adoptive parent, grandparent, adopted child, grandchild or sibling.<sup>9</sup> Nevertheless, the Act clearly indicates that the reproductive work of nurturing and childcare remains women's work.

This gender division of labour is a cause for concern for heterosexual and LGBT workers alike, and results in the stereotyping of women as best suited to nurturing and caring work, while men are understood as more competent at providing financially for the family. The gender division of labour is also directly tied to the idea of the nuclear family – the “stay-at-home mother” and the “bread-winning father” – and this continues to be seen as a social norm even if it bears little resemblance to the daily lives of women, men and families. This heteronormative model of family, parenting and care for significant others excludes and discriminates against many LGBT people, whose relationships and family configurations do not fit the model based on a heterosexual norm.

This was the case for Nkele, who was forced out of her job because of the denial of family responsibility leave to attend a family funeral:

All colleagues have been taking leave because they have children or had to attend to a family matter. I remember the day I took leave because my girlfriend's father passed away and I wanted to attend the funeral. When I returned to work all of them were angry with me. They accused me of going to a party in Mpumalanga. After this incident I felt that it was time for me to leave. I even had to ask my girlfriend for a death certificate because they all wanted proof. I left with nothing: I mean zero. It was my choice to leave but I was not offered any compensation for my service. I think this was due to the fact that I identified as a lesbian. (Nkele, Female Focus Group)

The denial of family responsibility leave and of maternity leave also had poignant effects on the ability of workers in same-sex relationships to be with family members during key family moments, as was the case for Pelisiwe:

You know I would love to be with her in that maternity, I would love to. It is like her being sick. I am always there for her. I would like to share. They must understand that we are two women who are in love, not a man and a woman. I must not go to work and she will carry out all the responsibilities: I want to be there as a parent too. (Pelisiwe, Female Focus Group)

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<sup>9</sup> Basic Conditions of Employment Act. Available from: <http://www.labour.gov.za/DOL/legislation/acts/basic-guides/basic-guide-to-family-responsibility-leave>.

As well as the overt denial of benefits and entitlements to LGBT workers, persistent forms of homophobia and transphobia also made it difficult for LGBT employees to exercise their rights and claim benefits. For example, in relation to conditions of service, LGBT employees were made to feel marginalized and gaining access to benefits often meant revealing personal and health-related information that could elicit a negative, homophobic and unnecessarily public response from human resources departments and other staff members. For example, Mpho was repeatedly and invasively questioned by his line manager in a way that made him feel uncomfortable and that he felt was directly related to being open about his sexuality in the workplace:

I was sick two months ago and I called in sick. I spoke to my line manager that I was sick and she wanted to know exactly what the condition was and I said it's a bit private because I wasn't ready to tell her. She had a problem with that but at that time it was something related to my sexual health. (Mpho, Male Focus Group)

The necessity for self-disclosure so as to access same-sex benefits such as spousal cover as well as the fact that same-sex benefits appeared to be a separate category was a cause for concern for some participants, including Michael:

I know that there is a spouse cover and the policies explicitly state that it can be the same-sex, opposite sex and also in maternity leave they cover adoption by same-sex couples. I am not sure what it means that this is treated as a separate class—it does not seem to have less benefits but the fact that it is treated as a separate class perhaps does mean that people would have to disclose that to the company if they want these benefits. (Michael, Male Focus Group)

These are important concerns for LGBT workers as the necessity for self-disclosure means that LGBT workers may also be putting themselves at risk if they share personal information in a generally homophobic workplace. Michael also highlights the risks of developing policing and workplace practices that create separate but equal categories.

The issue of parental leave for LGBT people in general and transgender people in particular was flagged repeatedly by participants. It became evident that the concept of parental leave needed to be expanded beyond simple adoption leave, which tends to be very focused on sexual orientation, or maternity leave:

So in terms of transitioning, those are the problems that we encounter in terms of policies around motherhood, maternity leave. We struggle to get employers to understand that a transwoman also needs maternity leave even though biologically she cannot give birth. So you find that a transwoman would be given paternity leave instead of maternity leave...transgender bodies don't always fit into cisnormative conceptions around who is a parent or who can be a parent. (Busi, In-Depth Interview)

## **6 ILO constituents and Social Dialogue**

### **6.1 Collective bargaining and LGBT rights**

Overall, collective agreements in South African are mostly concerned with wage settlements and mirror some of the categories identified in the Basic Conditions of Employment Act. Very few agreements include measures to address discrimination. Trade unions and employer organizations also form bargaining councils to deal with collective agreements, solve labour disputes, establish various schemes and make proposals on labour policies and laws. In these bargaining councils, trade unions attempt to negotiate for wages but also conditions of service that meet the minimum criteria set in the Basic Conditions of Employment Act. In South Africa, there are 39 registered private sector bargaining councils across different industries and 6 national and local government bargaining councils. None of the bargaining council agreements make any specific mention of discrimination against LGBT workers.

As mentioned earlier statutes, policies, and codes of good practice relating to labour issues are negotiated through the National Economic and Development Labour Council (NEDLAC), which bring together government, workers, and employers and serves as a forum of social dialogue. The PRIDE research was given a formal endorsement by NEDLAC where it was described as “long overdue”.

### **6.2 Trade unions**

While many trade unions choose to include what are known as “life-partners” alongside spouses in benefits for employees, very few unions make mention of other issues related to the inclusion and protection of LGBT employment rights. In a preliminary search of South African trade union websites, only one union included non-discrimination policies on the grounds of sexual orientation in its employment bargaining. While two others mentioned discrimination on the basis of sexual orientation, they provided no applicable strategies or practical examples for protection.

Global union federations play an important role in enlarging the trade union agenda to include dialogue and conduct campaigns at an international level, and to develop international framework agreements. There is a growing concern within international trade union federations regarding violations of the rights of LGBT persons around the world (Benjamin et al., 2015). Many universities and academic institutes have also included coverage of LGBT issues in gender studies programmes (Educational International, 2011).

A number of South African trade unions are affiliates of the nine biggest global union federations. These federations are parties to international framework agreements with multinational corporations and some of these agreements now include sexual orientation among their non-discrimination clauses. The commitments made by these federations and the anti-discrimination tools in the international framework agreements represent important new tools for activists fighting for LGBT rights at the global level.

To this end, in 2011, 150 delegates from 45 countries gathered in Cape Town for a two-day forum on sexual diversity, organized jointly by two global union federations: Education International and Public Services International. This was the third joint LGBT forum for these two federations and was billed as the largest LGBT event ever held on the African continent. Education International and Public Services International have worked closely to make sexual orientation discrimination a priority and together they represent over 50 million workers covering 950 different nationally based unions (Benjamin et al., 2015). In 1999, they jointly published the guidelines *Working for Lesbian and Gay Members*, in which they mapped out a comprehensive strategy for trade union action and which was updated in 2007. Five years later, an international LGBT forum was created with representation from national unions from both federations. The forum was set up to generate awareness of sexual diversity issues among members of the two federations, to document cases of discrimination, to organize training sessions, and to press for the inclusion of sexual diversity rights in international conventions and policies.

From this survey, it emerged that, when LGBT workplace issues are raised, they are traditionally placed on the agenda of the trade union gender departments, departments that are very often under-resourced and whose coordinators are challenged by what they perceive as the marginalization. They speak of a pervasive patriarchal organizational culture that makes it difficult to mainstream gender equality issues into all aspects of trade-union life. Participants also indicated, however, that mainstreaming LGBT issues into gender departments within the unions was still advantageous, despite the resistance encountered. Some participants indicated that the LGBT issues which emerged in the unions were very closely related to gender issues:

We have this project now of the Labour Rights for Women, that's when women felt there is a space for them to be open about these issues because we identify the LGBT community within our workplaces but some of them won't even know but now that it's in our agenda that created that space for them. (Grace, In-Depth Interview)

Participants also talked of the personal growth that they experienced by working on issues of gender and LGBT rights:

Before I involved myself in gender I didn't know anything about LGBT. So now that I am getting into gender I begin thinking: "What can be involved in gender? Who are the different people that you will deal with in the work place?" (Grace, In-Depth Interview)

Participants were also clear that LGBT issues continued to be experienced as a difficult and uncomfortable topic for many within the unions, including at leadership level. This in turn made it even more important to have relevant policies in place:

You want to avoid people thinking that you are just talking off the top of your head, maybe because you have a lesbian or a gay child and that is why you are so passionate about all this. ... To avoid cases of thinking that it is wrong to belong to a certain community like LGBT, I think the policies are supposed to be in every workplace in terms of issues that involve everyone that can work there. (Grace, In-Depth Interview)

The internal culture of the unions themselves was cited by participants as a key obstacle to furthering dialogue and action in relation to LGBT issues. When mind-sets shift, however, this can make a significant difference in terms of LGBT participation:

But I must commend my union: we have done well in terms of this. I know for a fact we had employed here a person who was an open lesbian. Even in terms of dress code and all that. I must say, the reception she got here, she was like anybody else: she was not discriminated against. (Bongiwe, In-Depth Interview)

It clearly emerged that LGBT people themselves were unlikely to hold positions of leadership within the unions. Those who were carrying forward the conversation around LGBT issues were women, who were reported as having more interest and empathy for LGBT issues than their male colleagues.

There is still a challenge in terms of women getting into positions like being part of bargaining structures. So you find that it's men that are representing these workers at the CCMA, so obviously they don't entertain these [LGBT] things. They think these are not things that we should talk about in the unions, let's talk about labour issues. However, this is not part of a labour issue that I can go to the CCMA about. So you don't get them until somebody actually comes to you and says this is the case and my union doesn't want to take it. Obviously now through our gender structures, they come and say I need somebody else who is LGBT who can represent me ... So it is quite a challenge when it comes to dealing with issues of LGBT inside the workplace at the moment. (Bongiwe, In-Depth Interview)

When support was given and action taken in relation to LGBT rights, however, this was often done by women:

The difficulty is that the organizers are not comfortable. Let me put it out there, the organizers are not comfortable and understanding that there is also an LGBT community but they are not accepting as they are with women. I don't know if it's because we are mothers but it's easier for you to accept your child the way that child is because you carried that child for nine months. So you're going to understand and educate yourself about these things; I think it is a maternal instinct with us women. Like I said there are only a few of us trying to take cases to the CCMA. We are not organizers, we are just women; we are administrators and they are just workers in the workplace with no particular positions in the unions. (Grace, In-Depth Interview)

Internal programming in the unions emerged as a key arena for discussion and for building awareness. The unions' internal programming, including around HIV/AIDS, provided an opportunity for awareness-raising which, in the case of a federation such as COSATU, has a knock-on effect in that it then spreads this awareness to affiliate members across the nation:

In the other workshop that we did on our HIV/AIDS project, the people we were targeting also included LGBT people because we have noticed that the messages,

especially when we talk on issues of prevention, especially national messages in our country, do not deal specifically with same-sex relationships. We targeted them so that we are also able to advise and see how we are able to deal with this issue of HIV and mainstreaming LGBT issues into the HIV programmes. (Bongiwe, In-Depth Interview)

One of the strategies followed in some of the unions includes the conduct of diversity workshops and the inclusion of LGBT organizations and LGBT people as facilitators or presenters so as to humanize an otherwise abstract topic:

We call the LGBT organizations themselves to conduct these workshops and many a time they would send an open gay. Like in Cape Town, the person who was conducting the workshop is an open gay male. In Limpopo, the person who was there is an open lesbian. I'm told in the first workshop they had, she came with her partner. In the beginning, you would sense there's a tension, but as the workshop goes on and the terms are explained and people are taken through what LGBT means and what people are going through in their everyday life, you tend to see the change in terms of interaction. At the beginning of the workshop, people want to ask questions that would make others feel uncomfortable. As the workshop continues what is interesting is that the people who are conducting the workshops are giving practical examples because they deal with cases of people who are being harassed, people who have been killed, so they give practical examples. They also plead with teachers that in institutions they should be careful how they deal with kids whom they might perceive as lesbians or gays. (Bongiwe, In-Depth Interview)

A key feature of the work of trade unions is in defending workers by taking up cases and this emerged in participants' reports:

It happened in one of the provinces where this lesbian lady went for an interview at a school, she's a butch lesbian and she was wearing men's clothes. She was actually recommended for the position but the problem is the parents had a problem with it. It's like the union came in there and assisted because now they wanted her not to be appointed. ... However, she was successfully appointed but parents were now wanting to take their kids from the school where she was appointed, thinking that she was going to turn their children into lesbians as well. (Bongiwe, In-Depth Interview)

A key feature of the work of the trade unions is to negotiate agreements with employers with regard to salaries and benefits. There are limitations, however, to covering all LGBT issues through gender policies, because these policies are unlikely to accommodate the process of transitioning. One of the strengths of the unions' engagement in LGBT-related work is also their understanding of the local context and people's experiences:

Policies only work with our superiors but in terms of *inkosis* and *indunas*,<sup>10</sup> they don't know anything about that, bear that in mind. So we need to think about that too, and

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<sup>10</sup> Inkosi: respectful form of address for a man, a superior; from Zulu *inkosi*, ruler, chief. Induna: foreman, overseer, one in authority; from Zulu *induna*, headman.

how to approach *inkosis* and *indunas* in our areas because those policies will work out nicely with our directors. (Sindile, In-Depth Interview)

Union representatives were clear when it came to recommendations for next steps in relation to LGBT issues (see the Recommendations section below), which included campaigning:

A programme of educating and conducting workshops, going out of the boardroom, and also conducting outreach, a road show. Now we are busy with our 16 days of activism on gender-based violence and we are going to do workshops but we are going directly into the industry, we are going to do one-on-one and now on-on-two. There are unions that can now start working towards piloting those who have LGBT workers. (Gugu, In-Depth Interview)

Gugu's comments are relevant given a number of initiatives such as the Unison Project coordinated by the Foundation for Human Rights, which focuses on the rights of LGBT workers in the public sector.

Trade unions do have a key role to play in forwarding an LGBT rights agenda in workplaces across South Africa. And there is scope for this role to be enhanced. In September 2015 COSATU convened a gathering of members to discuss their emerging gender and sexual harassment policies. In this context, COSATU's gender-focal person had mainstreamed LGBT issues throughout the proposed policies, which met with little resistance from other members. It remains to be seen what the response to this approach will be at COSATU's annual, nationwide congress.

### **6.3 Business Unity South Africa (BUSA)**

One of BUSA's stated objectives is to develop an economic and social system based on the principles of justice, a market-oriented economy, individual entrepreneurship and equal opportunities, and to advance and promote transformation in the context of business in South Africa (BUSA, 2015).

As a social partner in NEDLAC, BUSA plays an important role in developing effective policies to promote economic growth, increased participation in economic decision-making and social equity in South Africa. The interview with a representative of BUSA reflected on the kind of challenges facing BUSA and the opportunities available to it in the promotion of LGBT rights in the workplace:

We are engaging on labour issues, labour law issues, conditions of employment, economic and trade issues ... high-level, but not issues like these [LGBT issues], issues around HIV/AIDS, we don't really have a standing item on our agenda that says what our members are doing about providing access and encouraging treatment. (Vumile, In-Depth Interview)

Issues of HIV/AIDS and LGBT discrimination and stigma are often still on the margins of what is regarded as belonging to the sphere of labour rights. Vumile recognized that bringing these issues into the mainstream remains a challenge but that at NEDLAC there are proposals for measures that will see social security benefits extended to same-sex couples:

Even on maternity leave, if you are same-sex and you adopt a child, you should be able to get the same benefits. So these are discussions, they are not really at an advanced level, these are just initial discussions. (Vumile, In-Depth Interview)

With extensive employment equity legislation in place, issues of gender, race and disability feature relatively prominently on the NEDLAC agenda but the profiling of LGBT workplace rights seems to depend on having specific LGBT people themselves as the leading advocates:

There has to be some engagement and some talk around [LGBT issues] but there is no space available to talk about other issues except gender and race and when the spaces are provided, it's only the people who are affected that get to talk about it. The space is not extended to everybody else who needs to understand and appreciate what it means. Take issues of disability for example, I think there's space to engage on issues of disability, the legislation, there's even a target in terms of your company or a department to reach 2 per cent in terms of employing people with disabilities but we don't see the same with gays and lesbians. And one wonders why this is the case. And so, imagine if you are black: I'm black, I'm a woman but I'm lesbian, it feels like it's an added burden, and it feels like people would only deal with me on the basis of being black and a woman, but now, adding this other fact that I mentioned, wow, it's too much! (Vumile, In-Depth Interview)

Promoting transformation features prominently on the BUSA's agenda but is still largely focused on racial transformation:

Transformation in the South African sense is racial, it's black and white, and hence you start to see black people occupying executive and very high-level positions in companies. So transformation has not really gone to the level of transformation in terms of sexual orientation, hence you don't find a lot of lesbians and gays occupying those positions. (Vumile, In-Depth Interview)

The respondent sees the opportunity for BUSA to play an important role in providing leadership on LGBT workplace rights at the level of company workplace policies and programmes and in the promotion of a national framework at NEDLAC level, setting out a clear set of principles and policies that can guide employers:

You need to educate the leader so that the leader can start appreciating the diversity and differences among people. Just like when employment equity is named we know what employment equity is and have got employment equity plans in organizations that say we will support this issue of female employees and we will support this number

of black people in these positions: we can have the same thing with transsexual issues or transgender issues. (Vumile, In-Depth Interview)

Leadership is very important and if you get that from the top, from our leaders that say this is the reality, we have to integrate, and I think you might even start seeing less and less violence. But because no leader is coming out and saying this is not acceptable, this is what needs to happen, you will find people not coming out, you will find people living their lives unhappy and miserable because they cannot be who they are. (Vumile, In-Depth Interview)

## 6.4 Government

The role of the Government was flagged repeatedly by participants as central to forwarding an LGBT workplace rights agenda, in preventing discrimination and violence against sexual and gender minorities, and in providing monitoring functions in relation to homophobia and transphobia in the workplace. Examples given by participants included the Labour Inspectorate in the Department of Labour, along with the CCMA:

I have this idea that if the Department of Justice and Constitutional Development can work hand-in-glove with the Department of Labour on campaigns that are currently running, those zones can be created into a national campaign where all employers can comply. (Mpho, Male Focus Group)

To this end, labour inspectors from the Department of Labour visit workplaces from time to time to check the level of compliance with labour legislation. The key legislation that informs the work of labour inspectors in dealing with discrimination is the Employment Equity Act, which addresses all forms of discrimination. One of the participants in the study was a female labour inspector from the Vaal area. She described her role as reactive (dealing with complaints), as well as proactive (deciding to do random compliance checks). She also reported having an advocacy role that involved educating employees, working with trade unions and promoting labour legislation.

I have visited many workplaces including big companies and heavy industries but I have never come across any LGBT people. But one cannot blame a LGBT person for not wanting to be exposed. I know the difficulties of coming into a company as a woman labour inspector, the way men treat you, whistle at you. Where you will find LGBT people are in small hair salons, where they are self-employed because I think working in these big companies is too difficult. One of the biggest challenges that we have is the ignorance of people and the fact that people do not know their rights but also have very little interest in participating in the training that is offered. People will come to the office when they have a problem but will not try to ensure that they know their rights and are able to exercise them. Employers will be more mindful of how they treat workers if workers show that they know their rights. (Buhle, In-Depth Interview)

Government officials provided numerous examples of LGBT cases, including Tabela's tale of a lesbian who came to lodge a complaint of unfair dismissal:

A lesbian butch-identifying woman who is working as a taxi driver approached our offices. She was furious because she had been dismissed. She did not speak about being dismissed because she is a lesbian but spoke about the way she was being treated by her employer as well as the abuse by the customers. We then calmed her down and listened to what she was saying. Part of our role is to make contact with the employer to hear the other side of the story. If both parties are not present we try to do some telephone mediation. In this case, as soon as we called the employer he apologized and asked her to come back to work. She is back at work now. In this case it was enough that we called and that the employer knew that she had visited the Labour Department to scare the employer into apologizing. (Tabelo, In-Depth Interview)

Government officials also flagged the importance of working across departments using a multi-purpose approach so as to improve response times when working on LGBT cases, as Tabelo pointed out:

In our offices we negotiated to have a member of the CCMA present. We find employees are not always clear about the roles of the different departments and will come to the first one that they think can help. So in this case when they come to the Department of Labour we are able to refer cases directly to the CCMA without having to send the worker to travel another distance. We find that often when we refer cases to the CCMA the worker does not pitch up for the appointment. This is usually because they do not have the money to travel or perhaps the time off to be able to go to another department. In some ways this is providing some kind of one-stop service. We also have the multipurpose centres where all government department services are offered in one place. So, for example, on the issue of child labour, when the case is reported we need to deal with the employer, ensure that the child gets what is rightfully theirs, work with social development to find a shelter and so on for the child and deal with the legal issues. (Tabelo, In-Depth Interview)

The Department of Community Safety is also a key government department for the purpose of engagement with LGBT issues. Accordingly, the research team interviewed a representative from the Gauteng Department of Community Safety and found that, while there is a general mandate, each provincial department has its own programme. The Gauteng department, through its labour section, has been directly involved with the labour rights for women, and this campaign has a focus on LGBT rights in the workplace and is working in partnership with the labour section of the Department of Community Safety.

The social crime prevention strategy falls under the programme dealing with crime prevention and community police relations. The main purpose of the social crime prevention subprogramme is to provide professional and volunteer-based victim support services to victims of crime in the province, with a special focus on victims of sexual and domestic violence. It is important to note, however, that there is no direct reference to LGBT people. The three sectors that have been identified for participation in the Take Charge Campaign are labour; faith-based organizations; and sports, arts, culture and edutainment. Thus, one participant commented:

The Take Charge Campaign is located here in the Department of Community Safety. We are in a partnership with the Government and the society and faith communities in terms of promoting safety in communities and also contributing in the prevention of crime. First, let me say on hate crimes broadly, there are two things that we do, as the Take Charge Campaign in the sector of faith-based organizations: this is working with faith communities on xenophobia and then on the other hand we deal with homophobia. I think for the last three years we have worked in particular on the emergence of lesbophobia violence: people call it corrective rape. (Tabiso, In-Depth Interview)

One participant spoke of the focus on women and lesbian women's safety and the programming that was necessary in this area:

As a prevention officer in the unit called Promotion of Safety, we do programmes that are actually combating the crime before it happens. These programmes include the safety of the LGBT community. What I am currently busy with is meeting with different forums or groups of LGBT people within different communities and speaking to them about their problems or the hate crimes they are experiencing. By doing this, I get a sense of where we can assist and how can we work together with different infrastructures to implement strategies or programmes that will oppose these actions that are taking place within our communities. So, I feel that it is actually wise for us to go and speak to them because the LGBT community are the ones that are feeling the brunt, so they are guiding us very well in terms of implementing this strategy. (Prevention officer, In-Depth Interview)

The Department of Community Safety has a labour section, which primarily works with the trade unions, and with the CCMA with a view to developing a coordinated approach to raising awareness and conducting programmes with a focus on LGBT issues.:

When they get to the CCMA office, all they have to do there is to allege that they've been treated unfairly, and they must be specific. They must say, I've been treated unfairly because I'm a gay, and then the person at the office will ask basic information to capture the case. And then the case will go in to conciliation. Remember, in terms of employment law, the employer is responsible for the safety of workers at the workplace. So, take the case where the employee is harassed by another employee and the employee has raised it with the employer in the form of a grievance, this employee is ill-treating me or is discriminating against me, and then that employer fails to act on that grievance. That mean to investigate and come back with the finding that yes, your case has merit, or no, your case doesn't have merit. That employee then has a right to come to the CCMA and then that employer will then face the music for what they failed to do regarding the complaint that they received. (Bekhi, In-Depth Interview)

## 7 HIV and AIDS and LGBT Workers' Rights

The ILO HIV and AIDS Recommendation, 2010 (No. 200) extends protections to LGBT persons and other key groups. And in many countries HIV and AIDS issues and LGBT issues become interlinked, often negatively whereby they become conflated, leading to double discrimination. This has been found to be the case in some other countries where the ILO has undertaken research on LGBT workers' rights, most notably in Hungary and Argentina. Conversely, research, advocacy and policy dialogue on HIV and AIDS can and has served as a valuable entry point to raise LGBT rights in the workplace and elsewhere, as was the case in Western Europe and North America in the nineteen-eighties.

In South Africa, the framing of HIV and AIDS is not seen as a substantial entry point in relation to dialogue around LGBT issues. While there is a national HIV and AIDS strategic plan that offers clear links to LGBT issues, HIV and AIDS was mentioned by very few participants in the in-depth interviews and focus group discussions and this link was rarely, if ever, made in existing policy documents. One exception to this were the mining companies, which had strong HIV and AIDS policies and programmes and, in interviews with participants from the mining sector, HIV and AIDS emerged much more clearly as a focus.

This is in many respects an unexpected finding of the research as the HIV pandemic is of pressing and immediate concern in South Africa and directly affects the labour market. South Africa has some of the highest rates of HIV infection in the world, with an estimated 6.3 million people living with HIV in 2013. In the same year, 200,000 South Africans died from AIDS-related illnesses and there were 330,000 new infections. HIV prevalence runs at about 19 per cent of the population, with marked differences between regions, with almost 40 per cent prevalence in the province of KwaZulu-Natal. South Africa also has the world's largest antiretroviral treatment programme and spends approximately \$1 billion a year on HIV and AIDS programmes.

The national strategic plan 2012–2016 indicates key populations at risk of HIV transmission, including men who have sex with men. Challenges arise for LGBT people in attempting to gain access to healthcare services, as many healthcare providers continue to oppose homosexuality, which makes it more difficult for LGBT populations to disclose their sexuality or gender identities.

While the Department of Labour's original Code of Practice on HIV and AIDS did not specifically mention sexual orientation or LGBT persons, it made explicit reference to the 'prohibited grounds' against discrimination as covered by the South African Constitution and enforceable through the Labour Relations Act (LRA), The Employment Equity Act (EEA) and The Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA), and the Medical Schemes Act (MSA), reviewed above. These 'prohibited grounds' provide compelling arguments in jurisprudence for fighting for LGBT rights in the world of work. The Bill of Rights and its subsequent interpretation by the courts suggest that sexual orientation and LGBT rights are both explicitly and implicitly protected. It should be noted that these Codes of Good Practice

were influenced by the AIDS activism which characterized the South African HIV and AIDS landscape from the mid-90s (Mbali, M. 2005).

On 15 June 2012 the Department of Labour published the *Revised Code of Good Practice on HIV and AIDS and the World of Work*. The Code was revised to take into account the adoption of the ILO Recommendation 200, and was issued on the advice of the Commission for Employment Equity in terms of Section 54 (1)(a) of the Employment Equity Act, 1998 (Act No. 55 of 1998) (Government Gazette Republic of South Africa, 2012 p., 8). Under both the Labour Relations Act and Employment Equity Act, this Code encourages all employers to develop workplace programmes on HIV and AIDS (Department of Labour. 2000). The Code prohibits unlawful disclosure of one's HIV status without written consent. Key Principle (5.4) Gender Equality states that, "measures must be taken in the world of work to ensure gender equality, prevent violence and harassment, protect sexual and reproductive health and rights, and involve men and women workers, regardless of their sexual orientation, in the HIV response" (Government Gazette Republic of South Africa, 2012 p., 8).

## 8 Conclusions

While South Africa has taken a leadership role on LGBT rights internationally, and its Constitution specifically mentions sexual orientation and gender identity as a prohibited ground for discrimination, its non-discrimination legislation lacks explicit references to LGBT persons. Furthermore, implementation of non-discrimination provisions is very low. While the policy context in South Africa is generally favourable towards minority inclusion and non-discrimination, participants in the study repeatedly highlighted the lack of any tangible implementation of affirming policy.

LGBT workers in South Africa face workplace discrimination and exclusion despite constitutional and legislative protections. Some collective bargaining agreements, albeit few in number, are also in place but these appear to not filter down into the day-to-day experiences of LGBT people in the workplace. As a result, participants in the present study reported widespread discomfort – if not outright hostility – on the part of fellow employees and employers. Employers are mostly ignorant to how best to foster LGBT inclusion in the workplace and about how best to prevent and stop discrimination when it occurred.

The lesbian, bisexual and gender-alternative women in this study were discriminated against on the grounds of both their sexual orientation and their gender expression, which included their dress and appearance. They were incorrectly perceived as less skilled and less prepared for their jobs and were often denied employment simply on the basis of their sexual orientation and gender expression. As a result, they had sometimes given up searching for work, lost their jobs or worked in environments that had become dangerous.

The productivity, opportunities for career progression and ability to contribute as active and respected members of the workforce were severely compromised. Despite the availability of same-sex marriage in South Africa, participants' personal lives and the particular demands that they involved were routinely ignored, dismissed or denigrated. Participants in the study were clear about the ways in which they were excluded from social protection programmes, discriminated against in employment and promotion and excluded from participation in the workplace more generally. Paradoxically, given that LGBT people are more vulnerable to sexual violence and harassment both in the workplace and more broadly in society, participants were often wrongly accused of sexual harassment. Due to the pervasiveness of discrimination based on sexual orientation and gender identity South African workplaces, few LGBT persons choose to come out to their colleagues.

The study also noted that transgender people faced specific challenges relating to transphobic work environments, lack of information on rights of transgender persons and difficulties obtaining legal representation. The study also noted that intersections between gender, age, sexual orientation and gender identity and race put young, black LGBT women at particular risk of discrimination.

Furthermore, the framing of HIV/AIDS is not a substantial entry point in relation to dialogue around LGBT issues. This was a surprising finding and perhaps differentiates the South

African context from others globally. While there is a national HIV/AIDS strategic plan that offers clear links to LGBT issues, the framing around HIV/AIDS was mentioned by very few participants in the In-Depth Interviews and focus group discussions and this link was rarely if ever made in the existing policy documents.

Government, trade unions, employers and civil society all have key roles to play in the transformation of our workplaces into safer, more inclusive and more egalitarian spaces for all workers. Despite most employer's ignorance towards the challenges facing LGBT employees, this study identified three employers represent best practices for LGBT inclusion.

## 9 Recommendations

A number of key recommendations emerged from the findings of the study, based on the core research questions: these related to the need to change laws, policies and practices; the need for education and training; the development of LGBT leadership; submission by ILO of an LGBT policy to NEDLAC; and other specific issues. There were also recommendations that were specific to different sectors.

### **Need to change laws, policies and practices**

Given the gaps and weaknesses in existing policy and practice, there is an urgent need to address gaps in existing legislative and policy frameworks relating to LGBT rights. In this regard, two focuses are needed: first, on broad strategies, such as what would it mean to educate and raise awareness and in turn influence policy; and, second, on the specific issues that need to be addressed in workplaces. These two focuses are interrelated.

### **Need for education and training**

Given the clear lack of information among all stakeholders in relation to LGBT issues, there is an urgent and pressing need for training and further information for a wide range of stakeholders on LGBT workplace rights. This would include a wide variety of different educational interventions, ranging from broad dialogues, diversity workshops, to work on mainstreaming LGBT issues in existing programmes. These educational interventions need to be sector-specific and site-specific, and to take full account of the realities of particular workplaces and of local understanding of LGBT issues.

### **Development of LGBT leadership**

Findings from the study indicate a clear openness towards LGBT workplace rights. The lack of leadership in furthering LGBT workplace rights in South Africa, however, is evident and, in consequence, there is a need for coherent and concerted programmes to develop awareness of LGBT issues and foster leadership in this area, either among LGBT people themselves or their allies. This applies to all sectors, including trade unions, the Government and businesses. This process could include, but is not limited to, dialogues and leadership awareness-raising, as is the case in one of the good practice case studies.

### **Submission by ILO of an LGBT policy to NEDLAC**

Given the key role of NEDLAC in terms of furthering LGBT workplace rights, it is recommended that ILO submit an LGBT policy for discussion by NEDLAC. Momentum is already building with the unions in favour of LGBT workplace rights, as witness the recent mainstreaming of LGBT issues in COSATU policy.

### **Specific issues**

Some specific LGBT workplace issues that require attention include the following:

- Benefits such as maternity protection for both lesbian partners and paternity for those who are taking on the father role

- Recognition of same-sex couples for the purposes of family responsibility leave
- Introducing inclusive facilities, such as bathrooms
- Educational programmes for staff
- HIV/AIDS awareness and well-being programmes to include an LGBT focus
- Sexual harassment to include all forms of harassment, including same-sex harassment
- Media advertisements to include the LGBT community
- President to include LGBT issues in the state-of-the-nation address
- Need for collective agreements in unions to be sensitive
- Need for LGBT policy formulation and implementation of specific LGBT issues
- Safe-space campaigns including posters
- Inclusive human resource policies
- Clear anti-discrimination policies in the workplace
- Information dissemination in relation to LGBT rights
- Inclusion of LGBT in the decent work plans of South Africa and other African countries
- Implementation of COSATU's inclusive policy
- Inclusion of LGBT in collective bargaining negotiations at the workplace level and in resolving specific sectoral issues

Emerging from the findings and the core research questions are also recommendations for specific sectors:

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## Appendix

### **COSATU resolution**

#### **Sexual orientation and hate crimes against gay, lesbian and transgendered people<sup>11</sup>**

##### **Noting that:**

1. Over the past 10 years there has been an upsurge of hate crimes against gay, lesbian and transgendered people in South Africa and internationally;
2. These hate crimes are part of a toxic family of discriminations (racism, sexism, homophobia, xenophobia, islamophobia, etc.) that if left to fester will be used to divide the working class;
3. The recent decapitation of a gay man in the Northern Cape and the attack on a young woman who kissed her partner in the Carlton Centre are just the tip of the iceberg;
4. Rape and murder of lesbian women is increasing in our communities;
5. Only 1 in 9 rapes are reported in South Africa;
6. Homophobia is rife in our society and workplaces;

##### **Believing that:**

1. All people should be free to live their lives as they choose without fear of attack and that the right not be discriminated against on the basis of sexual orientation; is enshrined in South Africa's Constitution;
2. COSATU should be a champion of these rights;
3. There is a need to arm shop stewards and leaders with the tools and consciousness to be able to address these forms of discrimination at workplace level;
4. COSATU must develop a coherent campaign throughout the affiliates on this issue;

##### **Therefore resolves to:**

1. Call upon Government to take a firm stand on the rights of lesbian, gay, bisexual, and transgender (LGBT) people and in particular to speak out unequivocally against hate crimes in our communities;
2. Demand that Government holds accountable any political figure who encourages the idea that LGBT people are not normal and should be deprived of rights;
3. Demand that Government brings legislation before parliament dealing with hate crimes;
4. Demand that the police and magistrates be sensitized to these issues and be trained to deal with victims;
5. Demand that the National Hate Crimes Task Team set up to deal with hate crimes against LGBT people and set up by the Ministry of Justice and Constitutional Development in May 2011 is properly funded and becomes a campaigning body and not just a talk-shop;
6. Develop a COSATU strategy and campaign document to ensure that no member of any affiliate is unable to declare his/her sexual orientation;
7. Develop education strategies aimed at combating homophobia and discrimination on the basis of sexual orientation;

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<sup>11</sup> Available from: <http://www.cosatu.org.za/show.php?ID=9061>.

8. Reach out to organizations in the LGBT sector and other organizations which have taken a stance on hate crimes as a way of implementing the above resolution.