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The Technical Committee on Fundamental Rights
During the Transition
Negotiating Forum
World Trade Centre
Kempton Park

Dear members of the Technical Committee

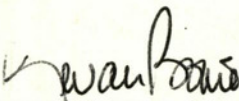
SCOPE AND LIMITATIONS OF THE TERM 'SEXUAL ORIENTATION'

The enclosed submission is made as a result of the reservations expressed by the Minister of Justice on the scope and application of the term sexual orientation during the Negotiating Council meeting on Thursday, 7 October 1993.

The reservations expressed by the Minister have been taken up by the Equality Foundation and the Deputy Minister this morning informed me that the objection would not be pursued by the Justice Department. This submission is therefore made as a courtesy to the Technical Committee, informing them of the representations which have been made in the interim and in order to assure you that the term has a recognised and limited legal reference.

We trust that the Technical Committee accepts these submissions as resolving any doubt amongst the negotiating parties as to the precise definition of the term. Should you require any further assistance please contact me directly.

Yours faithfully


KEVAN BOTHA

SEXUAL ORIENTATION : DEFINITION, SCOPE AND LIMITATIONS

1. Introduction

- 1.1. The Tenth Report of the Technical Committee of Fundamental Rights During the Transition enumerates various conditions which are protected from unfair discrimination. Included in this enumeration is the term *sexual orientation*. The majority of negotiating parties have agreed on this formulation as the terminology employed in protecting the right to equality for heterosexuals, bisexuals and homosexuals.
- 1.2. However, it has been brought to our attention by the National Party that the Minister of Justice may have a reservation that the term might, by definition, include bestiality, paedophilia and sex with imbeciles and idiots. The Minister has, through his private secretary, subsequently confirmed this reservation.
- 1.3. As a result of the Minister's concern we have addressed this memorandum to the Minister of Justice and the Deputy Minister of Justice in order to allay that fear. After consideration of the scope and limitations of the definition and reference to its use in other jurisdictions we are confident that sexual orientation does not include these activities and is restricted only to the sexual orientation of heterosexuals, bisexuals and homosexuals.
- 1.4. Subsequently we have been advised by the Deputy Minister that the Ministry of Justice is now satisfied that sexual orientation does not include bestiality, paedophilia or sex with imbeciles and idiots and that the original objection would not be pursued. However, in the light of the fact that this reservation has been raised with the Technical Committee we consider it prudent to advise you of the content of our submissions to the Minister and to assure the Technical Committee of the precise legal meaning attaching to the term sexual orientation. The enclosed representation is therefore intended as background information for members of the Technical Committee.

2. Sexual Orientation: the legal meaning of the term

- 2.1. Despite diligent search we have been unable to find a single instance in any jurisdiction employing the term *sexual orientation* which includes in the definition of sexual orientation paraphilia activities such as zoophilia (bestiality), paedophilia (sexual activity with minors) or sex with imbeciles and idiots. Our own research indicates that sexual orientation is the preferred terminology and is consistently employed in numerous

jurisdictions to describe only the sexual orientation of heterosexuals, bisexuals and homosexuals.

- 2.2. In most jurisdictions where the rights of gays and lesbians to equal protection of the law are defined the term sexual orientation is used. The term appears in the statutes of 23 States in the United States of America. In the case of all of these statutes, sexual orientation is understood as embracing an orientation for or being identified as having an orientation for heterosexuality, bisexuality, or homosexuality.
- 2.3. In the Canadian case of Haig v Birch¹ the omission of sexual orientation from the list of proscribed grounds of discrimination in s3 of the Canadian Human Rights Act was considered. The Court held that sexual orientation had to be read in, in interpreting the protected conditions, it being an analogous ground of discrimination. The Court accepted that sexual orientation referred in the context of the case to the homosexual orientation of the applicant. In Douglas v Canada² the homosexual orientation of a lesbian officer in the Canadian Armed Forces is accepted without comment as falling within the parameters of sexual orientation as protected in the Canadian Human Rights Act.
- 2.4. There is thus no suggestion whatsoever in the North American case law or statute law that sexual orientation refers to anything other than heterosexuality, homosexuality and bisexuality.

3. **Scope and limitations of the term sexual orientation**

- 3.1. Before any meaningful interpretation of sexual orientation as a legal construct can be undertaken it is necessary to examine the scope of the term as it applies to the sexual identity of people.
- 3.2. The sexual orientation of an individual is not merely a description of the preferred gender of his or her sexual partner or an indication of preferred erotic activity. Sexual

¹ 10. C.R.R. (2d) 287.

² 12 C.R.R. (2d) 284.

orientation is a matter of identity. This embodies both personality and individuality.³ Identity is not synonymous with gender.⁴ Gender differentiates the male and female physiological attributes. These are generally inherited. Identity, on the other hand, relates to gender only in so far as the male or female physiology is incorporated into the psycho-social structure of the individual.⁵ The term sexual orientation embraces both gender and identity. This is described by Isaacs and Miller⁶ in the following terms:

"Homosexuality is seen as a broad spectrum of psychological, emotional and sexual variables in a state of interplay between two people of the same gender. Homosexuality is not only sex attraction between two people of the same sex, but also includes (i) the emotional as well as physical bond, (ii) a fantasy system, and (iii) an element of symbolism, eroticism and sexuality. Homosexuality can be experienced in different degrees."

This definition of the scope of sexual identity, or orientation is no less true of the emotional and physical bonds, fantasy systems, eroticism and sexuality inherent in heterosexual or bisexual orientation.

- 3.3. Compelling scientific and medical empirical evidence supports the contention long held by the gay community that same-sex intimacy is indivisible from an individual's identity. This contrasts vividly from the traditional belief that intimacy, or desire, and identity were separable. Today, most professionals support the concept of sexual orientation in that the gender of those to whom one is attracted is a function of personality and identity.⁷
- 3.4. The term sexual orientation thus denotes both heterosexuality and homosexuality. But sexual orientation usually only becomes an issue for those not in the majority⁸. Traditionally therefore, sexual orientation has concentrated on same-sex sexual

³ Isaacs & McKendrick *Male Homosexuality in South Africa, Identity Formation, Culture and Crisis*, Oxford University Press, 1992 at p5.

⁴ Hart J, *Social Work and Sexual Conduct*, London: Routledge and Kegan Paul.

⁵ Isaacs, *ibid.*

⁶ Isaacs G and Miller D, *AIDS - its implications for South African Homosexuals and the Mediating Role of the Medical Practitioner*, South African Medical Journal, 68, 327-30.

⁷ Harvard Law Review, Vol 102 (1989) *Sexual Orientation and the Law*, 1511.

⁸ *Sexual Orientation and the Law*, *ibid* 1511 note 1.

orientation. It is the existence of minority sexual orientation, with the concomitant discrimination as a result of this differentiation which provides the rationale for the inclusion of sexual orientation as a protected condition in the equality clause of a bill of fundamental rights. There may therefore be a notional misdirection that sexual orientation applies only to gay and lesbian orientations; by definition it includes also the majority sexual orientation and the inclusion of such protection will be equally applicable to heterosexuality as it will to bisexuality and homosexuality.

- 3.5. Over time numerous terms have been used to describe homosexuality as distinct and different from heterosexuality. Traditionally the term "homosexual", with its scientific and medical connotation, is typical of the "illness" approach to sexual orientation⁹. Most adherents to the concept of sexual orientation as neutral difference prefer the unpejorative terms "gay" or "gay and lesbian". Some, particularly those who see sexual orientation as a social construct, use "gay" as an adjective, viewing the use of the word as a noun as implying that being gay is the most important characteristic of the individuals so described.¹⁰
- 3.6. The law in South Africa has been less concerned with homosexual identity than with homosexual conduct. But social discrimination at large occurs principally on the basis of what people perceive as categories of sexual orientation. In other words, men and women are discriminated against not only because they perform sexual acts with others of their own gender, or because they accept for themselves the labels 'gay' or lesbian, but because they are perceived as likely or disposed to perform homosexual acts - even if in fact they never do. Discrimination therefore reaches well beyond the self-conscious

⁹ Sexual orientation as it applies to homosexuality has traditionally been defined in one of four terms:

- the "sin" conception views homosexual acts as immoral and wrong; this conception does not ascribe to the view of homosexuality as an intrinsic part of identity;
- the "illness" conception which also views homosexuality negatively; this framework however sees it as part of the affected individual's personality, albeit a potentially curable component;
- the "neutral difference" conception, like the illness approach, embraces the concept of sexual orientation as identity but views it merely as a difference that should not be a basis for discriminatory treatment;
- the social construct conception rejects categorising individuals by sexual orientation and views same-sex acts and relationships as not materially different from opposite-sex ones.

The vocabulary one uses in discussing or defining sexual orientation issues, and even the fact that it is necessary to discuss and enumerate them as a protected condition, implicates one of these four viewpoints. *Sexual Orientation and the Law*, 1512. See also Cameron *Sexual Orientation and the Constitution: A Test Case for Human Rights* 110 SALJ 450 at 452 where he notes that "'homosexual' is seen as condescending because its use elevates a defining characteristic (sexual attraction and sexual functioning) to an exclusive basis of definition."

¹⁰ *Sexual Orientation and the Law*, ibid 1512.

categories of orientation.¹¹

- 3.7. *Sexual orientation* implies that the gender of an individual's partner is part of that individual's identity and not a matter of choice, whereas *sexual preference* does not.¹² In addition sexual orientation reinforces the facts of non-volition and immutability¹³ inherent in heterosexual, bisexual and homosexual orientations. On the other hand sexual preference ascribes to the erotic activity an element of volition, choice, immediacy, predilection and preference, which may change according to the erotic motivation at a particular time, irrespective of the orientation of the individual.
- 3.8. In our submission sexual preference has a broader meaning than sexual orientation and it is perhaps the term sexual preference which would encompass the reservations alluded to by the Minister. For that reason we recommend the retention of the term *sexual orientation* as the correct legal description of the category of discrimination which the bill of fundamental rights seeks to protect.
- 3.9. The terms *sexual orientation*, *homosexual orientation* and *heterosexual orientation* have already received judicial recognition in a recent unreported judgment of the Cape Supreme Court¹⁴ where two senior judges stated that-

"What, in my view, also renders the criminalisation of consenting, adult, private, homosexual acts particularly repugnant is that the free mutual expression of erotic attraction between adult members of the same sex is proscribed even though such orientation may indeed be immutable. There are cases in our Courts where it has been accepted that, in particular cases, homosexual orientation is congenital and that it might well-nigh be impossible to change such orientation."¹⁵

"... there appears to be a growing body of psychological opinion that

¹¹ Cameron *ibid* at 452.

¹² *Sexual Orientation and the Law*, 1512 at note 6.

¹³ Cameron E, *Sexual Orientation and the Constitution : A Test Case for Human Rights*, 110 SALJ 450 at 460. Recognition of the immutability of sexual orientation has been recognised in our case law; see *R v K*, referred to in *R v C* 1955 (2) SA 51 (T) 52-3, *S v S* 1965 (4) SA 405 (N) at 409.

¹⁴ *S v Hugo*, unreported case No. 93/03046, (CPD) delivered on 6 September 1993.

¹⁵ at p21 of the typed judgement.

such [homosexual] orientation is immutable and a product of psychological or genetic factors. Whilst immutability of homosexual orientation would make the criminalisation of adult, private, consensual homosexual acts even more undesirable, this does not detract from the broader and more fundamental consideration, already alluded to, that principles of equality, privacy, autonomy, and the absence of public harm militate strongly against criminal proscription of such acts."

"...this of course depends on the context in which the privacy argument is employed. It is certainly relevant in the field of the criminal law where, even in the case of heterosexual orientation, a limit is placed on the public expression of eroticism. Considerations of equality, however, would demand that no greater limitation be placed on homosexual erotic expression than on heterosexual erotic expression."¹⁶

- 3.10. Significantly, the learned judges make the following qualifications with reference to homosexual orientation-

"I would stress that this judgement deals solely with the case of homosexual acts performed in private by consenting male adults"¹⁷ (emphasis in the original).

"One possible qualification needs to be mentioned. This judgement deals only with the position in society as it normally functions. There may be special situations where a legitimate societal interest might justify a different view being taken of private sodomy, even between consenting adults. The position of prison inmates comes to mind. There may well be others."

- 3.11. The employment of the term sexual orientation in the bill of fundamental rights will therefore not apply beyond the scope of the definition set out in paragraph 2.1 above.

- 3.12. Compelling reasons for the exclusion of paraphilias from the definition are:

3.12.1. the proposed equality clause¹⁸ in the bill of fundamental rights refers to the protection against unfair discrimination. This limits the category of

¹⁶ at page 22.

¹⁷ at page 25.

¹⁸ Clause 8 of the proposed Bill of Fundamental Rights, Tenth Report of the Technical Committee on Fundamental Rights During the Transition, 5 October 1993.

discrimination to a value judgement which may be interpreted by the Courts. As demonstrated in the *Hugo* case, our judges are sensitive to the limitations of consensual sexual conduct.

- 3.12.2. the limitations clause¹⁹ allows for the limitation of the protected conditions enumerated in the equality clause, by law of general application, to the extent that it is reasonable or justifiable in an open and democratic society based on freedom and equality; in no jurisdiction displaying the criteria of an open and democratic society are bestiality, non-consensual sex (as with imbeciles) or paedophilia tolerated or sanctioned.
- 3.12.3. the legitimate interests of society referred to by the Cape judges will therefore still acquire judicial relevance and recognition in a constitutional state and may be taken into consideration in determining the extent of protection afforded by a protected condition.
- 3.12.4. The paraphilias referred to by the Minister, in contradistinction with heterosexuality, bisexuality and homosexuality, are considered pathological in psychiatry.²⁰ This is another compelling reason for the natural exclusion of these behaviours from any notional broadening of the term sexual orientation. In psychological terms non-pathology would require the elements of erotic activity with (i) consenting, (ii) human, and (iii) adults as definitive. Any conduct where one of these three elements is not present would render the erotic activity pathological and therefore unlikely to survive judicial scrutiny in a constitutional state.
- 3.12.5. the elements of 'consensual' and 'adult' in relation to sexual behaviour have gained recognition in our case law and the criteria for consent is a matter of evidence; crimes constituting a malum in se and where consent is absent or impossible to obtain or where a victim is present cannot be said to be reasonable and acceptable in an open and democratic society or to fall within

¹⁹ Clause 34 of the proposed Bill of Fundamental Rights, Tenth Report of the Technical Committee on Fundamental Rights During the Transition, 5 October 1993.

²⁰ Diagnostic and Statistical Manual (DSM III) of the American Psychiatric Association, 1980.

the parameters of adult consensual behaviour.

3.12.6. Just as the protection the equality clause gives to 'religion' will not permit ritual sacrifice, or the protection to 'race' a racist murder, so too according protection to 'sexual orientation' will not legitimate deviant, abusive or otherwise legally repugnant conduct.

3.13. *Sexual orientation* as a terminology used in the proposed bill of fundamental rights has the distinct advantage of-

3.13.1. recognition within the statutes of other jurisdictions, without any expansionist definition beyond heterosexual, homosexual and bisexual orientations;

3.13.2. existing reference and limitation in our own case law;

3.13.3. neutrality and equality because the concept includes heterosexuality, bisexuality and homosexuality as the protected non-discriminatory conditions;

3.13.4. correctly incorporating the concepts of personality, identity and erotic intimacy without any secular, theological or medical bias concentrating only on sexual behaviour.

4. Conclusion

Accordingly we submit that the term *sexual orientation* does not include and will never be suggested or interpreted to include bestiality, paedophilia or sex with imbeciles or idiots. Sexual orientation has a definite legal meaning already received into South African case law and recognised by statutory and judicial sources in other jurisdictions. In our respectful submission there are thus no substantive objections in supporting its inclusion in these terms in the proposed bill of fundamental rights.


KEVAN BOTHA

for the Lawyers Committee of The Equality Foundation