

GAY AND LESBIAN ORGANISATION OF THE WITWATERSRAND

P.O.Box 23297
Joubert Park 2044
Johannesburg
South Africa



G.L.O.W.

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FAX: 397-2211

TO: CODESA
WORKING GROUP 1

Hereby is a submission to Working Group
1 - constitution submissions
from G.L.O.W.

Johan Sam
Gen. Secretary.



ILGA

MEMBER OF INTERNATIONAL LESBIAN & GAY ASSOCIATION

PROPOSAL FOR THE INCLUSION
OF LESBIAN AND GAY RIGHTS IN A NEW CONSTITUTION

1 INTRODUCTION

- 1.1 In response to a request by the CODESA the Gay and Lesbian Organisation of the Witwatersrand (GLOW) submits the following proposal for the protection of the rights of gay, lesbian and bisexual people in a new constitution.
- 1.2 GLOW wishes to point out that it, and other gay and lesbian organisations, are presently in the process of gathering opinions of members of the gay community regarding the discrimination they experience, and their suggestions for specific provisions, legislation and protection need to protect their rights. This process is a difficult one, in large part because of the silence in which the community has enclosed itself as a result of the legal and social prejudice in this country. This document is therefore not necessarily fully representative of all lesbian and gay opinion in South Africa. Nevertheless, the major points made in support of our submission are generally agreed upon in the gay and lesbian community.
- 1.3 The terminology used in this document is as follows. Homosexual, gay or lesbian people are those attracted towards members of their own sex. The first two of these terms refer to either men or women; the third is used only for women. Bisexual people are those who feel attraction for members of either sex. The terms gay, lesbian and bisexual are generally preferred by such people, and are therefore used in this document.
- 1.4 Lesbian, gay or bisexual people may or may not choose to express their sexual orientation or preference openly. If they do, they may do so in a variety of lifestyles. We do not believe that the specifics of these lifestyles have any bearing on the following submission. We seek recognition and protection for all lesbians, gay men and bisexuals, and the opportunity for them to follow any existing or other lifestyle they may choose.

2 SUBMISSION

- 2.1 We submit that any new South African constitution or bill of rights should include a clause expressly forbidding discrimination against people on the basis of their sexual orientation.
- 2.2 As a result, legal provisions - some of which are described below - which discriminate against lesbians, gay men and bisexuals would need to be repealed.
- 2.3 In addition, many of the practises we mention as examples of discrimination against lesbian and gay people would

become illegal, and would either naturally disappear or be prohibited by the courts.

- 2.4 In the sections which follow, we set out arguments in support of the inclusion of a clause in a future Constitution or Bill of Rights outlawing discrimination against people on the basis of their sexual orientation. In addition, we detail the nature and extent of the discrimination which lesbians, gay men and bisexuals are currently subjected to, and which would to some measure be countered through the introduction of such a clause.

3 ARGUMENTS FOR THE PROVISION OF GAY RIGHTS

- 3.1 It is the belief of most experts that homosexuality is a natural variant of human sexual behaviour. Discrimination on the basis of sexual orientation has no basis, then, in a just legal system.
- 3.2 A new dispensation would, we believe, be fundamentally committed to the principle of freedom of choice where such choice does not harm another member of society. The choice to follow a gay or lesbian lifestyle is fundamentally one of private choice, and the government ought not, therefore, to restrict it.
- 3.3 The major harm that society experiences in this regard is not homosexuality but homophobia, that is, discrimination and hate directed against gay and lesbian people. A just legal system would attempt to destroy this phenomenon.
- 3.4 We submit that the inclusion of a right to privacy in a new constitution would not be adequate to protect the rights of lesbian and gay people. Although such a right would protect sexual activity in private, lesbian and gay people are discriminated against in many other spheres, as described below. In addition, while there already exists, to a degree, a de facto right of privacy regarding private, consensual sexual activity, lesbian and gay people still experience many acts of discrimination against them in their daily lives.
- 3.5 We also contend that a clause outlawing discrimination in general would not adequately protect our rights.
- 3.5.1 Unless the constitution specifically mentioned lesbian and gay rights, it might be later argued in court that it was never intended to protect them. There is no reason not to mention specifically that the constitution will defend the rights of lesbian and gay people.
- 3.5.2 Furthermore, we believe that the rights of gay and lesbian people deserve explicit protection in a constitution just as, among others, the rights

of workers and women do, and which we believe, a future constitution should and will protect. Such groups have suffered persistent discrimination in the past, just as lesbian and gay people have. The new constitution ought to prevent the possibility of that this discrimination will continue.

4 GAY POPULATION

- 4.1 The Kinsey Report, an American study conducted in 1948 of human sexuality, widely accepted as the best such study so far, estimated that ten percent of the population was exclusively lesbian or gay.
- 4.2 Estimates of bisexual people range up to eighty percent of the population, although, clearly, many people choose not to act on their attraction towards members of the same sex. Kinsey reported that sixty-three percent of men and slightly fewer women reached orgasm in a same-sex encounter at least once in their adult lives.
- 4.3 Other studies have shown that the number of people openly living a bisexual lifestyle has varied immensely according to the prevailing norms. However, later research has confirmed the finding that ten percent of people are exclusively lesbian and gay people to be true historically and worldwide. Only the freedom with which lesbian and gay people have been able to express their sexuality and to live fulfilled lives in other spheres has varied according to the surrounding mores.

5 PRESENT DISCRIMINATION

The following examples of discrimination focus mainly on that discrimination perpetuated by the South African legal system and state practise. They do not exhaust the forms of discrimination which lesbian and people face. However, we submit that to eliminate these restrictions will destroy some of the major obstacles to a complete lesbian and gay lifestyle.

In addition, we contend that government efforts to reduce discrimination will prompt similar efforts in the private sector and in society in general.

We again submit that the guarantee of a right to privacy will protect only those rights discussed in paragraph 5.1V.A.

5.1 Legal discrimination

- 5.1.1 In general, present South Africa law penalises the behaviours associated with homosexuality, in preference to the condition of homosexuality per se. Although many of the relevant prohibitions

are contained in the common law, statutory law covers those areas where common law sanctions are absent.

- 5.1.2 Roman-Dutch and English common law consider homosexual acts illegal. Although an old tradition, it ought to be noted that this is the same legal tradition which once considered among crimes self-masturbation, ordinary sexual relations between Jews and Christians, and many of the following acts when committed between men and women. It is the same tradition which still classes homosexual conduct with bestiality.
- 5.1.3 South African common law separates homosexual conduct into "sodomy" and other "unnatural offences". "Sodomy" is considered anal intercourse between males. "Unnatural offences", never defined, seem to include mutual masturbation between males, masturbation of one male by another, and friction of one male's private parts against another, the latter presumably including fellatio.
- 5.1.4 "Unnatural offences" do not prescribe the gender of the participants; therefore the same or similar acts between two women could be considered criminal. However, there has never been a case of prosecution on this basis in South African courts.
- 5.1.5 We emphasise that the common law makes no distinction between acts committed in public places and those committed in private places. While prosecution for committing "sodomy" or an "unnatural offence" in a private place is rare, there have been prosecutions, and there may continue to be as long as the law exists. We also point out that these acts are crimes even when they are committed by willing participants.
- 5.1.6 Statutory law reinforces the sanctions against certain offences which would fall under the common law, and partly covers acts which may not.
- 5.1.7 Under Section 14(3)(b) of the Immorality Act 23 of 1957 any female who commits or attempts to commit an immoral or indecent act with a girl under the age of 19 years commits an offence. Such acts may be any form of sexual behaviour, including but not limited to those mentioned above. The law thus criminalises any lesbian sexual behaviour in which either one or both of the participants is under nineteen.

- 5.1.8 Under Section 14(1)(b) a man may not commit an immoral or indecent act with a boy under the age of nineteen years. However, it is a statutory defence that both participants were below nineteen.
- 5.1.9 We note that in heterosexual cases, that is those involving a man and a girl, or a woman and a boy, the age of consent is sixteen years.
- 5.1.10 Section 20A of the Immorality Act 23 of 1957, as amended, criminalises any act between males at a party calculated to stimulate sexual passion or to give sexual gratification. The first category would seem to include kissing, fondling and displaying one's sexual organs; the second, anything that induces orgasm. The courts have interpreted the phrase "at a party" to mean any gathering, anywhere, at which more than two people are present.

The vast majority of prosecutions against gay men take place under Section 20A of the Immorality Act. Convictions, resulting generally in the payment of a fine, number in the hundreds every year.

5.2 Arguments For and Against the Application of these Laws

- 5.2.1 Among the more recent arguments for the criminalisation of homosexual acts are that:
- 5.2.1.1 they negate the basic purpose of a sexual relationship, that is, procreation
 - 5.2.1.2 procreation is the basic instinct of the human species
 - 5.2.1.3 they have damaging effects on family life
 - 5.2.1.4 a man who indulges in such behaviour with other men would turn his attention towards boys, and a woman towards girls;
 - 5.2.1.5 the repeal of this legislation would result in unbridled license;
 - 5.2.1.6 they generally inspire the disgust of the public, and have always therefore been proscribed.
- 5.2.2 We submit that:
- 5.2.2.1 contraception also negates procreation, yet is not proscribed in law;
 - 5.2.2.2 a life of celibacy also hinders procreation, yet the monks, nuns and other celibates of various cultures receives high praise and sanction;

- 5.2.2.3 adultery is no less, if not more, damaging of family life, yet is no longer criminal; and that such considerations are based on a definition of "family" which we do not accept, and challenge below;
 - 5.2.2.4 studies have shown that the vast majority of paedophiles are heterosexual, even where their victims are of the same sex, and that the belief that gay and lesbian people seek to indulge their sexual behaviour with children is false;
 - 5.2.2.5 experience elsewhere and statistics suggest that the repeal of legislation creates no more lesbian and gay and people, and that it promotes no more sexual activity than already takes place;
 - 5.2.2.6 although there is much debate about the social acceptability of homosexuality, we submit that the law should not regulate what merely displeases but does not harm society.
- 5.2.3 In addition we would argue that the presence of these provisions in the common and statutory laws of our country no longer has a place in law for the following reasons:
- 5.2.3.1 They discriminate against the ten percent of the population who are exclusively lesbian or gay, the unknown number who feel equally attracted to members of both sexes throughout their lives, and against anyone else at such time that he or she acts on his or her feelings for a member of the same sex. In the present prevailing spirit of equality and non-discrimination in South Africa, these laws are an anachronism.
 - 5.2.3.2 Democratic modern states recognise that every human being has a fundamental right to privacy. Decisions about the human body fall within this realm of individual human privacy. This sphere must be allowed to operate without intrusion from the state.
 - 5.2.3.3 The consequences of criminalising homosexual conduct are deleterious. These laws create great misery and are impossible to police. They further bring the law into disrepute. Every practising lesbian or gay person breaches notional provisions of the criminal law every time he or she commits an "unnatural act". Many lesbian and gay people exist openly. There are gay bars in every major city in the country. There is a bi-monthly gay newspaper and gay culture is fairly openly shown and discussed in the mainstream media. In theory, if conspiracy and incitement laws were applied, all these activities would be criminal. The fact that this absurd situation persists cast shame on the law.

- 5.2.3.4 The criminalisation of some of the behaviours which spread AIDS and other sexually transmitted diseases suppresses the spread of information about ways in which these practises may be made safer. Furthermore, they discourage gay people from seeking help for an affliction that may have arisen from such practises. AIDS and STDs are by no means exclusively gay diseases, but the decriminalisation of homosexual acts would help eliminate the prurience and secrecy which hinder education aiming to make these practises safer.

5.3 Judicial Bias

- 5.3.1 A spate of recent court cases indicates the disturbing trend that homosexuality has been taken as both an extenuating and an aggravating factors, in neither instance to the benefit of the lesbian or gay person.
- 5.3.2 Courts have accepted that the advances of a gay person are a legitimate reason for self-defense. We find the prioritisation of outdated prejudices above human life to be abhorrent. We are disturbed that the homosexuality of the victim of a crime has blinded the courts to the nature of that crime. For instance, in one recent case in the Cape, the accused was acquitted of all charges, including related ones of robbery.
- 5.3.3 In other cases, homosexuality has been seen as an aggravating factor. Homosexuality is not paedophilia. Homosexuality makes paedophilia no worse than it already is. Furthermore, as noted above, gay men and women may be charged with paedophilia for committing a sexual act with a person between the ages of sixteen and nineteen, who, by the heterosexual definition are already consenting adults.

We argue that all cases of paedophilia should be treated, psychologically often, for what they are, and that they neither be tainted by the additional negative prejudices of the courts, nor that they taint the lives of ordinary lesbian and gay men and women by association.

- 5.3.4 The courts will not recognise, however, recognise prejudice against gay and lesbian people as an aggravating factor. One of the distressing and all too common realities of gay life in South Africa is "gay-bashing", that is, violence towards or even the murder of someone simply because she or he is lesbian or gay. We submit

that if the courts were prepared to condemn these cases for what they were, whatever deterrent effect sentences have might bring an end to this violence.

5.4 Police Bias

- 5.4.1 The police in particular are notorious for their prejudice towards lesbian and gay people.
- 5.4.2 This prejudice often dissuades gay and lesbian people from reporting crimes of which they are the victims, and, when they do, from providing all relevant information.

5.5 Government Discrimination

- 5.5.1 No branch of the South African government has an overt policy barring lesbian and gay people from employment. However, lesbian and gay people in the service of the state almost without exception are forced to hide and lie about their private lives. They experience daily anguish and, if discovered or suspected of being gay, are humiliated, harassed or fired.
- 5.5.2 Although we are not in possession of detailed information in this regard, we gather that personnel in upper reaches of the government, and especially in the foreign service, are subject to a security check. Homosexuality is invariably a disqualification.

Once again the reason for this discrimination has a weak foundation. It is argued that gay and lesbian people are more vulnerable to blackmail. However, if homosexuality were accepted by the state employers, lesbian and gay officials would be no more vulnerable than anyone else.

5.6 Discrimination in the Defence Forces

- 5.6.1 Although GLOW is opposed to the system of conscription, especially as it currently exists, we acknowledge that as long as it does exist approximately ten percent of the conscripts will be gay and subject to the harassment noted below.
- 5.6.2 Discrimination in the Defense Forces is not limited to servicemen, but is faced by a substantial number of members of the permanent force.
- 5.6.3 Examples of discrimination include the following:

- 5.6.3.1 Gay servicemen are regularly classified as G3, where they have no other "disability" besides their homosexuality.
 - 5.6.3.2 Gay servicemen are often, if informally, segregated.
 - 5.6.3.3 Men caught committing homosexual acts are court-martialled.
- 5.6.4 We submit that the major foundation of these practises has no strength. Gay men are often accused of harming morale in the defence forces. We submit that in countries where gay people are integrated into defence units this is not the case.

Where prejudice exists, as it does, this is often the result of ignorance. Where gay and lesbian soldiers are accepted, or where units are compelled to integrate them, ignorance and consequent prejudice have quickly disappeared.

Exactly the same arguments have been used against the acceptance of soldiers of different races. These arguments are no more acceptable or valid than those above ought to be.

5.7 Socio-legal Discrimination

- 5.7.1 The inability to form legally recognised unions, which would include but not be limited to the right to marry as it is currently understood, is among the most glaring restrictions facing lesbian and gay people. South African common law defines marriage as a contract between a man and a woman, a definition upheld by all legislation regulating marriage. Thus, gay and lesbian unions cannot, by definition, be lawful.
- 5.7.2 The inability to form legally recognised unions denies lesbian and gay people real benefits available to heterosexual couples. These include joint taxation, rights of inheritance, and rights to maintenance. Since we cannot list our partners as dependents or beneficiaries, in private schemes such as medical aid which require a married relationship, we cannot receive those benefits.
- 5.7.3 The legal recognition of gay and lesbian partnerships would help encourage the acceptance of those relationships by society in general. Such recognition might eliminate one of the

greater hardships in a lesbian or gay person's life, that is, the necessity to disguise and lie about one's private life to colleagues and acquaintances, to create a double identity. The relief which this change would bring about would at the very least boost the productivity of a large number people.

- 5.7.4 The recognition of lesbian and gay unions holds a number of benefits for society too, as does marriage. In particular, it promotes the stability of relationships, it encourages the formation of an settled lifestyle, and it fosters the development of an ordered community.

5.8 Parental Rights

- 5.8.1 Although in law often not prohibited, in practise it is difficult for a lesbian or gay person to receive the benefits extended to heterosexual parents.
- 5.8.2 The courts tend to accept the argument that a person's homosexuality may be a reason not to grant custody of a child to that person. Such judgements apply no less in divorce cases as in cases that assign parental rights to unmarried parents.
- 5.8.3 Unmarried mothers may not receive artificial insemination. This policy clearly excludes lesbians, even those involved in a long-term relationship.
- 5.8.4 A host of administrative decisions and practises have made it impossible for a lesbian or gay person legally to become a non-biological parent, that is, to adopt or foster children.
- 5.8.5 Section 17 of the Child Care Act 74 of 1983 states that the "consent of the Minister" is required in the case of a single person who wishes to adopt or foster a child. Section 18(4)(b) of that Act states that such a person must be "of good repute" and "fit and proper to be entrusted with the custody of the child". "The Minister" and adoption agencies have never found a lesbian or gay person to be a "fit and proper" parent, on the ground of their homosexuality.
- 5.8.6 The most common arguments against lesbian and gay parents are that:
- 5.8.6.1 lesbian and gay people may sexually

- abuse the child
- 5.8.6.2 a lesbian and gay parent may unduly influence a child to become homosexual
- 5.8.6.3 the children of gay or lesbian parents experience great humiliation and prejudice from their peers
- 5.8.7 To these arguments we respond as follows:
- 5.8.7.1 We repeat and emphasise that homosexuality is completely different from, and should in no way be connected with paedophilia. To do so is to perpetuate a false, damaging and insulting myth.
- 5.8.7.2 The influence of a parents sexual orientation on that of his or her children is still unknown. Overseas studies have shown that the children of lesbian or gay parents are no more likely to become homosexual than those of any others. Furthermore, we submit as proof of the irrelevance of one's parents' sexuality the fact that the parents of almost all lesbian and gay people are heterosexual.
- 5.8.7.3 While gay parents are extremely concerned about the prejudice their children may face. The prejudice of children exists, yet it is largely the result of ignorance. Children taunt one another for any number of reasons, no one of which is any better or worse than another.
- 5.8.7.4 Experience elsewhere has shown that the role model of gay foster parents can be extremely beneficial in cases where a child already knows that he or she is gay or lesbian, a not altogether uncommon occurrence with older foster children.
- 5.8.8 Therefore, we argue that the fitness of lesbian and gay people to be parents ought to be judged as that of any others. That is, whether they are loving, supportive, and have the financial and material means to support a child. We contend, moreover, that such evaluations be considered whether the prospective parents are single or a couple.

5.9 Discrimination in Employment

- 5.9.1 Many companies refuse to hire lesbian and gay people or fire them once their sexuality becomes known.
- 5.9.2 At the very least, this discrimination forces lesbian and gay employees to hide their sexual orientation, to lie about or disguise their private lives.
- 5.9.3 More significantly, it is simply unfair to people who are as capable and productive as any others.
- 5.9.4 Furthermore, openly lesbian and gay couples do not receive the benefits extended to married couple, such as dependent health plans, nor can a partner become the beneficiary of a pension scheme, or life assurance plan. The detriment of these policies is discussed above.
- 5.9.5 We submit that this discrimination has no economic or institutional benefit. It causes much grief and harm, to the employees and to the economy which loses their capabilities. It also has no place in society committed to eliminating discrimination

5.10 Health and Welfare Discrimination

- 5.10.1 Medical insurance may be denied to a person on account of his or her sexuality, often discovered because he or she has taken the sensible precaution of being tested for HIV.
- 5.10.2 As mentioned above, partners of lesbian and gay people may not be listed as dependents on medical aid schemes. Again, this preclusion often forces people to depend on the already stretched resources of the state health system.
- 5.10.3 In large part because AIDS is identified in the public mind as a gay disease, lesbian and gay people suffer severe discrimination at the hands of the health services. Lesbian and gay people are routinely and automatically are suspected of having AIDS. They are consequently treated in a hostile manner, or refused treatment.
- 5.10.4 In addition, lesbians and gay men with AIDS will not be treated by the state health system. While we acknowledge that the health services are over-taxed, we do not feel that a person's sexual orientation is a fair basis for exclusion from them.

5.11 Discrimination in Prisons

- 5.11.1 A recent NICRO study shows that gay prisoners are routinely raped or harassed by their fellow prisoners. They are forced to provide sexual services against their will, because, since they are gay, it is assumed they enjoy it. We submit that rape is not enjoyable to anyone. Because of the bias of the prison authorities, this abuse is ignored.

5.12 Education

- 5.12.1 Homosexuality may not be discussed in classrooms, even as sex education and AIDS education are becoming accepted and integral parts of the curriculum.
- 5.12.2 The major argument against the explanation of homosexuality and its presentation as a valid lifestyle option is that to do so might encourage students to become lesbian or gay.
- 5.12.3 We submit that:
- 5.12.3.1 exposure to homosexuality has very little influence on people's sexuality. While there are many accepted theories about the origin of homosexuality, the presentation of facts regarding homosexuality is not one of them.
 - 5.12.3.2 We admit only that the presentation of homosexuality in schools will lead to more people accepting and living openly with their sexual orientation. Given the extreme pressure and confusion that most gay and lesbian people feel as adolescents and adults, such a result, we submit, would be most beneficial.
 - 5.12.3.3 Studies have shown that as many as one in five teenage suicides is related to the victim's homosexuality. Such figures betray a crisis situation which must be tackled as quickly and effectively as possible.

5.13 Censorship

- 5.13.1 Gay literature and magazines, even those that cannot be regarded as pornographic in any way, are subject to a large degree of censorship.
- 5.13.2 The relaxations of the past few years are intended to change this situation. We are unsure

whether booksellers have tried and failed to import such literature, or whether they have simply not tried. However, as long as such literature is not explicitly allowed, we contend that the losses censorship practises have imposed in the past does not encourage booksellers to try to import it.