

**Brief supporting Evidence Report 7**

# A PROGRESSIVE CONSTITUTION MEETS LIVED REALITY: SEXUALITY AND THE LAW IN SOUTH AFRICA

**Sexuality, Poverty and Law**

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This paper focuses on homophobic hate crimes in South Africa, and how such crimes are dealt with by the legal system. In the South African legal context hate crimes are not yet recognised as a specific category, but lesbian, gay, bisexual, transgender, queer or intersex (LGBTQI) activists have used the hate crime label to refer to acts of violence 'motivated by prejudice or hatred' (Harris 2004: 12). Significantly, hate crimes are seen as 'message crimes' that affect not just the individual victim, but also the community or category to which that victim is seen to belong. The South African Hate Crime Working Group identifies four types of hate crime documented in South Africa: xenophobic violence; violence based on sexual orientation or gender identity bias; racist violence, and antireligious vandalism.<sup>1</sup> This paper looks only at violence based on sexual orientation or gender identity bias. Through the accounts of two particular cases of hate crime – the severe assault of a young gay man and the murder of a young lesbian woman – we examine what can be learned from LGBTQI activists' use of the law to hold the state to account and what gaps their interventions identified, in both legislative and policy provisions.

The equality clause in the Bill of Rights of the South African Constitution enacted in 1994 asserts the right to non-discrimination on the basis of sexual orientation. This clause set the stage for a raft of jurisprudence in post-apartheid South Africa, challenging the apartheid laws that had criminalised lesbian and gay sexualities and relationships. To some extent, as discussed in more detail below, South African activists have successfully driven an agenda for social change through law and policy. However, since 1994, there have been numerous incidents of physical and sexual assault and murder based on sexual orientation and gender expression (Human Rights Watch 2011: 14).

While South Africa's constitution has been lauded for recognising the rights of gay, lesbian and transgendered people, statements made by public figures in the country indicate that deeply conservative views about gender and sexuality prevail (De Lange 2012). To cite just three instances concerning the views of South African officials:

- The National House of Traditional Leaders recently made a submission to the constitutional review committee calling for changes to the equality clause which guarantees protection against discrimination on the basis of sexual orientation.
- In August 2009 Lulu Xingwana, then South Africa's Minister of Arts and Culture, famously walked out of an exhibition that contained several works by Zanele Muholi. Muholi is a queer activist and photographer who documents the lives of black South African lesbians. Xingwana left the exhibition on the grounds that Muholi's photographs were 'immoral, offensive' and worked 'against nation-building'.<sup>2</sup>
- In 2010 Jerry Matjila, South Africa's representative at the United Nations, objected to the inclusion of sexual orientation in a report on racism at the United Nations Human Rights Council in Geneva. He argued that to include sexual orientation would be to 'demean the legitimate plight of the victims of racism' (Fabricius 2010).

Hate crimes expose the gap between the lived realities of those marginalised on the basis of sexuality and gender and the promises made to LGBTQI people in the constitution. As shown above, there is also a marked disjuncture between the views expressed and embodied in the constitution and the perceptions held by many South Africans themselves. The significant failure by civil society on the one hand and law-makers and enforcers on the other to define and grapple with hate crime reflects this disjuncture.

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<sup>1</sup> From [www.humanrightsfirst.org/wp-content/uploads/UPR\\_SA\\_hate\\_crimes\\_submission-FINAL-Human-Rights-First.pdf](http://www.humanrightsfirst.org/wp-content/uploads/UPR_SA_hate_crimes_submission-FINAL-Human-Rights-First.pdf) (accessed 20 May 2013).

<sup>2</sup> Van Wyk. 'Xingwana: Homophobic claims 'baseless, insulting', 5 March 2010, online, <http://panafricannews.blogspot.co.uk/2010/03/south-african-minister-of-arts-and.html> (accessed 20 May 2013). For the media statement issued by Xingwana see [www.dac.gov.za/media\\_releases/2010/04-03-10.html](http://www.dac.gov.za/media_releases/2010/04-03-10.html) (accessed 20 May 2013).

Nel and Judge (2008) note that 'homophobic victimisation is an endemic part of the South African landscape' (2008: 19), where discrimination together with gaps in policy and legislative responses serve to block the realisation of the rights enshrined in the constitution.

South Africa's failure to address hate crime can be seen within the context of a more general weakness within the country to uphold and maintain the rule of law.<sup>3</sup>

Its failure should also be seen in the context of escalating homophobia on the continent:

Recently, an escalation of state-sponsored homophobia has cascaded through African governments (Kenya, the Gambia, Nigeria, the Democratic Republic of Congo and Uganda) and included the African Union's rejection of the Coalition of African Lesbians' application for observer status. In countries in which hate crime against lesbian, gay and transgendered people is reported (such as South Africa), there are frequent reports of terrorisation, murder and rape. While there is nothing new about public – and private – homophobia, the hysteria accompanying contemporary religious and politicians' discourses suggests alarming state fragilities, and increasing levels of ideological corruption in the fight for constituencies and status (hence, resources).

(Bennett 2010: 3)

By examining two cases of homophobic hate crime in post-apartheid South Africa, this paper illuminates how activists have used the legal system to address the violence faced by many LGBTQI South Africans. Drawing on court transcripts, the experience of the lawyer in one of the cases and on interviews conducted with activists in South Africa, the article also draws attention to some of the challenges faced by those seeking to secure justice for LGBTQI people. The authors argue that recognising forms of violence motivated by prejudice as 'hate crimes' can serve as a powerful legal tool. The article provides a brief overview of the use of the term 'hate crime' in the South African context and offers concise accounts of the case studies and observations drawn from them. It also provides a series of recommendations regarding sexuality, violence and the law for state actors (ranging from police officers to judges and policymakers), for LGBTQI activists and educators, and for donors.

The authors make a number of recommendations to government, activists, and donors. Key among these are:

- That specific hate crimes legislation is introduced.
- That political leaders *consistently* publicly condemn homophobic discrimination and violence.
- That a system for monitoring hate crimes be established.
- That public service providers are properly trained to deal with hate crimes.
- That the Department of Education work with civil society organisations to produce materials on gender expression and identity and sexual orientation.
- That LGBTQI organisations working towards legal reform develop a strategic litigation policy.
- That donors support programmes to develop legal and constitutional literacy.
- That donors support interventions to facilitate collaboration and movement building within the LGBTQI non-governmental organisation (NGO) sector.
- That donors support programmes that provide leadership training for LGBTQI activists.
- That donors support programmes offering training in media sensitisation and correct etiquette for reporting homophobic hate crimes.

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<sup>3</sup> Debates regarding the rule of law in South Africa have taken place in relation to vigilantism and mob justice as well as in relation to whether the current President ought to be prosecuted for corruption and whether a crime investigation unit established by the prosecuting authority should be disbanded.