

The Ministry of Justice and Constitutional Development

Minister Jeff Radebe

14 March 2011

MEMORANDUM

We, the following civil society organisations:

Rape Crisis Cape Town Trust

Triangle Project

providing legal, psycho-social, community based and health services and support to Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) persons, welcome the opportunity to meet with the Ministry of Justice and Constitutional Development and applaud the Ministry for its efforts to meet with us.

We recognise that LGBTI persons are unfairly discriminated against on the basis of their gender, gender identity, sex and/or sexual orientation and that such unfair discrimination often manifests itself in the form of violent crimes such as assault, rape, related sexual offences and murder (*herein after referred to as hate crime*).

We recognise that various forms of unfair discrimination prevail in South Africa and that sexual orientation and gender identity intersect with discrimination on the ground of gender, race, age, religion, culture, ethnicity, socio-economic status, class, nationality, disability, geographical location and HIV status. It is also our experience that these intersections impact on people's vulnerability to violence and the extent to which people are able to exercise their constitutional and other legal rights and access justice.

We recognise that no statistics can be produced on the number of hate crimes committed against LGBTI persons but state that the severity of the problem is

assessed in accordance with our experiences with those many individuals to whom we provide services and support.

We recognise that hate crime is on the increase and/or that the reporting of hate crime is increasing.

We recognise that the supreme law of our country, Section 9 of the Bill of Rights of the Constitution Act 108 of 1996, guarantees LGBTI persons the right to equality and the right not to be unfairly discriminated against on the basis of gender, sex and/or sexual orientation.

We recognise that Section 9 of the Bill of Rights of the Constitution binds the state to promulgate legislation that advances the rights and interests of marginalised groups or categories of people and which gives effect to the Constitution and that the Promotion of Equality and Prohibition of Unfair Discrimination Act 4 of 2000 is one such piece of legislation which provides LGBTI persons with recourse in terms of civil law.

Additionally, we recognise that The Protection from Harassment Bill which is currently before the Portfolio Committee on Justice and Constitutional Development gives greater consideration to Section 9 of the Constitution through the explicit inclusion of harassment based on unfair discrimination on one or more grounds, including: gender, sexual orientation, gender identity, race, nationality, socio-economic status, class; religion; culture age; disability; and HIV status.

We further recognise that a gap exists in criminal law which specifically affords protection to LGBTI persons and that such legislation needs to be promulgated in order for the state to fulfil its constitutional duty to advance the rights and interests of marginalised groups or categories of people and to impose appropriate penalties for offenders who commit criminal offences against LGBTI persons on the basis of hatred of their gender, sex and/or sexual orientation.

We recognise that on or about 25 January 2011 the Minister of Justice and Constitutional Development reported that the Department of Justice and Constitutional Development is in the process of conducting research into a draft anti racism, racial discrimination, xenophobia and related intolerance Bill which covers hate crime against LGBTI persons and look forward to making submissions or

recommendations to the Portfolio Committee on Justice and Constitutional development on the proposed 'Hate Crimes' Bill.

In the interim and until the 'Hate Crimes' Bill is promulgated, we ask for the following temporary measures to be taken to protect the rights and interests of LGBTI persons:

1. That the South African Police Force, Department of Justice and Constitutional Development and National Prosecuting Authority monitor hate crime cases in the criminal justice system from when the case is reported to the South African Police Force until sentence is handed down to ensure inter alia that the criminal justice system does not re-victimise or re-traumatise the complainant, that investigating officers properly investigate cases, that prosecutors fulfil their duties and execute their duties with a high level of skill and diligence and that criminal trials are finalised without unreasonable delays.
2. That rape cases based on race, gender, sex, sexual orientation and/or sexual identity be heard in the designated sexual offences courts.
3. That the National Prosecuting Authority keep disaggregated statistics of the number of *alleged* hate crime cases that they decline to prosecute, the number of hate crime cases that are withdrawn by complainants and the number of convictions of perpetrators of hate crime.
4. That the National Prosecuting Authority develop a directive for prosecutors to raise hate crime as an aggravating circumstance to oppose bail.
5. That the National Prosecuting Authority develop a directive for prosecutors to raise hate crime as an exacerbating factor for sentencing.

6. That the National Prosecuting Authority develop a directive that prosecutors advise complainants of the right to apply to court to not have the trial conducted in open court in terms of Section 153(1) of the Criminal Procedure Act 51 of 1977.
7. That the Minister of Justice and Constitutional Development issue a notice in the *Government Gazette* in terms of Section 170A(4)(a) of the Criminal Procedure Act 51 of 1977 providing that survivors of hate crimes are competent to be appointed as intermediaries and that once such notice is issued, the National Prosecuting Authority develop a directive that prosecutors advise complainants of the right to apply for an intermediary in terms of the Minister's notice.
8. That Parole Boards view the commission of a hate crime as an aggravating factor for the consideration of the perpetrators parole application.

We acknowledge that the criminal justice system suffers a range of systemic failures which adversely affect the majority of complainants irrespective of the nature of the crime but call for special measures to be taken in hate crime cases on the basis that LGBTI persons constitute a marginalised group or category of persons in terms of the Constitution.

LIST OF ENDORSEMENTS

CHILDLINE SOUTH AFRICA

COMMISSION FOR GENDER EQUALITY

DURBAN LGBT COMMUNITY HEALTH CENTRE

FORUM FOR THE EMPOWERMENT OF WOMEN

GENDER DYNAMIX

GOOD HOPE METROPOLITAN COMMUNITY CHURCH

IAM INCLUSIVE AND AFFIRMING MINISTRIES

INTERSEX SOUTH AFRICA

LESBIAN AND GAY EQUALITY PROJECT

OUT IN AFRICA

SANAC LGBTI

SANAC WS

SEX WORKER EDUCATION AND ADVOCACY TASKFORCE

SONKE GENDER JUSTICE

SOUTHERN AFRICAN MEDIA AND GENDER INSTITUTE

TEDDY BEAR CLINIC

TRAUMA CENTRE

UNISA CENTRE FOR APPLIED PSYCHOLOGY

WESTERN CAPE NETWORK ON VIOLENCE AGAINST WOMEN

INDIVIDUALS:

MELANIE JUDGE: LGBT ACTIVIST

DR. NADIA SANGER: RESEARCH SPECIALIST, HUMAN SCIENCES RESEARCH COUNCIL