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Sexuality, Poverty and the Law

A Progressive Constitution Meets Lived Reality: Sexuality and the Law in South Africa

Tessa Lewin, Kerry Williams and Kylie Thomas

June 2013

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

Tessa Lewin, Kerry Williams and Kylie Thomas

June 2013

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1 Executive Summary

This paper examines two cases of homophobic hate crime in post-apartheid South Africa. The paper illuminates how activists have used the legal system to address the violence faced by many lesbian, gay, bisexual, transgender, queer or intersex (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 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.

2 Introduction

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 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.[1] 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 trans-gendered 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'.[2]

[1] From http://www.humanrightsfirst.org/wp-content/uploads/UPR_SA_hate_crimes_submission-FINAL-Human-Rights-First.pdf (accessed 20 May 2013).
[2] Van Wyk. 'Xingwana: Homophobic claims 'baseless, insulting', March 5, 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 http://www.dac.gov.za/media_releases/2010/04-03-10.html (accessed 20 May 2013).

- 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.

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.[3]

Its failure should also been 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 DRC 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)

[3] 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.

3 Methodology

The research for this paper has engaged with the work of many feminist and LGBTQI activists who have been working in this field over a long period of time. It has drawn on interviews with activists and researchers,[4] as well as on research conducted by Human Rights Watch (2011) and by the Human Science Research Council in South Africa (Mkhize *et al*. 2010). One of the authors of this paper, Kerry Williams, led the legal team on the Mazibuko case and her intimate knowledge of the criminal justice system in South Africa is central to our findings. The explanation of the Mazibuko case draws on the case transcripts. The Nkonyana case study draws on the press coverage of the case,[5] as well as interviews with key stakeholders. As discussed in more detail below, our research into the Nkonyana case was constrained by a number of factors, including our lack of access to court transcripts and political uncertainty and violence in Khayelitsha.

[4] Interviews were conducted with Melanie Judge (activist/researcher, ex-OUT), Trish Watson (activist/researcher), Mikki van Zyl (currently writing up the Nkonyana trial with researchers from Free Gender for the Triangle Project), Cherith Sanger (Sonke), Jayne Arnott and Sharon Ludwig-Cox (Triangle), Sally Jean-Shackleton (SWEAT), Phumi Mtetwa (ex-Equality Project), Lisa Vetten (ex-Tshwaranang Legal Advocacy Centre/ CSVR), Kylie Thomas (activist/researcher).

[5] http://www.bbc.co.uk/news/world-africa-16835653, http://www.huffingtonpost.com/2012/02/01/south-africa-zoliswa-nkonyana-lesbian-killed-sentencing_n_1247320.html, http://www.dailymaverick.co.za/article/2011-12-09-well-make-you-a-real-woman-even-if-it-kills-you/, http://www.mambaonline.com/article.asp?artid=6580 (accessed 20 May 2013); http://mg.co.za/article/2006-02-26-not-just-another-murder (accessed 27 May 2013).

4 Legal context

Legally speaking, South Africa is one of only seven countries in the world that allows same-sex marriage and is one of the few[6] countries in Africa that does not criminalise same-sex sexual acts; its progressive constitution and laws are intended to protect LGBTQI people, but the LGBTQI community is increasingly the target of a citizenry which is intolerant of non-normative sexual expression.

Some argue that the very laws meant to protect people are in fact responsible for placing them at risk. 'People trust those laws and their decision to come out on the basis of them in fact places them in danger by making them targets'. [7] Many point to the fact that there is not a sophisticated enough understanding of how to put into practice the values underlying the Bill of Rights in South Africa's constitution, nor of what additional legal and social structures might be needed to support full realisation of such rights.

4.1 Hate crimes and the law

The four areas of law relevant to addressing hate crimes are: criminal law, criminal procedure, the law on punishment and constitutional law. The Bill of Rights in South Africa's constitution entrenches the right to equality and places a duty on the state to respect, protect, promote and fulfil this right.

The focus of criminal law is on the behaviour that constitutes a crime, whereas the focus of the law on punishment is the type of punishment most appropriate to the particular crime (bearing in mind the nature of the crime, the circumstances of the perpetrator and the interests of society). The law on criminal procedure requires the perpetrator to stand trial to determine his or her guilt (where all elements of a particular crime are present). If the perpetrator is found guilty, then the criminal procedure laws require the judge (or magistrate, in the case of the lower courts) to determine an appropriate punishment. The prejudicial aspect of a hate crime is relevant to defining what constitutes a hate crime as well as to determining how to respond to, or punish, such crime. The right to equality may be used by lawyers and activists to improve aspects of criminal law, criminal procedure and the law on punishment in an effort to see hate crime properly addressed by the state.

4.2 Overview of existing legislation

According to Mkhize *et al*. (2010) in their report on hate crimes and homophobia in the lives of black lesbian South Africans, there are five legal statutes that can potentially offer protection under the law:

[6] http://www.consultancyafrica.com/index.php?option=com_content&view=article&id=904:decriminalising-sexual-orientation-three-african-states-compared&catid=91:rights-in-focus&Itemid=296 (accessed 20 May 2013).
[7] Emily Craven, 2009, Joint Working Group coordinator in http://www.ipsnews.net/2009/08/south-africa-law-failing-lesbians-on-corrective-rape/ (accessed 20 May 2013).

1. the constitution and the Bill of Rights expressly forbid discrimination on the basis of sex, gender, race and sexual orientation;
2. the Promotion of Equality and Prevention of Unfair Discrimination Act of 2000 (PEPUDA);
3. the Sexual Offences Act of 2007;
4. the Domestic Violence Act of 1998;
5. the legalised rights of lesbian partners to adoption as co-parents, to the extension of partner benefits to same-sex partners, and to marriage (through the Civil Union Act of 2006).

> While each of these legal protections represents a step towards a culture of human rights, and in all cases represents also the results of extremely hard won battles… it remains the case that South Africa black lesbians are very vulnerable to attack at every level of society. (Mkhize *et al*. 2010: 46)

The report entitled '*We'll Show You You're a Woman': Violence and Discrimination against Black Lesbians and Transgender Men in South Africa* clearly outlines South Africa's domestic and international legal obligations.

> In addition to a strong rights-based constitution, with its explicit Bill of Rights, South Africa is a party to several key international and regional treaties that underpin its international legal obligations to respect, protect, and fulfill the human rights of all persons regardless of their sexual orientation of gender identity. This includes the International Covenant on Civil and Political Rights (ICCPR), the African Charter on Human and Peoples' Rights (ACHR), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol). (Human Rights Watch 2011: 63)

South Africa's commitment to equality in both its constitution and its signature of various international instruments suggests that the state would be concerned about hate crime as it overtly undermines equality in South African society, as such crime actively discriminates against vulnerable.

Nel and Judge note that:

> Presently, neither common law nor statutory law define what constitutes a hate crime, nor do they create a separate hate crime offence. Prosecutors may, however, draw on common law and section 28(1) of Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA) to argue that unfair discrimination played a part in the commission of the offence and that this should be viewed as an aggravating factor in the determination of an appropriate sentence. (Nel and Judge 2008: 32)

Section 28(1) of the Promotion of Equality and Prevention of Unfair Discrimination Act 2000 (PEPUDA) states that, '[i]f it is proved in the prosecution of any offence that unfair discrimination on the grounds of race, gender or disability played a part in the commission of the offence, this must be regarded as an aggravating circumstance for purposes of sentence'. Notably, this section has not been brought into force yet, despite being on the

statute books for over a decade, and it contains no specific mention of offences that involve unfair discrimination on the grounds of sexual orientation, which means it may not provide protection for LGBTQI people.

4.3 Defining a hate crime

There is no specific law that legislates against hate crime in South Africa. Crimes, or criminal offences, are defined in either the common law, or statutory law. So, for example, murder, robbery and assault are all defined in the common law, while numerous other offences, like smoking in a public place or selling medicines without a licence, are created by various statutes. Neither the South African common law nor statutory law recognises hate crime as a specific crime or criminal offence.

Internationally, hate crime has been defined using two models: *the hostility model* and *the discriminatory selection model*. In fact, most international hate crime legislation uses a combination of these models. The hostility model posits that the offender acts out of hatred, hostility or prejudice towards a particular identity trait of the victim. This model, however, does not capture crimes where the victim is chosen because s/he is considered to be an easy target due to this identity trait. As a result, the discriminatory selection model posits that the offender selects his or her victim as a result of the victim belonging to a particular group or having a particular identity. If, for example, a gay man is robbed because he is believed to be an easy target as a gay man (rather than because the perpetrators harboured particular hatred for gay men), the robbery would fall into the discriminatory selection model rather than the hostility model.

In an important exploration of hate crime in South Africa, Bronwyn Harris defines it as acts of violence 'motivated by prejudice or hatred' (Harris 2004: 12) and notes 'the concept of a hate crime' is not common within the South African context, although crimes motivated by prejudice are' (*op. cit*.: 12–13).[8] Hate crimes may appear to be aberrations in the social order and acts that manifest the extreme prejudices of a limited number of individuals; however, hate crimes cannot only be thought of and addressed at the individual level. In addressing these forms of violence, it is critical to recognise that what makes such acts possible is the broader social and political context in which they occur. In a discussion of ways to understand and address institutional racism, Harris argues, 'it is important to explore political discourse and its relationship with institutions and identity (and their overlaps with hate crimes)' (*op.cit*.: 77).

4.4 Punishing hate crimes

Hate crimes are not merely about the crimes themselves, since the perpetrator seeks, through the crime, to demean or dehumanise the victim, because of their identification with a particular group against which the perpetrator holds prejudice. 'Hate crimes can [therefore] be understood as representing the extreme side of a continuum that starts with it being socially acceptable to name call and demean specific social groups' (Nel and Judge 2008: 22).

[8] Apartheid itself can be understood as a large-scale hate crime.

Harris draws on the definition of hate crimes provided by the American Psychological Association to argue that

> hate crimes impact not only on the individual victim, but on the whole 'hated group'. … They are different from other crimes in that the offender is sending a message to members of a certain group that they are unwelcome in a particular neighbourhood, community, school or workplace. (Harris 2004: 22)

Hate crimes differ from other crimes as a result of the severity of the impact that they have both on the victim and the larger community or category to which the victim belongs. South African activists therefore argue that these crimes warrant additional or harsher punishment precisely because of the range of damaging effects such crimes have on the victim, his or her community and society at large. Additionally, they argue for additional or harsher punishment as hate crimes are message crimes, and they believe judges and magistrates should be sending a counter-message to the perpetrators of such crimes, illustrating that they are socially unacceptable. A failure to punish perpetrators properly, the activists argue, perpetuates the belief that certain victims are less worthy because of their identity or group membership.

The term 'hate crime' has been used internationally to describe violence motivated by prejudice directed against so-called minority groups. The high incidence of rape and other forms of sexual violence and violence against women in South Africa complicates the question of what comes to be understood as a hate crime in this context.

4.5 Sentencing of hate crimes

The judiciary holds an important place in South Africa. Sentencing is entirely within an individual judge's or magistrate's discretion (and prosecutors, on behalf of the state, are required to request that a particular sentence be imposed on a perpetrator). Activists have suggested that minimum sentencing laws could be introduced for hate crimes, so offering judges and magistrates some guidance in the passing of sentences, which would also help prosecutors to know what sentence to request for a perpetrator of a hate crime.

There are a number of court decisions which have accepted that crimes that are racially motivated should receive harsher sentences. This evidences a development of the common law, which requires racially prejudicially motivated crimes to receive harsher sentences – but this is yet to be extended to crimes motivated by homophobia or other forms of prejudice directed against LGBTQI people. As previously noted, prosecutors may in the future be able to use section 28(1) of the PEPUDA (2000) to argue for a harsher sentence in cases of hate crime involving discrimination on the grounds of race, gender or disability. However, notably missing from this subsection is any reference to discrimination on other listed grounds such as sex or sexual orientation, which will make it difficult, if not impossible, for prosecutors to use it in relation to homophobic hate crime.

5 Case studies

The following case studies look at two different instances of hate crime, one in the province of Gauteng and the other in the Western Cape, where activists have engaged with the law and the legal system. The studies give a sense of how South African law has been used in relation to specific hate crimes. In the first case, a civil society organisation led evidence as a friend of the court (or *amicus curiae*), but was not ultimately able to influence the magistrate (and so extend the scope of the law) to recognise the experiences of sexual marginalisation and the vulnerability of LGBTQI people in South Africa. In the second case, civil society organisations were called by the state to give evidence as expert witnesses in the trial. These organisations formed a civic alliance that testified to the nature of the offence as a hate crime, and therefore one that had particular ramifications, not only for the victim but for the victim's family and community. Both cases are significant in terms of challenging the legal system and requiring the law to recognise hate crimes as a particular form of crime, one that has a damaging social impact beyond the individual victim. Both cases also reveal weaknesses in the criminal justice system and demonstrate potential avenues for civil society activism.

5.1 The case of Deric Duma Mazibuko

On 7 October 2007, Deric Duma Mazibuko, a young black gay man, was assaulted in a bar in Germiston, South Africa. He was punched, kicked, and hit over the head with chairs and a metal spanner by a group of patrons. The assault was accompanied by homophobic hate speech (one of the perpetrators said Mazibuko was gay and therefore had 'no reason to live'). Mazibuko had a series of fits during the assault and was then knocked unconscious. Mazibuko's friends eventually managed to stop the assailants and take him to hospital.

Mazibuko subsequently approached a non-profit organisation, OUT LGBT Wellbeing (OUT), for psychological support and help in bringing the perpetrators to justice. None of the perpetrators were arrested despite the assault being reported to the South African police.

OUT recognised that the assault on Mazibuko would make a strong test case for hate crime: Mazibuko had survived the attack and was committed to seeking justice, and there were numerous witnesses who could testify to the fact that the crime was motivated by homophobia. In the end, the trial of the three men who assaulted Mazibuko took five years, during which time Mazibuko, his friends and a group of lawyers and activists worked together on the case.

OUT agreed to act on behalf of Mazibuko to ensure that the perpetrators were prosecuted. OUT initially wrote to the prosecutor to enquire whether there was to be a prosecution and was told that the decision had been taken not to prosecute as the matter was considered to be just a 'tavern fight' (where tavern is a colloquial term for a bar). As a result, OUT, with the assistance of its attorneys, launched an appeal to a higher authority within the National Prosecuting Authority against the decision not to prosecute. OUT won this appeal and the

prosecutor at the Germiston Magistrate's Court was instructed to prosecute the perpetrators for the homophobic hate crime.

It took about one year for the court case to begin and then a further year for any evidence to be brought. The trial went on for another two years before the perpetrators were finally convicted.[9] Once they had been convicted, OUT applied to be admitted as a friend of the court, in order to lead evidence that showed the damaging effects of homophobic hate crimes and help the prosecutor to persuade the magistrate to give an accordingly harsher sentence. OUT was successful in its application to be admitted as a friend of the court and proceeded to call three expert witnesses on the effects of homophobic hate crimes.

OUT, rather than the prosecutor, called three witnesses, over a period of two days, and led expert and experiential evidence that it believed was crucial to a fair sentence, including:

- victims of homophobic hate crimes experience particular psychological difficulties such as feelings of depression and marginalisation which lower self-esteem;[10]
- victims experience suicide ideation (thoughts of wanting to take one's life) as a result of the crime; [11]
- victims often suffer a post-traumatic stress disorder and experience a heightened sense of fear, anxiety, distrust and vulnerability which leads to behavioural change such as not going to public places.[12] Mazibuko, for example, experienced some forms of this trauma, including flashbacks. He needed a counsellor from OUT to accompany him to court and had to move out of the Germiston area, where he had been residing;[13]
- homophobic hate crimes send a message not only to the individual victim but to all gay and lesbian people that they are less worthy and more at risk of being attacked. The resultant fear and anxiety mean gays and lesbians limit their self-expression and movement, are less likely to live openly and sometimes go into hiding for a period of time;[14]
- homophobic hate crimes undermine South Africa's efforts to create an equal society with dignity for all, including gays and lesbians, and set back the advances that have been made towards this;[15]
- the psychological effects of homophobic hate crimes on their victims last longer and are more severe than those of ordinary crimes.[16] This is because homophobic hate crimes target vulnerable individuals because of their sexual orientation and are often accompanied by extreme levels of violence which indicate an intention to demean or dehumanise the victim;[17]
- the defendants were disrespectful, offensive and threatening towards gays and lesbians during the course of Mazibuko's trial: one of them, with the tacit consent of the other two, wore a T-shirt to the proceedings which read 'Dip me in chocolate and

[9] Once the prosecution began the delays were primarily caused by the dilatory behavior of the three perpetrators: the accused and their lawyers regularly failed to appear at court.
[10] Evidence of Professor Nel (9 December 2011), transcript of court proceedings: 45–46.
[11] Evidence of Professor Nel (*ibid*. : 44); evidence of Melanie Judge (27 January 2012), transcript of court proceedings: 84.
[12] Evidence of Professor Nel (*ibid.*: 47–48); evidence of Melanie Judge (*ibid.* : 83–84).
[13] *Ibid.:* 67.
[14] Evidence of Professor Nel (*ibid.* : 51–52); evidence of Melanie Judge (*ibid.* : 91–93).
[15] Evidence of Professor Nel (*ibid.* : 56–57); evidence of Melanie Judge (*ibid.* : 94).
[16] *Ibid.*: 58–59.
[17] Evidence of Melanie Judge (*ibid.* : 90–91).

throw me to the lesbians'.[18] It was argued by OUT's lawyers that this signified a disdain for the court process and continuing prejudice and a lack of remorse on the part of the perpetrators.[19]

Unfortunately, the magistrate misunderstood, or misinterpreted, OUT's evidence. She saw it as expressing the outrage of the LGBTQI community, rather than articulating the damaging effects of homophobic hate crimes, which would have justified a harsher sentence. She chose instead to accept the defence's appeal for lighter sentences on account of mitigating circumstances (unemployment, dependants). Two of the defendants were sentenced to three years of correctional supervision, subject to various conditions, including their attendance at treatment and support programmes. The third defendant received a R1500 (£110) fine, or four-month imprisonment; this sentence was suspended, on account of the defendant's mitigating circumstances. All the defendants were required to attend 'the awareness programmes of the LGBT group'. Interestingly, no such programme existed and the state merely assumed that civil society offered such a programme. Despite OUT being admitted as a friend of the court to lead evidence – which is unprecedented – the evidence was not understood or properly interpreted, and was ultimately rejected by the court.[20]

The importance of this case is discussed in detail in section six, 'Observations', below. The case indicates that while expertise in hate crime does not currently exist within the state, activists and NGOs have an extremely important role to play, until such time as prosecutorial services improve. This role may always be important in a South African context as developments in research are more likely to be brought to the courts by activists and NGOs, while the state lags behind in assimilating such research and implementing it. Although this case was decided by a magistrate and consequently no written judgement was produced, it has been referred to by other NGOs. They and the broader activist community agree that it is important for friends of the court to be admitted to Magistrates' Courts, where the majority of cases are heard. The case is significant because, although the admission of friends of the court to the High Court, Supreme Court of Appeal and the Constitutional Court is uncontroversial, they had not previously been admitted to the Magistrates' Courts. The case is therefore seen as a test case and the trial was widely reported in both the LGBTQI and mainstream press.

5.2 The case of Zoliswa Nkonyana

Our research into this case was significantly limited by our lack of access to the court transcripts (see later discussion pertaining to this in section 6.2, below). In addition, during the period that we were researching this paper (December 2012-January 2013), there was a public enquiry into policing in Khayelitsha, which had been set up by the provincial

[18] Evidence of Mmapaseka Emily Letsike (*ibid.* : 69); evidence of Melanie Judge (*ibid.*: 96).
[19] Advocate Kate Hofmeyr's argument (27 January 2012), transcript of court proceedings: 103–104. Advocate Hofmeyr explained that '[w]e submit that the wearing of that T-shirt represents a number of things. It represents a disdain for this process and a refusal to be remorseful about the conduct that accused 3 and indeed the other accused perpetrated. We submit that it is deeply offensive to wear such a T-shirt in this public setting where the purpose for us all gathering together is to assess the guilt of three men accused of brutally attacking a man because he was gay. It is also, we submit, a confirmation of the very prejudice that motivated that attack. It is a confirmation that those were not just words that crept into accused 3's mouth when he said, "He is gay he does not deserve to live". Those words were representative of a view that certain people are less worthy than others and that certain people do not deserve as much respect as others and the T-shirt simply confirms that prejudice.'
[20] The reasons for not using this evidence are not entirely clear.

government of the Western Cape in response to the high number of vigilante murders[21] taking place in the township. The commission was contested by the Minister of Police, Nathi Mthethwa, and by the ANC and as a result there was a great deal of nervousness around the inquiry, which meant that talking to the local prosecutors and police was not possible. Free Gender, the black lesbian organisation significantly involved in Nkonyana's case, were not available for interview as they were caught up in the response to the recent murder of Sihle Sikoji.[22] It is important to consider the impact of such structural, political and resource constraints on research of this type, and how difficult they can make accessing the details of legal process. Nonetheless, we were able to talk to some of the people involved in the trial and there are useful comparative observations to be made about the way in which the state and civil society interacted in this case, as compared to the Mazibuko case.

In February 2006, a 19-year old lesbian woman, Zoliswa Nkonyana, was brutally murdered in Khayelitsha. She had been drinking with a friend in a tavern and had an altercation with one of the female patrons, who had chided her for using the women's toilet when she insisted on 'acting like a man'. The same woman told the group of men that she was with that Nkonyana had made unwelcome sexual advances towards her.

This group of men caught up with Nkonyana as she was leaving the tavern, severely beat and stabbed her, and bashed her head with a rock, leaving her dead. Nine men were charged with Nkonyana's murder in a trial that took six years to complete, with over 40 postponements.[23] In 2012, four of the nine men were convicted of Nkonyana's murder. The remaining five were acquitted of all charges.

A civic alliance (differently constituted at different times because of the extensive length of the trial period) of the Social Justice Coalition, the Treatment Action Campaign, Free Gender, the Triangle Project, Campaign 07-07-07, the Women's Legal Centre, the Equality Project, and Sonke Gender Justice lobbied and protested throughout the trial period to realise justice for Nkonyana and her family.

The Triangle Project became involved in the Nkonyana case initially through their LGBTQI helpline, which Nkonyana's friend and witness to the murder called for support and protection. Later, both the Triangle Project and Free Gender were asked by the court to appear as state witnesses in the trial. Jill Henderson from Triangle Project and Funeka Soldaat from Free Gender gave evidence demonstrating that the murder was a hate crime. Their evidence attempted to show how such murders 'terrorise the collective by victimising the individual'.[24] Triangle Project urged that the court's sentencing reflect both the brutal nature of the crime, and that discrimination based on sexual orientation and gender be considered and explicitly named as an aggravating factor in sentencing. Soldaat's evidence articulated how the murder had affected Nkonyana's immediate family and the lesbian

[21] 'Vigilante murders' are justified by the idea that adequate legal mechanisms for criminal punishment are either non-existent or insufficient. Vigilantes typically see government as *ineffective in enforcing* the law; and such individuals often presume to justify their actions as protecting 'the community'.
[22] A 19-year old lesbian stabbed to death in Nyanga in November 2012, see http://www.iol.co.za/news/crime-courts/lesbian-speared-to-death-by-gang-1.1421252#.UWlStSt34zI (accessed 20 May 2013).
[23] Many of these postponements were as a result of the defendants and defense attorneys routinely missing court appearances, see http://www.dailymaverick.co.za/article/2011-12-09-well-make-you-a-real-woman-even-if-it-kills-you/#.UWlViSt34zI (accessed 20 May 2013).
[24] See http://feministssa.com/2012/01/31/evidence-for-sentencing-in-the-zoliswa-nkonyana-murder-trial/ (accessed 20 May 2013).

community in Khayeltisha, who continued to be harassed and taunted on account of their sexual orientation.

The magistrate in this case accepted the evidence of the underlying motivation of discrimination as an important aggravating factor in the severity of sentencing delivered. Marlow Newman-Valentine, Deputy Director of the Triangle Project noted '[this] is the first case in South Africa where sexual orientation and identity was [*sic*] named and recognised as an aggravating factor in a murder trial' and the judgement sent a clear message that hate crimes would be taken seriously.[25]

Women's Legal Centre director Jennifer Williams noted:

> There is a provision in the Equality Act which says that the court can take discrimination into account when considering sentence. This is the first case of such a kind we are aware of. We hope it will act as a deterrent to people who think they can commit such crimes.[26]

[25] See http://www.iol.co.za/news/crime-courts/gender-activists-hail-justice-for-slain-lesbian-1.1225930#.UWwsCCt34zI (accessed 20 May 2013).
[26] See http://www.iol.co.za/news/crime-courts/gender-activists-hail-justice-for-slain-lesbian-1.1225930#.UWwsCCt34zI (accessed 20 May 2013).

6 Observations on the case studies

6.1 Legal precedents

The Mazibuko case is important because, prior to it, friends of the court had been admitted to the High Court in South Africa, but not to a Magistrates' Court, where the majority of cases are heard and are arguably where access to justice is felt by most South Africans. This case established a precedent for friends of the court being accepted in Magistrates' Courts. There has not been another case where an *amicus curiae* has successfully applied to intervene in a criminal trial in a Magistrates' Court and has been authorised to lead its own evidence against the accused. It is unusual for an *amicus curiae* to play this role as it ordinarily falls to the prosecutor, so that there is a balance between the accused persons on the one hand, with their protected fair trial rights in the Bill of Rights, and the state on the other, with its powers to prosecute, determine guilt and incarcerate. The Mazibuko case therefore signifies a potentially exciting and useful development for non-profit public interest organisations who wish to play a role in cases of hate crime.

In terms of legal precedent, the Nkonyana case, also heard in the Magistrates' Court, is significant because it represents the first case where evidence of a homophobic hate crime was accepted as an aggravating factor in the sentencing of the perpetrators. Not only does this reinforce the category of 'hate crime' as a means of recognising the extent of injustice against LGBTQI people, it also sends a powerful message to South African society about the implementation of the constitution and, more particularly, the right to equality in the Bill of Rights.

While both these cases demonstrate progress in terms of using the legal system to address acts of violence against LGBTQI people, it is apparent that a range of structural factors also shapes – and limits – its scope. The following sections explore political discourse and its relationship with institutions and identity. They also examine how structural, political and resource constraints limit the possibilities of civil society activism against hate crimes.

6.2 The importance of records

We had hoped to use the court transcripts from the Nkonyana case for this study, but had trouble gaining access to them. Court transcripts are not automatically available in South Africa. Typically, trial proceedings are audio recorded. Members of the public wanting access to these recordings have to apply for them (by all accounts a lengthy and time-consuming process) and then pay a private party to transcribe them – in the region of R10,000–R20,000 (£700–£1,400), depending on the length of the trial. Both the time and the cost act to prevent public access to information. This illustrates one of the many difficulties of research and activism in this area. Also, Magistrates' Court judgements are not reported, with judgements passed on by word of mouth, so it is difficult to create a body of precedent which can be used to protect rights. In both the Mazibuko and Nkonyana cases we have only a court transcript of what the magistrate read out as a judgement; there is no other formal record keeping as yet.

A key recommendation for improving the way states deal with hate crimes relates to record keeping, and access to the records made. This recommendation has been cited extensively both locally and internationally. The Hate Crimes Working Group (HCWG[27]) is currently (2013) rolling out a 'Hate and Bias Crime Monitoring Tool' that it has developed and piloted over the past two years. They aim to provide a baseline record for a five-year longitudinal study.[28]

6.3 Gaps in service provision

In Mazibuko's case, after the failure on the part of the South African police to make any arrests and a failure on the part of any service provider to provide counselling or other forms of support, he turned to OUT, a non-profit organisation, which was concerned with the wellbeing of LGBTQI people, for support. As a result of the state's failure to uphold its obligations to investigate and prosecute crimes, Mazibuko felt it necessary to approach a civil society organisation to fulfil these roles. OUT provided both psycho-social support to Mazibuko and access to legal counsel.

In Nkonyana's case, her friend and witness to the murder approached the Triangle Project, another LGBTQI non-profit organisation, for protection and support.

The fact that in both these cases the victims turned to LGBTQI organisations for support and assistance demonstrates both inadequate state provision and the recognised trend that members of the public do not trust the police or state service providers. The Joint Working Group, a network of South African LGBTQI organisations, commissioned a study in Gauteng to explore the dynamics related to homophobic discrimination in South Africa. The study indicated that 62 per cent of survivors of hate victimisation did not report their experience to the police, some because they did not expect the police to take the case seriously, some because they feared further victimisation from the police, and others because they did not want their sexual orientation to be public knowledge (Polders and Wells 2004, cited in Nel and Judge 2008: 27).

Victims of hate crimes often face 'secondary discrimination' (or 'secondary victimisation') when they attempt to engage with the criminal justice system:

> Service provider de-prioritisation, marginalisation, exclusion and targeted victimisation are everyday realities in many communities. This is especially true for those who are perceived to differ from, or who challenge, social and gender norms. The lack of targeted strategies to address LGBT discrimination negatively impacts on the extent to which the criminal justice system and other service delivery agents can adequately respond. (Nel and Judge 2008: 19)

[27] The HCWG is a multi-sectoral network of civil society organisations set up to spearhead advocacy and reform initiatives pertaining to hate crimes in South Africa and the region. Members of the network work in diverse sectors, namely in LGBTI rights; migrants, refugees and asylum seekers rights; gender-based entities and broader human rights organisations. They all share a common concern about the impact of hate crimes in South Africa from the perspective of the victims or from a legal, service provision, research-based or advocacy perspective.
[28] For more information on this, see their website http://www.hcwg.ipt.co.za/.

Sipho Mthathi, the director of Human Rights Watch, South Africa, commenting on the report *We'll Show You You're a Woman* noted:

> Almost every lesbian or transgendered man we spoke to… the sentiment was, we're not going to go to the police, we're not going to go to government institutions because the burden of proof is on you… There is also a sense that there [are] not going to be consequences because most often there are no consequences.[29]

6.4 Training the police

In the Nkonyana case, there was a clear need for training of the police to protect the key witness more sensitively, who herself was a survivor of the hate crime. Her support came primarily from civil society, not the state. The perpetrators contacted Mazibuko in an attempt to get him to drop charges against them, but although this was undesirable, they were not violent, and he did not need active protection during the trial period. Because there is no statutory or common law hate crime, police are not trained to investigate the crime so that they collect evidence on any prejudicial motive or selection bias. As a result, prosecutors are more often than not presented with cases of hate crime where evidence identifying the crime as such is not collected.

This points to the need for police sensitisation, training, and clear guidelines on how to deal with such cases. Nel and Judge argue that 'to ensure that victim support services are accessible to LGBT people without discrimination, requires concerted and programmatic effort in which the public sector becomes the leading agents' (2008: 30). There is a National Victim Empowerment Programme in South Africa[30] and a service charter for victims of crime and violence (Victims' Charter)[31], but Nel and Judge (2008: 29) note that these offer only a partial framework and that LGBTQI people are not specifically defined in the present policy as a vulnerable group.

6.5 Training the prosecution

In both our case studies the prosecution was ill equipped to deal with the issues raised by hate crime. In both cases the court relied heavily on civil society to compensate for their shortcomings. In the Nkonyana case, the prosecution was very open to seeking help from civil society to understand better the broader implications of the hate crime aspect of the case. The state called on civil society to supply expert witnesses. In the Mazibuko case, OUT introduced Mazibuko to its *pro bono* attorney. The attorney took full statements from Mazibuko (and two other witnesses) three days after the commission of the crime. The police made no attempt to collect any evidence of the hate crime – this was left to the victim and his attorneys. Additionally, before OUT's appeal, the prosecuting authority had decided that the case was not serious enough to prosecute, despite there being a *prima facie* case.[32]

[29] See http://www.dailymaverick.co.za/article/2011-12-09-well-make-you-a-real-woman-even-if-it-kills-you/#.UWwwnyt34zI (accessed 20 May 2013).
[30] See http://www.info.gov.za/view/DownloadFileAction?id=111693 (accessed 27 May 2013).
[31] See http://www.justice.gov.za/VC/docs/vc/vc-eng.pdf (accessed 20 May 2013).
[32] This mistaken belief on the part of the National Prosecuting Authority that it still has the discretion not to prosecute where there is a *prima facie* case has been written about elsewhere. It certainly reflects a current failure of the rule of law in South Africa.

During the trial, the court relied on OUT to lead evidence as to the hate crime nature of the case. It is important to note that, although OUT called three expert witnesses to the stand during the sentencing phase of the trial, the prosecutor herself did not call any. She relied on OUT to make the sentencing case, rather than seeing its intervention as supplementary to the state's own case. Civil society itself, not the state, pushed for this evidence. Ultimately, OUT's proactive role in applying to intervene to lead evidence may have allowed the prosecutor to abdicate her responsibility to do the same. By stepping into the gap left by the state's withdrawal from its responsibilities and obligations, civil society may have inadvertently colluded in the state's withdrawal.

Whatever happened in this instance, the prosecuting authority has little experience prosecuting homophobic hate crimes and both the cases, in different ways, show the need to train prosecutors as to why such crimes are so harmful and then how to prosecute their perpetrators taking this harm into account.

6.6 Training magistrates

Although the magistrate in the Nkonyana case accepted that the homophobic motive of the crime should be treated as an aggravating factor in sentencing the perpetrators, the magistrate in the Mazibuko case did not. There is the risk that ignorance, prejudice, or even unintentional blundering on the part of magistrates influence whether perpetrators of homophobic hate crimes are punished appropriately. It is therefore important that magistrates are trained so that they are aware of the prejudice that LGBTQI people experience and how, as magistrates, they can contribute to building a more equal society, both in relation to how they hear cases and hand down sentences.

6.7 Correctional supervision training

In sentencing the perpetrators at the Mazibuko trial, the magistrate stipulated that they should attend LGBTQI awareness training as part of their correctional supervision. In handing out this sentence the magistrate presumably assumed that OUT would be willing and able to provide such training. In reality, this was not a service offered by OUT, nor did it have the resources to do so. OUT was in fact perturbed by the magistrate's assumption that it would consider offering such training (not only is it completely unclear what the magistrate intended, but placing such an obligation on OUT added further injury to that caused by the crime – OUT had at no point indicated that training could perform the function that the magistrate hoped it would and had itself advocated for a harsher sentence). Again, the magistrate's sentence reveals the fact that the state offers no correctional supervision training relating to prejudice against LGBTQI people and demonstrates the state's reliance on civil society to fulfil a role that many would argue is the responsibility of the state.

6.8 Training the media

The Mazibuko case was not particularly sensational and was not extensively reported in the media, prior to the trial. Nonetheless, it was significant as a test case, and the trial received significant coverage. There was, however, some coverage of the NGO's intervention and its

plans to lead evidence against the accused and this the press did very well. When addressed from a legal perspective, legal journalism in South Africa tends to be well done, but the more sensationalist press is often problematic, particularly when extremely violent crimes against gays and lesbians are involved. Here the media often fails to consider the sensitivity of the topic and its effect on the victims, often further traumatising LGBTQI people and inadvertently reinforcing violence as a response to non-normative expression of sexuality. This was particularly evident in the Nkonyana case. As mentioned above, in-court records are not available to the public. Nonetheless, the media reported on the case in ways that did not recognise the sensitivity of the topic. Mkhize *et al.* document Thuli Madi's media analysis of the Nkonyana case during which the press showed named images of Zoliswa's friends:

> Outrage suffused the LGBTI activist community because offering the names and pictures of young women known to be 'Zoliswa's friends' constituted a direct invitation to those who had murdered Zoliswa because of her identity to find new victims. (Mkhize *et al*. 2010: 37)

Clearly, there is also a need to sensitise the media as to how to deal appropriately with hate crime cases in a way that does not further victimise or endanger survivors.

7 Shortcomings of the existing legal framework

South African activists have highlighted the failures of the criminal justice system to bring perpetrators of hate crimes to justice. The people and institutions involved in this failure are:

a) the investigating officers at particular police stations – they are police officers who are employed by the Department of Safety and Security;
b) the prosecutors in district and regional Magistrate Courts and the High Courts – they are employed by the Department of Justice and Constitutional Development;
c) the judiciary, both magistrates and judges – they are independent but employed by the Department of Justice and Constitutional Development;
d) the Department of Correctional Services, through employees in either the prison services or correctional supervision.

Each of these elements of the justice system needs strategic training and support to deliver on the promises enshrined in the constitution.

It is apparent from both these cases that shortcomings exist in policy and legislation on hate crimes. The failure of policymakers and the legislature comprehensively to consider how hate crimes should be combated sends the message that hate crimes are not taken seriously by South African society.

Nel and Judge (2008: 29) note that although the National Victim Empowerment Programme and the minimum standards for service delivery contained in the Service Charter for Victims of Crime and Violence (or the Victims' Charter) offer a partial framework for minimum standards of service delivery, LGBTQI people are not currently defined within the current policy as a vulnerable group:

> At the level of service delivery it is crucial that both the Victims' Charter and minimum standards are implemented and enforced to maximise service delivery and to lower the risk of secondary victimisation for survivors of crime and violence. This requires that relevant services are accorded to all victims equally. Service providers need to distinguish between their right to hold personal values, beliefs and prejudices, and their professional obligation to render services free of prejudice and/or discrimination. (Nel and Judge 2008: 30)

Vance notes that the South African Department of Justice and Constitutional Development (DOJCD) launched a hate crimes task team in May 2011 to tackle the escalating incidents of homophobic attacks and develop a legislative intervention plan, a public awareness strategy and LGBT-sensitive shelters (2011: 21).

While the task team is still functional, it is clear that little progress has been made towards these objectives. The task team was established as government's response to political pressure and comprises representatives from the DOJCD as well as the members of the

hate crimes working group (a civil society organisation). In July 2012, two NGOs (Free Gender and the Women's Legal Centre) withdrew from the task team, citing their frustration with the delays and lack of progress.[33] An official from the department confirmed that the terms of reference for the task team had not yet been signed and the initial tasks identified had had to be reassigned twice. Activists have suggested that although there is a desire to act against violence and discrimination on the part of some government sectors, institutional inertia combined with a lack of adequate skills have thwarted progress.

The South African government also launched the National Council Against Gender-based Violence in late 2012. The launch was met with scepticism from some activists who question both how useful it will be and how it will fit in with existing structures. Its establishment is seen by some as hollow state-posturing, and its effectiveness has yet to be seen. A statement in February 2013 from Helen Lamoela, the Shadow Minister of Women, Youth, Children and People with Disabilities, suggests that the council has not yet delivered on its promises.[34]

Rape, sexual violence and murder, both amongst LGBTQI and other people is not uncommon in South Africa. However, since the particularly horrific murder of Anene Booysen[35] in February 2013, which re-ignited public anger, there have been many government calls to re-open special courts for sexual offences. These were special courts set up to deal with cases of sexual violence, particularly rape, which were closed by the state in 2007 and 2008, due to a lack of funds.[36]

[33] See http://www.iol.co.za/the-star/no-action-on-hate-crimes-say-ngos-1.1350431#.UWxqaCt34zI (accessed 20 May 2013).
[34] See http://www.da.org.za/newsroom.htm?action=view-news-item&id=11822 (accessed 20 May 2013).
[35] Ms Booysen was gang-raped, murdered and mutilated at a construction site in Bredasdorp, a rural town some 130km (80 miles) from Cape Town, on 1 February 2013. See http://mg.co.za/article/2013-02-15-00-will-anene-booysens-brutal-rape-and-murder-shake-the-nation-into-action (accessed 20 May 2013).
[36] see http://ewn.co.za/2012/12/12/No-decision-on-sexual-offences-courts (accessed 20 May 2013).

8 Supporting legal activism

As will be clear from the details of the case studies presented above, there are numerous state and civil society actors who are, or have been, variously involved in campaigning around cases of hate crime in South Africa. What is articulated frequently in terms of the civil society organisations and groupings is that the sector is currently in crisis. Individuals are burnt out, funding is scarce and morale is low. In spite of the prevalence of gender-based violence and its recent appearance as a high level political concern[37], activists working in this field have faced cutbacks in funding and, in general, do not receive support for their work from the state. Rape Crisis, one of the longest-running NGOs working in this sector, faces imminent closure due to a lack of funds.

One interviewee thought that the LGBTQI sector in South Africa had been artificially buoyant as a result of financial support primarily from Atlantic Philanthropies, a private US philanthropic foundation. This support has recently been withdrawn as a Dutch-based NGO, Hivos, and Atlantic Philanthropies are in the process of establishing a new organisation 'the OTHER Foundation'.[38] As a result, many organisations are in disarray and facing closure. In the press statement announcing the launch of the OTHER foundation, Associated Press noted the importance of LGBTQI organisations in South Africa undergoing a cultural shift towards the diversification of funding sources.

Interviewees consistently spoke of two problems facing contemporary LGBTQI activism in South Africa. The first was the disparate, silo-ed, non-cooperative or uncohesive nature of the field, and many articulated a dire need for interventions that supported collaboration and movement building. The second – and in some ways related – observation was that there were no explicitly politicised queer organisations at a national level. Again, interviewees spoke of the need for a social force for change, of the necessity of engaging and investing at a grassroots level in door-to-door activism, and movement building within, for example, trade unions. In addition to both of these problems, several people mentioned the need for leadership training for activists.

Another interviewee spoke of the need to offer skills training and funding to grassroots organisations such as Free Gender, Luleki Sizwe, and One in Nine. Many involved in these organisations do not have regular employment and the organisations themselves do not yet offer their employees a stable means of making a living. Mikki van Zyl, who is leading the Triangle Project's action research team with Free Gender, is trying to use this work as one way of training LGBTQI researchers in Khayelitsha, in the hope that this might help them find work in future.

Activists in South Africa have tended to be strong on campaign building but less so on sustained and systematic engagement with the law. Many activist organisations are thinly stretched, and trying to fulfil multiple and diverse roles. This paper identifies four possible

[37] In the State of the Nation address delivered by Jacob Zuma in February 2013 in response to of the brutal gang rape and murder of a young woman, Anene Booysen, who was disemboweled. This case led to a public outcry and numerous statements from government officials.
[38] See http://www.efc.be/news_events/Pages/Other_Foundation.aspx (accessed 20 May 2013).

ways in which activists might usefully engage with the law and argues that, ideally, activists should specialise in one of these areas to avoid over-stretching themselves: strategic litigation; building campaigns and movements; influencing policy development; influencing the passing of laws.

Useful donor interventions could be made by supporting some of the excellent work that is happening at a grassroots level, helping to strengthen the sector by investing in movement building activities and leadership training, and supporting many of the veteran organisations that are struggling to survive in the current funding climate.

9 Conclusion

Changing the law is clearly not sufficient to bring an end to the psychological and physical forms of violence experienced by LGBTQI people in South Africa, but it is an essential component in addressing these forms of violence. Both Mazibuko's and Nkonyana's cases suggest that there is much more to be done by those concerned with social justice to systematically transform the legal system to enable it to better deliver on the promises of equality enshrined in the constitution. The current institutional architecture that should support and implement the constitutional provisions is insufficiently developed. The passing of specific hate crime legislation would go some way towards addressing this, but additional policies, frameworks and guidelines are needed to make clear where various responsibilities for implementation sit, and what incentives and sanctions are linked to these responsibilities. As noted above, there are numerous public institutions that could benefit from training in how to sensitively manage incidents of homophobic hate crime.

Another intervention area that is vitally important is education across all sectors of South African society. Public office holders and journalists need to be sensitised as to their constitutional and legal responsibilities in dealing with homophobic prejudice and violence. One interviewee spoke of interventions in national curriculum publications, where there is a need to assert that LGBTQI citizens are important rights holders. She spoke of adopting a strategy of writing up as a response to being written out of Department of Education publications. Where there are other 'more acceptable' rights holders, LGBTQI citizens are often not explicitly mentioned, which can have a significant detrimental long-term impact.

As well as more detailed guidelines and policy and training for implementing bodies, support for activists and interventions in education, there is a dire need for strong and consistent leadership. State actors need to be encouraged and trained to stand by the provisions made in the constitution. The Human Rights Watch report recommends that government leaders:[39]

> Publicly condemn gender-based violence, including homophobic and transphobic violence, and institute public education initiatives to increase awareness in all sectors of society of the Equality Clause of the Constitution and principles of non-discrimination. (HRW 2011: 68)

Research on the HIV/AIDS epidemic in South Africa has shown that the ways in which those at the highest levels of government speak about, and engage with, issues relating to science and appropriate treatment and care for people living with HIV, as well as with issues relating to gender, sexuality and sexual violence, and the lack of official disapproval of such statements, have material effects. In our context, the views of government officials who have disputed the connection between HIV and AIDS and the efficacy of antiretroviral therapy have shaped policy decisions at all levels of government and have often led to increased levels of stigma and discrimination.

[39] Mkhize *et al.* (2010), Human Rights Watch (2011), Nel and Judge (2008), and Vance (2011) all offer a broad and fairly comprehensive range of recommendations and are worth consulting for a more detailed list.

In a similar way, the prejudice expressed by national leaders in South Africa towards those who do not follow the codes of hetero-normative patriarchy *authorises* the violence of those who rape and murder lesbian women. In addition to better, systematised, procedures across sectors to deal with hate crimes, strong, actively non-homophobic political leaders who publicly condemn violence against LGBTQI South Africans and acknowledge them as equal rights holders feels like an essential, yet elusive change.

10 Recommendations

10.1 To the state

- That the state introduces specific hate crimes legislation.
- That political leaders consistently publicly condemn homophobic discrimination and violence.
- That a system for monitoring hate crimes be established.[40]
- That South African Police Service investigating officers be trained to investigate and build a case against the accused where there has been a form of discrimination or prejudice that motivated the crime. This will ensure that evidence is collected and led.
- That prosecutors in the National Prosecuting Authority be trained to prosecute hate crimes in a way that ensures judges understand the crime to be a hate crime and the attendant consequences for sentencing its perpetrators.
- That magistrates be made aware of the pernicious nature of prejudice or discrimination motivating a criminal offence in order to give it the correct weight when determining sentencing.
- That an adequate implementation framework (which would include training investigating officers, prosecutors and magistrates) be set up and supported in the long term by the state to prevent the 'secondary victimisation' of survivors.
- That the Department of Education work with civil society organisations to produce material on gender expression and identity and sexual orientation, and that this material be part of teacher training, and used in 'life orientation classes' in school.[41]
- That school counsellors should also be adequately trained on issues of gender-based violence, including information about sexual orientation and gender expression.[42]

10.2 To activists

- That LGBTQI organisations working towards legal reform should develop a strategic litigation policy, which clearly articulates what legal reforms are desired and how litigation may lead to such reform.
- That activists should then look out for test cases and consider pursuing litigation that falls within the categories of litigation that will lead to the objectives set out in the strategic litigation policy.

[40] Please note that the Hate Crimes Working Group (HCWG) is currently rolling out a version of the 'Hate and Bias Crime Monitoring Tool' that they have piloted over the last two years – see http://hcwg.ipt.co.za/ (accessed 20 May 2013).
[41] From Human Rights Watch Report, 2011: 71.
[42] Ibid.

10.3 To donors

- That donors support programmes to develop legal and constitutional literacy.
- That donors support the creation and implementation of programmes that enable activists to affect and influence policy.
- That a monitoring system be set up which ensures that LGBTQI activists are aware when laws which affect their constituency are being debated and passed.
- That donors support interventions to facilitate collaboration and movement building within the LGBTQI NGO sector.
- That programmes that provide leadership training for LGBTQI activists be supported.
- That programmes offering training in media sensitisation and correct etiquette for reporting homophobic hate crimes be supported.

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