

Call for Inputs

Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity

Freedom of religion or belief and freedom from violence and discrimination based on sexual orientation and gender identity

Introduction

Outright International is dedicated to working with partners around the globe to strengthen the capacity of the lesbian, gay, bisexual, transgender, intersex and queer (LGBTIQ) human rights movement, document and amplify human rights violations against LGBTIQ people, and advocate for inclusion and equality. Founded in 1990, with staff in over a dozen countries, Outright works with the United Nations, regional human rights monitoring bodies, and civil society partners. Outright holds consultative status at the United Nations where it serves as the secretariat of the UN LGBTI Core Group. This submission is a response to the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identityIndependent Expert on Sexual Orientation and Gender Identity's call for inputs for the upcoming thematic report "freedom of religion or belief and sexual orientation and gender identity."

1. What are the actual or perceived points of tension (if any) between the right to manifest one's freedom of religion or belief, and freedom from violence and discrimination based on sexual orientation and gender identity? Are there any areas in which they are mutually exclusive?

The right to manifest one's religion includes the right of everyone to "adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice, and teaching." On the other hand, the right to freedom from violence and discrimination based on SOGI means that everyone, irrespective of their SOGI, has a right to be free from unfair discrimination and everyone has a right to respect for their life and integrity of their person; as well as a right to equal protection of the law and the right to be free from torture and other cruel, inhuman and degrading treatment or punishment.²

One point of tension between these rights has been documented in the area of so-called "conversion therapy" or conversion practices. Through research conducted over several years by civil society organisations in Kenya, Nigeria and South Africa on the nature, extent and impact of conversion practices in these countries, a key finding was that religious leaders are amongst the

¹ International Covenant on Civil and Political Rights, 16 December 1966, Article 18(1)

 $^{^2}$ 275 Resolution on Protection against Violence and other Human Rights Violations against Persons on the basis of their real or imputed Sexual Orientation or Gender Identity – ACHPR/Res.275(LV) 2014

³ "This is an umbrella term to describe interventions of a wide-ranging nature, all of which have in common the belief that a person's sexual orientation or gender identity can band should be changed. Such practices aim (or claim to aim) at changing people from gay, lesbian or bisexual to heterosexual and from trans or gender diverse to cisgender". See IE SOGI report https://www.ohchr.org/sites/default/files/ConversionTherapyReport.pdf

main perpetrators of conversion practices and that such practices include "exorcism, drinking of herbs, prayer, laying of hands for healing" as well as forced fasting and deprivation of food. 4

In this context, LGBTIQ people cannot enjoy their right to manifest their religion and belief through worship with others because for them this space is one where they are consistently exposed to the risk of experiencing violence and discrimination through efforts of conversion practices. This is demonstrated in the testimonies of survivors of conversion practices, shared below.

In Kenyan respondents shared the following testimonies of their experience of conversion practices in the religious environment:

- "I was told that being gay was demonic and that I need spiritual intervention to cure the homosexuality spirit. I went through many prayers, and at some point, I had contemplated
- committing suicide. I almost lost myself."⁵
 "My parents locked me in the house. I could not go anywhere, and every night, they would pray for me not to be a homosexual. This happened when I was expelled from school for being a lesbian. This continued for like three years. They also invited a pastor from the church. I had to go for like five sessions in a month."6
- One conversion practice practitioner said: "I handle all issues pertaining to this case. I prepare a ritual for the person so that he or she is healed. This is first done by making some purification signs on one's body and applying some medicines on it. Afterwards I advise them not to take a shower for 24 hours and allow the process to take place. They should later on avoid the gender with which they were sexually engaging for a month."

In Nigeria 59% of 1072 respondents stated that they had undergone rituals such as exorcisms (casting out demons), prayer or laying of hands for healing, which was the most prevalent form of conversion practices in the context of Nigeria, with 28% of respondents indicating that they had experienced physical deprivation including fasting (abstaining from food).8 43% of 1052 respondents reported that religious leaders facilitated conversion practices. Testimonies from Nigerian respondents are as follows:

- "When my parents found out about my sexual orientation, I was severely punished and beaten. Then, they took me to the church for deliverance. The pastor who did the deliverance later counselled me, telling me all sorts of things, including that I should go to the gym and take exercises to look more masculine. He also told me I needed to fast. After fasting, the pastor would come to meet me at night, and we did "things." I was shocked. I went through the process to please my mom and sister even though I felt what they did to me wasn't right. I wasn't happy. I still get these feelings of shock, but I am just trying to comport myself." 10
- "I only did it for my mum, who thought I was being possessed by an evil spirit though I knew I wasn't being tormented by an evil spirit. I just wanted her to do what's in her mind by taking me to different churches. I allowed that because I was just 16 years old and still under her care, but I don't think it can happen again." II

The South African respondents said:

⁸ The Initiative for Equal Rights, The Nature, Extent and Impact of Conversion Practices in Nigeria, 2022, pg 42 and Available at: https://outrightinternational.org/sites/default/files/2022-09/TIERS Conversion Practices in Nigeria.pdf ⁹ Id pg 48

⁴ Outright International, Summary of the Research findings on the Nature, Extent and Impact of Conversion Practices in Kenya, Nigeria and South Africa, July 2022. Available at:

https://outrightinternational.org/sites/default/files/2022-09/SOGIEReport_July192022_2.pdf

⁵ galck+, Shame is not a cure: So-called conversion "therapy" practices in Kenya, 2022, pg 2 Available at: https://outrightinternational.org/sites/default/files/2022-09/galck%2BConversion Practices in Kenya.pdf

⁶ Id pg 26

⁷ Id

¹⁰ Id pg 52

¹¹ Id pg 40

- "Family members organized different sessions, firstly with the pastor, then traditional healer, then with a professional psychologist. None of it helped." ¹²
- "I was continually prayed and fasted over, and when that didn't work, they made my cousin sleep with me forcefully. Actually, my cousin raped me." 13

The dichotomy between the right to manifest one's freedom of religion and belief and the right to freedom from discrimination and violence based on SOGIE is that LGBTIQ people experience violence and discrimination within the religious environment where they seek to manifest their religion in community with others. In many cases, the religious environment is unsafe for them and presents a real risk of experiencing violence and discrimination at the hands of religious leaders. In a context where LGBTIQ people are viewed as needing to be cured or fixed, and such views are underpinned by religious beliefs and perpetrated by religious leaders, LGBTIQ people's ability to manifest their religion, be it by adopting a religion or belief of their choice, by worshiping, observing, practicing, or teaching in community with others, is compromised.

2. Are there any ways in which the right to freedom of religion or belief, and freedom from violence and discrimination based on sexual orientation and gender identity are mutually reinforcing?

The current draft of the South African Prevention and Combating of Hate Crimes and Hate Speech Bill¹⁴ attempts to balance the right of LGBTIQ people to freedom from violence and discrimination, with the right to manifest religion in section 4 dealing with the crime of hate speech. In this section, while making it an offence to intentionally publish, propagate or advocate with the intention to be harmful or to propagate hatred on the basis of *inter alia* sexual orientation,¹⁵ an exception is made in the context where this amounts to the "bona fide interpretation and proselytising or espousing of any religious tenet, belief, teaching, doctrine or writings, to the extent that such interpretation and proselytization does not advocate hatred that constitutes incitement to cause harm" based on sexual orientation.¹⁶ While this remains a Bill and is not yet in force, it is an attempt by parliament to use the law to ensure the enjoyment of the right to freedom from violence and discrimination for LGBTIQ persons, while also protecting the right to manifest religion.

Where religious leaders include in their teaching messages of acceptance, love, and tolerance, this reinforces the right to manifest religion but also emphasizes the right to freedom from discrimination and violence based on SOGI.

In a convening of traditional and religious leaders facilitated by Outright, to discuss eradicating conversion practices in Africa, religious and traditional leaders provided the following strategies for the right to freedom of religion and belief and the right to freedom from violence to be mutually reinforcing¹⁷:

- Messaging of religious teachings must be devoid of judgment to make everyone feel at home.
- Using legal tools to challenge the propagation of hate speech by religious leaders through media can be a way to hold the religious leader accountable.
- More education about the importance of SRHR, gender diversity, and sexual orientation for traditional and cultural custodians.
- Addressing flawed theology and misguided approaches to scripture and other literature.
- Promoting the rights and interests of the LGBTQ+ community within the religious settings.

¹⁴ Prevention and Combating of Hate Crimes and Hate Speech Bill, 2018. Available at: https://www.iustice.gov.za/legislation/hcbill/B9-2018-HateCrimesBill.pdf

¹² Access Chapter 2, Inxebalam': Conversion Practices and implications in the South African Context, 2022, pg 16. Available at: https://outrightinternational.org/sites/default/files/2022-09/AC2-conversion-report.pdf

¹³ Id pg 17

¹⁵ Id section 4(1)(00)

¹⁶ Id section 4(2)(d)

¹⁷ Report from October 2022 Meeting of traditional and religious leaders to discuss conversion practices in Africa. Report can be availed on request.

- Traditional and religious leaders issuing statements that condemns violence, destructive, cruel, harmful, painful, and damaging elements of conversion practices in all their forms and calling on the traditional and religious community to respond similarly.
- Let the religious/traditional leader take the stand as advocates that is, peer-to-peer advocacy
- 3. Are there examples where gender and sexual diversity has been used in religious, traditional, or indigenous narratives or values in a manner which promotes the acceptance of LGBT+ individuals, or protects LGBT+ individuals from violence and discrimination? Has this informed any legal interventions or public policies?

In South Africa, the Institution of the Traditional and Khoi-San Leadership¹⁸ has developed a Social Cohesion programme, which is aimed at "promoting the concept of Ubuntu in traditional communities." ¹⁹ This programme is aimed at addressing social ills including the abuse of LGBTQI persons and "unconstitutional cultural and religious practices."²⁰

4. What are the key trends or significant instances of discriminatory or abusive practices by individual providers of goods or services in the public sphere against LGBT+ and gender-diverse persons that rely on religious narratives?

In Kenya research found that "conversion 'therapy' practitioners advertise their practices mostly through word of mount (referrals) and sermons and other talks in faith-based organizations. However, they also advertised their services on the internet or social media, referrals from health care practitioners, community bulletins, conference presentations, and published books and brochures."21 This has also been evident in Ghana where In June 2018, Head Pastor of Osu Church of Christ, Kofi Tawiah stated that "Homosexuality is considered as a capital offence which is abominable and is accompanied by capital punishment." He continued, "hence Ghanaian Christians must rise up and fight a justice course for the country. It is unfortunate for anybody to think that today homosexuality is accepted by God."22 Soon thereafter, in August 2018, the first regional media consultative forum for religious and traditional leaders was held. During this convening, the Chief Executive Officer (CEO) of the coalition, Mr Moses Foh-Amoaning, said Four hundred homosexuals had registered with the National Coalition for Proper Human Sexual Rights and Family (NCPHSRFV) to undergo voluntary counselling and reformation.²³ In May 2022, the National Coalition for Proper Human Sexual Rights and Family in partnership with the Mental Health Nurser Group. Organized a 2-day training workshop on the treatment, care and support for persons with sexual orientation and gender identity disorder. The posters for this workshop were shared on social media platforms. (Annexed below)

5. Has the State adopted, in public policy, legislation or jurisprudence, norms purportedly based on protecting freedom of religion or belief that promote, enable and/or condone violence and discrimination against individuals based on sexual orientation or gender identity? If so, please give examples, with commentary as needed to explain context, scope, and application.

https://nationalgovernment.co.za/units/view/135/national-house-of-traditional-leaders-nhtl

22.5

¹⁸ This is "a body composed of traditional leaders who are delegates from the Provincial Houses of Traditional Leaders of South Africa, representing the Provincial Houses at national level." See

¹⁹ Department of Traditional Affairs, Annual Performance Plann 2022/23. Available at: https://static.pmg.org.za/DTA_APP_2022-23_Final.pdf

²⁰ Department of Traditional Affairs, Annual Performance Plann 2022/23. Available at: https://static.pmg.org.za/DTA APP 2022-23 Final.pdf

²¹ galck+ report, pg 20

²² Pastor warns government against homosexual issues. Available at https://www.gbcghana.com/1.11598927

²³ '400 Homosexuals register for counselling' https://www.graphic.com.gh/news/general-news/400-homosexuals-register-for-counselling.html

In Nigeria²⁴ and Kenya²⁵, the research found that laws criminalizing consensual same-sex sex fuel conversion practices. Furthermore, "some politicians and religious leaders manipulate rich indigenous notions of the importance of family in Kenya, using these ideas to fuel campaigns for non-inclusive "family values"."²⁶

The Introduction of the Promotion of Proper Human Sexual Rights and Ghanaian Family Values Bill in Ghana²⁷ "promotes violence and discrimination against persons for their sexual orientation, sex characteristics, and gender identity, contrary to principles of non-discrimination and equality. It also prescribes conversion practices which can amount to torture, and are against international human rights standards." The Bill provides that if an accused person "openly recants and requests access to an approved medical help or approved medical treatment", the court may "make such orders as appropriate to serve the interest of justice or secure the welfare or wellbeing of the convicted person."

Whilst some of these Bills have not yet been enacted into law, evidence suggests that, even the mere introduction of such Bills has a consequence of fuelling violence based on SOGI. One respondent said "Before the Bill, it was normal. But now, people look at us like we're satanic. Like, we are the cause of the issues happening in Ghana. We used to have safe places to go to, but now we don't." This bill has mainly been supported by religious fundamentalists and evidence indicates that violence against LGBTIQ persons has grown since the introduction of the Bill. Furthermore, "religious bodies have played a role in fuelling the anti-LGBTIQ sentiment during the discussion of the Bill. 32

- 6. Has there been any legal challenge to these policies/provisions under any domestic, regional, or international human rights provisions? If so, state the outcome and rationale of the case. If not, provide your opinions as to why such a challenge has not yet been brought.
- 7. Are there any examples of State restrictions based on preventing violence and/or discrimination against LGBT+ persons that prohibit or limit practices undertaken in the name of the religion or spirituality, such as public accommodation non-discrimination protections? If so, have they been legally challenged on the basis of freedom of religion or belief? If yes, explain the outcome and rationale of the case(s).

The current draft of the South African Prevention and Combating of Hate Crimes and Hate Speech Bill³³ attempts to balance the right of LGBTIQ people to freedom from violence and discrimination, with the right to manifest religion in section 4 dealing with the crime of hate speech. In this section, while making it an offence to intentionally publish, propagate or advocate with the intention to be harmful or to propagate hatred on the basis of *inter alia* sexual orientation,³⁴ an exception is made in the context where this amounts to the "bona fide interpretation and proselytising or espousing of any religious tenet, belief, teaching, doctrine or writings, to the extent that such interpretation and

²⁴ TIERS report, pg 12 and 18

²⁵ galck+ report, pg 4

²⁶ Outright report, pg 6

²⁷ Promotion of Proper Human Sexual Rights and Ghanaian Family Values Bill, 2021. Available at: https://cdn.modernghana.com/files/722202192224-0h830n4ayt-lgbt-bill.pdf

²⁸ Outright, We deserve Protection, Anti-LGBTIQ Legislation and Violence in Ghana, 2022, pg 4 available at: https://outrightinternational.org/sites/default/files/2022-09/GhanaReport_2022.pdf

²⁹ Promotion of Proper Human Sexual Rights and Ghanaian Family Values Bill, 2021, Article 21. Available at: https://cdn.modernghana.com/files/722202192224-0h830n4ayt-lgbt-bill.pdf

³⁰ Outright, We deserve Protection, Anti-LGBTIQ Legislation and Violence in Ghana, 2022, pg 19 available at: https://outrightinternational.org/sites/default/files/2022-09/GhanaReport_2022.pdf

³¹ Id

³² Id pg 21

³³ Prevention and Combating of Hate Crimes and Hate Speech Bill, 2018. Available at: https://www.justice.gov.za/legislation/hcbill/B9-2018-HateCrimesBill.pdf

³⁴ Id section 4(1)(00)

proselytization does not advocate hatred that constitutes incitement to cause harm" based on sexual orientation.³⁵ While this remains a Bill and is not yet in force, it is an attempt to use the law to ensure the enjoyment of the right to freedom from violence and discrimination for LGBTIQ persons, while also protecting the right to manifest religion.

On 29 March 2022 the Portfolio Committee on Justice and Correctional Services³⁶ held public hearings on the Bill.³⁷ In these public hearings the main oral presentations against the Bill were from religious bodies³⁸ who argued that:

- i. "The Bill is unnecessary in light of the South African crime of *crimen injuria* (the wilful injury to someone's dignity) and civil sanctions for hate speech under the Promotion of Equality and Prevention of Unfair Discrimination Act."³⁹
- ii. The definition of "harm", "hate speech" and the "prohibition of hate speech", must be revised and the religious exemption clause must be strengthened because failing to do so would "lead to a violation of the ICCPR and that the preamble of the Bill should include specific reference to section 15 and 31 of the Constitution" which address freedom of religion, belief and opinion and cultural, religious and linguistic communities, respectively.⁴⁰
- iii. Concerns were also cited about utterances that can be perceived as hate speech such as statements about "same-sex marriages [...] made from the pulpit or in church, it would not be seen as a crime yet when same comments are made by individuals outside, they would be in breach of the law."

The Bill has not been made into law and it is yet to be seen how this debate will unfold and whether the Bill will become law.

- 8. What role (if any) has the concept of conscientious objection played in limiting the full enjoyment of the right to freedom from violence and discrimination on the basis of sexual orientation and gender identity?
- 9. Has the scope and application of conscientious objection been sufficiently defined, limited, and/or regulated so as to strike a fair balance between manifestation of one's freedom of religion or belief, and freedom from violence and discrimination based on SOGI? Where the doctrine is invoked to permit the withholding of goods or services to members of the LGBT+ community (such as in the context of sexual and reproductive healthcare, provision of marriage licences, access to consumer goods, etc.), do State laws provide alternative access to goods or services?
- 10. Where State legislation or policy requires the reasonable accommodation of religious beliefs, practices, and/or institutions, are there instances where such laws or policies limit freedom from violence and discrimination against LGBT+ and gender-diverse persons? These may include but are not limited to exemptions from non-discrimination legislation, and/or accommodations within the workplace, educational institutions, healthcare-settings, the justice system, etc. Are there reports of violence, spiritual abuse, and/or other forms of discrimination against LGBT+ and gender-diverse persons because of these practices?

-

³⁵ Id section 4(2)(d)

³⁶ Committees are, in general, proportionally representative of the parties in Parliament. The National Assembly appoints from among its members a number of Portfolio Committees to shadow the work of the various national government departments and they consider Bills, deal with departmental budget votes and oversee the work of the department they are responsible for. Parliament of the Republic of South Africa, Role of Parliamentary Committees. Available at: https://www.parliament.gov.za/role-of-parliamentary-committee (Accessed 3 December 2022)

³⁷ Parliament of the Republic of South Africa, Committee holds public hearings on Hate Crimes Bill, 29 March 2022. Available at:

 $[\]frac{https://www.parliament.gov.za/news/committee-holds-public-hearings-hate-crimes-bill\#:\sim:text=The\%20purpose\%20of\%20the\%20Bill,accordance\%20with\%20international\%20law\%20obligations. (Accessed 3 December 2022)$

³⁸ Freedom of Religion SA (ForSA), The South African Jewish Board of Deputies and the Southern African Catholic Bishops Conference (SACBC).

³⁹ Parliament of the Republic of South Africa, Committee Holds Public Hearings on Hate Crimes Bill, https://www.parliament.gov.za/news/committee-holds-public-hearings-hate-crimes-bill#:~:text=The%20purpose%20of%20the%20Bill,accordance%20with%20international%20law%20obligations. (accessed 3 December 2022)

11. Good Practices:

a. Provide any examples of good practice – at the international, national or local level – where State and non-State actors (including faith leaders, groups and organisations, international organisations, civil society organisations, and the UN human rights system) have taken effective measures to protect and promote freedom of religion or belief of LGBT+ and gender-diverse persons, and made efforts to prevent, mitigate and respond to any violence and/or discrimination justified in the name of religion.

In South Africa, the government, through the Department of Justice, has set up a multisectoral group (comprising both state and non-state Actors) called the National Task Team (NTT) on Gender and Sexual Orientation-Based Violence. 41 "The aim of the NTT is to address human rights concerns and violations amongst LGBTI) persons [and] the spate of attacks against black, lesbian women in the form of 'corrective rape' within various South African communities."42 This mechanism also has a Rapid Response Team, whose mandate includes preventing, mitigating and responding to violence against LGBTIQ persons, including violence in the name of religion.⁴³ In its communications strategy, the NTT recognises the importance of changing mind-sets of opinion makers including "traditional leadership structures, church leadership and political leadership" and included in primary target audience is traditional leadership and faith-based organisations. 44 The NTT has embarked on civic education on the rights of LGBTI persons and engaged traditional leaders and faith-based organisations in this regard.⁴⁵ The NTT has also engaged the House of Traditional Leaders⁴⁶, presenting issues faced by the LGBTIQ community in South Africa, including the issue of violence and conversion practices. As a result, the chairperson of the House of Traditional leaders has come out in support of LGBTIQ persons in South Africa and pledged support to fighting conversion practices and other forms of violence faced by LGBTIQ persons in South Africa.47

b. Provide any examples of measures by State or non-State actors to ensure effective participation of people with diverse gender identities and sexual orientations in religious, cultural, social, and public life. Please provide relevant examples where LGBT+ people have asserted their individual or collective rights to access (or establish) religious or spiritual frameworks and institutions.

In the absence of the teachings on love and acceptance of LGBTIQ populations within the mainstream churches, LGBTIQ+ individuals have, in several countries, established churches and spaces of worship that enable them to realise and exercise their freedom of religion and belief free from discrimination. For example, Cosmopolitan Affirming Community in Kenya. The Cosmopolitan Affirming Church is an inclusive faith community in Kenya that openly welcomes LGBTIQ people of faith to explore and experience their faith in an affirming environment.⁴⁸

https://www.nationallgbtitaskteam.co.za/about-the-task-team/about-the-task-team-2

https://www.gov.za/sites/default/files/gcis document/201409/2014-lgbti-terms-reference-rapid-reponse-teama.pdf

https://www.gov.za/sites/default/files/gcis document/201409/2014-lgbti-commstrategya.pdf

⁴¹ National Task Team, About the Task Team, available at:

⁴² id

⁴³ Terms of Reference for the Rapid Response Team to fast track pending and reported LGTI related cases in the Criminal Justice System. Available at:

⁴⁴ NTT Communication Strategy, pg 5. Available at:

⁴⁵ Id pg 16

⁴⁶ This is "a body composed of traditional leaders who are delegates from the provincial houses of traditional leaders in South Africa, representing provincial houses at national level. See

https://nationalgovernment.co.za/units/view/135/national-house-of-traditional-leaders-nhtl

⁴⁷ In her speech at the Launch of Outright's conversion practices report, the Chief pledged support to ending conversion practices in Africa. See https://www.youtube.com/watch?v=bzSkXychquc

Learn more about the Cosmopolitan Affirming Community https://cac-kenya.com/

ANNEX

