Submission to the South African Human Rights Commission public inquiry into the right to have access to health care services

Health care for lesbian, gay, bisexual and transgender people: Issues, implications and recommendations

Presented by OUT LGBT Well-being on the 31st May 2007

Thank you for the opportunity to make this submission, on behalf of OUT LGBT (lesbian, gay, bisexual and transgender) Well-being. We commend the Commission for engaging civil society in the critical matter of access to health care services in South Africa.

OUT's vision is to build healthy, empowered lesbian, gay, bisexual and transgender communities, and to reduce heterosexism and homophobia in society at large. Our mission is to strengthen LGBT peoples' physical and mental health, and their access to rights. We do this through the following programmatic areas: the provision of sexual and mental health services; research; mainstreaming programmes; and advocacy and lobbying toward the realization of sexual and gender rights.

As a direct service provider, OUT is familiar with the impact of discrimination and marginalization on members of LGBT communities and the unique challenges people face when accessing a range of health care facilities, services and programmes. By way of the present submission, we trust that the issues and experiences facing LGBT South Africans, in the context of health care provision, will be adequately considered in the Commission's deliberations and inquiry process.

I would like to start by focusing on the legal basis of our submission, which is grounded in three simple, yet well-founded legal principles: Firstly the right of access to healthcare requires the state to take positive steps to protect the most vulnerable groups in our society, which include lesbian, gay, bisexual and transgender (LGBT) people. Secondly, the constitutional right to equality informs the manner in which healthcare services are delivered in South Africa, and the state is required to ensure that healthcare services are delivered without discrimination on grounds of sexual orientation. Thirdly, the patient's right to privacy must be respected when the public and the private sector deliver healthcare services. This privacy right is particularly significant for LGBT people who come into contact with the healthcare system.

In relation to vulnerable groups' right of access to healthcare Section 27(1)(a) of the Constitution provides that *"[e]veryone has the right of access to health care services*". This places a positive obligation on the state to "*take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of each of these rights*".

As you are well aware assessment as to whether the state has taken reasonable measures to realize the right of access to healthcare will be done in a context specific way and on a case by case basis. However, the Constitutional Court in *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) clearly indicated that in order for the state's measures to be considered reasonable they must take account of the most vulnerable groups in our society:

I quote: "*A society must seek to ensure that the basic necessities of life are provided to all if it is to be a society based on human dignity, freedom and equality. . . . <u>Those whose needs are the most urgent and whose ability to enjoy all rights therefore is most in peril, must not be ignored by the measures aimed at achieving realization of the right</u>.*" (our emphasis, at para 44)

Accordingly, laws or policies which confer health-related benefits may not unfairly or arbitrarily exclude vulnerable groups or individuals. In the submission which follows we show how LGBT people are a vulnerable group in our society and how their needs should be considered when the state formulates the measures it intends taking to realize the right of access to health care.

Now turning to the second legal principle, ensuring equality when accessing healthcare services

As discussed above the right of access to healthcare requires the state to take reasonable measures to ensure its realization. The Constitutional Court in *Khosa v Minister of Social Development; Mahlauele v Minister of Social Development* 2004 (6) SA 505 (CC) ("***Khosa***") held that the assessment or reasonableness requires a consideration of the impact that the measure taken by the state has on other rights, especially the right to equality. Therefore in *Khosa* legislative provisions providing for social welfare grants which failed to confer benefits on permanent residents as a result of their lack of citizenship were found to be discriminatory and struck down by the Court (at para 40 – 45).

The Constitutional Court's pronouncement in *Minister of Home Affairs v Fourie* 2006 1 SA 524 (CC) serves as a reminder as to how the health care sector should be upholding the right to equality:
I quote *"A democratic, universalistic, caring and aspirationally egalitarian society embraces everyone and accepts people for who they are. To penalize people for being who and what they are is profoundly disrespectful of the human personality and violatory of equality. Equality means equal concern and respect across difference."* (our emphasis, at para 60)

In the submission which follows we show how LGBT people are confronted with discrimination when trying to access healthcare services, which constitutes a systemic rights violation which must be addressed.

The third legal principle underpinning our submission relates to healthcare workers and respect for the right to privacy and non-discrimination.

We are all well aware that there have been a number of high profile successes in the fight for lesbian and gay equality in South Africa. However, it is often forgotten that many, if not most, LGBT people are unable to take advantage of legal equality and often face pernicious discrimination from South African society.

In this light, it is important that the public and private health care sector respect and protect LGBT peoples' right to privacy regarding their sexual orientation. In *Jansen van Vuuren NO v Kruger* 1993 (4) SA 842 (A) the Appellate Division found there was a breach of a patient's right to privacy where his doctor had disclosed his HIV status to a third party. Sexual orientation is a similar private fact to HIV status and should not be disclosed without consent. In the submission which follows we show how disclosure of sexual orientation to healthcare practitioners often has a discriminatory effect, and disclosure of sexual orientation by a healthcare practitioner to a third party can have harmful consequences for LGBT people. This too is a rights violation which requires attention.

With these legal principles in mind **I would like to turn to the facts before us with regard to the systemic discriminations experienced by lesbian and gay people in the health care setting**, noting that such discrimination may threaten physical and mental health and result in the denial of access to care, inappropriate therapies, or inferior care.

One of the key barriers for sexual and gender minorities with regard to accessing rights and services is that they are frequently targets of victimization. In 2004 and 2005 OUT conducted research among

lesbian, gay and bisexual populations in Gauteng and KwaZulu-Natal. As the first representative, qualitative study of its kind, the research revealed significant rates of victimization among LGB men and women in both provinces.[1]

Because they are stigmatized for their perceived sexual and/or gender "deviance", LGBT people are frequently targeted for marginalization, exclusion or victimization precisely because of their sexual and/or gender identity.

The quantitative findings of the OUT research highlight specific barriers to health care access for LGBT people.

The findings in KZN indicate that not all health care practitioners provide a safe and accepting environment for LGBT people:
• Approximately half the sample felt that health care practitioners do not maintain confidentiality.
• 30% indicated that health care practitioners did not make them feel comfortable
• 23% of participants reporting that heterosexist questions were asked
• 37% indicated that health care practitioners assumed they are heterosexual

In addition to more subtle forms of heterosexism, findings revealed that LGBT people also face overt homophobia at the hands of health care practitioners:
• 5% indicated that they were refused treatment by health care practitioners because of their sexual orientation.

The fear of discrimination and sexual orientation being discovered often prevented access to health care:
• 13% delayed seeking treatment due to the fear of discrimination by health care practitioners

The impact of discrimination in the health care system, as a result of negative and prejudiced attitudes toward sexual minorities, can result in individuals not seeking treatment as was reported by 16% of the sample in KZN.

Our Gauteng research findings presented similar trends:
• 6% of the sample had been refused treatment based on their sexual orientation
• 12% of the sample delayed seeking treatment for fear of discrimination
• 12% of respondents had lived with health conditions and not sought help for fear of their sexual orientation being discovered. These statistics are concerning, as living with conditions like sexually transmitted infections (STIs) can accelerate the spread of HIV/AIDS.

Turning to the matter of gender-based violence the OUT research revealed concerning levels of violence, sexual and non-sexual, against gay men and lesbian women in both provinces.[2] Gay and bisexual men are also frequently targeted for rape, usually at the hands of men they identify as

[1] Levels of Empowerment among Lesbian, Gay, Bisexual and Transgender [LGBT] People in Gauteng, South Africa, OUT LGBT Well-being, 2004; Levels of Empowerment among Lesbian, Gay, Bisexual and Transgender [LGBT] People in Gauteng, South Africa, 2004
[2] In Gauteng, 14.9% of black women and 11.2% of white women reported that they had survived sexual abuse and rape in school, while 15.3% of black men and 11.3% of white men reported similar experiences. *Levels of Empowerment among Lesbian, Gay, Bisexual and Transgender [LGBT] People in Gauteng, South Africa*, p.4.

straight.[3] And the notion of "corrective rape", the rape of lesbian woman to "make them straight", has been documented by a partner organization The Forum for the Empowerment of Women.

Gender-based violence may drive LGBT people to seek health care, and also expose them to specific stigmas related to sexual practice and gender presentation. Sexual violence may increase the urgency of an individual's health care needs. In such instances, the sexual orientation of the victim may be fore-grounded during the consultation process with the health care worker. As the health worker attains information about the rape/sexual violence, the potential for sexual orientation/gender identity disclosure may increase. Negative attitudes and prejudice, on the part of health care workers, play a role in secondary victimization, and may result in a poorer level of care being rendered to LGBT survivors of gender-based violence.

We wish to also highlight the specific challenges facing transgender people[4] in the context of health care.

There is no conclusive research in South African on transgenderism. However LGBT service providers are aware that transgender people face high levels of discrimination due to the fact that they represent a challenge to gender stereotypes and rigid sex-roles more strongly and obviously than many other grouping. Based on their work with transgender people, Gender DynamiX (the only registered African organisation that focuses exclusively on transgenderism) has tracked key issues facing this constituency. Their anecdotal evidence forms part of our written submission.

Gender DynamiX[5] contends that transgender people experience specific health care challenges, as follows:

- In spite of legislation that recognises the needs and rights of transgender people, those who have started their gender transition face medical and administrative barriers in the process of gender reassignment surgery.
- Access to medical care and treatment for transgender persons is severely limited due to: a lack of knowledge on the part of medical and mental health professionals on how to manage transgender clients; cost factors associated with gender reassignment therapy; and limited availability of services.
- The World Professional Association for Transgender Health has compiled Standards of Care and Ethical Guidelines[6] for medical professionals to ensure standardised, quality care and treatment for transgender persons. These international guidelines do not seem to be consistently applied in the medical care of transgender people in South Africa. The lack of uniform application of the guidelines may negatively affect the quality of care rendered and may compromises the treatment process for transgender people.

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[3] *Ibid.*, p. 16.

[4] This overview was provided by Gender DynamiX, a registered non-profit organization that was founded July 2005. Gender DynamiX is currently the only African organization focusing exclusively on transgender issues. The organization aims to increase awareness and visibility of transgenderism in South Africa and also to support transgender persons' access to human rights and services.

[5] For more detailed information on anecdotal evidence of transgender experiences in the health care setting, contact Liesl Theron, Director of Gender DynamiX on liesl@genderdynamix.org.za or 083 3207691

[6] Harry Benjamin Standards of Care

So, what are the implications of these experiences for LGBT health care access and provision?

All people need to consult a health care professional at some point in their lives. For LGBT people, this experience is often negative and can be said to relate to a form of homo-prejudice termed 'institutionalized homophobia'. The effects of institutionalized homophobia, coupled with other negative experiences such as heterosexism and victimization can have a profoundly negative effect and may even be fatal.[7] Other than the primary victimization, LGBT people may also be at risk of decision-maker de-prioritization and service provider neglect.[8]

As the OUT research illustrates, negative attitudes of health care providers often result in LGBT people being afraid to compromise their health by disclosing their sexual identity, or they may delay or avoid health care altogether for fear of discrimination. The OUT studies found that health care practitioners often assume heterosexuality. Sometimes, for a health professional to give an accurate diagnosis and treatment plan, disclosure of sexual orientation is important. A health care practitioner's assumption that someone is heterosexual can suppress adequate communication, and so certain health risks may not be addressed. In conjunction with the fact that communication is lacking, many gay and lesbian people do not visit doctors for routine check-ups which may negatively affect well-being, for fear of disclosing their sexual orientation because of a perceived insensitivity among health care practitioners[9].

In the early days of the HIV epidemic there was the misconception that HIV was only a "gay disease". We now know that HIV spread is linked to sexual behaviour not orientation, however the vast majority of HIV/AIDS public education has focused on assumed heterosexuality. National HIV messaging and service provision is presently not equipped to deal with a range of sexual and gender identities. Rather it confines itself to an often imagined notion of human sexuality, based on hetero-normative, highly gendered assumptions of behaviour. As such, gay men, lesbian women and transgender people have been neglected as a target audience for HIV/AIDS prevention, treatment and care.

So, what does all this mean for the delivery of health care services in South Africa?
Central to the right to health for all South Africans is assurance of equal access based on the principle of non-discrimination. South African health frameworks assert that no one may refuse a lesbian or gay person a service or treatment or provide them with inferior services due to their being lesbian or gay. Respect for the dignity and privacy of individuals, a cornerstone of health policy in South Africa, can facilitate more sensitive and humane care for LGBT people. On the other hand, stigmatization, exclusion, marginalization and discrimination can thwart medical and public health efforts.

Key to the availability of health-care is the need to ensure that facilities are equipped with the relevant and appropriate services and programmes for the needs of all people. We need health care settings that provide appropriate education materials and health care products for the needs of LGBT people. In addition, psycho-social support in mental health care facilities should be equipped to cater

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[7] Nel, J.A. 2005(a). Hate crimes: A new category of vulnerable victims for a new South Africa. In Linda Davis and Rika Snyman (eds.), Victimology in South Africa, Pretoria: J L van Schaik.
[8]. *Ibid*
[9] Bonvicini, K.A. & Perlin, M.J. (2003). The same but different: clinician-patient communication with gay and lesbian patients. Patient Education and Counseling 51, 115-122

for the specific issues that may face lesbian/gay people in relation to: sexual behavior; relationships and legal issues.

Currently, in South Africa, targeted health care services for LGBT people are provided primarily by LGBT organizations, whose funding is for the most part depended on foreign donors. To ensure that health facilities, goods and services are accessible to LGBT people, without discrimination, requires concerted and programmatic efforts in which the public sector becomes a leading agent. The information developed and utilized in the public health sector should be applicable for all sexual orientations. There is a need to ensure services that are safe, non-judgmental and affirming for LGBT people. Safe facilities include a guaranteed of the right to privacy and confidentiality. This requires enhancing an ethos in health care facilities that is underpinned by notions of human dignity and agency, and that is mindful of gender and sexuality appropriateness.

Matters of sexual orientation and gender identity have largely been neglected in the research, practices and theoretical concerns of health professionals. Changing both the attitudes of health care providers to LGBT people and addressing heterosexist culture within the health care setting are major challenges for the principle of inclusive care. Shifts need to take place at both individual and institutional levels, to ensure accessible, tolerant, safe and inclusive health care services and programmes.

Finally, I would like to turn to our recommendations

OUT submits the following recommendations for consideration by the Commission:

- LGBT people should be considered a 'vulnerable group' within policies related to health care provision.
- Policies and procedures in health care settings need to be reviewed and revised in order to reduce the potential for discrimination and to strengthen the practice of "inclusive health care".[10]
- Partnerships between public health programmes and LGBT service providers should be strengthened. This should include integrating the respective competencies of governmental bodies and NGOS, into a comprehensive framework for increasing the accessibility and relevance of appropriate health care services for LGBT people.
- Education programmes for health care service providers should include information related to LGBT concerns and these should be mainstreamed into all aspects of professional development.
- Curricula and education content for medical students, doctors, mental health and nursing staff should incorporate research, guidelines and standards of care that are also relevant to LGBT clients.
- Policies and procedures concerning the admission of transgender people into hospital wards and places of safety should be developed and implemented.

[10] For example: OUT has developed a resource called "Understanding the Challenges facing Gay and Lesbian South Africans: Some guidelines for service providers". In addition, on the request of the Gauteng Department of Social Development, OUT has developed draft guidelines "LGBT Youth in Care Guidelines", an addendum to the existing manual for Places of Safety and Secure Care Centers.

- Minimum standards, in line with international best practice, should be instituted for medical practitioners in the management of care interventions for transgender people.
- The production and dissemination of relevant and appropriate information on a range of health care issues for lesbian and gay people should be ensured.
- A gender-sensitization programme needs to be integrated into the training of health care personnel and this should include training on the difference between sexual orientation and gender identity variance, and the implications for health care facilities and service provision.

In closing, the right of access to healthcare requires bold steps to protect the most vulnerable groups in our society, which include LGBT people. The constitutional right to equality should shape the delivery of healthcare services in South Africa, underpinned by the core value of non discrimination. And, we must ensure that health care beneficiaries are treated with dignity and their right to privacy upheld. These imperatives require a pointed effort to interrogate the appropriateness and sensitivity of present health care approaches and strategies, and to strengthen and expand these where needed.

It is in all our interests to work collectively towards a health care dispensation that provides equal and adequate access, and appropriate and quality services, to all in South Africa. OUT is committed to this vision. We must work collaboratively to develop an informed and unified strategy to ensure that, in the spirit of our Constitution, all South Africans are able to enjoy the right to health care.

I thank you.

END NOTE

This oral submission was drafted by Melanie Judge (Advocacy Manager, OUT LGBT Well-being) and presented to the South African Human Rights Commission by Dawie Nel (Director, OUT LGBT Well-being). We wish to acknowledge Kerry Williams and Portia Mngomezulu of Webber Wentzel Bowens for their pro bono assistance during the drafting of this submission.

For more information contact:
Melanie Judge, Advocacy Programme Manager
OUT LGBT Well-being
(012) 344 5108 (t)
(012) 344 6501 (f)
programmes@out.org.za