

Access to Justice for Lesbian, Gay, Bisexual and Transgender Survivors of Sexual Offences in South Africa

A research report



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EXECUTIVE SUMMARY

Background

Over the past two decades research on lesbian, gay, bisexual and transgender (LGBT) people, health and violence has highlighted substantial vulnerabilities and health disparities based on sexual orientation and gender identity (SOGI). In South Africa, a number of highly publicised cases of homophobic rapes and murders has increased awareness of bias-motivated violence against LGBT people. Particularly, attacks on black lesbian women have become well known. Beyond individual cases, academic research increasingly confirms that in South Africa, like elsewhere in the world, LGBT people are more vulnerable to violence¹ in general, and sexual violence in particular, due to their real or perceived sexual orientation or gender identity.

These vulnerabilities are in contrast with South Africa's inclusive constitutional and legislative framework, which offers comprehensive recognition and legal protection to LGBT people. Emanating from this constitutional mandate, LGBT people enjoy the full range of civil rights. Legislative and policy reforms (and the development of equality jurisprudence) after 1996 have sought to remove or amend any law that criminalises or discriminates against LGBT people, and ensure equal treatment regardless of sexual orientation and gender identity. This included the revision of the Sexual Offences Act, in form of the Criminal Law (Sexual Offences and Related Matters) Amendment Act Amendment Act² (herein referred to as the Sexual Offences Act). The Sexual Offences Act definition of rape is gender-neutral – an act of sexual penetration that is both unlawful and intentional – criminalising sexual violence against and by people of all genders and sexual orientations.

Despite legal protections, few LGBT persons report cases of sexual violence to the police, including bias-motivated incidents, and even fewer make it to court. The report by the Ministerial Advisory Task Team on the Adjudication of Sexual Offences Matters (MATTSO) from 2013 highlights several barriers faced by LGBT people to reporting sexual violence, which are confirmed by research. These barriers include experiences of discrimination within the criminal justice system, and are rooted in societal homophobia³ and transphobia⁴. A 2016 study by The Other Foundation highlights the contradictory attitudes that South Africans hold towards LGBT people: while 55% would accept a gay family member, only 51% believed LGBT people should have the same rights, and 72% felt that same-sex activity was 'morally wrong'. Thus, South Africans who do not conform to heteronormativity⁵ experience discrimination and marginalisation because of their sexual orientation, gender identity (SOGI), or gender expression – that is because they are or are perceived to be LGBT.

The MATTSO report also highlights that information on a survivor's sexual orientation and/or gender identity is not routinely captured in South African Police Services (SAPS) reporting procedures. Therefore, it is not possible to estimate the prevalence of violence motivated by bias that relates to sexual orientation and/or gender identity.

In 2016, the GHJRU research team conducted a baseline assessment of five pilot sexual offences courts in South Africa. For this baseline study, the researchers spoke to 53 participants, drawn from all levels of court personnel (court clerks to magistrates, including intermediaries and personnel from non-governmental court support organisations), and reviewed existing case files at the courts. The researchers specifically asked about court personnel's knowledge of, and experience with, cases that involve survivors who identify as LGBT. Many interview respondents said that they were not aware of cases that involved survivors who identified as LGBT, and that "we don't have much of such cases". While there were notable exceptions to this, the majority of interview participants were not aware of cases involving survivors who identified as LGBT.

Notes

¹ Bias-motivated violence is violence directed at a person because of their identity – because of who they are. It is often meant as a 'message crime' – a crime that sends a message to other people who are like the survivor. Violence against LGBT people is often motivated by the survivor's sexual orientation and/or gender identity – or by what the perpetrator perceives their sexual orientation or gender identity to be.

² Criminal Law (Sexual Offences and Related Matters) Amendment Act Amendment Act, No 5 of 2015. Prior to its recent revision this was the Criminal Law (Sexual Offences and Related Matters) Amendment Act No. 32 of 2007

³ Homophobia is the fear, hatred, discomfort with, or mistrust of people who identify as lesbian, gay, or bisexual.

⁴ Transphobia is the fear, hatred, discomfort with, or mistrust of people who identify as transgender or gender non-conforming/ gender diverse.

⁵ Heteronormativity is the assumption that heterosexuality (being attracted to the opposite sex and gender) is normal and applies to everyone, which creates a bias in favour of heterosexual relationships.



These findings are in stark contrast with the documented levels of violence, especially bias-motivated sexual violence that LGBT people encounter. The research team thus decided to conduct a follow-up sub-study, to investigate why criminal justice personnel at the five pilot sexual offences courts were not aware of cases involving LGBT survivors of sexual violence.

Methods

Researchers from the GHJRU conducted a qualitative study with a convenience sample of representatives of organisations providing advocacy and support services to LGBT people in Gauteng, KwaZulu-Natal and Mpumalanga, as well as representatives of organisations providing court support services in the catchment areas of the five courts in question. Thirteen interviews were conducted with 17 interviewees. All data were thematically analysed using NVivo software. The research findings were validated through (1) a presentation to the LGBTI National Task Team (NTT) in the Department of Justice and Constitutional Development (DoJ&CD) in order to discuss and validate the findings before finalising the analysis; and (2) at a workshop with members of the criminal justice system cluster, court support and LGBT organisations, as well as experts on the prosecution of SOGI-related violence.

Findings

The findings need to be contextualised within existing evidence on the challenges that all sexual violence survivors face when accessing the criminal justice system. LGBT survivors, and survivors who experienced sexual violence due to their perceived sexual orientation or gender identity, share these access challenges with survivors from the general population, and also experience additional challenges due to their sexual orientation and/or gender identity.

The researchers identified two broad reasons for the lack of awareness of cases involving LGBT survivors of sexual violence: 1) many of these cases do not reach the criminal justice system, and 2) cases might not be identified as LGBT-related or bias-motivated.

1) Cases do not reach court

Across the three provinces participants in both court support and LGBT organisations felt that the number of LGBT survivors reporting sexual offences were quite low. In addition to the trauma, fear and stigmatisation associated with sexual assault and with low reporting of sexual offences in general, LGBT survivors experience additional and compounding factors that result in non-reporting.

- **Safety concerns**

Survivors may not report due to concerns about their safety. This is especially the case where the perpetrator lives in the same community. Whilst survivors in the general population often also fear for their safety, LGBT survivors may have the further vulnerability of not having familial or community support, nor the social capital (resources, networks and support systems) to buffer the impact of relocation or transience, or further harm from the perpetrator or other community members. NGO personnel and advocates of LGBT rights are not immune from such safety concerns either, and organisations also reported having threats directed at them, including when undertaking advocacy work about bias-motivated crimes against LGBT people, underscoring the prevalence of hostility to those who actively challenge heteronormativity and other gendered norms.

- **Lack of support and familial homophobia**

Throughout South Africa, identifying as LGBT is an extreme source of stigma and alienation. Simultaneously, many families find extreme difficulty in dealing with sexual violence, and the assault of a family member can be a source of stigma and shame, disabling familial support for survivors. Due to the double stigma of being an LGBT survivor, family members may be particularly unable or unwilling to provide support, and stigma can have a powerful silencing effect on the individual and create an additional barrier to reporting sexual violence.

- **Experiences of prejudice at points of entry into the criminal justice system**

Participants frequently mentioned past or anticipated negative experiences, including homophobia and transphobia, as a reason for not reporting crimes. They indicated that LGBT people tend to avoid service providers that are not explicitly LGBT-focused, including important entry points into the criminal justice system, such as SAPS, clinics, hospitals and specialised Thuthuzela Care Centres. This was the most widely cited factor for low reporting among LGBT people.

- **Perception of inefficiency of the criminal justice system**

Another significant barrier to reporting was the perception that the criminal justice system did not work for LGBT people, or at all. As a result, individuals may feel that reporting is not worthwhile, especially as they risk exposing themselves to societal or familial homophobia and safety risks or ill treatment.

2) Cases reach court but are not identified as LGBT-related or bias-motivated

Participants were adamant that some LGBT people do report sexual offences, including where they are specifically targeted due to their sexual orientation, gender identity and/or expression, or the perception thereof. All participants provided examples of such cases. They highlighted that a core reason that LGBT survivors of sexual offences were not believed to be seen within the criminal justice system was due to difficulty in identifying when LGBT people or LGBT-related cases enter the system. Participants attributed this to either (1) LGBT people not disclosing their sexual orientation and/or gender identity; or (2) LGBT people disclosing their sexual orientation and/or gender identity, but the crime not being identified as bias-motivated.

- **Non-disclosure of sexual orientation and/or gender identity**

It is likely that LGBT people have gone through the court system without disclosing their sexual orientation and/or gender identity, and thus without disclosing the possible bias-motivation of the attack. In these cases, the sexual orientation and/or gender identity of the survivor would not have entered into evidence, and the survivor would not have been identified as LGBT by criminal justice personnel. There is currently no formal mode of enquiring about a person's sexual orientation or gender identity in the criminal justice process. For example, personal information and intake forms do not include demographic questions related to SOGI. Criminal justice personnel are reliant on individuals disclosing their SOGI and/or any possible bias-motivation of their own volition. In the context of widespread prejudice and discrimination, not only in the criminal justice system but also in the wider social context, the risk of disclosure through the course of reporting and trial might be too risky for some LGBT people. In such instances a survivor may report their sexual assault, but not necessarily the bias-motivation of the crime.

- **SOGI disclosed but not identified as bias-motivated crime**

Participants pointed out that, beyond the initial statement to the police, criminal justice system personnel (investigating officers, prosecutors and magistrates) were not equipped to adequately investigate, prosecute and judge a case with a SOGI-related bias-motivation. Establishing and arguing SOGI-related bias requires not only a nuanced and detailed understanding of sexual orientation, gender identity and the social context within which LGBT people live, but also access to research and resource experts.

Further challenges in the investigation and prosecution of sexual violence against LGBT people that were raised by the participants include:

- Lack of capacity and knowledge to investigate cases, including investigating SOGI bias-motivation
- In addition to safety concerns for LGBT survivors, the safety of support organisations and at times criminal justice system personnel
- The lack of capacity within victim support services to address LGBT survivors' needs and vulnerabilities
- The specific and complex challenges faced by LGBT adolescents who are survivors of sexual assault.

Recommendations

The findings from this report show that beyond the barriers to access to justice faced by survivors in the general population – necessitating the improvement of general gender-based violence services and access to justice throughout the criminal justice system and related services – the lack of a focus on LGBT survivors of sexual violence is rooted in prejudice, homophobia and transphobia, and a lack of skills and knowledge. Additionally, the findings show that there is a critical lack of knowledge within the criminal justice system on how to establish, investigate and prosecute SOGI-related bias-motivation. In cases where SOGI-related bias is suspected, the focus often remains on the victim's/ survivor's identity (their sexual orientation or gender identity) rather than on the motivation of the perpetrator. The distinction between



these two is critical: framing bias-motivation based on survivor identity instead of perpetrator motivation places the burden on the survivor (to disclose their sexual orientation and/or gender identity); risks missing cases where the bias was based on the survivor's perceived SOGI (for example, where a heterosexual, cisgender woman was attacked because the perpetrator(s) assumed her to be a lesbian woman); and detracts from the way in which bias-motivated crimes convey and valorise transphobia and homophobia in the wider community.

Based on the research findings, and the outcomes of the data validation workshop, this report recommends capacity building, training and criminal justice system strengthening in four operational areas: Reporting, investigating, prosecuting and judgement/ sentencing. Additionally, the report identified a number of cross-cutting issues that should be taken into consideration at each of these four stages.

Reporting

- SAPS and healthcare personnel should be knowledgeable about sexual orientation and gender identity, and its impact on survivor's social context and vulnerability, including on barriers to reporting.
- All SAPS and healthcare personnel need to be aware of the definition of rape and sexual assault as per the 2007 Sexual Offences Act.
- Statements should be taken in the language of the survivor's choosing, and should be correctly translated.
- SOGI status should be noted in the wider demographic information collected on cases reported to SAPS.
- The way in which SOGI information is asked from the survivor should be carefully considered and done in a non-threatening and non-judgemental way.
- All the above recommendations should be taken into account in the current development of the SAPS Standard Operating Procedures for protection of rights of lesbian, gay, bisexual, transgender and intersex (LGBTI) persons.
- SAPS and healthcare providers should develop relationships with local LGBT organisations, in order to facilitate the reporting of bias-motivated crimes, as well as referral mechanisms for support for LGBT survivors.

Investigation

- All SAPS personnel, including investigating officers, should be knowledgeable about sexual orientation and gender identity, and its impact on survivors' social context and vulnerability, including on barriers to reporting
- All personnel gathering forensic evidence should be trained on how to gather evidence for all forms of rape and sexual assault.
- Guidelines should be developed in order to facilitate the identification of SOGI-related bias-motivation through the investigation. A list of indicators of bias-motivation, based on the workshop hosted by the GHJRU and the LBGTI NTT in DoJ&CD, is included in this report.
- Investigating officers should receive training on these guidelines, including identifying (what indicators might signal bias) and investigating (what evidence should be looked for) bias-motivated cases. This investigation should not focus on the victim/survivor's sexual orientation or gender identity, but rather establish whether the SOGI of the victim/survivor was known to the perpetrator, or if the perpetrator perceived the survivor to have an LGBT identity, the perceived motivation for the crime, and if the perpetrator has any record of bias.
- The expertise of NGOs should be included in the investigation in order to help ascertain bias-motivation through social context, including if the SOGI of the victim/survivor is known in the community.
- Investigating officers should be cognisant of the additional vulnerability of LGBT survivors throughout the investigation, and additional measures should be taken to provide survivor support, in collaboration with NGOs and other government department (such as Department of Social Development (DSD)), and to ensure the safety of the survivor.

Prosecution

- All NPA and court personnel, including prosecutors and court clerks, should be knowledgeable about sexual orientation and gender identity, and its impact on survivor's social context and vulnerability.
- According to the Sexual Offences Act Directives (2010), all cases must be addressed equally, including being sensitive to secondary victimisation. In building a case, the prosecutor should recognise and engage with SOGI and its relevance to the crime and to the victim's right to privacy.
- Prosecutors should actively direct further investigations into SOGI-related bias-motivation where they suspect such motivation and it is not addressed in the case docket.
- Prosecutors should actively develop collaborations with LGBTI NGOs in order to help ascertain bias-motivation through social context, including if the SOGI of the victim/survivor is known in the community.
- Prosecutors should be aware of the additional vulnerability of LGBT survivors throughout the prosecution, and additional measures should be taken to provide survivor support, in collaboration with NGOs and other government department (such as DSD), and to ensure the safety of the survivor.
- Prosecutors should ensure that survivors who will be witnesses in their own cases receive thorough and appropriate court preparation, including to prepare them to be able to publicly disclose their SOGI.
- Prosecutors should be able to identify appropriate expert witnesses and other expertise that can demonstrate the ways in which bias-motivated crimes convey to and valorise trans- and homophobia in the wider community, and of the crime's impact on the survivor.
- Prosecutors should ensure that victim impact statements are drafted in ways that speak to and capture the effects of the bias-motivated nature of the crime.

Judgment/ Sentencing

- Judges should be aware of the impact of SOGI-related stigma on a survivor's vulnerability, experience and access to justice.
- Magistrates should consider how to account for the bias-motivation of a sexual offence in judgment and sentencing, including through victim impact statements.
- Judgment and sentencing should clearly stipulate the bias-motivation and its impact on the court findings in order to counter transphobic and homophobic public discourses, including those inherent to the perpetration of the crime.



BACKGROUND & LITERATURE REVIEW

BACKGROUND & LITERATURE REVIEW

Over the past two decades research on lesbian, gay, bisexual and transgender persons, health and violence has highlighted substantial vulnerabilities and health disparities based on sexual orientation and gender identity (SOGI) in many parts of the world. There is growing awareness of the broad ranging negative consequences of stigma, marginalisation and discrimination (Institute of Medicine 2011; Logie 2012; Pega and Veale 2015; Mayer et al. 2008). For example, in a recent landmark report on lesbian, gay, bisexual and transgender (LGBT) health (Institute of Medicine 2011), the United States Institute of Medicine pointed out that LGBT individuals are at increased risk of violence, harassment, and victimisation. These findings underscore the link between stigma, marginalisation and discrimination and corroborate that sexual orientation and gender identity are important determinants of vulnerability and health (Logie 2012; Pega and Veale 2015).

In South Africa, awareness of SOGI-motivated violence has increased through a number of highly publicised cases of homophobic rapes and murders. Last year, government introduced a draft bill, the Prevention and Combatting of Hate Crimes and Hate Speech Bill 2016, to legislate the prosecution of bias-motivated crimes, including SOGI-motivated crimes. It is in this context that this report examines the barriers to access to justice faced by LGBT people in the specific context of sexual violence.

Introductory comments

Lesbian, gay, bisexual and transgender (LGBT) people are not a homogenous population. The acronyms LGBT or LGBTI (“I” for intersex) group individuals together based on similar experiences of discriminatory treatment in society because of their sexual orientation, gender identity, and/or gender expression. While this is helpful to analyse the consequences of marginalisation, it is important not to assume that individuals under this umbrella acronym necessarily have similar experiences or needs. In fact, individual experiences differ greatly across the populations covered under the acronym. Thus, the populations represented by each individual letter in the acronym are complex and heterogeneous, even more so when differences in race, age, ability, religion, culture, socioeconomic class, and geographic location are also taken into account. This report utilises the acronym LGBT in order to point to common causes and types of experiences, stigma, marginalisation and discrimination. However, this is not to suggest that LGBT people are homogenous, or necessarily share the same experiences.

While the most commonly used and known acronym in South Africa includes the “I” for intersex people, the researchers and authors of this report have made the conscious decision to describe the focus population of the report as LGBT people. This is for one simple reason: during both the literature review and the empirical research, intersex people’s experiences did not surface, nor did the researchers find specific data relating to intersex people’s barriers of facilitators of access to justice. The researchers decided not to negate the absence of evidence on intersex people’s lives and experiences, and therefore describe the focus population as lesbian, gay, bisexual and transgender – LGBT – only, except where referring to names or existing documents.

Prevalence of violence against LGBT people in South Africa

Over the past 10 years, violence against people identifying as LGBT has increasingly gained media and public attention in South Africa. Cases of rape and murder of black lesbian women make for gruesome headlines, and the term ‘corrective rape’ has been coined, not without contestation, to denote the targeted sexual violence against people whose sexual orientation or gender identity does not conform to heteronormative⁶ societal ideas. The term ‘corrective rape’ has been criticised for giving too much focus, and legitimacy, to the motivation of the perpetrator, and ‘homophobic sexual assault/violence’ has been introduced as a more survivor-focused term, which also captures the motivation of the violence. This report purposefully employs the latter term.

Notes

⁶ Heteronormativity is the assumption that heterosexuality (being attracted to the opposite sex and gender) is normal and applies to everyone, which creates a bias in favour of heterosexual relationships.



Over the past decade, the South African media has reported on the rape or murder, often under circumstances of excessive violence, of many LGBT people: Ivan Johannes, Zoliswa Nkonyana, Madoe Mafubedu, Simangele Nhlapo, Sizakele Sigasa, Salome Masooa, Thokozane Qwabe, Waldo Bester, Eudy Simelane, Khanyiswa 'Lhoyie' Hani, Desmond 'Daisy' Dube, Neil Daniels, Sibongile Mphelo, Girly 'S'Gelane' Nkosi, Noxolo Magwaza, Nqobile Khumalo, Nontsikelelo Tyatyeka, Thapelo Makhutle, Phumeza Nkolonzi, Sasha Lee Gordon, Andritha Thapelo Morifi, Sanna Supa, Ntombana Desire 'Deezay' Mafu, Dineo, Gugu 'George' Mazibuko, Millicent Gaika, Duduzile Zozo, David Olyne, Disepo 'Gift' Makau, Phoebe Titus, Noluvo Swelindawo, Nonki Smous, Bobby Motlala, Lebogang Moremi, and Lerato 'Themba' Moloi ⁷.

Beyond these individual examples, academic research evidence increasingly confirms that in South Africa, like elsewhere in the world, LGBT people are more vulnerable to violence in general, and sexual violence in particular, due to their real or perceived sexual orientation or gender identity (cf, for example, Love Not Hate Campaign 2016, Matebeni et al. 2013, Sandfort et al. 2015, Mkhize et al. 2010, Nel & Judge 2008). Vulnerability to violence is high across the different sexual orientations and gender identities grouped together under the LGBT acronym.

The Hate Crimes Working Group (HCWG), established in 2011, is a multi-sectoral network of civil society organisations set up to spearhead advocacy and reform initiatives pertaining to hate crimes, with members of diverse sectors (LGBT rights organisations; migrants, refugees and asylum seekers rights organisations; gender based entities and broader human rights organisations). Its researchers, led by the Department of Psychology at the University of South Africa, is currently conducting a study to identify and monitor crimes motivated by bias, including SOGI-related bias. Preliminary results from the HCWG show that of 394 reported cases, almost half were motivated by the victim's sexual orientation or gender identity (Hate Crimes Working Group, 2013). 44% of all cases were rape cases (ibid). Sandfort and colleagues (2015), in a four-country study where the majority of participants came from South Africa, found that 31% of women who have sex with women reported being forced to have sex at some point in their lives. Importantly, 15% reported forced sex by men only; 6% reported forced sex by women only; and 10% had forced sexual experiences with both men and women. In a qualitative study with 24 black lesbian women, one third said that they had been raped (Matebeni et al., 2013) – this study also points out that sexual violence places lesbian women at increased risk for HIV transmission. It is not only lesbian, bisexual and other women who have sex with women that are at risk for violence, however. A recent review points out that transwomen are particularly vulnerable to physical and emotional violence (Evans, 2016), and a recent report by the Love Not Hate Campaign demonstrates that sexual violence is experienced by LGBT people of all sexual orientations and gender identities (Love Not Hate Campaign, 2016). Of note is that sexual violence among LGBT people is not always perpetrated by strangers: in a recent study with young people, Thurston et al. (2014) found that LGBT youth had experienced higher levels of partner-perpetrated violence than heterosexual matched peers.

Beyond sexual orientation and gender identity, there are other factors that increase LGBT people's vulnerability to violence. Nel and Judge (2008) found that violence levels experienced by black lesbian women and black gay men were notably higher than among white lesbian women and white gay men. A Human Rights Watch Report (Nath and Mthathi, 2011) highlights that it is black lesbian women and black transgender men living in townships and rural areas who are most vulnerable to experiencing violence, arguing that it is visible gender non-conformity, and therefore perceived non-conforming sexual orientation, that places individuals at risk of (sexual) violence. A survivor's race and class not only impacts their vulnerability but also their access to and trust in the criminal justice system: black lesbian women are more likely to experience violence in public spaces, and less likely to report it to the police (Wells and Polders, 2006). In the study of Nel and Judge (2008), black lesbian women and gay men experienced higher levels of verbal, physical and sexual abuse than white women and men. Lynch and Van Zyl (2013) point out that experiences of violence among LGBT people are distributed not only according to race, but also according to class differences, and it is people living in under-resourced communities that are at highest risk due to higher overall levels of violence, poorer policing and less access to public services (Lynch and Van Zyl 2013; Nath and Mthathi 2011).

Qualitative accounts of female lesbian survivors of sexual violence indicate that perpetrators often made it clear that such violence was justified as a 'corrective' measure, and that it was a way of enforcing heteronormative, patriarchal structures. As one study participant noted: "They [male students] said that it would make me 'a real lady'. They stressed that corrective rape was the best way to change my satanic behaviour" (Mavhandu-Mudzusi and Sandy, 2015).

Notes

⁷ A detailed list of each of these cases is listed in Annex

BACKGROUND & LITERATURE REVIEW

These evidence-based research findings corroborate the anecdotal evidence that numerous civil society organisations have collected, by virtue of their work, for years, and suggest that lesbian women and other women who have sex with women in South Africa are particularly vulnerable to sexual assault (for example, Mkhize et al. 2010, Lynch et al. 2013, Lynch & Sanger 2016). Although civil society has documented individual accounts of sexual violence against LGBT people, more research is urgently needed to provide data about prevalence, risk factors and outcomes of sexual and other forms of violence – such as pregnancy, sexually transmitted infection, post-traumatic stress and other deleterious effects – of sexual assault and to understand how to provide competent and comprehensive support for LGBT survivors in the health and criminal justice systems.

Law and policy framework

Legislation pertaining to the non-discrimination of LGBT people

South Africa's Constitutional and legislative framework offers comprehensive recognition and legal protection to LGBT people, and is among the most progressive globally. The Constitution provides that the state is obliged to “respect, protect, promote and fulfil” the rights enshrined in the Bill of Rights.⁸ Central to the Bill of Rights is the Equality Clause in Section 9(3), which mandates that nobody may be discriminated against based on, among other grounds, their sex, gender or sexual orientation. Section 10 guarantees that everyone has inherent dignity and the right to have their dignity respected and protected. Further rights enumerated in the Bill of Rights include the right to life (Section 11), as well as the right to security of the person, including the right “to be free from all forms of violence from either public or private sources,” the right “to security in and control over their body,” and the right “not to be treated or punished in a cruel, inhuman or degrading way” (Section 12).

Emanating from this constitutional mandate, LGBT people enjoy the full range of civil rights. Legislative and policy reforms (and the development of equality jurisprudence) after 1996 have sought to remove or amend any law that criminalises or discriminates against LGBT people, and ensures that everybody is treated the same regardless of their sexual orientation and gender identity. For example, the Domestic Violence Act of 1998⁹ expands the definition of domestic relationships to recognise cohabitation by unmarried people including same-sex couples; and the Refugees Act of 1998¹⁰ recognises gender and sexual orientation as grounds for vulnerability and persecution and, thus, for seeking asylum in South Africa.

Legislation pertaining to sexual violence

The South African Criminal Law (Sexual Offences and Related Matters) Amendment Act Amendment Act¹¹ (herein referred to as the Sexual Offences Act) makes no particular reference to the sex or gender of either the victim or the perpetrator, and defines that “Any person (‘A’) who unlawfully and intentionally commits an act of sexual penetration with a complainant (‘B’), without the consent of B, is guilty of the offence of rape”.¹² The definition of sexual penetration is gender-neutral, and as follows:

Any act which causes penetration to any extent whatsoever by –

(a) *the genital organs of one person into or beyond the genital organs, anus, or mouth of another person;*

Notes

⁸ Constitution of South Africa (1996), Article 7(2).

⁹ Domestic Violence Act, No. 116 of 1998.

¹⁰ Refugees Act, No. 130 of 1998.

¹¹ Criminal Law (Sexual Offences and Related Matters) Amendment Act Amendment Act, No 5 of 2015. Prior to its recent revision this was the Criminal Law (Sexual Offences and Related Matters) Amendment Act No. 32 of 2007

¹² Chapter 2(3), SOA of 2007.



- (b) *any other part of the body of one person or, any object, including any part of the body of an animal, into or beyond the genital organs or anus of another person; or*
- (c) *the genital organs of an animal, into or beyond the mouth of another person.*¹³

Thus, the Sexual Offences Act criminalises sexual violence against and by people of all genders and sexual orientations.

Legislation that addresses harassment, including verbal harassment of persons, is detailed in the Protection from Harassment Act,¹⁴ which allows for the victim of sexual and other harassment to obtain a protection order against the harasser(s). In addition, the Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA),¹⁵ gives effect to section 9(4) of the Constitution, prohibiting unfair discrimination by the government, private organisations and individuals, and prohibiting hate speech and harassment. PEPUDA also established Equality Courts to adjudicate civil matters specifically relating to infringements of the right to equality, unfair discrimination and hate speech.

Alongside these, there are various organisations established according to Chapter 9 of the Constitution to support constitutional democracy. Relevant among them are the Human Rights Commission (SAHRC) and the Commission for Gender Equality (CGE).

For survivors of sexual violence, the Department of Social Development's Victim Empowerment Programme (VEP) integrated policy guidelines mandate services to "develop knowledge of victim issues, strengthen resources, address needs of victims, stimulate volunteer participation, and prevent of secondary victimisation", and particularly to ensure an integrated, holistic approach and coordinated service delivery to victims (survivors) of crime and violence in an enabling environment, and to support, protect and empower victims of crime and violence with a special focus on vulnerable groups (Department of Social Development, 2011). Victims of hate victimisation should be one of the ten priority groups (Department of Social Development, 2011).

Under the current laws, the bias motivation of sexual violence targeted against LGBT people is pertinent in the following aspects of a criminal justice system process:

- (i) The **initial evidence**, initiated and gathered from police investigation, based on which a prosecutor decides on the decision to proceed with prosecution.
- (ii) **Prosecution:** Based on the evidence the prosecutor should decide, ideally with the survivor, which prosecution strategy to adopt and which evidence to include. Beyond speaking to the motivation of the perpetrator, the survivor's sexual orientation might be of particular importance to bolster evidence that the survivor did not consent, which is often claimed by the defence.
- (iii) **Sentencing:** For sentencing, common law requires a judge to consider a range of factors. These include the nature and effect of a crime, the circumstances of the perpetrator, and the interests of society. A bias motivation based on sexual orientation and/or gender identity constitutes a particular consideration for the nature of the crime. The second consideration for sentencing is the effect or impact of the crime on the survivor, usually captured by victim impact statements. These statements provide opportunities to elucidate the particular impact of the targeted violence on the survivor, especially in light of existing discrimination and marginalisation due to their sexual orientation and/or gender identity.

Despite these provisions, Williams (2012) and Lynch and Van Zyl (2013) argue that there are significant challenges for recognising SOGI-related bias motivation during the investigation and trial of a homophobic physical assault, and a homophobic rape-homicide respectively. Drawing on observations of the trials for these two crimes, both authors note a lack of knowledge and capacity around SOGI-related bias crimes within the criminal justice system, which the concerted and continuous efforts of non-governmental organisations sought to address.

Notes

¹³ Chapter 1(1) SOA of 2007.

¹⁴ Protection from Harassment, Act No. 17 of 2011.

¹⁵ Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA or the Equality Act), Act No. 4 of 2000

BACKGROUND & LITERATURE REVIEW

After many years of advocacy by civil society (Breen & Nel, 2011), the Department of Justice and Constitutional Development introduced a first draft of the Prevention and Combatting of Hate Crimes and Hate Speech Bill, widely referred to as the Hate Crimes Bill, in 2016. The objectives of the Bill include:

To give effect to the Republic's obligations in terms of the Constitution and international human rights instruments concerning racism, racial discrimination, xenophobia and related intolerance in accordance with international law obligations;

to provide for the offence of hate crimes and the offence of hate speech and the prosecution of persons who commit those crimes; to provide for appropriate sentences that may be imposed on persons who commit hate crime and hate speech offences; to provide for the prevention of hate crimes and hate speech;

to provide for the reporting on the implementation, application and administration of this Act [..]

However, there has been criticism of the Hate Crimes Bill on the basis that it also criminalises hate speech, and that it addresses issues of equality and the prevention of discrimination and violence that are already covered under existing legislation, such as PEPUDA, the Protection from Harassment Act, and the Sexual Offences Act (Hate Crimes Working Group, 2017). Whilst not constrained to SOGI-related bias, should this Bill be enacted into law, it would directly guide the criminal justice system in the prosecution of bias-motivated crimes based on sexual orientation and/or gender identity.

Access to justice and healthcare for LGBT people

In 2013 the Ministerial Advisory Task Team on the Adjudication of Sexual Offences Matters (MATTSO) report¹⁶ evaluated the functioning of dedicated Sexual Offences Courts. It notes that LGBT persons are particularly vulnerable to sexual violence, but are not considered a vulnerable group by the Department of Justice and Constitutional Development's 'Promotion of the Rights of Vulnerable Groups' Chief Directorate. MATTSO also highlights several barriers faced by LGBT people to reporting sexual violence, which are confirmed by academic research (see for example Matebeni et al., 2013; Sandfort et al. 2015). These barriers, often rooted in prejudice, need to be understood in the wider societal context. In this context, South Africans who are perceived to be lesbian, bisexual or gay, or whose gender identity does not conform to the heteronormative understanding of gender, experience prejudice, discrimination and marginalisation because of their sexual orientation, gender identity (SOGI), or gender expression. A 2016 study by The Other Foundation highlights the contradictory attitudes that South Africans hold towards LGBT people: while 55% would accept a gay family member, only 51% believed LGBT people should have the same rights, and 72% felt that same-sex activity was 'morally wrong' (The Other Foundation, 2016).

Notes

¹⁶ Ministerial Advisory Task Team on the Adjudication of Sexual Offence Matters (2013). Report On The Re-Establishment Of Sexual Offences Courts.

¹⁷ Department of Justice and Constitutional Development, LGBTI NTT. (n.d.). National Intervention Strategy for Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) Sector. Pretoria: DoJ&CD, LGBTI NTT.



The key barriers to accessing justice and healthcare identified by the MATTSO report and academic research include:

- Fear of discrimination can lead to the avoidance or delaying of accessing healthcare services and/or criminal justice services (MATTSO, 2013; Nel and Judge, 2008; Wells & Polders, 2006);
- Prejudicial attitudes by criminal justice personnel leads to secondary victimisation of LGBT survivors through victim-blaming (MATTSO, 2013);
- Religion-based and other prejudice leads to stigma and discrimination of LGBT patients by healthcare providers, including the denial of care (Mavhandu-Mudzusi & Sandy, 2015; Müller, 2017)

The MATTSO report also highlights that information on a survivor's sexual orientation and/or gender identity is not routinely captured in South African Police Services (SAPS) reporting procedures. Therefore, it is not possible to estimate the prevalence of violence motivated by bias that relates to sexual orientation and/or gender identity. International literature points out that this is a key challenge to addressing and preventing bias-motivated violence (Haas et al., 2015). In South Africa, the Hate Crimes Working Group is currently conducting a study to pilot and evaluate an incident reporting form in order to investigate how useful a form that captures additional demographic information is in assisting to establish bias motivation, and in gathering national disaggregated data on the prevalence of bias-motivated crimes.

The LGBTI National Task Team (NTT) in the DoJ&CD

In response to media attention surrounding the elevated rates of sexual and gender-based violence experienced by black lesbian women and transgender men, particularly in the context of homophobic sexual assault, the DoJ&CD established an LGBTI National Task Team (NTT) in 2011. Since its inception, the NTT has released a National Implementation Strategy¹⁷ outlining three key areas for action to address the levels of violence against LGBTI persons, including: (i) developing prevention programs, (ii) improving the response of the criminal justice system and (iii) strengthening the capacity of state and civil society institutions and systems to address and prevent violence against LGBTI persons (DoJ&CD, LGBTI NTT, n.d.).

Outputs identified as a part of this strategy include:

- (i) Creating a database to document and track cases;
- (ii) Promoting the rights of LGBTI survivors, developing strategies to address hate crimes;
- (iii) Designing and providing education and training programmes;
- (iv) Creating a mentoring programme for public service officials;
- (v) Strengthening the capacity of civil society organisations;
- (vi) Supporting engagement between Chapter 9 organisations, civil society organisations and the government; and
- (vii) Developing a monitoring and evaluation strategy.

Additionally, the National Intervention Strategy established a Rapid Response Team (RTT) to respond to the backlog of pending cases. The 2014 progress report for the NTT reported that out of 45 cases, received by the RTT from civil society organisations, 21 had been finalised, 8 of which resulted in convictions, while 24 cases were still pending. Additionally, the NTT has developed a training programme for civil society and service providers, and a guide for officials at service points entitled Working with Diverse Communities: Understanding Sexual Orientation, Gender Identity and Expression: A Guide for Service Providers. The guide outlines the legislative framework for service provision to LGBT people in South Africa, and provides information for service providers to offer helpful and appropriate services to LGBT persons.¹⁸

BACKGROUND & LITERATURE REVIEW

Improving Case Outcomes for Gender-Based Violence Pilot project

This study is a sub-study of the Improving Case Outcomes for Gender-Based Violence Pilot project (ICOP), for which the Gender, Health and Justice Research Unit (GHJRU) at the University of Cape Town collaborates with The Networking HIV and AIDS Community of South Africa (NACOSA) and the DoJ&CD, funded by USAID. The project assesses the functioning of five Sexual Offences Courts in Gauteng (Protea Magistrates Court, Soweto), KwaZulu-Natal (Durban Magistrates Court and Umlazi Court) and Mpumalanga (Boschfontein Magistrates Court and Tonga Magistrates Court). Of particular relevance to this sub-study is Objective 2 of the project: Improving justice services to sexual assault survivors in the pilot sexual offences courts. Within this objective, there is a particular focus on survivors from vulnerable groups: children, survivors with intellectual or psychosocial disabilities, and survivors who identify as LGBT. With regards to survivors who identify as LGBT, the project aims to do the following:

- (i) Enhance existing justice sector training curricula for GBV [gender-based violence] and LGBTI¹⁹ issues, with particular reference to sensitisation trainings, skills building workshops around LGBTI-inclusive service provision and prevention of secondary victimisation, and knowledge of relevant legislation, case law as well as possible litigation strategies and legal remedies relevant sexual offences committed against LGBT persons; and
- (ii) Identify best practice litigation strategies and sentencing options for bias-motivated offences against persons who identify as LGBT.

In 2016, the GHJRU research team conducted a baseline assessment of the five pilot sexual offences courts. For this baseline study, the researchers assessed, among other factors, the turnaround time of cases at each court, case flow at each court, and the training experiences and needs of all court personnel. For this baseline study, the researchers spoke to 53 participants, drawn from all levels of court personnel (court clerks to magistrates, including intermediaries and personnel from non-governmental court support organisations), and reviewed existing case files at the courts. The researchers specifically asked about court personnel's knowledge of, and experience with, cases that involve survivors²⁰ who identify as LGBT. Many interview respondents said that they were not aware of cases that involved survivors who identified as LGBT, and that "we don't have much of such cases" (Prosecutor in the larger ICOP study). While there were notable exceptions to this, the majority of interview participants were not aware of cases involving survivors who identified as LGBT.

These findings are in stark contrast with the documented levels of violence, especially sexual violence that LGBT people encounter, as described above. The research team thus decided to conduct a follow-up sub-study, to investigate the following research question:

Why are criminal justice personnel at the five pilot sexual offences courts not aware of cases involving LGBT survivors of sexual violence?

Notes

¹⁸ Department of Justice and Constitutional Development, LGBTI NTT. (n.d.). Working with Diverse Communities: Understanding Sexual Orientation, Gender Identity and Expression: A Guide for Service Providers. Pretoria: DoJ&CD, LGBTI NTT.

¹⁹ The acronym 'LGBTI' is used here as this is what was specified in the Terms of Reference of the project.

²⁰ Due to the fact that the larger study focused on sexual offences courts, this sub-study also focused on survivors of sexual violence, that is, people who have experienced and survived sexual violence. The term 'survivor of sexual violence', or 'survivor' in short, is used deliberately, and in keeping with survivor-centred research and service provision, in order to highlight the survivor's agency and resilience. In cases of rape-homicide, which are examined in Part II of the findings of this study, the term 'victim' is used because the person who experienced sexual violence is deceased as a result of the crime.



METHODOLOGY

METHODOLOGY

Study design

In order to investigate why court officials at the five sexual offences courts perceived not to come into contact with complainants who identify as LGBT, researchers from the GHJRU conducted a qualitative study with a convenience sample of: representatives of organisations providing advocacy and support services to LGBT people in the three provinces; and representatives of organisations providing court support services in the catchment areas of the five courts in question. Using a semi-structured questionnaire, researchers asked participants questions related to a number of key themes (see Table 1).

Table 1: Key themes addressed in interviews

LGBTI organisations	Court support organisations
Organisation aim, focus and constituency	Organisation aim, focus and constituency
Experience with providing court support for LGBT survivors of sexual and other violence	Experiences with LGBT survivors of sexual and other violence
Barriers to access to justice for LGBT survivors	Training and organisational capacity to provide services to LGBT survivors
Specific experiences in the courts in question	Specific experiences in the courts in question
Strategies to improve access to justice for LGBT survivors of violence	

Researchers contacted the key organisations providing services to LGBT people in the catchment areas of the five courts, identified through the contact list of the LGBTI NTT, as well as through an online search and the professional contacts of a member of the research team. Additionally, researchers contacted the main court support organisation in the catchment areas of the courts in order to interview providers who could offer a broad perspective on court support. Table 2 has a list of all organisations that were interviewed.

Table 2: Organisations interviewed for the study

Province	Organisation	No of participants	Type
Gauteng	People Against Women Abuse (POWA)	1	Court support
	Iranti-org	1	LGBT
	OUT LGBT Wellbeing	1	LGBT
	Teddybear Clinic	2	Court support
	Hate Crimes Working Group	1	Research/LGBTI



Province	Organisation	No of participants	Type
KwaZulu-Natal*	Durban Lesbian and Gay Centre	3	LGBT
	Gay and Lesbian Network	2	LGBT
Mpumalanga	Lowveld LGBTI	1	LGBT
	ANOVA Health	1	LGBT
	GRIP	1	Court support
	Thuthuzela Care Centre	1	Court support
	Mpumalanga LGBTI	2	LGBT

* The researchers approached the Umlazi Thuthuzela Care Centre (TCC) for an interview, but unfortunately could not schedule it as the coordinator was on leave during the research visit.

Data collection: interviews

Researchers contacted the identified organisations with information about the study, and requested an interview in person. In total, 13 interviews were conducted with 17 interviewees. All interviews were conducted by two GHJRU researchers who are experts in sexual orientation, gender identity and the criminal justice system. All interviews were recorded and transcribed, and the researchers took detailed notes during and after each interview.

Data analysis

Based on the content of the interviews and the overall research question, the researchers decided on a thematic framework, as well as analytic codes for the qualitative data analysis. All transcripts were collated in NVivo, and the data was coded according to the established codes. Where additional codes emerged during the analysis, the researchers discussed these and utilised them if they had reached consensus about content and relevance. Table 3 shows an overview of the key thematic codes used for data analysis. Throughout the process, the researchers discussed themes and codes, and kept a record of emerging themes.

Table 3: Key thematic codes for Nvivo analysis

Code	Sub-code
Death of complainant	
Barriers to reporting	
	Homophobia
	Fear of perpetrator

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Code	Sub-code
	Perception of 'ineffective' criminal justice system (CJS)
	Other
Barriers to identification	
	Not disclosing sexual orientation or gender identity
	Disclosed but not identified as bias-motivated crime
	Other
Societal homophobia	
	Turned away or discouraged at SAPS
	Other
Procedural/ evidentiary problems	
Positive experiences with CJS	

Data validation

On 16 May 2017, the researchers presented preliminary findings at a meeting of the LGBTI NTT in the DoJ&CD in order to discuss and validate the findings before finalising the analysis. At this meeting, all stakeholders that were present had the opportunity to engage with and discuss the preliminary findings, and to contribute further suggestions or criticisms about the data analysis. Based on these inputs, the researchers finalised the analysis.

In order to share the findings and discuss possible recommendations, the researchers, in collaborations with the LGBTI NTT in the DoJ&CD, organised a workshop with members of the CJS cluster, court support and LGBT organisations, as well as experts on the prosecution of SOGI-related violence. The workshop took place on 13 October 2017. At the workshop, participants discussed the research findings, and its implications for the prosecution of SOGI-motivated violence, and the individual practices of the various CJS stakeholders. Participants' inputs corroborated the findings from interviews and have informed the recommendations of this report.

Ethical considerations

The study was approved by the University of Cape Town's Faculty of Health Sciences Human Research Ethics Committee under the parent project 'Improving Case Outcomes for Survivors of Sexual Offences' (HREC Reference: 140/ 2016). All participants received information about the study and its aim, and signed an informed consent form. Participants had the option of sharing their opinions anonymously, or on behalf of their organisation. All data in this report is de-identified in order to protect the anonymity of individual participants. In addition, whilst the organisations are listed above, we have chosen not to attribute quotes or information to specific organisations. This means that all information that might identify a participant or an organisation has been removed from the quotes presented. Quotes are however attributed to a specific code that reveals whether the organisation was a LGBT organisation, for example LGBT1, or a court support organisation, for example CS3. Additional information, such as the province in which an organisation is based, is provided where it does not risk revealing the organisation or participant and provides further context to the data.



FINDINGS

FINDINGS

The findings that are reported in the sections that follow need to be contextualised within existing findings on the challenges that all sexual violence survivors face when accessing the criminal justice system. LGBT survivors, and survivors who experienced sexual violence due to their perceived sexual orientation or gender identity, share these access challenges with survivors from the general population. However, they also experience additional challenges due to sexual orientation and/or gender identity.

Part I: Cases do not reach court

Across the three provinces, Kwa-Zulu Natal (KZN), Mpumalanga and Gauteng, participants in both court support and LGBT organisations felt that in general the number of LGBT survivors reporting sexual offences were quite low. This comports with existing evidence. For example, one study found that 62% of LGBT survivors of hate victimisation did not report their experience to the police (Polders & Wells, 2004). This finding is to be contextualised within existing evidence of the trauma, fear and stigmatisation associated with sexual assault and with low reporting of sexual offences in general (Jewkes & Abrahams, 2002; Machisa et al., 2011). However, in the case of LGBT survivors, there may be additional or compounding factors that result in non-reporting.

In Mpumalanga, one provider suggested that of the twenty-five recent cases she could think of, only seven people had reported the offences to the criminal justice system (LGBT₃). In KZN, another LGBT organisation reported that while most of the survivors they came across through community networks and outreach were happy to accept support when offered, they did not seek out LGBT or gender-based violence services themselves, let alone report the offence (LGBT₄). Similarly, an academic and advocate of LGBT rights in Gauteng suggested that even those cases that NGOs and community advocates come to know of may be a very small proportion of actual prevalence:

I can just tell you that [...] when this research study [forthcoming research] was done [...] there is reportedly many LGBTI people who experience hate victimisation, but very few, if any, go to NGO's and CSO's [community service organisations] to ask for assistance or report it. (LGBT₆)

This may speak to the relative pervasiveness and normalisation of sexual violence experienced by LGBT people, such that they do not actively seek support or recourse. Other likely reasons, particularly for not reporting and entering into criminal justice processes, are set out in the following part of the report.

Safety concerns of LGBT survivors

It is not uncommon for survivors of gender-based violence to fear their perpetrators, including to the extent that they are rendered silent about the violence they experience. This is particularly true in smaller communities where the perpetrator is known to the survivor and might even be a member of their social group or family. One participant, from an organisation that focuses on highlighting violence against LGBT people through story-telling and media, compares the task of raising awareness of the lives and deaths of deceased LGBT victims of violence to sharing stories and raising awareness about living survivors:

It's harder [to document the story] with cases of people who are alive [rather than victims of rape-homicides]. They are willing to talk to us off camera, sometimes just voice. We've also been like reluctant to do media around those stories, so you will see one story on our site which is the Disebo Makau story where she speaks about the rape and there are other lesbians who speak about the attacks on them in Ventersdorp, but in the cases where people are still alive, there are a lot of concerns about security, safety and I mean just general feelings about shame, about powerless you know. (LGBT₈)



In addition, limited resources to protect survivors from future violence are related to the risk of reporting:

Also the added problem there, is the issue about safety and alternative security options for LGBTI people who are raped and the case in Limpopo in [place name] who was a lesbian who was raped outside of her gate, she is a mother you know and she was also assaulted with a weapon and we had to urgently find like emergency housing to move her from that one town to another town, and what does that mean for people who have to physically become further displaced in order to find shelter and safety. It's the same thing in the Vaal case. We don't know where she is right now, but she has also moved from where she lived and that may be the same situation with the Potchefstroom case [...], so what happens in those situations, so with people who are alive and who survive sexual violence it's like a whole completely different [...]. (LGBT8)

Realities such as the ones described above may make reporting even harder for survivors, given how it might severely disrupt their lives, and how they may not have the resources to relocate without it seriously impacting their livelihoods, including that of their dependants. In the case of LGBT survivors, all the same concerns as those in the general population of survivors are present, with the additional vulnerability of not having familial or community support (see next subsection), nor the social capital (resources, networks and support systems) to buffer the impact of relocation or transience, or further harm from the perpetrator or other community members.

One participant raised an example of a survivor being intimidated for having reported:

And there was another one of a lesbian girl, she was gang-raped and when she went to open a case, dockets disappeared and there wasn't sufficient follow-up and then one of the rapists cornered her another time and tried to rape her again, of which she stabbed him and then after the stabbing, he unfortunately lost his life so then it became a murder case, but this happened, I think she was 15 when it happened, but [the case has still not been tried]. The parents were not being supportive, they were coming from a very impoverished family. We didn't get assistance with that case. We tried to get her back into school. She wasn't feeling safe in the community, so she was studying in town and we were providing her transport and then she just started using drugs and it just got bad after that. She really felt frustrated that she wasn't getting support from the courts she wasn't getting support with regards to her case. (LGBT4)

This case demonstrates LGBT survivors' vulnerability to further violence, as well as the relative lack of support, and the isolation, that LGBT people - especially LGBT youth - experience. It also intimates that perpetrators may sometimes be 'connected' to officials and criminal justice personnel. Similarly, in other instances, participants stated that survivors were fearful of perpetrators' families, who are well-known and well-connected. For example, participants mentioned that in small communities, perpetrators often had relationships with SAPS and other CJS personnel, making the survivor even more afraid and sceptical about receiving justice should they report (LGBT9). In rural areas, family members who are rumoured or known to be involved in witchcraft may also be used to intimidate survivors (LGBT3). This concern extends to other witnesses to bias-motivated crimes, who may also be reluctant to come forward with evidence due to fear for their safety (LGBT8). In such cases, these witnesses are frequently other LGBT people and so face the same concerns as the survivor, and wish to avoid the hardships associated with involvement in the criminal justice system. NGO personnel and advocates of LGBT rights are not immune from such safety concerns either, and organisations also reported having threats directed at them, including when undertaking advocacy work about bias-motivated crimes against LGBT people, underscoring the prevalence of hostility to those who actively challenge perpetrators of gender-based violence (LGBT4).

FINDINGS

Finally, the nature of the crimes that participant organisations spoke about was particularly brutal and macabre, and often included torture and murder. For example, several victims were assaulted over the course of several hours, including with a range of weapons and objects, and were beaten, set on fire, or decapitated.²¹ Given the extreme violence that LGBT people experience, and its prominent documentation and sensationalism in the media, LGBT people may on the one hand simply be relieved to get away with 'only' being sexually assaulted, and may not want to provoke further violence from the perpetrator or the wider (homophobic or transphobic) community. As one participant put it "It's like 'I am just glad that they did not beat me up, or I was just glad I was able to get away, so I'm not even going to bother'" (CS4). On the other hand, statements as this one also speak to the pervasiveness and normalisation of sexual violence experienced by LGBT people that have been outlined above, and thus might reflect the resulting level of despondency and hopelessness.

Familial homophobia and lack of support for LGBT survivors

Unfortunately, throughout South Africa, identifying as lesbian, gay, bisexual or transgender is an extreme source of stigma and alienation. Frequently, families reject LGBT family members, or maintain a silence around their identity and related-aspects of their lives, which can be extremely alienating (Zway & Boonzaier 2016, Kowen & Davis 2006, Msibi 2013). Simultaneously, many families find extreme difficulty in dealing with sexual violence and struggle to support survivors. In families with conservative backgrounds, the assault of a family member can be a source of stigma and shame. Thus, if LGBT identities are already considered shameful, family members may be unable or unwilling to accept or support LGBT survivors. The combination of these two stigmatised identities (LGBT person and survivor of sexual violence) can have a powerful silencing effect on the individual. One participant says of survivors, "they are scared to go back and say I was raped because of this, because they will say 'Ja that is why we said you mustn't be gay'" (LGBT9). Another service provider explains:

I think a lot of unreported cases, especially in our black community with the people with their family members, it's hard to report those cases, because even if you are heterosexual [and experience rape] they will be harsh, but if you say you are LGBTI, they will say it's because you deserve it. So you end up not reporting the case, because you feel that you will embarrass your whole family and this is not what you are supposed to do, so rather let me keep quiet with the case. (LGBT4)

This may be the case both when individuals are out (i.e. have disclosed their LGBT identity) to their families who have then expressed shame and rejection, and when individuals are not out to their families but suspect or fear their rejection. In the latter case, disclosing bias-motivated violence carries the added responsibility of disclosing your LGBT identity to your family and community as this may become known through reporting or the court process.

Similarly, participants who work with men explained that some men who have sex with men do not identify as gay, but may be targeted for homophobic violence because in some spaces or at certain times they may be identified or perceived as gay or gender non-conforming. However, they may be reluctant to disclose this violence because they identify as straight, and so as to avoid having to disclose their non-heterosexual practices to friends and family (LGBT2, LGBT7).

Notes

²¹ We have provided more information about cases of homophobic or transphobic violence that we have identified through existing research and a media search, or that participants identified during the interviews, in Annex 1.



Individuals working within the participant organisations are not immune to violence, societal homophobia or familial stigmatisation either. One participant, a senior staff member at an LGBT organisation, revealed that a young staff member's uncle had sexually assaulted her. She tells the story as follows:

She [the young staff member] lost her parents [...] and because she came to [place name] for studies, the relative was her aunt and the husband and when they found out that she is lesbian, the uncle was going to teach her to be a woman. When she reported to her maternal aunt, she was like 'Well, that's what you deserve, you need to be a proper woman, you need to learn to be a proper woman', and she [the survivor] literally ran away and she has been staying with friends. (LGBT4)

This story highlights the powerful effects of societal homophobia in shaping an individual's vulnerability to violence, but also in their own response to it, and their ability to conceive of recourse after an assault. In some cases, a survivor may not feel able to share their story due to trauma or a lack of trust that they will be treated with care, and may prioritise their own wellbeing and livelihood over the pursuit of justice. In the present case, it was only after years of working at an LGBT organisation that the survivor felt able to share her story and trust that support would be provided, and even then, the respondent did not report to SAPS. In less conducive circumstances, that is without the support and community of LGBT colleagues and friends, it is unsurprising that people do not disclose to their communities, let alone report to the criminal justice system.

In the case of LGBT minors, families, particularly parents and guardians, are pivotal in reporting violence and in disclosing the bias motivation of the offence. A KZN service provider tells of one case involving an adolescent girl and her parents:

But at the end of the day, she was raped and then the only thing I think before they came here, was after she was raped, instead of taking her for all the tests within 72 hours, the mother was still delaying because she didn't accept her as a lesbian, so then the father heard the story outside and then the father was the one who took the child to the clinic and to the police station and then they were fighting, both parents, about what to do. (LGBT9)

This is not a scenario limited to parents of LGBT children. For example, in research on intellectual disability, there is evidence that families block access to justice for people with disabilities (Meer & Combrinck, 2017)²². However, the stigma and pervasive animosity toward LGBT peoples is a serious compounding factor.

Notes

²² Findings of this study of woman survivors with intellectual disabilities showed that due to social stigma associated both with having a family member with a disability, misconceptions about the abnormal sexuality of people with disabilities, perpetrators being

within families, and fear of social ostracisation and isolation, family members are often reluctant to acknowledge sexual assault of women with disabilities, blame the survivor, or hamper her access to services and criminal justice system in order to conceal the violence.

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Experiences of prejudice at points of entry: SAPS and healthcare facilities

Across the three provinces, participants frequently mentioned negative experiences, including those that involve societal homophobia and transphobia, or the fear thereof, as a reason for not reporting crimes. This has also been recorded in the literature (cf Nel & Judge 2008 for a summary of the literature on secondary victimisation). Participants indicated that LGBT people tend to avoid government services and service providers that are not explicitly LGBT-focused, and that these are important entry points into the criminal justice system for survivors, such as SAPS, clinics, hospitals and TCCs. In fact, this was the most widely cited factor for low reporting among LGBT people.

An LGBT service provider in Gauteng noted that one client did not want to report his sexual assault as he felt that his gender expression, as a feminine man, would result in people not taking him (or his complaint) seriously. Remarking on how this client's femininity was a possible barrier to reporting, the participant said "I think it's very dicey as well, because it's a direct reflection in terms of how actually society treats women in general" (LGBT7). This tendency to undermine feminine people (including women), is combined, in this case, with the stereotype of the camp or feminine gay man as dramatic, "a jokester" or "entertainer" (LGBT7), someone who seeks attention, and is not a credible survivor or witness. In this case, the survivor's past experiences of general homophobia, and their perception that SAPS is not a safe place for LGBT people, meant that they elected not to report their assault.

This client's scepticism seems well-founded, as conversely, another provider informed us that in a training with SAPS, an officer reported that he finds gay men to be "over the top and [...] dramatic" (LGBT4). The SAPS member goes on to say that he finds providing services to gay and gender non-conforming men to be difficult, and that he "just don't [sic] know how to handle them". However, as the participant notes, the SAPS officer was expressing his own prejudice or discomfort rather than an actual difficulty in executing his job. The participant demonstrates this in her response to the SAPS member:

We then said 'Okay, now if it was a heterosexual woman who comes to report a charge, how does she look?' And then they would say 'Disorientated, she was crying and she was this and this and this'. And I said 'Well why is it being dramatic and over the top if it's a gay man?' (LGBT4)

In some cases, participants reported that LGBT people experienced the same victim-blaming discourses at SAPS, and at other entry points, that many survivors of sexual offences and other acts of violence in the general population experience. This includes being asked "Why were you doing this? Why were you wearing this? Why were you walking at night?" (LGBT9). However, homophobic and transphobic views about the permissiveness, perverse or hypersexuality of LGBT people also means that they are seen as provoking assault, "as supposedly a normal person wouldn't be exposed to what happened to you as an LGBTI person" (LGBT9). Comparing these experiences to the reported experiences of women who have experienced sexual violence (Moffett, 2006; Jewkes, Penn-Kekana & Rose-Junius, 2005)²³ reveals the gendered nature of such secondary victimisation. The blame, or responsibility, for the rape is feminised – it is levelled at women, or at men who are perceived as 'feminine' because they do not conform to patriarchal norms of masculinity. It has been highlighted in the healthcare context that such gendered accusations are used to discipline expressions of gender or sexuality that do not conform to conservative, patriarchal ideals (Meer & Müller, 2017).

Participants also related incidents where the gender of the survivor was scrutinised by SAPS. In KZN, an LGBT activist stated that "the gay guys, they are scared that when they report the case, they [SAPS officers] will say 'You wanted to be a woman maybe that is why the guy did this to you' " (LGBT9). This statement not only illustrates the homophobic attitudes and stereotypes of some SAPS members, such as that gay men want to be women, but also their deeply misogynistic views, including that being a woman necessarily involves being raped. This participant went on to say that she knew of men who had been gang-raped, but thought that they did not report these incidences because they feared a humiliating and "emasculating" treatment by officials.

Notes

²³ Although there is no single study specifically on victim-blaming of rape survivors in South Africa, stigmatising and blaming attitudes towards survivors by their family members,

healthcare practitioners, police and other service providers have been highlighted in numerous works that address sexual violence in the country. Those cited here are merely two examples.



Similarly, lesbian women and transgender people also experience interrogation of their gender when reporting. In Gauteng, one service provider said:

You are now researching why people are not going to court, it's not even going to court, it starts with going to the police, or going to a service provider. Do you know lesbian women who go to a clinic [...] they are being told that 'You are a man', and there are jokes made to say 'You are man' [...]. So their matters will never even go to court, because they end there, at entry points, which would be your police station, which would be your clinic, which would be an organisation, because I think it's important that even staff members within organisations are trained and we continually have discussions around these issues because you are getting people all the time. (CS4)

The service providers interviewed gave numerous other examples of LGBT people being ridiculed for their sexual orientation or gender identity when seeking services. In an interview with an LGBT organisation in Gauteng, a participant recounted, "We had a case of a transwoman who just got laughed at by the police, so like 'Oh but you look like a man', or 'You have man parts, so how could you be raped?' etcetera" (LGBT8). Another LGBT organisation in Mpumalanga points out that this also happens at healthcare facilities where LGBT people are made a spectacle of, and "made the talk of the hospital" for the amusement of staff. This is especially the case when survivors are attending the clinic due to a health complaint, including for STIs that are the result of an assault (LGBT3). Another Mpumalanga participant said that healthcare providers would call their colleagues over from other departments, or away from their own tasks, to ogle the survivor (LGBT2).

As has been demonstrated elsewhere (cf Müller (2017) for a discussion of homophobia in South African healthcare facilities) homophobic and transphobic views often take the form of an invasive curiosity about LGBT people's bodies and sex lives.

I guess on my opinion, because people they don't disclose that's the one, and secondly, for those who may be strong enough to go and open, they get shy after that, I don't know, because it's more focusing on the sexuality instead of focusing on what really happened. I think that is why you will find now LGBTI or lesbians when they get raped, they keep quiet, because it's changed, the focus will be more on the sexuality [...] (LGBT9)

In other cases reported by organisations, negative experiences involved the refusal of services altogether. A Gauteng gender-based violence service provider describes an instance where the police officer at the SAPS service desk refused to take statements or open a case for two lesbian women:

When they [two butch lesbian women] got to the police station to open a case of assault and then a case of rape, the police person [...] refused to open the case because for the assault case, they said how can you say you were assaulted by a man when you are a man yourself, and for the rape one, they said how can you say you were raped when you are a man. So even though these two young women told them that we are women, yes we are in a relationship, we are here to report, but they refused. (CS4)

In some instances, homophobia or transphobia intersects with other beliefs or values of officials, who then make judgements based on those, rather than on their responsibilities and obligations as a government official or service provider:

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So now she divorced the partner [ex-husband], so now she's moving in with her [new] partner who is a lesbian, so the ex-husband is harassing the partner to say I need my child back, I want grant money for the child and when they give him the grant money, he always has an excuse of coming back to their house and one day, he assaulted them and then they went to report the case, but when they were reporting the case to [SAPS officer's name], so when they were reporting the case, he said he has a right to do so [visit their home/assault them], because this was the wife who was paid lobola, so did he get the lobola back? (LGBT4)

As observed in the existing evidence on sex work and access to justice (for example Rangasami, Konstant & Manoek, 2016), LGBT people, particularly transwomen, who engage in sex work are especially suspicious of ill treatment by the police and are very unlikely to report. Simultaneously, they are also extremely likely to be victimised multiple times, due to the confluence of the vulnerability of sex work itself, their LGBT identity, and their visibility as transwomen.

One service provider relayed an incident wherein a SAPS member assaulted a man who reported a sexual offence:

There was a particular gentleman who went to go lodge a case about an attempted rape. He got put into the van and they said show us where the crime scene was and he got raped there by the police, so he didn't feel like he wanted to report the case. (LGBT4)

Taken together with the other evidence from this section, this suggests that existing stereotypes about masculinity, and the violability of feminine bodies, lead individuals to believe that once someone has been violated they are less masculine. Such prejudicial ideas legitimate sexual violence against people with non-conforming sexual orientations and/or gender identities, and place LGBT survivors of sexual violence at risk for further violence.

Negative experiences of reporting or accessing services tend to have an amplified effect. News of poor treatment or secondary victimisation circulates through LGBT communities, which in some places can be small or tight knit, so that "then obviously that person is going to share their story to their friends" and others are further discouraged from reporting (LGBT3).

It is clear from participants' accounts that whilst societal homophobia and transphobia exist in various parts of the criminal justice cluster, SAPS were often perceived to be the main culprits thereof. This may be because of a particular organisational culture within SAPS, or because SAPS, as the key entry point into the criminal justice system, is the one component of the system that LGBT people accessed – very few organisations spoke about cases that were taken to court and prosecuted.

Participants reported that SAPS received both government-initiated and NGO-initiated training, however, this does not always amount to behaviour change for individual officers, and in some cases participants expressed frustration that there were not better disciplinary measures in place for officers who exhibited homophobic, transphobic or anti-survivor attitudes and behaviours. This points to a crucial concern that emanated from the broader ICOP study, related to the efficacy of training around SOGI for criminal justice and healthcare personnel.

We are trained for that (sexual offences cases) because you have to even attend separately other special courses. Like the week before last we were attending because we don't just heterosexual people. We have got gays too. So, to another person, doing anal sex is a normal thing, to us you can think maybe it is rape. It is not rape it is a normal thing, so normally we attend such a seminars and workshops. It is courses, special courses like the one, men sleeping with men because if I get a victim like that, I mean a sexual survivor who is like that and he is already a gay and he is sleeping with another man, how can I tell those injuries



are from the very, very sexual offence or injuries that he sustained maybe during normal consensual sex. So we are exposed to different courses. [Forensic Nurse, interviewed for the broader ICOP study]

This quote demonstrates that despite the fact that training attendees might praise a training, its actual effectiveness – or post-training application – is not easily measured. In this case, the sensitisation training for forensic staff did not alter the nurse's prejudicial perception of who can, and cannot, be raped, as evidenced by her opinion that gay men cannot be victims of sexual offences as they already engage in anal sex. Especially where a client's or patient's cases might be deemed controversial by service providers because of their own values and beliefs, content training is usually not sufficient to address value-based decisions in service provision (Müller et al., 2016).

Perception of inefficacy of the criminal justice system

Another significant barrier to reporting was the perception that the criminal justice system did not work for LGBT people, or at all. Again, this aligns with existing research; with one study observing in a Gauteng cohort that 76% believe the CJS does not uphold LGBT rights (Polders & Wells, 2004).

As a result, individuals may feel that there is no point in reporting, and thereby exposing themselves to societal or familial homophobia and related safety risks or ill treatment, as described above. This perception was based both on participants' professional experience of the criminal justice system, and on the experiences reported by their clients. These views were linked to frustrations about the limited resources, lack of a client-focus in the system, homophobia or transphobia, or disappointing outcomes. One LGBT activist said "some cases, they don't even go anywhere – so it's [...] me reporting and [...] exposing myself to this policeman who is secondary discriminating me, and then after that, my case is not even going to go to court, or it gets postponed and postponed – so why do I have to go through that hardship" (LGBT3).

In some instances it is difficult to ascertain whether the perception of the inefficacy of the criminal justice system arises from actual poor systems, processes or outcomes, or from misunderstandings about how the criminal justice system works. For example, an LGBT support organisation states: "So people get the bai – even LGBTI people ask you 'Why should I report the case?' – because we all see the person walking around. Because it happens to heterosexual people, it will be worse for me because I'm LGBTI, so why should I report a case when a person will come back and roam around the streets again?" (LGBT4). Here the participant pointed out that improved communication to survivors about the court process, what to expect, and why, could help ameliorate the distress of the process and decrease the perception that the system is not working by creating realistic expectations and an understanding of how the system operates. This would also decrease attrition as documented elsewhere (see for example Vetten et al 2008, Artz & Smythe 2008).

As with other stigmatised groups, it is not uncommon for an LGBT person to experience multiple episodes of victimisation over their lifetime, including in the neighbourhood or community where they reside and where their LGBT identity is known. In one instance in Gauteng, a staff member at a gender-based violence organisation tells of one such case, where after having her rapists acquitted of a brutal gang-rape, "the second time it happened to the very same person, she said 'I am not even going to go to the police, why should I?'" (CS4). In such cases it seems that the first assault, and the perception that it was not deemed punishable by the criminal justice system, affirms homophobic views within the community, and legitimates the idea that this particular person 'deserves' violence, or that violence against them can be justified. In this regard, the survivor's reluctance to report again is understandable and may further existing perceptions of impunity.

In KZN, one participant pointed out that individuals are more likely to report and to have a good experience under the following conditions: if they are supported by an NGO; if they are already familiar with the criminal justice system and have had a positive experience with the system previously; or if they know a strategic insider (LGBT4). In such instances, they are both more comfortable and familiar with criminal justice processes, are also more assured of their rights, and have more confidence about asking for what they need or what they are legally entitled to. This is also the case where survivors are strongly supported and advocated for by their families and communities, and when these groups or individuals are determined to keep the criminal justice system accountable (LGBT5, LGBT8).

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Death of victim

Participants in LGBT organisations also raised the problem of determining the sexual orientation or gender identity of the victim, and the bias motivation of a sexual offence, when a person has been murdered – that is in the case of rape-homicides.

Based on years of working on such cases, one participant in Durban explained that frequently, whilst individuals may be out to their friends, or may be perceived as LGBT in their community, they may not be out to their families: “That’s why the frustration was because you are no longer there and your family perhaps did not even know, it just goes down from there, unless you’ve got a non-profit organisation or group of friends that say they are going to push, otherwise it just ends there” (LGBT5). As a result, the participant says older cases may not have unpacked the bias motivation of a rape-homicide, and highlights how there have been efforts both by the Hate Crime Working Group and by NGOs to “resurface”, and “resuscitate” those cases and “check were they really handled as best as possible, or did they just die simply because at that stage we were not looking at the motivation or the intent behind the murders” (LGBT5). Whilst the sexual orientation and/or the gender identity of the victim and the bias motivation may not directly impact the case per se, this raises questions about how thoroughly such cases were investigated at the time, as the SOGI of the victim should have surfaced. It again raises the importance of community and NGO activism in creating accountability in the criminal justice system and getting justice for deceased victims, who cannot themselves delineate the circumstances of their violation and death or push for the thorough investigation of their case. This may be as true for the general population of victims as for LGBT victims.

In short, in rape-homicide cases, the LGBT identity of the victim may not be acknowledged, including because they may not have been out to their families. All the courts under study were Sexual Offences Courts, and so if LGBT sexual offences result in the death of the victim, such cases will not be prosecuted in those courts due to the primacy of the charge of murder over that of the sexual offence.

Part II: Cases reach court but are not identified as LGBT-related or bias-motivated

Participants were adamant that some LGBT people do report sexual offences, including where they are specifically targeted due to their sexual orientation, gender identity and/or expression, or the perception thereof. All participants provided examples of such cases. They highlighted that a core reason LGBT survivors of sexual offences were not believed to be seen within the criminal justice system, and specifically at the five courts in question, was due to difficulty in identifying when LGBT people or LGBT-related cases enter the system. Participants attributed this to either (1) LGBT people not disclosing their sexual orientation and/or gender identity; or (2) LGBT people disclosing their sexual orientation and/or gender identity, but the crime not being identified as bias-motivated.

Non-disclosure of sexual orientation and/or gender identity

In some cases, it is likely that LGBT people have gone through the court system without disclosing their sexual orientation and/or gender identity, and thus without disclosing the possible bias motivation of the attack. In these cases, the sexual orientation and/or gender identity of the survivor would not have entered into evidence, and the survivor would not have been identified as LGBT by criminal justice personnel.

A service provider in Durban raised the possibility that court personnel were expecting a certain kind of person or gender presentation: “Maybe the reason why they say they don’t see it, is [that] they’re expecting a certain somebody, who looks like somebody that they could actually say ‘This is an LGBTI person’... I’m not sure” (LGBT9).

However, irrespective of how the survivor looks and expresses their gender, there is currently no formal mode of enquiring about a person’s sexual orientation or gender identity in the criminal justice process. For example, there is no personal information or intake form that includes demographic questions related to SOGI, thus criminal justice personnel are reliant on individuals disclosing their SOGI and/or any possible bias motivation of their own volition. One court official expressed that asking survivors about their sexual orientation or gender identity was too sensitive a question for court staff to pose:



But then people might be offended very easily, if I'm going to sit and ask you now, taking down your statement [...] and I'm going to ask you 'Are you gay?'. I mean, if a person just doesn't want to tell or they might be butch or more effeminate, you might just get a klap, or you might offend that person, so ja, I don't think - because it's always to the person, the victim, him or herself to disclose that they were targeted because of that... and [...] we can use it when it comes to aggravation if we ask for a victim impact statement and all of that. (CS1)

This might further explain why court personnel think that LGBT survivors are not coming to court – in that the heteronormative environment of the court reads every survivor as heterosexual unless they match a stereotypical image of an LGBT person. Similar to what has been described in the South African healthcare system (Müller 2017), survivors who identify as LGBT, but 'pass' as heterosexual, become invisible in the eyes of court personnel unless the survivor specifically corrects this heteronormative assumption.

However, for a range of reasons, survivors may not want to disclose their sexual orientation or gender identity and its relationship to the motivation of the crime. An LGBT rights activist illustrates this with two cases, where lesbian women were sexually assaulted and it seemed clear that the assaults were bias-motivated “because the guys were saying they want to show them that they are not men, they are women and the other one has a kid, so they said no if she can have a kid, then that means she is still a woman“. She continues to explain:

They didn't want - because they are in the closet, so they didn't want us to be more involved, but we know that they are lesbians, so the case [...] was just treated as an ordinary [case], it was not treated as a hate crime case, it was just treated as a rape case. So the offender got like 6 years and the other one, I don't know what happened, I think the other one was postponed or something, but one I know that he got 6 years. [...] We tried to offer counselling or assistance, they said no, because their parents are going to know that they are lesbians, so that's why we had to attend just like ordinary citizens [not members of an LGBT organisation], just to give them support. (LGBT3)

As one prosecutor observes, it is likely that through the course of reporting and trial, people who are not out to their families or their community, may have to disclose to them, or risk having their sexual orientation or gender identity disclosed in the process:

In all probability, she is not going to disclose to the Prosecutor, because she will be scared that it will come out, because it will come out in trial, although we don't let anybody to sit in in Court, but it will come out and the accused, well he will know it and so it's a lot about themselves and how they want to disclose it, so that is one of your other challenges. I don't think it's just any person that wants the community to know, the family you know, so they rather not say and they will still be scared that people will tell. Although one should not and what happens in Court... - but I mean once it's a case, it's a public knowledge and people can report on it and stuff like that, so you do struggle with those sensitive issues. (CS1)

In such instances a survivor may report their sexual assault, but not necessarily the bias motivation of the crime because if she does, “then [the court] will need [to know]: Why do you say you were targeted? Does the community know? Does everybody know, you're open about it? And then [if some people do not know] it becomes maybe a problem for a person to disclose” (CS1).

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SOGI disclosed but not identified as bias-motivated crime

Service providers in court support organisations were often aware of the LGBT identity of individuals but were either unsure whether it impacted the case, or, if it did, how it bore on the case. One provider who works with minor survivors in Gauteng told the researchers about a case where a boy was raped because he was believed to be gay. However, when the researchers enquired how this had impacted the service provider's approach to the case, including how the trauma of the bias motivation might have impacted the survivor, and how that could bear on the case including the victim impact statement, she reported not having thought of that. She went on to state that the main reason the adolescent was at the organisation was for court preparation, saying that, "But you know it's interesting, because you have brought something to our attention that we haven't focused on before, where the need to capture specific information" (CS3).

Participants frequently cited the low reporting of crimes, including sexual violence, in the LGBT population as a reason for such cases not getting into the court system. One participant states:

A number of ladies here, especially girls, especially those that have got kids, I mean you have support group meetings with them and you realise you know what, they don't even want to get the matters to the system, they believe it has happened, it's done, I'm moving on with my life and you're like maintenance, because now you've got, you've got no family support, you're a bloody lesbian. Then they ask the lesbians how did, you get a kid when you're so butch. (LGBT5)

A participant from an LGBT organisation noted another instance where the LGBT identity and bias motivation of the crime did not manifest in the evidence of the case. According to this participant, when a lesbian woman gave her statement she expressed that she felt targeted due to her sexual orientation. However, the SAPS officer did not record this information. Later on, when the LGBT organisation intervened on her behalf and spoke with the prosecutor in the case, "he said 'no', according to the statement that he received, the victim didn't emphasis on the fact that she was being raped because of her sexual orientation", and "the statement now has already been signed and stuff like that, then the case is no longer [at the site of the original report], so the prosecutor said he was only working with the paperwork that he has, so he can't approach it differently where else in the statement it says different things" (LGBT3). According to the participant, the prosecutor would not consider introducing the survivor's sexual orientation, and so the possible bias motivation did not feature in the case.

In the example above it is unclear whether the prosecutor felt that the bias motivation was too tenuous to be useful as a prosecution strategy, or whether he was personally disinclined to engage with the issue of sexual orientation due to homophobia or lack of knowledge. However, the participant felt that in the first place, the SAPS officer had omitted the survivor's sexual orientation from her statement "intentionally, because those were the same people that were asking her that when you say you've been raped looking like that, because she is very like hard core [in appearance]" (LGBT3).

Participants also pointed out that, beyond the initial statement to the police, the SAPS investigating officers were not equipped to, or prepared to, adequately investigate a case with a SOGI-related bias motivation. One participant in Gauteng gave examples of well-known cases where the sexual orientation of the victim or survivor was not considered in the investigation, despite the fact that their LGBT identity was well-known:

In all of these cases, none of the investigating officers have any sense of how to investigate a case based on someone's sexual orientation and gender identity. So if you are found, like in Dudu [Zozo]'s case that would be a rape and robbery case, but it wouldn't be based on her identity or her sexual orientation. In [Eudy] Simelane's case [an out lesbian soccer



player in the SA national team who was murdered], the same thing, it was theft, cell phone was taken, money, so we often have that situation. In the case of Disebo Makau in the North West, the same thing happened, but in that case, the judge made two different sentences. The one was for the actual theft and the other was for the hate crime, for the rape and hate crime, so yes. [Organisation name] didn't exist in the time of Sizakele [Sigasa] and Salome [Masooa]'s time, but that was the Triple 7 campaign, a few other organisations were involved in that particular case. (LGBT8)

The participant pointed out that especially in cases where the victim was deceased, establishing her sexual orientation in order to prove the bias motivation of the crime requires a nuanced investigation into the social context of the victim, as well as the perpetrator, which often only happens under pressure from NGOs or through public attention:

I think in the Gift Disebo [Makau] case, which is the North West one, we really pushed the investigating officer to meet with the deceased's girlfriend and to meet with her family and really to kind of establish that this person lived openly as a lesbian. (LGBT8)

The same participant shared an incident that their organisation was involved in during a trial in which information about the sexual orientation of the victim or survivor was necessary for the evidence presented by the prosecution, but was not adequately prepared for in the course of the investigation:

Ja, but we've had incidences at the courts in the case of, it's a Davidson case, I think it's in the case of [victim name], where we were at the court and the investigating officers suddenly needed any lesbian person in the space to just verify that [the victim] was in fact a lesbian, [...] so they just suddenly wanted somebody to just verify there and there that - just outside the court proceedings that, like you come in with a docket and just confirm that this person is a lesbian right, so like no investigations into that person's relationships or circumstances, so the context is completely removed from the situation. (LGBT8)

Another service provider that works exclusively with men felt that another reason why the sexual orientation of gay men is not identified in sexual violence cases is that there is currently a considerable focus on a certain survivor profile – that of black lesbian women – and therefore, that gay men are made further invisible. The participant also explained that this may have to do with the perception that men are tough, and thus male survivors may get less attention:

So, people react differently when a man was raped as compared to a woman was raped, more especially a lesbian woman was raped. There is more hoo-hah around a lesbian woman getting raped, because there are more chances of it being potentially homicidal as well and then women in general getting raped, it's a big hoo-hah. Men getting raped, maybe they stand up and protest, it's okay, he's strong, he is a man. At least that's what I feel. (LGBT2)

Thus, in the view of this participant, people within the criminal justice system may be less perceptive of survivors who do not fit the widely understood profile because the idea of homophobic male-on-male sexual assault, for example, does not feature in the current discourse of bias-motivated crimes (LGBT2).

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Bias motivation not recognised

Another issue raised was that during trial, even when the survivor had disclosed their LGBT identity and the bias motivation of their victimisation, and where both were included in the evidence, the bias motivation might not be considered by the judge. In such cases, the bias motivation would neither reflect in the judgment, nor be a consideration during sentencing. For example,

The guy won the case, because they [the judge] said how she knows it was not about being a lesbian that she got raped, because they were both drunk, so the guy won the case. But the question asked by the judge was, because they were asking her ‘Does the guy know that you are a lesbian’, and she was like ‘Yes, the guy knows that I’m a lesbian’, he was saying those things when he was pushing her and he told her I want to show you what it feels like to be with a man, and they [the judge] said ‘Did you have proof of what he was saying?’ – but there was no proof that he said that. (LGBT4)

This example highlights, on the one hand, how difficult it can be to establish not only the LGBT identity of the survivor or victim, but that the perpetrator knew that the survivor identified as LGBT – or perceived the survivor to be LGBT. The latter is what constitutes a bias motivation. To establish these facts, which are crucial for arguing bias motivation in a case, needs a skilled and detailed investigation. On the other hand, it also demonstrates that, as Williams (2011:43) described, “if viewed benevolently [...] the state may be struggling with how to prosecute homophobic hate crimes – but, if viewed malevolently, that the state does not have a particular interest in protecting minority groups.”

Part III: Other challenges within the criminal justice system

In addition to the various reasons that LGBT people, and bias-motivated crimes may not be apparent in the court system, participants also mentioned other issues they had observed in the course of service provision, or advocacy, that may impact LGBT people’s access to justice.

Organisations repeatedly observed that LGBT survivors were able to access services and were treated better when accompanied by staff members from NGOs in the gender-based violence or LGBT sector. One participant said “sometimes people will treat you differently because they see that maybe you’re from an organisation, but when an ordinary LGBTI person comes, then it changes” (LGBT3). Similarly, as mentioned above, a Gauteng service-provider informed the researchers that when LGBT people are turned away at points of entry, they are frequently able to access services and the criminal justice system when they then return accompanied by personnel from NGOs (CS4). This is a serious concern as it suggests that additional authority or accountability is necessary in order for LGBT people to access the criminal justice and health systems, and this also puts a tremendous burden on NGOs. It shifts the responsibility towards NGOs, and away from public sector structures and their constitutional obligations, also articulated in the Victim Empowerment Programme guidelines, to treat all survivors fairly and equally.

Investigation of cases

Some participants mentioned other issues that were unrelated to the survivor’s SOGI, but indicative of broader challenges that exist in the criminal justice system. For example, one service provider in Gauteng recalled a case of sexual violence which had been reported by two lesbian survivors, in which the investigation was so delayed that, ultimately, the survivors decided not to take the case forward:



The young ladies were originally from the Eastern Cape and [the case] was put back and investigated, but the time that the police took in terms of the investigation and the arrest was so long that the arrest was not made and perhaps even we can say that they come in perhaps like today and the matter was taken and they were able to say this is where it happened, these are the people that we saw. You see our justice is usually delayed, things are not taken as seriously as they should, so the suspects were not arrested in that case and the investigation was also taking long and they decided to go back home to the Eastern Cape. (CS4)

Participants in all provinces raised concerns about the collection of forensic evidence in cases with LGBT victims. In one instance, a male survivor at a TCC was given a tampon “to sort of clean himself”, but when he handed the tampon to the nurse, she simply flushed it down the toilet. (LGBT4)

In another case an advocacy organisation reported seeing police at a crime scene leave behind the clothing that the victim may have been wearing during the assault. The participant in Gauteng explains:

We actually were on site when we witnessed the police not taking evidence from the scene [...] the team was like why aren't you taking all this evidence with you and the police were like they don't need it, so they just left all the clothing, so we are not forensic experts, we don't know, it seemed pretty important to us that all that should be taken. (LGBT8)

It is difficult to determine in these instances whether the delays or neglect of evidence were related to a general negligence or lack of rigour in collecting forensic evidence, or whether they were a result of officials' own prejudices against the LGBT survivor/victim.

In general, participants reported feeling that criminal justice system personnel were so overwhelmed by the nature and scope of their work that they seemed unable to offer thorough and compassionate services:

They deal with so many murders, so on a weekend, I don't know how many bodies they will pick up or how many, it's like I don't know, it's like to them, when you talk about it, they are completely not affected by it. Ja, completely de-sensitised, so for them it's like 'Oh ja another murder, we will look into it'. (LGBT8)

Under circumstances where SAPS and other officials are so overburdened, traumatised and desensitised, it is likely that LGBT survivors may be seen as less deserving, or as those who officials struggle to empathise with, and are thus given the least regard. This comports with research with healthcare providers, who, in contexts of extreme resource and time constraints, are more likely to provide services to patients that they deem worthy, based on their own moral framework (Müller et al., 2016).

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One provider gave the example of being in training with SAPS personnel to demonstrate how desensitised SAPS officers may be:

The guy from the Department of Health, when he takes you through some of the things that they see on women's bodies that police overlook in so far as physical, then he takes you through fifty-two slides and you feel so disgusted at the end of them [...] It's crazy, but you find a police official falling asleep in the middle of all of that, and you're like, well, this is why most of the cases don't make it through, because the evidence is there, but nobody sees it, so it makes you wonder really how much of this training is going to get through and how much of it really would change the way things are. (LGBT5)

A staff member at a Gauteng organisation, gives the example of a SAPS statement to further illustrate how SAPS seem to gloss over important aspects of cases which may impact the urgency and vigour with which it is investigated, and the understanding of the bias-motivated nature of the crime, which then could have a bearing on the sentencing of the perpetrator:

In June 2012 [...] SAPS said that Thapelo [Makhutle] died of a neck wound in their statement, but when we were there documenting, Thapelo was decapitated and castrated and his tongue was cut out, so the arguments like the aggravations and even the slowness of investigating the case, was not escalated until we emphasised what the aggravation of the assault was on the body, so once we released the statement saying actually it wasn't a neck wound, like you are denying the complete dignity of this person by not even stating the absolute truth about what happened, so the aggravation of the assault or the murder [...] (LGBT8)

In addition, participants mentioned that in small communities, perpetrators often had relationships with SAPS and other CJS personnel, raising questions about the fair investigation and prosecution of the crime (LGBT9). In one case, in a small inland town, the officer investigating a bias-motivated rape-homicide was the brother of the suspected perpetrator, which was ultimately raised as a problem, and then the removal of the investigating officer led to the investigation being stalled (LGBT8).

Safety concerns

As raised in the section that addresses poor reporting, safety is a major consideration for survivors. This includes both when considering whether or not to report an offence, and throughout the investigation and court process. Similarly, the safety of victim support and advocacy organisation personnel is also of concern where perpetrators have strong links in the community. In KZN and in Gauteng service providers shared recent experiences of intimidation whilst supporting a survivor at court, or when demonstrating outside the court to show support for the survivor and raise awareness of the case (LGBT4, CS4).

In another instance, a service provider observed that the prosecutor in a case was also threatened and "terrorised", and indicated that he would not like to work on LGBT cases again (LGBT5). Whilst this is not particular to cases with LGBT survivors, it is possible that the higher profile of LGBT cases due to NGO organising and related media interest may result in greater safety concerns for survivors, NGO staff and criminal justice personnel involved in the case. This might be exacerbated by the low social status of, and lack of community support for, the survivor, together with prejudiced community feelings about the legitimacy of the crime.



Victim support services

A few participants mentioned that the relative invisibility of appropriate services for LGBT survivors may be a barrier to reporting. That is, participants do not know where to report, or it might not even occur to them to report because they do not know of a space where they would feel comfortable doing so. This may be particularly important where people have negative experience or views of SAPS, and so are more likely to enter the criminal justice process from healthcare sites or NGOs. One NGO provider of gender-based violence services in Gauteng observes:

An ordinary person walks outside Baragwanath Hospital, a woman and you ask her do you know what this place is, and she says 'Yes, it is Baragwanath Hospital', 'What do they do?', and she will tell you about the hospital, she won't tell you that actually inside the hospital there is a TCC that provides these services and if that is happening, then it's a problem. I'm sure if you ask lesbian women if they've been to a TCC, I don't think they would even know that there is a TCC. (CS4)

This participant points out that it is only once people have been exposed to gender-based violence services or NGOs, that they become aware of where they are situated and what services they provide. In addition, many NGO services have a conservative ethos, or are provided by faith-based organisations, and so LGBT people may not view them as safe spaces to report.

In addition, service providers observed that there was a tension between the perceived special needs of LGBT survivors, and the view that everyone should receive equal or the same treatment. On the one hand, a service provider in the gender-based violence sector, who works mostly with children, seemed committed to the provision of the same services to all her clients. She said:

If they come in and they need the services, they are not identified as LGBTI, they are identified first as a person and a person in need and a victim, [...] regardless of what religion, race, class, creed, sexual orientation, that has no bearing or relevance to the support they come in for. (CS3)

In contrast, another participant in the LGBT sector notes that the trauma of sexual assault may take on additional dimensions when the crime committed against an individual is intended to be an expression of broader political or ideological (religious or ethical) views, and this may require additional or specific psychosocial support:

I mean you can think about other situations like say Bosnia or Rwanda where rape I would say, rape is used as a weapon against somebody's body and so in these very aggravated hate crime situations where somebody is being sexually violated because of their sexual orientation and gender identity, it takes a different set of skills to conduct those interviews and we've been very reluctant to step into that without knowing and be trained on that and so it's very complicated, especially for a lot of the survivors there are attempts by the perpetrators to actually kill them, to finish them off in that sense. Of course, thankfully there are some who survive, who live, but in those situations, it's highly complicated and then of course the idea that something could be public [...] (LGBT8)

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In this regard, there may be a lack of general gender-based violence services that are accessible and appropriate for LGBT people, and that afford LGBT survivors the same service as anyone else, but that at the same time account for their particular experiences, vulnerabilities, or trauma.

One particular concern, that demonstrates these issues, is the dearth of accessible and welcoming shelter services for LGBT people, especially transgender people:

There's a transgender woman who was raped in Gauteng in Johannesburg last year. She is transgender, she is raped, it is reported to the police, she is placed in a women's shelter. She is later evicted from the women's shelter because they discovered that she's transgender [...]. For her, she remains homeless, so she's displaced, the Department of Social Development who is the custodian of this citizen, has to-date still not responded to the case, even to the Commissioner for Gender Equality. (LGBT8)

Whilst the provision of shelter services, as mentioned by the participant, is not exactly within the ambit of the criminal justice system, it does have considerable implications for the criminal justice process, and for survivor wellbeing and resilience. In particular, if LGBT survivors are to be encouraged to report bias-motivated crimes, they need to trust that the system will support them and ensure their safety and wellbeing throughout the criminal justice and recovery processes.

LGBT adolescents

Finally, LGBT adolescents raise particular concerns for service providers. As one provider highlights, frequently it is the parents or guardians, and not the child themselves "discussing their sexual orientation, it is often the caregiver's concern" (CS3). She goes on to say "They bring in the child with the intention that we can fix the child in their eyes, to remediate the situation, so they feel that it's because of the victimisation" (CS3).

In this regard, the same service provider explains that she does raise the issue of the assault impacting on an adolescent's sexual orientation in the victim impact reports:

I had to do a trauma impact report for the High Court, so why did it come up? Because we looked at timelines, we looked at her development and as a teenager, she was in a heterosexual relationships and according to her of course and slowly it changed and that's why it had to be brought into the report that how this changed her trajectory, frame of reference and her reasoning or rationale behind that, becoming so emasculated and she saw this as a defence mechanism to protect herself and started associating only with males and changing her sexual orientation, so in that case, I can recall why it was actually brought into the report. (CS3)

It is unclear in this instance whether the assault was bias-motivated or not, or if that was even investigated as a possibility. In addition, whilst it is possible that sexual assault can shape a young person's development, including their sexuality or gender identity, this is as true for heterosexuals as for LGBT people. It is also possible that given the young age of the survivor, she was still exploring her sexuality and may have identified as LGBT independently of the assault. In such instances, focusing on LGBT identity as an outcome of violence may be pathologising, that is, to view non-heteronormative sexual orientation as a problem or a mental health concern. This may then detract from addressing the trauma of the assault itself, and, in cases of bias-motivated crime, from addressing the implications of this motivation for the prosecution strategy.



DISCUSSION

DISCUSSION

Improved access and outcomes

Part I of the findings of this study shows that the majority of cases of SOGI-motivated sexual violence are not reported. LGBT survivors of sexual assault face multiple layers of stigma. As with other stigmatised groups, it is not uncommon for an LGBT person to experience multiple episodes of victimisation over their life-time, including in their own neighbourhood or community, where their LGBT identity is known. Given the widespread belief that same-sex activity is 'morally wrong' (The Other Foundation, 2016), LGBT people experience homophobia, transphobia, discrimination and marginalisation because of their sexual orientation and gender identity. This renders them vulnerable to sexual and other forms of violence, which the organisations interviewed for this report all outlined, and which have already been documented (Love Not Hate Campaign, 2016; Matebeni et al., 2013; Hate Crimes Working Group, 2013; Nath & Mthathi, 2011; Mkhize et al., 2010; Nel & Judge, 2008). This study confirms previous findings that beyond shaping vulnerability to violence, societal stigma also limits support systems, including family support, and other services that are available to LGBT survivors after they experience violence.

Sexual orientation and gender identity-based stigma both increases vulnerability to sexual violence and decreases access to support services and resources, which has been observed for other stigmatised populations, for example people living with psychosocial and intellectual disabilities (Meer and Combrinck, 2015; Meer and Combrink 2017). Homophobic and transphobic stigma within families means that LGBT people, especially LGBT youth, have less family support and are rejected by their families because of their sexual orientation and/or gender identity. LGBT people do not access victim support services, healthcare services (Müller, 2017a & 2017b; Meer and Müller, 2017), or the criminal justice system (Nel & Judge, 2008) for fear of secondary victimisation. Thus, LGBT people who are already at risk for violence due to their sexual orientation and/or gender identity have less access to resources to buffer their vulnerability.

For LGBT survivors of sexual violence, there are significant risks associated with entering the criminal justice system, from the initial reporting of a case to actual court proceedings. Our findings show that these risks are a significant barrier to reporting sexual violence. LGBT survivors of sexual violence who access the criminal justice system risk further secondary trauma within the criminal justice system, and increased vulnerability to homophobic or transphobic discrimination, violence and exclusion in their families, communities and wider social contexts. Research with sexual violence survivors in the general population shows that survivors are also put at further risk of violence by the added stigma of the reported rape (Vetten et al. 2008). For LGBT survivors, this is an additional layer of stigma that compounds SOGI-related stigma.

The larger study, the Improving Case Outcomes for Gender-Based Violence Pilot Project, makes a number of pertinent recommendations to improve the experience of survivors, as well as case outcomes of sexual offences cases. From the findings of this study, it is evident that resources need to be made available for the specific vulnerabilities and needs of LGBT survivors, and that existing resources need to take these specific vulnerabilities into account. The findings of this study corroborate that improved communication to survivors about the court process (such as what to expect and why) helps to ameliorate the distress of the process, and decreases the perception that the system is not working by creating realistic expectations (Artz & Smythe, 2007, Vetten 2008, Watson, 2015).

There is therefore an onus on the criminal justice system to both create the perception, and to guarantee, that LGBT survivors who report sexual violence receive some kind of protection and support, and that such support is LGBT-inclusive and affirming, and takes into account the specific vulnerabilities and needs of LGBT survivors. The onus is also on guaranteeing that, if sexual violence is reported, the criminal justice system will punish the perpetrator. Many studies show that the most important reason for attrition in sexual violence cases is the survivor's fear that the criminal justice system won't punish the perpetrator (see, for example, Vetten et al. 2008). Better case outcomes might therefore also improve levels of reporting.



Risk of visibility and disclosure

Part II of the study findings shows that the invisibility of LGBT people in the criminal justice system is complex, for a number of reasons. In the absence of standardised methods of collecting information on, and inquiring about, sexual orientation and gender identity within the criminal justice system, the onus is on the LGBT survivor to disclose not only the sexual offence, but also their sexual orientation or gender identity. As research with LGBT patients in the South African health care system has shown (Müller, 2017a), in such circumstances the LGBT person's decision about whether or not to disclose is weighed up between the risks (of secondary victimisation, or further social stigma) and the perceived benefits (of receiving services, justice or support). Given the pervasive context of stigma and fear, the decision to not report a sexual offence, or to not disclose one's sexual orientation or gender identity when reporting, is a rational and reasonable decision by survivors of sexual violence. As is evident from the findings of this study, for many LGBT survivors the risks of reporting, or disclosing their sexual orientation or gender identity outweigh the benefits in the current context of the criminal justice system.

The larger study, the Improving Case Outcomes for Gender-Based Violence Pilot Project, points to how resource limitations within the criminal justice system, coupled with pressures on prosecution and success rates, leads service providers to report that survivors experience the system as alienating and difficult to navigate (Heath et al., 2018). The findings from the present study show that these limitations exacerbate the invisibility of LGBT survivors. For example, a prosecutor's lack of time to consult well before trial, and to build trust with a LGBT survivor results in less likelihood of the survivor disclosing their sexual orientation or gender identity and thus raising the bias motivation of the offence.

Criminal justice system capacity to address bias-motivated violence

From all three parts of the study findings, it is evident that existing training on 'sensitisation' and 'awareness raising' is insufficient to equip criminal justice system personnel with the knowledge and skills to adequately address, investigate and prosecute sexual offences cases motivated by the sexual orientation and/or gender identity of the survivor.

Findings in Part I point to prejudicial attitudes held by criminal justice personnel, and criminal justice personnel's lack of understanding of the experiences and vulnerability of LGBT survivors.

Findings in Part II highlight the lack of knowledge and skill needed for successfully investigating and prosecuting a case of SOGI-related sexual violence. Investigative officers do not know how to conduct a sensitive, nuanced investigation that establishes the evidence for the bias motivation of the sexual offence. Prosecutors are uncertain about how to incorporate SOGI into prosecution strategies and how to raise it in court so as to influence the sentencing outcomes, nor do they have strategies for how to argue that the bias motivation is relevant to the case.

Findings in Part III illustrate the factors that lead to a lack of support for survivors of SOGI-related sexual violence, which are particularly pronounced where SOGI-related vulnerability intersects with other vulnerabilities, for example in the case of children.

Our findings corroborate the literature that the necessary knowledge for cases of SOGI bias-motivated crimes is often supplied by NGOs who actively insert their expertise into court proceedings (Lynch and Van Zyl, 2013; Williams, 2011). While it is commendable that outside expertise is brought in for (some) SOGI-related bias-motivated crimes, this places a considerable burden on NGOs in terms of capacity, time, and emotional investment, and shifts the responsibility from the state to civil society.

The criminal justice system needs increased capacity and knowledge to successfully deal with SOGI-related bias-motivated sexual offences, and to ensure that LGBT survivors are not further traumatised through the criminal justice process.



RECOMMENDATIONS



Recommendations

The findings from this report show that beyond the barriers to access to justice faced by the general population of sexual assault survivors – necessitating the improvement of general gender-based violence services and access to justice throughout the criminal justice system and related services (Heath et al., 2018) – the lack of a focus on LGBT survivors of sexual violence is rooted in prejudice, homo- and transphobia, and a lack of skills and knowledge. Additionally, the findings show that there is a critical lack of knowledge within the CJS on how to establish, investigate and prosecute SOGI-related bias motivation. At the data validation workshop, participants pointed out that in cases where SOGI-related bias is suspected, the focus often remains on the victim's/ survivor's identity (their sexual orientation or gender identity) rather than on the motivation of the perpetrator. The distinction between these two is critical: framing bias motivation based on survivor identity instead of perpetrator motivation places the burden on the survivor (to disclose their sexual orientation and/or gender identity); risks missing cases where the bias was based on the survivor's perceived SOGI (for example, where a heterosexual, cisgender woman was attacked because the perpetrator(s) assumed her to be a lesbian woman); and detracts from the way in which bias-motivated crimes convey and valorise trans- and homophobia in the wider community.

Based on the research findings, and the outcomes of the data validation workshop, this report recommends capacity building, training and criminal justice system strengthening in four operational areas: Reporting, investigating, prosecuting and judgement/ sentencing. Additionally, the report identified a number of cross-cutting issues that should be taken into consideration at each of these four stages.

Reporting

- SAPS and healthcare personnel should be knowledgeable about sexual orientation and gender identity, and its impact on survivor's social context and vulnerability, including on barriers to reporting.
 - All SAPS and healthcare personnel should receive mandatory training on SOGI, including values clarification and briefing on constitutional obligation of civil servants.
 - Such training should be included in pre-service education, and on-going professional development, and be developed and delivered in consultation with LGBTI NGOs.
- All SAPS and healthcare personnel need to be aware of the definition of rape and sexual assault as per the 2007 Sexual Offences Act.
- Statements should be taken in the language of the survivor's choosing, and should be correctly translated.
- SOGI status should be noted in the wider demographic information collected on cases reported to SAPS.
- The way in which SOGI information is asked from the survivor should be carefully considered and done in a non-threatening and non-judgemental way.
 - SOGI should be included as part of demographic information in the case docket, (as well as at other stages of the CJS process – see subsection on Cross-cutting Issues below).
 - SAPS personnel should receive training on effectively taking a statement that includes information about the motivation of the crime, including SOGI-bias motivation.
 - The charge sheet used by SAPS should be reviewed and possibilities of adding prompts related to SOGI bias should be explored;

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- o The Hate Crimes Working Group should be consulted in the development of such a model, based on their on-going research.
- All the above recommendations should be taken into account in the current development of the SAPS Standard Operating Procedures for protection of rights of lesbian, gay, bisexual, transgender and intersex (LGBTI) persons.²⁴
- SAPS and healthcare providers should develop relationships with local LGBT organisations, in order to facilitate the reporting of bias-motivated crimes, as well as referral mechanisms for support for LGBT survivors.

Investigation

- All SAPS personnel, including investigating officers, should be knowledgeable about sexual orientation and gender identity, and its impact on survivors' social context and vulnerability, including on barriers to reporting
 - o All SAPS personnel, including investigating officers, should receive mandatory training on SOGI, including values clarification and briefing on constitutional obligations of civil servants.
 - o Such training should be included in pre-service education, and on-going professional development, and be developed and delivered in consultation with LGBTI NGOs and other expert stakeholders.
- All personnel gathering forensic evidence should be trained on how to gather evidence for all forms of rape and sexual assault.
- Guidelines should be developed in order to facilitate the identification of SOGI-related bias motivation through the investigation. A list of indicators of bias motivation, based on the workshop hosted by the GHJRU and the LGBTI NTT in DoJ&CD, is included in Annex 2: Establishing Bias Motivation.
- Investigating officers should receive training on these guidelines, including identifying (what indicators might signal bias) and investigating (what evidence should be looked for). This investigation should not focus on the victim/survivor's sexual orientation or gender identity, but rather establish whether the SOGI of the victim/survivor was known to the perpetrator, or if the perpetrator perceived the survivor to have an LGBT identity, the perceived motivation for the crime, and if the perpetrator has any record of bias.
- The expertise of NGOs should be included in the investigation in order to help ascertain bias motivation through social context, including if the SOGI of the victim/survivor is known in the community.
- Investigating officers should be cognisant of the additional vulnerability of LGBT survivors throughout the investigation, and additional measures should be taken to provide survivor support, in collaboration with NGOs and other government department (such as DSD), and to ensure the safety of the survivor (see subsection on Cross-cutting Issues below).

Prosecution

- All NPA and court personnel, including prosecutors and court clerks, should be knowledgeable about sexual orientation and gender identity, and its impact on survivor's social context and vulnerability.
- According to the Sexual Offences Act Directives (2010)²⁵, all cases must be addressed equally, including being sensitive to secondary victimisation. In building a case, the prosecutor should recognise and engage with SOGI and its relevance to the crime and to the victim's right to privacy.

Notes

²⁴ South African Police Service, draft directive V001/ 2017: Standard Operating Procedures for protection of rights of lesbian, gay, bisexual, transgender and intersex (LGBTI) persons.

²⁵ Directives issued in terms of section 66(2)(a) and (c) of the Criminal Law (Sexual Offences and related matters) Amendment Act, 2007 (Act 32 of 2007)



- The Sexual Offence Act Directives do not currently deal with SOGI related bias.
 - o Legislative guidelines should be developed for prosecutors to effectively deal with bias motivated crimes, including identifying (what indicators might signal bias), investigating (what evidence should be looked for), and arguing bias motivation.
 - o Prosecutors should receive training on these guidelines, including identifying (what indicators might signal bias), investigating (what evidence should be looked for), and arguing bias motivation and the parameters within which to establish that bias.
- Prosecutors should actively direct further investigations into SOGI-related bias motivation where they suspect such motivation and it is not addressed in the case docket.
- Prosecutors should actively develop collaborations with LGBTI NGOs in order to help ascertain bias motivation through social context, including if the SOGI of the victim/survivor is known in the community.
- Prosecutors should be aware of the additional vulnerability of LGBT survivors throughout the prosecution, and additional measures should be taken to provide survivor support, in collaboration with NGOs and other government department (such as DSD), and to ensure the safety of the survivor (see subsection on Cross-cutting Issues below and Annex 3 for a table outlining the key support needs of the survivor based on the workshop hosted by the GHJRU and the LGBT NTT in DoJ&CD).
- Prosecutors should ensure that survivors who will be witnesses in their own cases receive thorough and appropriate court preparation, including to prepare them to be able to publically disclose their SOGI.
- Prosecutors should be able to identify appropriate expert witnesses and other expertise that can demonstrate the ways in which bias motivated crimes convey to and valorise trans- and homophobia in the wider community, and of the crime's impact on the survivor.
- Prosecutors should ensure that victim impact statements are drafted in ways that speak to and capture the effects of the bias motivated nature of the crime.

Judgment/Sentencing

- Judges should be aware of the impact of SOGI-related stigma on a survivor's vulnerability, experience and access to justice.
- Magistrates should consider how to account for the bias motivation of a sexual offence in judgment and sentencing, including through victim impact statements.
- Judgement and sentencing should clearly stipulate the bias motivation and its impact on the court findings in order to counter trans- and homophobic public discourses, including those inherent to the perpetration of the crime.

RECOMMENDATIONS

Cross-cutting Issues

In addition, cutting across these four areas are the following concerns, for which we formulate the following recommendations:

Recognition of bias motivation throughout the four areas

- In order to enable the possibility of a court finding that recognises bias motivation – that is judgement and sentencing – key indicators of bias need to be identified early on in the system and need to be consistently pursued. That is, the evidence needs to be developed throughout the processes of reporting, investigation and prosecution.

Centring the survivor experience

- In the context of societal stigma, discrimination and prejudice based on SOGI, survivor-specific SOGI-related needs should be taken into account in each step of the criminal justice system process. A table outlining the key support needs of the survivor can be found in Annex 3 based on the workshop hosted by the GHJRU and the LGBT NTT in DoJ&CD.
- Prejudicial attitudes by criminal justice personnel should be addressed to reduce secondary victimisation.
 - o Mandatory training on SOGI, including values clarification and briefing on constitutional obligations of civil servants should be made available to all criminal justice personnel.
 - o Appropriate disciplinary mechanisms should be instated in cases where prejudicial attitudes persist and affect services to LGBT survivors.
- The expertise of NGOs and other expert stakeholders should be brought in to develop training programmes, and to provide additional LGBT-specific survivor support.

Addressing LGBT safety concerns during criminal justice processes, and integrating victim support services

- The safety concerns of LGBT survivors should be recognised at every step of the criminal justice system process.
 - o All criminal justice personnel should be knowledgeable about the specific vulnerabilities and safety concerns of LGBT survivors, and these should be considered by CJS personnel whenever SOGI status is elicited or revealed. This should be discussed with the survivor in order to adequately understand and address their safety concerns.
 - o LGBT survivors should be made aware of the process of obtaining protection orders, and protection orders need to be enforced.
- DoJ&CD should work with the Department for Social Development (DSD) to provide adequate solutions for SOGI-specific vulnerabilities and safety concerns that arise from or during CJS processes.
 - o Shelter services should be available to and accepting of LGBT persons, especially transgender and gender non-conforming people.
 - o Community dialogues and other advocacy activities should be undertaken in order to develop community awareness, as well as acceptance of and empathy toward minority SOGI identities.



- Victim support services, provided by the state or NGOs, should be aware of and responsive to SOGI-related vulnerabilities and specific survivor needs.
 - o Court support and victim support NGOs need to include training on SOGI into their staff education, preparation and development.
 - o DSD employees and registered social workers need to be knowledgeable and skilled to provide services to LGBT survivors of sexual violence.

Monitoring and evaluating the four areas

- DoJ&CD should report annually on the prevalence of SOGI bias-motivated violence, and on progress made with regards to the recommendations in the four operational areas.
- A standardised model of documenting SOGI information throughout the CJS process should be implemented in order to monitor the prevalence of SOGI motivated crimes and to understand their nature, and document the investigation, prosecution, judgment and sentencing of bias motivated crimes, as well as track LGBT survivors' experiences throughout the CJS.
 - o The Hate Crimes Working Group should be consulted in the development of such a model, based on their on-going research.
- Information on survivor/ victim demographics in annual and other reports and crime statistics should include sexual orientation and gender identity.

Working with support organisations (NGOs and referrals within/across the system)

- DoJ&CD, as well as DSD and DoH, should draw on the expertise of court support and LGBTI non-governmental organisations for designing, developing and implementing the above recommendations.
- Criminal justice actors, including SAPS, should work more closely with NGOs, including accepting referrals from, and referring to NGOs who provide LGBTI and court support services.

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ANNEX 1: A short list of SOGI-motivated sexual violence and homicide cases

Year	Victim/ survivor	Offence and circumstance
2001	Ivan Johannes	Kidnapped, raped and killed. Elsies River, Cape Town, Western Cape.
2006	Zoliswa Nkonyana	Beaten and stabbed to death. Khayelitsha, Cape Town, Western Cape.
2007	Sizakele Sigasa	Tied up and shot, with Salome Masooa. Meadowlands, Gauteng.
2007	Salome Masooa	Shot in the head, with Sizakele Sigasa. Meadowlands, Gauteng.
2007	Madoe Mafubedu	Repeatedly raped and stabbed to death.
2007	Simangele Nhlapo	Raped and murdered. Her two-year-old daughter was raped and left with both her legs broken. Soweto, Gauteng.
2007	Thokozani Qwabe	Killed. Her naked body was found in a field in Ezakheni, KwaZulu-Natal.
2007	Waldo Bester	Stabbed to death. Vredenburg, Western Cape.
2008	Khanyiswa 'Lhoyie' Hani	Stabbed and killed. Port Elizabeth, Eastern Cape.
2008	Eudy Simelane	Eudy was a well-known soccer player for the South African national team. Raped and murdered. KwaThema, Gauteng
2008	Desmond 'Daisy' Dube	Verbally assaulted, shot and killed. Yeoville, Johannesburg, Gauteng.
2008	Sibongile Mphelo	Raped and murdered. The mutilated body was found in an open veld. Strand, Cape Town, Western Cape.
2009	Girlie 'S'Gelane' Nkosi	Stabbed and killed. Kwa-Thema, Gauteng.
2010	Millicent Gaika	Raped. Gugulethu, Western Cape.
2010	Ncumisa Mzamelu	Burnt to death. KwaZulu-Natal.
2011	Nontsikelelo Tyatyeka	Stabbed and killed by neighbour, body stuffed in garbage bin. Nyanga, Cape Town, Western Cape.
2011	Noxolo Magwaza	Stoned, stabbed and murdered, Kwa-Thema, Gauteng.

ANNEX 1: A short list of SOGI-motivated sexual violence and homicide cases

Year	Victim/ survivor	Offence and circumstance
2011	Nqobile Khumalo	Raped and killed. The body was found in a grave near her parents' house in KwaMashu. Durban, KwaZulu-Natal.
2012	Sanna Supa	Shot and killed outside her house. Soweto, Gauteng
2012	Ntombana Desire 'Deezay' Mafu	Beaten and stoned to death. Dumbeked naked near her house. Soweto, Gauteng.
Year	Victim/ survivor	Offence and circumstance
2012	Phumeza Nkolonzi	Executed by gunshots at close range in her home. Nyanga, Cape Town, Western Cape.
2012	Thapelo Makhutle	Killed, decapitated and castrated. Kuruman, Northern Cape.
2012	Neil Daniels	Burnt and stabbed to death. Brooklyn, Cape Town, Western Cape.
2012	Sasha Lee Gordon	Stabbed in the heart and left to die on the pavement. Wynberg, Cape Town, Western Cape.
2012	Vuyisa Dayisi	Murdered. Duncan Village, East London, Eastern Cape.
2012	Hendrietta Thapelo Morifi (Andritha)	Raped and murdered. Was found in her home by her mother. Mokopane, Limpopo.
2013	Dudzile (Dudu) Zozo	Raped and murdered. Thokoza, Johannesburg, Gauteng.
2013	Disebo 'Gift' Makau	Raped and strangled to death, Ventersdorp, North West.
2014	David Olyne	Killed through repeated beating with a brick, then burned. Ceres, Western Cape.
2015	Phoebe Titus	Stabbed to death by a 15-year old boy. Wolesley, Ceres, Western Cape.
2015	Bobby Motlala	Raped and stabbed to death. Potchefstroom, North West.
2016	Noluvo Swelindawo	Shot and killed. Driftsands, Cape Town, Western Cape.
2016	Motshidisi Pascalina	Raped and murdered. The mutilated and burnt body was found in a veld. Johannesburg, Gauteng.

ANNEX 1: A short list of SOGI-motivated sexual violence and homicide cases

Year	Victim/ survivor	Offence and circumstance
2016	Lesley Makousa	Strangled to death. Potchefstroom, North West.
2016	Tebogo Mokhoto	Raped, stabbed, killed and decapitated. Vosloorus, Gauteng.
2016	Lucia Naido	Stabbed and killed outside her home. Katlehong, Gauteng.
2016	Mabelandile Mohlabi	Murdered. Katlehong, Gauteng.
2017	Lerato Moloji	Raped and killed. Naledi, Gauteng
2017	Nonkie Smous	Burned to death. Kroonstad, Free State.
2017	Lebogang Moremi	Murdered, Pretoria, Gauteng.
2017	Lerato 'Themba' Moloji	Raped and murdered. Soweto, Gauteng.
2017	Enrico 'Tamara' Van Der Merwe	Raped, stabbed, strangled to death. Worcester, Western Cape.

ANNEX 2: Establishing Bias Motivation

This Annex provides some pointers toward establishing bias motivation, based on the workshop hosted by the GHJRU and the LGBT NTT in the DOJ&CD.

Bias motivation is about the perpetrator and the message of the crime, not only about the identity of the victim. The motivators of a bias crime are the perpetrator's attitudes and perceptions of the victim, rather than the victim's identity per se.

How might you know when a sexual offence is bias motivated? What might be some of the indicators?

- Media exposure of incidents.
- The language used during the attack and whether that reflects hate speech.
- The manner in which the crime was perpetrated, noting that hate crimes are frequently extremely brutal and disproportionately violent.
- Links between the crime and the victim's identity.
- The perpetrator's attitudes towards LGBTI people and past patterns of behaviour in this regard.
- The perpetrator confessing the bias motive to friends or family.
- Trends related to the place where the offence took place e.g. the targeting of a specific place/location (for example an LGBTI-friendly tavern).
- Engaging with family and friends to get information on the context and circumstances of the crime.

ANNEX 3: Survivor Support Needs within the CJS

This Annex provides an overview of the needs of survivors in terms of support throughout the CJS process, based on the workshop hosted by the GHJRU and the LGBT NTT in the DOJ&CD.

What are key support needs of the survivor at each stage in the process?

Specific needs at each stage			
Reporting	Investigation	Prosecution	Judgment & Sentencing
Provision of appropriate, SOGI-affirming counselling	Cases dealt with by investigating officers who have been trained on SOGI issues and bias motivated crimes	Empathy with victim Court preparation for trial and evidence	Appropriate sentencing
Provision of psychosocial support prior to the victim giving a statement, to build their confidence	Engagement with witnesses and ensuring their protection	Psycho-social support	
LGBT-affirming shelter services if required	Psycho-social support	Financial support to attend trial	
Survivor protection (eg. protection orders)	Updates and information on progress of case	Witness protection	
Confidential, SOGI-affirming reporting procedures		Updates and information on progress of case	
Referral to NGOs that offer SOGI-affirming support			
Cross-cutting needs			
Accompaniment of the survivor throughout the process by friend, family and/or support organisations			
Addressing victim's support needs at each stage			
SOGI-affirming attitudes by CJS officials			
Updates on case progress, and information on how the CJS process, e.g. in relation to how bail works and the implications for the survivor.			
Speedy investigation, prosecution and sentencing			
Intersectoral and interdepartmental collaborations, ie. between SAPS, DoJ&CD and DSD			

Improving Case Outcomes for Sexual Offences Cases Project

Access to Justice for Lesbian, Gay,
Bisexual and Transgender Survivors
of Sexual Offences in South Africa

