

Discrimination on the grounds of sexual orientation and gender identity

submitted by the Young Queer Alliance
with the support of the International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA World)



Introduction

The fifth periodic report of Mauritius (E/C.12.MUS/5) was considered at the 14th and 15th meetings of the United Nations (UN) Committee on Economic, Social and Cultural Rights held on **26 and 27 February 2019**. Subsequently, the concluding observations of the fifth periodic report were adopted by the Committee at its 30th meeting held on **08 March 2019**, wherein, request was made at paragraph 68 thereof, in accordance with the procedure on follow-up to concluding observations adopted by the Committee, for the State party, that is, Mauritius, to provide, **within 24 months** of the adoption of the concluding observations, information on the implementation of the recommendations contained, *inter-alia*, at paragraph 16 with regard to the revision of the Equal Opportunities Act.

Taking into consideration the above delay of 24 months as from March 2019, and mindful of the fact that while the UN Committee on Economic, Social and Cultural Rights has, in its concluding observations, welcomed the establishment of the National Mechanism for Reporting and Follow-up (NMRF) by the State Party, but deplored the lack of engagement from stakeholders, including of the civil society, in the examination process for the fifth periodic report, the Young Queer Alliance (YQA) hereby, wishes to contribute to the Committee's follow-up and evaluation procedure with regard to recommendations made at paragraph 16 of the 'Concluding observations on the fifth periodic report of Mauritius'.

Paragraph 16 of the Concluding observations

"The Committee recommends that the State party revise the Equal Opportunities Act, in particular sections 2 and 19 (2), with a view to ensuring that the Act prohibits all direct, indirect and intersectional forms of discrimination, on any ground, including gender identity, social origin, property and other status, in all spheres relevant to the Covenant rights. The Committee also recommends that the State party provide for effective remedies for victims of discrimination, including through judicial and administrative proceedings. It draws the attention of the State party to its general comment No. 20 (2009) on non-discrimination in economic, social and cultural rights."

Summary

Mauritius still allows discrimination based on sexual orientation, specifically through the criminalisation of consensual same-sex sexual acts and the lack of legal recognition of same-sex couples; and does not consider gender identity as a protected ground under the Equal Opportunities Act. This demonstrates that the recommendation of the Committee has not been fully implemented.

Recommendation of the Committee (Para. 16)

Supporting Information

Measures taken by the State to implement the Committee's recommendations

The Committee recommends that the State party revise the Equal Opportunities Act, in particular sections 2 and 19 (2), with a view to ensuring that the Act prohibits all direct, indirect and intersectional forms of discrimination, on any ground, including gender identity,

- a) This Committee noted that since the adoption of the Covenant, the notion of the prohibited ground "sex" has evolved considerably to cover not only physiological characteristics but also the social construction of gender stereotypes, prejudices and expected roles, which have created obstacles to the equal fulfilment of economic, social and cultural rights.¹
- b) Within international human rights law, there is a well-established framework prescribing respect for gender identity. Consistently, United Nations bodies have established that gender identity, including gender expression, are prohibited grounds for discrimination, just like race, sex, colour or religion.²
- c) Gender identity refers to each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other gender expressions, including dress, speech and mannerisms.³

- a) The recommendation of the Committee refers to two sections of the Equal Opportunities Act:
 - i. Section 2 establishing the definitions; and
 - ii. Section 19 (2) on the limits of accommodation (including with regards to "the provision of shared accommodation in any premises, which, for reasons of privacy or decency or because of the nature of the sanitary facilities, are used by persons of one sex only"; and "the provision of accommodation in any premises is restricted or limited to persons of a particular sex, age, race or religious belief").
- b) Neither of these provisions define gender identity or provide explicit protection from discrimination based on gender identity.
- c) In line with international human rights law, including paras 20 and 32 of the CESCR General Comment No. 2 (2009), **the following amendments to the Equal Opportunities Act** by the State Party would have ensured its compliance with the Committee's recommendations:
 - i. Integration of the **definition of gender identity** provided by international human rights law (see "supporting information") into section 2 of the Equal Opportunity Act;
 - ii. Either explicit recognition of **gender identity as a protected ground**, or (based on international jurisprudence and definitions) direct explanation that the definition of sex is inclusive of sexual orientation and gender identity.
- d) Failure of the State Party to domesticate and instrumentalise the provisions of the International Covenant on Economic, Social and Cultural Rights only serves to demonstrate that the State Party is itself discriminatory towards the protection of the economic, social and cultural rights of particular

¹ UN Doc E/C.12/GC/20, CESCR general comment No. 20 (2009) on non-discrimination in economic, social and cultural rights, para 20

² UN Doc A/73/152, Report of Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, para 17; UN Doc E/C.12/GC/20, CESCR general comment No. 20 (2009) on non-discrimination in economic, social and cultural rights, para 32; UN Doc CCPR/C/119/D/2172/2012, Human Rights Committee, G v Australia, para 7.12

³ (UN Doc A/73/152, Report of Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, para 2; UN Doc E/C.12/GC/20, CESCR general comment No. 20 (2009) on non-discrimination in economic, social and cultural rights, para 32; Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity

Recommendation of the Committee (Para. 16)

Supporting Information

Measures taken by the State to implement the Committee's recommendations

		<p>groups of people based on their gender identity. <u>There is also no indication as to whether the inclusion of gender identity in diverse laws, including the Equal Opportunities Act forms part of the State Party's current Legislative Programme.</u></p> <p>e) To ensure equality in treatment by the state and equality in the protection of the economic, social and cultural rights of all groups of people, the State Party has <u>to clearly indicate, the timeframe for amending the Equal Opportunities Act</u> so as to confer equal protection for all persons, irrespective of their gender identity.</p> <p>f) In the light of provisions at Sections 3 and 5(1) of the Interpretation and General Clauses Act 1974 therefore, the State Party has to clarify whether –</p> <ol style="list-style-type: none"> i. the notion of “the neuter” concerning ‘sex’, ‘gender’ and ‘gender identity’ is legally recognised and applicable in “all other enactments in force”, including the Equal Opportunities Act 2008; ii. if in the affirmative, the effective remedies for victims of discrimination which have occurred so far, including through judicial and administrative proceedings; and iii. if in the negative, the effective remedies to be taken including through judicial and administrative proceedings and give clear timelines for same.
<p><i>social origin, property and other status, in all spheres relevant to the Covenant rights.</i></p>	<p>a) Within international human rights law, there is a well-established framework prescribing respect for sexual orientation. Consistently, United Nations bodies have that sexual orientation is a prohibited ground for discrimination, just like race, sex, colour or religion. When sexual orientation is not explicitly mentioned in international human rights treaties, it is covered by “other status”. Particularly, sexual orientation is recognized as “other status” under article 2, paragraph 2 of the International Covenant on Economic, Social and Cultural Rights.⁴</p>	<p>a) The Criminal Code (1838) Article 250 (1) states that any person found guilty of “sodomy or bestiality” shall be liable to up to 5 years’ “penal servitude”.</p> <p>b) In 2007, the Government introduced the Sexual Offences Bill, which would have deleted the crime of sodomy (see Section 24), and set an equal age limit of 16 years for sexual acts (Sections 11 to 14). However, the bill was never passed in the Parliament”.</p> <p>c) In June 2020, the Supreme Court of Mauritius authorised four activists to challenge the constitutionality of Section 250(1) of the Criminal Code. In February 2021, <u>the State Party has moved for the Plaintiff with Summons to be dismissed, implying that people shall continue to be criminalised for up to 5 years of</u></p>

⁴ UN Doc E/C.12/GC/20, CESCR general comment No. 20 (2009) on non-discrimination in economic, social and cultural rights, para 32; UN Doc CCPR/C/78/D/9412/2000, Human Rights Committee, Young v Australia, para 10.4

Recommendation of the Committee (Para. 16)

Supporting Information

Measures taken by the State to implement the Committee's recommendations

<p>b) Criminalization of consensual same-sex sexual relations constitutes violation of human rights and discrimination based on sexual orientation.⁵</p> <p>c) The lack of legal recognition of same-sex couples constitutes violation of human rights and discrimination based on sexual orientation.⁶</p>	<p><u>imprisonment irrespective of the act being consensual.</u></p> <p>d) The Equal Opportunities Act defines “spouse”, in relation to a person in a general and neuter form (“the person to whom one is, or has been, civilly or religiously married”, Section 2).</p> <p>e) However, in the Protection from Domestic Violence (Amendment) Act, the State Party uses the definition of “spouse” as “... a person who is or has been civilly or religiously married to a person of the opposite sex; is living or has lived with a person of the opposite sex as husband and wife; or whether living together or not with a person of the opposite sex, has a common child with that person” (emphasis added). In specifying the ‘opposite sex’, the Act limits the protection of rights to heterosexual persons only and explicitly excludes homosexual and LGBTQ persons from enjoying protection of their rights and deny them protection from domestic violence. This also effectively excludes LGBTQ persons from fully enjoying economic, social and cultural rights.</p> <p>f) The Equal Opportunities Act recognises service providers as potential discriminators. The Civil Status Office, under the Civil Status Act, has responsible for, <i>inter-alia</i>, the registration of marriages and other matter relating to the civil status of persons in Mauritius. Non-registration of marriages between people of the same sex is tantamount to the Civil Status Office not complying to the provisions of the Equal Opportunities Act and discriminating on the basis of “other status” including sexual orientation.</p> <p>g) In order to fully comply with the Committee’s recommendations, the State Party should decriminalize consensual same-sex sexual relations and recognize same-sex couples and their rights.</p> <p>h) <u>Criminalization of consensual same-sex sexual relations by the State Party, as well as the lack of legal recognition of same-sex couples in Mauritius constitute and contribute to different forms of discrimination based on sexual orientation.</u></p>
---	---

⁵ UN Doc CCPR/C/50/D/488/1992, Human Rights Committee, Toonen v Australia

⁶ UN Doc CCPR/C/78/D/9412/2000, Human Rights Committee, Young v Australia; UN Doc CCPR/C/89/D/1361/2005, Human Rights Committee, X v Colombia

Recommendation of the Committee (Para. 16)

Supporting Information

Measures taken by the State to implement the Committee's recommendations

The Committee also recommends that the State party provide for effective remedies for victims of discrimination, including through judicial and administrative proceedings.

-

- a) Trans people in Mauritius deplore that it is difficult to gain acceptance and respect.⁷ School settings remained a place of great challenge for trans people; them being the victim of perpetual harassment and bullying due to their gender identity.⁸ Owing to non-recognition by the State Party, of people based on their gender identity, trans people deplore that they are deprived of many rights; *inter-alia*, not being able to be defined on papers as their preferred gender, or being kicked out of public washrooms by security guards.⁹
- b) Under Section 27(3)(b) of the Equal Opportunities Act, the Equal Opportunities Commission is mandated to keep under review the working of the Act and any relevant law and submit to the Attorney-General proposals for amending them, if required.
- c) The Commission has not informed of any proposal submitted to the Attorney-General under the Act to address equal opportunities and issues of discrimination specifically concerning gender identity and other status, including sexual orientation.
- d) As one of the remedies for victims of discrimination, the Equal Opportunities Commission could have proposed amendments to design guidance for commercial and non-residential buildings as well as design sheets concerning the Planning Policy Guidance. These would have ensured compliance to the recommendation of the Committee. The amendments would have also encouraged non-discriminatory practices such as gender-neutral facilities to create greater accessibility for bathrooms and toilet facilities by trans people in such **new building and facilities construction**.

It draws the attention of the State party to its general comment No. 20 (2009) on non-discrimination in economic, social and cultural rights.

-

- a) The Young Queer Alliance condemns that; 12 years after the issue of General Comment No. 20 of 2009 (E/C.12/GC/20) and 24 months after the recommendation of the 'Concluding observations on the fifth periodic report of Mauritius' by the UN Committee on Economic, Social and Cultural Rights on non-discrimination in economic, social and cultural rights, which also explicitly includes sexual orientation and gender identity as statuses for non-discrimination; **the State party has still not yet amended laws that (i) criminalise same-sex consensual relationships; (ii) prohibit marriage between persons of the same sex;**

⁷ <https://youngqueeralliance.com/2019/11/26/petitekath-transgender-day-of-remembrance-2019-i-story-series/>

⁸ <https://youngqueeralliance.com/2019/11/21/andrea-transgender-day-of-remembrance-2019-i-story-series/>

⁹ <https://youngqueeralliance.com/2021/02/27/i-story-velani/>

**Recommendation
of the Committee
(Para. 16)**

Supporting Information

**Measures taken by the State to
implement the Committee's
recommendations**

	<p><u>and (iii)do not recognise persons who are transgender, transsexual or intersex; and has still not amended the Equal Opportunities Act 2008 at section thereof to include 'gender identity' as a ground for non-discrimination.</u></p> <p>b) Such blatant inaction on the part of the State Party is regrettably the manifestation of the tyranny of the majority, inasmuch that LGBTQ issues remain a highly sensitive issue in Mauritius in view of the delicate socio-cultural and religious fabric of the Mauritian society; whereby, a conscious choice has been made to deny minority groups, including LGBTQ people of the protection from discrimination of their economic, social and cultural rights, and which hence, is a long-standing practice of gross injustice.</p>
--	--