



Economic Injustice:

Employment and Housing Discrimination
Against LGBTI Refugees and Asylum Seekers
in South Africa



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PASSOP is a not-for-profit organisation located in Cape Town, South Africa devoted to securing the rights of asylum seekers, refugees, and immigrants in South Africa.¹ Through PASSOP's LGBTI Refugee Advocacy programme, PASSOP advocates for the rights of lesbian, gay, bisexual, transgender, and intersex (LGBTI) asylum seekers and refugees, providing a support network and a wide range of social and paralegal services.² PASSOP extends its deepest gratitude to OSF-SA for their support of the LGBTI project.

At PASSOP's request, the Leitner Clinic conducted research and fieldwork in Cape Town, South Africa to assist PASSOP in documenting housing and employment discrimination against LGBTI asylum seekers and refugees in South Africa.

This report was written by Lily Asquith, Jeannie Cho, Jessica Feghali, and Frances Martel, legal researchers in the Leitner Clinic. It was supervised and edited by Professor Chi Adanna Mgbako, Director of the Leitner Clinic, and Laura Garr, Esq., Pro Bono Clinical Supervisor. Fieldwork in Cape Town, South Africa was organised by Guillaín Koko, Project Coordinator of PASSOP's LGBTI Refugee Advocacy programme, and conducted by Lily Asquith, Jeannie Cho, Jessica Feghali, and Laura Garr in March 2013. While in Cape Town, the Leitner Clinic conducted extensive interviews with the LGBTI refugee community, including 33 interviews with LGBTI refugees and asylum seekers, and two LGBTI South African nationals.

PASSOP and the Leitner Clinic are extremely grateful to all the interviewees who shared their personal stories with us. We remain inspired by their continued courage in the ongoing struggle for equality.

¹ *About Us*, PASSOP, <http://www.passop.co.za/about-us> (last visited July 9, 2013).

² LGBTI Refugee Advocacy, PASSOP, <http://www.passop.co.za/programmes/lgbti-refugee-advocacy> (last visited July 9, 2013).

ECONOMIC INJUSTICE:

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EXECUTIVE SUMMARY

This report seeks to raise awareness of the discrimination that LGBTI refugees and asylum seekers face in the South African employment and housing markets. Discriminatory practices against the LGBTI community and foreigners, coupled with the lack of enforcement of existing anti-discrimination laws, create barriers to employment and housing for LGBTI refugees and asylum seekers. The South African asylum process further hinders LGBTI asylum seekers' access to stable and secure housing and employment.

Unique among African nations, South Africa has an established legal framework protecting all individuals from unfair treatment due to their sexual orientation.³ South Africa was the first country in the world to provide its LGBTI community constitutional protection from discrimination based on sexual orientation,⁴ and is Africa's only nation to legalise same-sex marriage.⁵ Today, it is just one of two

countries in Africa to offer some form of legislative protection for sexual minorities.⁶

In contrast, 38 of 54 countries in Africa have criminalised same-sex activity in some form, with penalties ranging from fines and imprisonments to death.⁷ These nations permit, and often encourage, both public and private sectors to discriminate against the LGBTI community.⁸ LGBTI individuals within many of these countries often endure perpetual threats of criminal prosecution, hate crimes, and dangerous abuse meted out by their families and neighbours.⁹ Fearing for their personal safety, some LGBTI individuals flee their homes to seek refuge elsewhere, most commonly in South Africa.¹⁰

In the late 1990s, South Africa collaborated with non-governmental organisations (NGOs) to enact migrant-friendly immigration and asylum laws.¹¹ Such laws specify that persecution or fear of persecution based on gender or sexual orientation qualify as

3 See Adam J. Kretz, 'Is Aid Conditionality the Answer to Antigay Legislation? An Analysis of British and American Foreign Aid Policies Designed to Protect Sexual Minorities', *Vienna Journal of International Constitutional Law* 7, (2013) 1, 5.

4 See Constitution of the Republic of South Africa, 1996 [*hereinafter* S. Afr. Const.] § 9(3); International Lesbian and Gay Association, LGBT World Legal Wrap Up Survey (2006) 6; Fred Edmund Jandt, *An Introduction to Intercultural Communication: Identities in a Global Community* (6th ed. 2010) 366.

5 See Civil Union Act 17 of 2006 (S. Afr.); Vasu Reddy et al (eds), *From Social Silence to Social Science: Same-sex Sexuality, HIV & AIDS and Gender in South Africa* (2009) 22.

6 See 'LGBTI Special Initiative', OSISA, <http://www.osisa.org/Programme/lgbti-special-initiative> (last visited May 4, 2013).

7 See PASSOP, *A Dream Deferred: Is the Equality Clause in the South African Constitution's Bill of Rights (1996) Just a Far-off Hope for LGBTI Asylum Seekers and Refugees?* (2012) 8; see e.g., Human Rights Watch, *More than a Name: State-Sponsored Homophobia and its Consequences in Southern Africa* (2003) 1–2 [*hereinafter* *State-sponsored Homophobia*] (discussing Zimbabwe's state-sponsored homophobia encouraging discrimination against the lesbian, gay, bisexual, transgender, and intersex, or LGBTI, individuals); see also International Gay & Lesbian Human Rights Commission, *Outspoken: Focus on Africa 2012* (IGLHRC, New York), Summer 2012.

8 See PASSOP, *supra* note 1.

9 See PASSOP, *supra* note 1, at 11.

10 See Mashilo Mnisi, 'Africa's Gay Haven', *Mail & Guardian* Aug. 10, 2007 (Johannesburg), <http://mg.co.za/article/2007-08-10-africas-gay-haven>; PASSOP, *supra* note 1, at 6.

11 See Darshan Vigneswaran, 'A Foot in the Door: Access to Asylum in South Africa', *Refuge* 25 (2008) 41, 43–44.

grounds for asylum in South Africa.¹² The laws also mandate individualised refugee status determination procedures, intended to create institutional safeguards for applicants against arbitrary prejudice.¹³ The Refugees Act mandates that refugee status determination be made within 180 days.¹⁴ Fleeing the systemic and societal persecution in their home countries suffered because of their sexual orientation or gender identity, some LGBTI individuals seek refuge under South Africa's progressive legal framework.¹⁵

Despite South Africa's liberal anti-discrimination and immigration laws with regards to LGBTI persons, such laws are not always respected or enforced.¹⁶ Often, LGBTI asylum seekers and refugees continue to experience harassment, violence, and overall mistreatment caused by the very homophobic sentiments from which they fled.¹⁷ LGBTI individuals in South Africa have reported experiencing unfair treatment and verbal and physical abuse, including by law enforcement and other state officials.¹⁸ Discrimination is also often prevalent among employers, employees, landlords, and neighbours,

creating barriers to steady employment and safe housing. Often, gay men, lesbians, and transgender and gender non-conforming individuals are targets of sexual violence.¹⁹

Xenophobia in South Africa also exacerbates the struggles of LGBTI refugees and asylum seekers in finding stable employment and housing.²⁰ In part due to high unemployment rates²¹ and pervasive poverty, some South Africans view foreigners as competition to the country's limited housing, jobs, and health care.²² As a result, some South African citizens oppose the influx of new migrants.²³

Though some LGBTI refugees and asylum seekers arrive with professional degrees and years of experience and expertise obtained in their home countries, many are denied opportunities to gain meaningful employment.²⁴ Often, employers will not hire applicants if they hear a foreign accent on the phone or learn through a curriculum vitae (CV) that the applicant is a foreign national.

Some employers also refuse to hire asylum seekers while their legal status is pending and are often

12 See Refugees Act 130 of 1998 §§ (1)(xxi), (2) (S. Afr.).

13 South Africa's refugee reception system is a four-part process whereby an asylum seeker who has entered the nation will: (1) register at a refugee reception office (RRO) their intention to apply for refugee status; (2) submit an application for refugee status; (3) obtain a formal hearing for refugee status determination; and (4) receive documentation, or a temporary permit, providing the asylum seeker the right to be inside the country while awaiting their refugee status determination. See Vigneswaran, *supra* note 11, at 44. With regards to the fourth step, a Department of Home Affairs (DHA) official at the RRO is required to accept the asylum seeker's claim and provide the permit evincing the asylum seeker's lawful presence in South Africa. See *id.* Refugees Act 130 of 1998 §§ 21(2)(a)–(b), 22 (S. Afr.). In theory, the individualised refugee status determination procedures safeguard asylum seekers in South Africa from automatic repatriation and provide all foreign nationals seeking refuge an opportunity to apply for the State's protection. See Vigneswaran, *supra* note 11, at 42–43; see also Human Rights Watch, *Prohibited Persons: Abuse of Undocumented Migrants, Asylum-Seekers, and Refugees in South Africa*, (1998) 115 (noting that, prior to South Africa's current refugee laws, South Africa employed “blanket denials of refugee status” to certain foreign nationals and that such practices were “inconsistent with international law and the UNHCR Basic Agreement, which require[d] an individual determination of refugee status”).

14 Regulations to the Refugees Act 130 of 1998 § 3(1), (3).

15 See Mnisi, *supra* note 10.

16 See Mwananwina Ilyayambwa, ‘Homosexual Rights and the Law: A South African Constitutional Metamorphosis’, *International Journal of Humanities and Social Science* 2 (2012) 50, 51–52.

17 See ORAM, *South Africa COI Report: Discrimination and Persecution of LGBTI Individuals in South Africa* (2012) 1 [hereinafter *South Africa: Discrimination of LGBTI*].

18 See *id.* at 1–3.

19 See Human Rights Watch, “We’ll Show You You’re a Woman”: Violence and Discrimination against Black Lesbians and Transgender Men in South Africa (2011) 2–3 [hereinafter *We’ll Show You You’re a Woman*]; South Africa: Discrimination of LGBTI, *supra* note 17, at 1–2, 7–8.

20 See Human Rights Watch, *No Healing Here: Violence, Discrimination and Barriers to Health for Migrants in South Africa* (2009) 32.

21 As of May 2013, South Africa's unemployment rate is 25.2 per cent. See Statistics South Africa, ‘Quarterly Labour Force Survey: Quarter 1 2013’, (May 6, 2013) v. The South African government's official statistics provide that the labour force increased by 144,000 people in the first quarter of 2013 (January to March 2013) from the fourth quarter of 2012 (October to December 2012). See *id.* The first quarter of 2013 saw 0.3 per cent increase in unemployment over the previous quarter. See *id.* Since 2008, when the unemployment rate was 21.9 per cent, the rate has steadily been rising. See *id.*, at xiii; Statistics South Africa, ‘Quarterly Labour Force Survey: Quarter 4 2010’, (Feb. 9, 2010) vi.

22 See African Centre for the Constructive Resolution of Disputes (ACCORD), ‘It’s Not Just Xenophobia: Factors That Lead to Violent Attacks on Foreigners in South Africa and the Role of the Government’, *ACCORD Policy and Practice Briefs* 5 (Mar. 2011) 3.

23 See *id.*

24 See *id.* at 5; PASSOP, *supra* note 1, at 7.

ignorant of the fact that the permits issued to asylum seekers authorise the individuals to work in South Africa. Though the Refugee Act requires that status determinations be made within 180 days,²⁵ many asylum seekers spend years waiting for a determination and thus find it difficult to secure stable employment throughout the full waiting period.²⁶

Of those LGBTI asylum seekers or refugees who secure an interview, some are denied employment based on their appearance alone if their nationality, sexual orientation, or gender identity is apparent or assumed. Several LGBTI asylum seekers and refugees interviewed reported being verbally harassed by their potential employer on interviews. As a result, many LGBTI asylum seekers and refugees pursue informal jobs that do not guarantee stable work or income. Those who are able to secure employment often face discrimination at the hands of their bosses, coworkers, and customers. LGBTI refugees and asylum seekers report being skipped over for promotions, paid a lower salary, and fired due to discriminatory attitudes in the workplace.

The struggle to find stable employment as a result of discrimination is inextricably tied up with the ability to afford safe and adequate housing. When LGBTI refugees and asylum seekers are under- or unemployed or are paid lower than market wages, it is difficult to maintain a stable income adequate to pay for housing.

Upon arrival to South Africa, many LGBTI refugees and asylum seekers end up living in homeless shelters or on the streets. Some will find themselves in and out of homeless shelters for many years. Unfortunately, LGBTI refugees and asylum seekers report that shelters are often unsafe for them and that they face discrimination from shelter residents and sometimes shelter administrators.

A large numbers of LGBTI refugees and asylum seekers with limited resources also live in townships, where homophobic, xenophobic, and racist attitudes are prevalent and violent attacks against LGBTI refugees and asylum seekers are common. LGBTI individuals report heterosexual refugees and asylum seekers from their own countries of origin perpetrate many such attacks.

Even LGBTI asylum seekers and refugees with sufficient income face obstacles to housing. Landlords often discriminate against such individuals by refusing to rent to them or asking for higher rent than other tenants are asked to pay. Even inside their home, many landlords and roommates subject these individuals to violence and harassment as a result of their nationality and/or sexual orientation.

South Africa's law enforcement also employs discriminatory practices against LGBTI individuals and foreign nationals. Without protection from the police, LGBTI refugees and asylum seekers are left

25 Regulations to the Refugees Act 130 of 1998 § 3(1), (3).

26 Furthermore, in July 2012, the Department of Home Affairs (DHA) closed its Cape Town RRO and refused to accept any new requests for asylum at the location. See Scalabrini Centre, 'Press Release: Update on Cape Town Refugee Office Western Cape High Court Case' (Feb. 4, 2013). The temporary shutdown was particularly problematic for undocumented LGBTI newcomers because it placed them at risk of detention and subsequent repatriation. See The Agency for Refugee Education, Skills Training and Advocacy (ARESTA), 'The Impact of Closing Maitland Refugee Reception Office on Potential Asylum Seekers' (Oct. 12, 2012), <http://www.aresta.org.za/the-impact-of-closing-maitland-refugee-reception-office-on-potential-asylum-seekers>. In fact, the largest population of refugees and asylum seekers reside in Cape Town. See Kristin Palitza & Bridget Mnyulwa, *Africa Belongs to All Those who Live and Work in It: Sonke's Refugee Health and Rights Programme* (2011) 4. To push back, PASSOP and other advocates protested outside the closed RRO. See Francis Hweshe, 'Refugees March Against Closure of Centre', *The New Age* Jun. 1, 2012 (Midrand), http://www.thenewage.co.za/52448-1011-53-Refugees_march_against_closure_of_centre; David von Burgsdorff, 'Press Statement: Concern Over Potential Closure of Maitland RRC', PASSOP (May 9, 2012), available at <http://www.passop.co.za/news/featured/press-statement-concern-over-potential-closure-of-maitland-rrc> [hereinafter PASSOP Press Statement]. Another human rights organisation also challenged in court the legality of the RROs closing. See *generally Scalabrini Centre v. Minister of Home Affairs 2012 4 SA 655 (WCHC)* (S. Afr.), available at <http://www.saflii.org/za/cases/ZAWCHC/2012/147.pdf>. In July 2012, the Western Cape High Court ordered the DHA to continue accepting new asylum applications until the court provided a final determination on the case, thereby providing new asylum seekers entering Cape Town interim relief. See *Scalabrini Centre 4 SA 655 at 35–37*. After months of rallies and public outcry spearheaded by PASSOP, the Western Cape High Court ordered in March 2013 that the RRO fully resume operations by July 2013. *Scalabrini Centre v. Ministers of Home Affairs 2013 (WCHC) at 49 para. 120* (S. Afr.), available at <http://www.saflii.org/za/cases/ZAWCHC/2013/49.pdf>; see Voice of Africans for Change, 'Cape Town Refugees Reception Center to Be Re Open' (Mar. 19, 2013), <http://vac-africa.org/cape-town-refugees-reception-center-to-be-re-open/>; Qaantiah Hunter, 'Passop, Home Affairs Told', *The New Age* Apr. 11, 2013 (Midrand), <http://www.thenewage.co.za/mobi/Detail.aspx?NewsID=91432&CatID=1008>. However, despite these 2012 and 2013 court rulings, it was reported in April 2013 that the Cape Town RRO had not accepted any new applications since June 2012. Qaantiah Hunter, 'Home Affairs Accused of Defying Court Order', *The New Age* Apr. 12, 2013 (Midrand), <http://www.bigissue.org.za/news/home-affairs-accused-of-defying-refugee-court-order>; see also *Scalabrini Centre 2013 at 49 para. 120*.

vulnerable on the streets of South Africa and in their neighbourhoods and homes. Police officers often ignore cases involving foreigners and mock LGBTI persons when they report a crime. At times, law enforcement officials physically and sexually assault LGBTI refugees and asylum seekers. Similarly, legal remedies for employment and housing discrimination have been reported as ineffective.

To address these barriers to housing and employment, advocacy is needed to: (i) amend the asylum seeker permit renewal process; (ii) create LGBTI-focused training programmes for law enforcement, Department of Home Affairs officials, Commission for Conciliation, Mediation,

and Arbitration officials and other government officials; (iii) develop awareness campaigns related to the employment and housing rights of LGBTI asylum seekers for LGBTI asylum seekers, employers, landlords and immigrants; (iv) create employment opportunities for LGBTI asylum seekers and refugees; (v) develop safe shelters and housing options for LGBTI foreign nationals; (vi) enable support groups and empowerment campaigns within the LGBTI and asylum seeker/refugee community and collaboration among existing organisations and community programmes; and (vii) generally improve education about, compliance with, and enforcement of existing anti-discrimination laws and available remedies.

I. SOUTH AFRICA'S LEGAL PROTECTIONS FOR LGBTI REFUGEES AND ASYLUM SEEKERS

This section provides a brief background on relevant South African laws that prohibit unjust treatment of LGBTI persons and foreign nationals. It then analyses the applicable employment and housing laws barring employers and landlords from discriminatory practices against such individuals. In addition, this section discusses South Africa's asylum law and the procedures related to refugee status determinations. The section concludes by examining international laws to which South Africa is a signatory, through which the nation has signaled its commitment to promote a universal right for LGBTI individuals to be free from discrimination.

A. National Law

South Africa's legal framework promotes equality among all persons and safeguards LGBTI refugees and asylum seekers from discrimination based on gender, sexual orientation, ethnicity, or national origin.²⁷ The South African Constitution prohibits the state or any person from "unfairly discriminat[ing] directly or indirectly against anyone" due to the individual's race, gender, sex, ethnic or social origin, or sexual orientation.²⁸ Sections 23 and 26 of the Constitution afford all persons in South Africa the right to fair employment practices and the right to be free from housing evictions without court orders.²⁹ In addition, the Promotion of Equality and Prevention of Unfair

Discrimination Act (PEPUDA) forbids the State and any person from discriminating against or harassing individuals on the basis of the enumerated prohibited grounds, including gender, sexual orientation, and ethnic or social origin.³⁰ PEPUDA further prohibits unfair treatment of LGBTI persons and foreign nationals by employers and arbitrary evictions of these individuals by landlords.³¹

1. Employment and Housing Laws

South Africa has enacted various domestic laws to insulate individuals from unfair employment and housing practices on the basis of their LGBTI status, ethnic origin, or nationality.³² With regards to workplace conduct, the Employment Equity Act of 1998 prohibits all persons from harassing or discriminating "directly or indirectly, against an employee, in any employment policy or practice" for reasons of race, gender, sex, marital status, ethnic or social origin, sexual orientation, or language.³³ The 1995 Labour Relations Act (LRA) regulates employer-employee labour dispute procedures, by which it created the Labour Court and established the Commission for Conciliation, Mediation, and Arbitration (CCMA),³⁴ an independent governing body that resolves workplace conflicts through alternative dispute resolution methods.³⁵ Section 187 of the LRA also presumes that employee terminations are

27 See S. Afr. Const., 1996 § 9; UN General Assembly, Convention Relating to the Status of Refugees, GA Res. 2198 (XXI), 28 July 1951, United Nations Treaty Series 189, Chapter II, 137 [*hereinafter* UN Refugee Convention]; Rental Housing Act of 1999 (S. Afr.); Refugees Act 130 of 1998 (S. Afr.); Employment Equity Act of 1998 § 1 (S. Afr.); Basic Conditions of Employment Act 75 of 1997 (S. Afr.); Labour Relations Act 66 of 1995 (S. Afr.).

28 S. Afr. Const., § 9(3)–(4).

29 *Id.* §§ 23, 26(1).

30 Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (S. Afr.) [*hereinafter* PEPUDA] §§ 1(xiii), (xvii), (xxii), 6, 10, 11, 29(1), (4) (specifying that the term "nationality," which is defined as ethnic and national origin, as well as xenophobic practices, are given "special consideration" due to the "overwhelming evidence of the importance, impact on society and link to systematic disadvantage and discrimination").

31 *Id.* §§ 29(1), (4).

32 See generally, Rental Housing Act of 1999; Refugees Act of 1998; Employment Equity Act of 1998 § 1 (S. Afr.); Basic Conditions of Employment Act of 1997; Labour Relations Act of 1995; PEPUDA *supra* note 30.

33 Employment Equity Act of 1998 §§ 1, 6(1), (3).

34 Labour Relations Act of 1995 § 112, 115; see also B.J. Erasmus et al, *South African Human Resource Management: Theory and Practice*, 4th ed. (2008) 613 for more information on the Commission for Conciliation, Mediation, and Arbitration (CCMA); 'Guidelines for Respondents', *South African Labour Guide*, <http://www.labourguide.co.za/ccma-information/guidelines-for-respondents-316> (last visited May 13, 2012) ("Conciliation is a relatively informal and flexible process in which an independent third party assists the parties in dispute to reach an agreement"). The CCMA may also resolve disputes regarding workplace discrimination prohibited under section 6 of the 1998 Employment Equity Act. Employment Equity Act of 1998 §§ 6, 10.

35 See Labour Relations Act of 1995 §§ 1, 9, 112, 115, 151.

“automatically unfair” if the individual was discharged on the basis of race, gender, sex, ethnic or social origin, sexual orientation, language, or marital status,³⁶ thereby furnishing employees the right to legally challenge such dismissals.³⁷ Moreover, the 1997 Basic Conditions Employment Act (BCEA) promulgates the minimum level of workplace protections owed to all employees by employers, such as the right to refuse to accept certain provisions in their employment contract, obtain fair notice of termination,³⁸ and receive severance pay following termination of employment under specified circumstances.³⁹

In terms of housing, the Rental Housing Act of 1999 (RHA) states that while advertising or negotiating for a lease agreement, or after one has been entered into, “a landlord may not unfairly discriminate against such prospective tenant or tenants, or the members of such tenant’s household or the *bona fide* visitors of such tenant” on the basis of race, gender, marital status, sexual orientation, ethnic or social origin, or language.⁴⁰ It grants all residents the right to privacy, to not have their homes or possessions searched or seized,⁴¹ and to not have their leases terminated based on discriminatory grounds.⁴² In addition to tenants’ constitutional protection from eviction without

a court order, the RHA prohibits landlords from terminating leases in the absence of the violation of terms detailed in the agreement and without prior written notice to the lessee.⁴³

2. Asylum Law

South Africa’s asylum laws explicitly contemplate the arrival of LGBTI foreign nationals seeking the nation’s protection.⁴⁴ Specifically, the Refugees Act of 1998 grants asylum to persons who qualify as “refugees.”⁴⁵ Under the Refugees Act, a “refugee” is an individual who, “by reason of his or her race, tribe, religion, nationality, political opinion or membership of a particular social group...is outside the country of his or her nationality and is unable or unwilling to avail himself or herself of the protection of that country.”⁴⁶ “Social group” includes gender and sexual orientation.⁴⁷ The Refugees Act provides that, “no person may be refused entry..., expelled, extradited or returned to any other country” if the individual might face persecution based on gender and sexual orientation.⁴⁸ The Refugees Act further establishes that “refugees” procure legal residency in South Africa, full protection under the State’s laws, and the

36 When a dismissal is deemed “unfair” under the Labour Relations Act (LRA), but not “automatically unfair,” after the employee first “establish[es] existence of the dismissal,” the burden of proof shifts to the employer to demonstrate that the reason for dismissal was “related to the employee’s conduct or capacity, or is based on the operational requirements of the business.” *Id.* § 192; Code of Good Practice: Dismissal for Conduct and Incapacity, Schedule 8 to Labour Relations Act 66 of 1995 § 2(4) (S. Afr.). However, if a dismissal is found “automatically unfair,” once the employee establishes the dismissal, the Labour Court may remedy the employee as it finds necessary. *Id.* § 193(3); Sonia Bendix, *Industrial Relations in South Africa*, 4th ed. (2007) 582.

37 Labour Relations Act of 1995 § 187(1); see Erasmus, *supra* note 34, at 683.

38 Under the Basic Conditions of Employment Act (BCEA), the required notice of termination to employees by employers varies between one and four weeks depending on total duration of employment. Basic Conditions of Employment Act of 1997 § 37.

39 Employees entitled to severance pay are those who are “dismissed for reasons based on the employer’s operational requirements,” such as “economic, technological, structural or similar needs of an employer.” See *Id.* §§ 2, 41(1)–(2), 78; Erasmus, *supra* note 34, at 92. The BCEA does not apply to employees who work less than twenty-four hours a month for an employer. *Id.* § 6(c). The BCEA also requires employers to display such rights where employees will read them. *Id.* § 30.

40 See Rental Housing Act of 1999 § 4(1) (S. Afr.).

41 The Rental Housing Act of 1999 (RHA) requires a landlord seeking to seize a tenant’s possessions to first obtain a court order. *Id.* § 4(3)(c).

42 Under the RHA, the right to not have their property searched or seized extends to tenants’ *bona fide* visitors, as well. *Id.* § 4(3)–(4), (5)(c).

43 See *id.* pmbl, § 4(5)(c), 5(5); S. Afr. Const., 1996 § 26.

44 See, e.g., Refugees Act 130 of 1998 § 1(xv), (xxi), 2–3 (S. Afr.) (including fear of persecution for reasons of gender or sexual orientation as grounds for asylum and refugee status); see also Human Rights Watch, *Together, Apart: Organizing Around Sexual Orientation and Gender Identity Worldwide* (2009) 10 (explaining that “[s]tate-sponsored homophobia has become a political staple in many African countries” and that “in the 1990s, leaders began discovering the political advantages of promoting homophobia”); Jonathan Kaaren, ‘Southern Africa: As Seen Through Sexuality, Mobility and Citizenship’, *African Sociological Review* 9 (2005) 168, 170–71 (“[T]he explicit protection afforded by the definitional provision of the South African statute is greater than the implicit protection given elsewhere.”)

45 Refugees Act 130 of 1998 § 1(xv), (xii), 2–3, 27.

46 *Id.* § 3(a).

47 *Id.* § 1(xxi) (confirming that the term “social group” includes gender and sexual orientation).

48 *Id.* § 1(xxi), 2(a).

right to employment, healthcare, and education.⁴⁹

The Refugees Act also details the application procedures for foreign nationals seeking refugee status in South Africa.⁵⁰ Envisaging a four-step process, the law requires asylum seekers to register their intent to apply for refugee status in person at a Refugee Reception Office (RRO), complete and submit the application within fourteen days of arrival,⁵¹ obtain a formal hearing for status determination by a Department Home Affairs (DHA) official, and receive documentation indicating their legal right to be in South Africa.⁵² The Refugees Act mandates DHA officers to provide applicants awaiting their refugee status determinations with temporary permits, also known as Section 22 permits,⁵³ which evince their pending application for refugee status and their lawful presence inside the country.⁵⁴ This temporary permit usually is valid for one to three months at a time.⁵⁵ Thus, Section 22 permit holders, commonly referred to as asylum seekers,⁵⁶ must continuously renew their permits until their application is approved.⁵⁷ They are assigned a single day on which to renew their permits and those who fail to comply with renewing their permit on the specified date are subject to fines, imprisonment, or both.⁵⁸

Moreover, the Refugees Act requires the DHA to adjudicate refugee status determinations within 180 days of application.⁵⁹ In the event that officials

fail to reach a conclusion on such matters within the prescribed 180 days, the asylum seeker may request from a government body work or study authorisation or other forms of relief.⁶⁰ However, if the DHA approves the refugee status request, the applicant will receive a Section 24 permit.⁶¹ The Section 24 permit, which the holder must renew every two years, also authorises the refugee to apply for refugee identity and travel documents.⁶²

B. International Law

In addition to domestic laws, South Africa is a signatory to the UN Convention and Protocol Relating to the Status of Refugees (Refugee Convention), which governs the rights of refugees at the international level.⁶³ Although gender and sexual orientation are not among the enumerated grounds for asylum under the Refugee Convention,⁶⁴ the UNHCR Handbook and Guidelines for Determining Refugee Status under the Refugee Convention acknowledges that an individual asserting fear of persecution due to his or her LGBTI status “could establish a valid claim where the State condones or tolerates discriminatory practices or harm perpetrated against him or her, or where the State is unable to protect effectively the claimant against the harm.”⁶⁵ The Refugee Convention also obligates member nations to afford refugees equal treatment

49 *Id.* § 27.

50 *See id.* § 21.

51 Immigration Act 13 of 2002 § 23(1) (S. Afr.) (validating up to 14 days for individuals to apply for Section 22 permits); *see also* Refugees Act 130 of 1998 § 21, 22; Vigneswaran, *supra* note 11, at 44.

52 *See id.* §§ 21, 22, 27, 30; Vigneswaran, *supra* note 11, at 44.

53 Department of Home Affairs (DHA) South Africa, ‘Refugee Status & Asylum’, <http://www.home-affairs.gov.za/index.php/refugee-status-asylum> (last visited May 13, 2013) [hereinafter DHA, ‘Refugee Status’].

54 *See id.* §§ 22; Vigneswaran, *supra* note 11, at 44.

55 *See* DHA, ‘Refugee Status’, *supra* note 53.

56 *See* Refugees Act of 1998 § 22; South African Government Services, ‘Asylum Seeker’s Permit’, http://www.services.gov.za/services/content/Home/ServicesforForeignNationals/Temporaryresidence/asylumseekers/en_ZA (last visited May 14, 2012).

57 *See* DHA, ‘Refugee Status’, *supra* note 53.

58 Refugees Act of 1998 § 22(7); Peter Luhanga, ‘South Africa: Home Affairs Runs Out of Paper for Asylum Seeker Permits’, *West Cape News* May 13, 2013, <http://allafrica.com/stories/201204160797.html>.

59 Regulations to the Refugees Act 130 of 1998 § 3(1), (3).

60 *Id.* § 3(3).

61 Refugees Act of 1998 § 24, 27; DHA, ‘Refugee Status’, *supra* note 53.

62 Refugees Act of 1998 § 24, 27, 30, 31; DHA, ‘Refugee Status’, *supra* note 53; *see also* Jeff Handmaker et al. (eds), *Advancing Refugee Protection in South Africa* (2008) 21–22 (discussing the importance of identity and travel documents to refugees because it not only evinces their “more or less permanent” legal presence in South Africa, but also grants them full protection under the law).

63 *See generally* UN Refugee Convention, 150; Convention Relating to the Status of Refugees, UN Treaty Collection, http://treaties.un.org/pages/ViewDetailsII.aspx?&src=TREATY&mtdsg_no=V-2&chapter=5&Temp=mtdsg2&lang=en (last visited May 14, 2013).

64 *See* UN Refugee Convention, *supra* note 63, art. 1(A)(2) (defining a “refugee” as one who “owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country”).

65 UNHCR, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, HCR/1P/ENG/REV. 3. (Dec. 2011) 83,

as the nations' citizens with regards to employment wages and regulations as well as housing practices.⁶⁶

Additionally, South Africa is a signatory to the Yogyakarta Principles.⁶⁷ Although it is non-binding, as a signatory to the document South Africa affirms

the values set forth therein and concedes that such rules should be standards of law.⁶⁸ Chiefly, the Yogyakarta Principles declare a universal prohibition on discrimination for reasons of sexual orientation or gender identity.

II. EMPLOYMENT DISCRIMINATION

LGBTI refugees and asylum seekers arrive in South Africa every year attracted by the sanctuary of the nation's constitutional safeguards, anticipating freedom from persecution due to their sexual orientation.⁶⁹ Often arriving with little to no resources of their own, the first challenge these individuals face in South Africa is applying for refugee status at the DHA. There, they often face not only long lines but discrimination and corruption from DHA officials themselves.⁷⁰ After obtaining Section 22 permits pending a determination on their status, LGBTI individuals are legally permitted to work in South Africa.⁷¹

This section details the many challenges LGBTI refugees and asylum seekers face in obtaining and maintaining stable employment in South Africa owing to ineffective asylum procedures and existing discriminatory practices based on sexual orientation, gender identity, national origin, and on their legal status in the country. First, this section details the obstacles LGBTI asylum seekers and refugees face in their search of employment. Second, it highlights

how the inability to secure employment leads many LGBTI asylum seekers and refugees to unstable, informal work. Next, it discusses discrimination faced by those who are able to obtain employment. Finally, it reviews the experiences of some LGBTI asylum seekers and refugees who attempt to obtain legal redress for employment discrimination.

A. Discrimination While Seeking Employment

LGBTI refugees and asylum seekers face several challenges in their search for steady employment. Routine problems with the DHA, including the difficulty of acquiring and renewing Section 22 permits, have a profound effect on obtaining employment.⁷² Many potential employers assume that LGBTI refugee and asylum seekers can be deported at any time, regardless of what kind of permit they have.⁷³ Interviewees cited this apprehension, as well as xenophobia generally, as a major issue with potential

⁶⁶ See UN Refugee Convention, *supra* note 63, art. 17, 21, 24.

⁶⁷ Conference of International Legal Scholars, Yogyakarta, Indonesia, Nov. 6-9, 2006, Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity (Mar. 2007), http://www.yogyakartaprinciples.org/principles_en.pdf (last visited May 13, 2013) [hereinafter Yogyakarta Principles] (signatories include Justice Edwin Cameron of South Africa's Supreme Court of Appeal).

⁶⁸ See generally Yogyakarta Principles, *supra* note 67; Commission on Human Rights, Economic and Social Council (ECOSOC), Report by the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, and on the Right to Non-Discrimination, P30, UN Document E/CN.4/2006/118 (Feb. 27, 2006) (prepared by Miloon Kothari); see also Alexandra Pisa, 'How Could the Yogyakarta Principles Help Improve the Situation of Transgender People, When Examined in the Framework of Existing Bodies of International Non-discrimination Norms?' (2012) 5-7 (unpublished M.A. thesis, Tilburg University), available at <http://arno.uvt.nl/show.cgi?fid=127432>.

⁶⁹ Most interviewees in this report were aware of the protections in South Africa's Constitution, and the minority that were not came to the country following rumors of tolerance in the nation's communities; see also Dan Littauer, 'Unsafe Haven: Gay Refugees in South Africa', Gay Star News May 30, 2012, <http://www.gaystarnews.com/article/unsafe-haven-gay-refugees-south-africa300512>.

⁷⁰ Only four of the members of PASSOP have refugee status; the rest are still pending a determination on their status. Of the four members with refugee status, the 2 interviewees with refugee status that we spoke with reported obtaining a refugee determination on the first day they applied by bribing DHA officials (R1 000 and R2 500, respectively). Several reported being asked for money while they waited in line at the DHA.

⁷¹ DHA, 'Refugee Status', *supra* note 53.

⁷² See generally Interview with Cleopatria, in Johannesburg, South Africa (Mar. 21, 2013); Interview with Mari, in Cape Town, South Africa (Mar. 21, 2013); Interview with Masani (pseudonym), in Cape Town, South Africa (Mar. 21, 2013).

⁷³ "Employers either don't know that the status allows them to work or they don't want to hire refugees with this status, because they think it will be temporary." Interview with Guillain Koko, in Cape Town, South Africa (Mar. 21, 2013).

employers.⁷⁴ In addition, fifteen interviewees reported feeling discriminated against during job interviews because of their LGBTI status, race, ethnicity, or all of the above.

Employers often discriminate against applicants based on their national origin prior to discovering the applicant's sexual orientation or gender identity.⁷⁵ A name on a resume or an accent heard on the telephone can expose the applicant as a foreigner.⁷⁶ One interviewee explained that some employers demand fluency in Afrikaans,⁷⁷ although not needed for the job, to keep from hiring foreigners and black South Africans.⁷⁸

Some employers will discriminate against applicants if they suspect the individual is LGBTI based solely on appearance.⁷⁹ Several female interviewees reported being rejected almost instantly for having an insufficiently feminine appearance.⁸⁰ Lesbian asylum seeker Mari has an educational background in finance management and worked as an accountant in her home country of Angola. She reports that she had two interviews where, after having a positive reception on the phone, the potential employer would not even ask for her CV or paperwork after meeting her in person and assuming her sexual orientation.⁸¹ Another interviewee, Cleopatria of Zimbabwe, reported being asked several times if she was a man by potential employers, to the point that she has given up searching for a job entirely, because it is "useless to keep pushing."⁸² She has not been able to secure stable work in South Africa in the five years she has

been in the country.⁸³

Competition with South African nationals for jobs in a difficult economy additionally inspires negative reactions to applicants who are recognisably foreign (for instance, having a foreign accent) or LGBTI. As one LGBTI asylum seeker remarked, "refugees are seen as trying to steal South African jobs."⁸⁴ Discrimination against foreigners is further exacerbated by South Africa's policy favouring domestic applicants over foreigners in the job application process.⁸⁵

Despite the looming shadow of xenophobia over the job application process, Rodney, an LGBTI South African, stated that LGBTI citizens suffer employment discrimination on the basis of sexual orientation and gender identity as well.⁸⁶ Rodney noted that he "feels like a foreigner" in his own country, adding "I am no different [than LGBTI asylum seekers or refugees struggling to find stable employment]."⁸⁷ Conversely, of those who report not experiencing discrimination, a number noted that they are either "straight-looking" or have remained in the closet.⁸⁸ One interviewee described his decision to stay in the closet as an attempt to keep his "peace," expressing "so much fear" which affects his physical and mental wellbeing.⁸⁹

B. Informal Work

For many LGBTI refugees and asylum seekers, informal forms of work are one of the few sources of income available.⁹⁰ Cleopatria, a lesbian from

74 See, e.g., Interview with Cleopatria, *supra* note 72.

75 See Interview with Marc, in Cape Town South Africa (Mar. 18, 2013); Interview with Junior Miteo, in Cape Town, South Africa (Mar. 19, 2013); Interview with Elton, in Cape Town, South Africa (Mar. 19, 2013); Interview with Chance (pseudonym), in Cape Town, South Africa (Mar. 20, 2013); Interview with Roy, in Cape Town, South Africa (Mar. 20, 2013); Interview with Cheyenne, in Cape Town, South Africa (Mar. 21, 2013); Interview with Masani (pseudonym), *supra* note 72.

76 *Id.*

77 Afrikaans is a language with Dutch origins native to South Africa and spoken by 13.5 per cent of the population, according to the 2001 census. See South African Government Information, 'South Africa's People', <http://www.info.gov.za/aboutsa/people.htm> (last accessed July 16, 2013).

78 Interview with Uche, Belleville, March 21, 2013.

79 Interview with Mari, *supra* note 72; Interview with Masani (pseudonym), *supra* note 72; Interview with Cleopatria, *supra* note 72.

80 *Id.*

81 *Id.*

82 *Id.*

83 *Id.*

84 Interview with Junior Mayema, in Cape Town, South Africa (Mar. 18, 2013).

85 Interview with Guillain Koko, *supra* note 73.

86 Interview with Rodney, in Cape Town, South Africa (Mar. 22, 2013).

87 Interview with Rodney, *supra* note 86.

88 Interview with Tino, in Johannesburg, South Africa (Mar. 2013).

89 *Id.*

90 Interview with Elton, *supra* note 75; Interview with Mussa, in Cape Town, South Africa (Mar. 20, 2013).

Zimbabwe, has never held steady employment, and sells CDs on the street instead.⁹¹ She attributes this to being undocumented, noting that many small businesses “hire illegals because they can discriminate and treat them unfairly, because they cannot go to the police.”⁹² Two interviewees noted that they often found work at car washes.⁹³ Another remarked that many of the LGBTI refugees and asylum seekers he knew were pigeonholed into informal security jobs regardless of education level.⁹⁴ Five interviewees noted that they had engaged in sex work to supplement or obtain income; three of the five reported preferring other work but being unable to find any at this time.⁹⁵ In addition to informal work, many unemployed LGBTI refugees and asylum seekers volunteer at their local churches and LGBTI organisations where they may receive a small stipend.⁹⁶

C. On-the-Job Discrimination

Discrimination based on sexual orientation, gender identity, and national origin persists for those who are employed. LGBTI refugees and asylum seekers report being fired from their jobs when their sexual orientation is discovered or revealed.⁹⁷ Most of the individuals interviewed said they faced discrimination by employers, coworkers, or customers.⁹⁸ They cited many varieties of homophobic and xenophobic behaviour from their bosses, coworkers, and clients

or patients, respectively. Many have to endure inappropriate comments or insults on the job and are often paid less than their South African coworkers. Many even report facing discrimination from other LGBTI individuals while at work.

Interviewees also reported many instances of improper payment from employers.⁹⁹ Mussa, a gay asylum seeker from the Democratic Republic of Congo, works as a cashier in a fast food restaurant. He noted that his coworkers are also all refugees, and paid below the market value of their jobs.¹⁰⁰ Jean Claude, a gay asylum seeker from Democratic Republic of Congo, reports having had his annual leave shortened for arbitrary reasons.¹⁰¹ He constantly fears losing his job at a department store and has been forced to apologise to customers who have asked him, “What are you doing here? You look like a female.”¹⁰² Interviewee David was chased out of a music studio he had used to record music by fellow Congolese refugees.¹⁰³ His experience generally with re-establishing a life in South Africa has forced him back into the closet; he says, “I can only be gay from the inside. I have to hide it from the public now and be a ‘real man’ otherwise, there will be no opportunities for me. South Africa has made me regret being gay.”¹⁰⁴ Abraham used to own a tuck shop that his Somali neighbours in South Africa set on fire while he was sleeping inside because he is gay.¹⁰⁵

91 Interview with Cleopatria, *supra* note 72; see also Interview with Roy, *supra* note 75 (selling handmade bracelets to local shops for R9 per bangle); Interview with Flavirina, in Cape Town, South Africa (Mar. 18, 2013) (selling cigarettes from her home).

92 *Id.*

93 Interview with Elton, *supra* note 75; Interview with Mussa, *supra* note 90.

94 Interview with Marc, *supra* note 75.

95 Interview with Junior Mayema, *supra* note 84; Interview with Beyonce, in Cape Town, South Africa (Mar. 19, 2013); Interview with Teddy, in Cape Town, South Africa (Mar. 20, 2013); Pukkie, in Cape Town, South Africa (Mar. 21, 2013); Interview with Flavirina, *supra* note 91.

96 See generally Interview with Albert, in Cape Town, South Africa (Mar. 18, 2013); Interview with Elton, *supra* note 75; Interview with Junior Mayema, *supra* note 84; Interview with Marc, *supra* note 75; Interview with Mussa, *supra* note 90; Interview with Roy, *supra* note 75; Interview with Saafi, in Cape Town, South Africa (Mar. 19, 2013).

97 See e.g., Interview with Junior Mayema, *supra* note 84; Interview with Marc, *supra* note 75.

98 *Id.*

99 Interview with Mussa, *supra* note 90. Other interviewees also reported being paid less for equal work. See interviews with Cheyenne, *supra* note 75; Roy, *supra* note 75.

100 Interview with Mussa, *supra* note 90.

101 Interview with Jean Claude, in Cape Town, South Africa (Mar. 18, 2013).

102 *Id.*

103 Interview with David, in Cape Town, South Africa (Mar. 19, 2013).

104 *Id.*

105 Interview with Abraham, in Cape Town, South Africa (Mar. 20, 2013). Abraham is a gay Somali asylum-seeker who arrived to South Africa in 2002 and, despite what he reports as homophobic attitudes within the Somali community, he sought refuge in a township in Port Elizabeth with a predominantly Somali population. Abraham was able to find work in a tuck shop and eventually saved enough to open a shop of his own, where he also slept in the backroom. When Abraham's Somali neighbours discovered his sexuality, they set fire to Abraham's shop in the middle of the night while he slept inside. Abraham was able to escape alive, but lost everything he owned, including the shop, his savings, and his legal documentation. In fear for his life, Abraham fled Port Elizabeth. For years, he

Having an LGBTI employer has also not proven to prevent discrimination. Two female interviewees reported being discriminated against by an LGBTI employer.¹⁰⁶ One was fired by a stridently anti-lesbian LGBTI South African boss, and one transgender female was fired by a Tanzanian bisexual hair salon owner explicitly for her gender identity.¹⁰⁷ Both interviewees, it should be noted, also cited xenophobia as a contributing factor to the discrimination.¹⁰⁸

D. Filing for Employment Relief

The CCMA, responsible for labour dispute resolution in South Africa, is designed to provide relief to those whose rights are violated.¹⁰⁹ Many of the discriminatory practices against LGBTI asylum seekers and refugees violate South Africa's labour provisions.¹¹⁰ Unfortunately, LGBTI refugees and asylum seekers have often found the CCMA process ineffective, due to a general distrust of state officials and the lack of enforcement of Commission rulings.¹¹¹ In addition, such rulings often fail to address the full range of issues raised before the Commission.

Reports of the CCMA mispending their resources or failing to follow through on rulings are common. Tafadzwa, an LGBTI asylum seeker from Zimbabwe, noted that officials often improperly research foreigners' pasts in an attempt to impugn their story.¹¹² Saafi, an LGBTI asylum seeker from

Somalia, initially went to labour authorities after his employer refused to pay him two month's salary.¹¹³ The employer agreed to pay him the money if he dropped the case, and CCMA officials agreed to have the case closed.¹¹⁴ Once the CCMA formally closed the case, Saafi never received his money.¹¹⁵

One respondent, Boniface of Kenya, went to the CCMA after working for an employer for four years without receiving vacation leave and for subsequently being fired without sufficient notice or cause.¹¹⁶ He had discovered he was being paid less than his South African colleagues and confronted his boss about the discrepancy in pay.¹¹⁷ The manager argued that his DHA paperwork was insufficient and, since he was not South African, he could not pay Boniface more. Boniface pursued a remedy with the CCMA despite his employer's warning that he had "connections" at the CCMA.¹¹⁸ At the CCMA hearing, the employer argued he fired Boniface because he wanted "to change the face of the employees of the business."¹¹⁹ The CCMA ruled in the employer's favour with respect to the firing, but granted relief for the lack of vacation leave during his time at the job, which amounted to less than one month's salary.¹²⁰ Neither the lack of notice upon termination nor discriminatory payment practices were addressed.¹²¹ Boniface suspects that, as threatened, his former boss knew someone at the court who helped him, and he did not appeal the decision.¹²²

moved between Cape Town and Pretoria in attempt to keep his identity a secret. Everywhere he went, Abraham changed his name, in fear that word would spread throughout the Somali community in South Africa that he was "the gay Somalian" who was discovered in Port Elizabeth. Eventually however, Abraham's true identity was discovered in Cape Town. He was fired immediately from the tuck shop in which he worked and slept. After being discovered, Abraham knew he could no longer live within the Somali community. Today, Abraham explains, "If I see Somalians, I go the other way. I know who knows me and I know who to avoid."

¹⁰⁶ Interview with Cheyenne, *supra* note 75; Interview with Beyonce, *supra* note 95.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ 'Guidelines for Respondents, Provided by the Commission for Conciliation, Mediation, and Arbitration', *The South African Labour Guide*, <https://www.labourguide.co.za/ccma-information/guidelines-for-respondents-316> (last visited May 5, 2013).

¹¹⁰ See e.g., Interview with Saafi, *supra* note 96.

¹¹¹ *Id.*

¹¹² Interview with Tafadzwa, in Cape Town, South Africa (Mar. 19, 2013).

¹¹³ Interview with Saafi, *supra* note 96.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ Interview with Boniface, in Cape Town, South Africa (Mar. 19, 2013).

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

III. HOUSING DISCRIMINATION

The inability to secure stable employment is inextricably tied to the struggle faced by LGBTI asylum seekers and refugees in obtaining safe housing. When employers refuse to hire LGBTI refugees and asylum seekers or offer lower wages than those paid to heterosexual persons or South African citizens, LGBTI asylum seekers and refugees are unable to maintain a stable income adequate to pay rent. Yet even with sufficient resources, homophobic and xenophobic attitudes impede LGBTI refugees and asylum seekers' ability to obtain safe and stable accommodation.

This section documents the challenges faced by LGBTI asylum seekers and refugees related to housing in South Africa. First, this section explores the experiences of LGBTI asylum seekers and refugees in South African homeless shelters. Next, this section discusses discrimination in townships on the outskirts of large cities where rent is cheap and violence against LGBTI individuals and foreigners is prevalent. This section also recounts the discrimination and violence endured by LGBTI refugees and asylum seekers both inside and outside of their homes, from landlords, roommates, and neighbours. Lastly, this section details the interaction between LGBTI asylum seekers and refugees and South African law enforcement.

A. Homelessness

Many LGBTI refugees and asylum seekers are forced to flee from their home countries very abruptly to escape persecution.¹²³ Consequently, they arrive in South Africa with no available resources to pay for accommodation.¹²⁴ Several interviewees reported

that they had relatives or friends in South Africa to stay with upon their arrival.¹²⁵ For these refugees and asylum seekers, however, the accommodation was temporary.¹²⁶ Many reported being ousted from the homes of their friends or relatives once their sexual orientation or gender identity was disclosed or discovered.¹²⁷ Consequently, many LGBTI asylum seekers and refugees find themselves in and out of homeless shelters for many years after their initial arrival in South Africa.

1. Stability Upon Arrival to South Africa

Two gay interviewees revealed similar experiences of being taken in by family members in South Africa, only to be kicked out of the home immediately when their relatives discovered their sexual orientation.¹²⁸ Most LGBTI refugees and asylum seekers interviewed, however, arrived without any friends or family to rely on for temporary accommodation.¹²⁹ Mari, who recently escaped from Angola with her girlfriend, explained that she and her girlfriend had to sell all of their possessions and combine their savings to purchase plane tickets to flee to South Africa.¹³⁰ Since arriving in Cape Town, they have been unable to find work and therefore are unable to afford housing.¹³¹ At the time of the interview, Mari and her girlfriend had been staying in a shelter since their arrival, almost five months.¹³² With no source of income, Mari reported that they have no other option but to remain in the shelter until they are able to find stable employment.¹³³

123 See *supra* notes 1–4 and accompanying text.

124 See, e.g., Interview with Saafi, *supra* note 96; Interview with Mari, *supra* note 72; Interview with Cheyenne, *supra* note 75; Interview with Abraham, *supra* note 105.

125 See, e.g., Interview with Saafi, *supra* note 96; Interview with Mussa, *supra* note 90; Interview with Roy, *supra* note 75; Interview with Flavirina, *supra* note 91.

126 *Id.*

127 See, e.g., Interview with Saafi, *supra* note 96; Interview with Mussa, *supra* note 90.

128 Interview with Saafi, *supra* note 96; Interview with Mussa, *supra* note 90.

129 See, e.g., Interview with Mari, *supra* note 72; Interview with Cheyenne, *supra* note 75.

130 Interview with Mari, *supra* note 72.

131 *Id.* Mari explains that despite their efforts to find employment, they are extremely limited because they cannot seek asylum seeker status and obtain legal documentation since the Cape Town DHA office has stopped accepting new arrival applicants. *Id.*

132 *Id.*

133 *Id.*

2. Experiences in Shelters and on the Streets

As a result of discrimination, LGBTI refugees and asylum seekers face very high barriers to safe and adequate accommodation.¹³⁴ Of the 33 LGBTI refugees and asylum seekers interviewed, 14 have at some point found themselves homeless in South Africa.¹³⁵

Numerous refugees reported that without jobs to pay for rent or friends who will temporarily take them in, they end up on the streets.¹³⁶ One interviewee, Flavirina of Burundi, recalls arriving in South Africa and having to travel between Johannesburg and Cape Town, staying with friends who could offer her a place to stay for weeks or sometimes months at a time.¹³⁷ After many months of moving from place to place and staying with friends, Flavirina lived on the streets, hiding her clothes and belongings in bushes and gardens.¹³⁸ She started working as a sex worker, though she still was not making enough to afford accommodation.¹³⁹ Flavirina described the fear and uncertainty of being homeless saying, “When I have to struggle to find a place to sleep and food to eat, I can’t know my future for tomorrow.”¹⁴⁰ Another interviewee, David, had been homeless for eleven months at the time of the interview, after he lost his job and was evicted from his apartment because he

could no longer pay rent.¹⁴¹ David now sleeps in cars parked in a garage, where his friend works as a security guard and lets him in each night.¹⁴²

Many LGBTI refugees and asylum seekers stay in shelters when they find themselves without safe accommodation.¹⁴³ Eleven of the 33 LGBTI refugees and asylum seekers interviewed reported that they have had to stay in a shelter at some point since fleeing to South Africa.¹⁴⁴ While shelters are often the only option for homeless LGBTI refugees and asylum seekers, an overwhelming majority of interviewees explained that shelters are not always a safe place for them owing to the discrimination they face, from both shelter personnel and other residents.¹⁴⁵

One major obstacle for LGBTI refugees and asylum seekers is the lack of shelters dedicated to addressing the specific needs of LGBTI refugees and asylum seekers, who face a combination of xenophobia, homophobia, and racism.¹⁴⁶ In homeless shelters where refugees and asylum seekers reside, the LGBTI refugees and asylum seekers face homophobia from fellow foreigners and shelter employers.¹⁴⁷ But, in the LGBTI shelters in Cape Town, where most of the other residents are white South African LGBTI individuals, refugees and asylum seekers face discrimination due to xenophobia and racism.¹⁴⁸

Jean Claude, from the Democratic Republic of Congo, reported regular instances of discrimination

134 See PASSOP, *supra* note 1, at 12.

135 See, e.g., Interview with Junior Mayema, *supra* note 84; Interview with Cleopatria, *supra* note 72; Interview with Beyonce, *supra* note 95.

136 *Id.*

137 Interview with Flavirina, *supra* note 91. Flavirina arrived in Cape Town from Burundi as a guest for an LGBTI/transgender conference. When people in her hometown heard why she had left the country, an official from Burundi contacted her and warned her to stay out of the country or she would likely be imprisoned or attacked upon her return. She applied for refugee status in South Africa and is still pending a determination. Since living in South Africa, she has lived in various shelters, on the streets and is currently living in a township. At one point, Flavirina found refuge at a Christian shelter, where she had to hide both her Muslim religion and her gender identity. The shelter separated the living quarters by gender, forcing her to share showers, dressing rooms, and other living quarters with men. As the shelter did not allow new members to leave the premises for the first three months of their stay, Flavirina was trapped in this environment, having to dress and act male. After coming out to the pastor in charge of the shelter, he told her he could no longer guarantee her safety. After living in the shelter for seven months, she moved to a township outside of Cape Town.

138 *Id.*

139 *Id.*

140 *Id.*

141 Interview with David, *supra* note 103.

142 *Id.*

143 See, e.g., Interview with Albert, *supra* note 96; Interview with Mari, *supra* note 72; Interview with Junior Mayema, *supra* note 84; Interview with Cheyenne, *supra* note 75; Interview with Jean Claude, *supra* note 101.

144 *Id.*

145 *Id.*

146 See generally Interview with Guillain Koko, *supra* note 73; Interview with Jean Claude, *supra* note 101; Interview with Albert, *supra* note 96.

147 See e.g., Interview with Flavirina, *supra* note 91; Interview with Jean Claude *supra* note 101; Interview with Albert, *supra* note 96.

148 *Id.*

while he stayed in a Cape Town LGBTI shelter because he was a foreigner. He noted that the employees of the shelter would often go through his belongings, eat his food, and refuse to provide him with a key to his room.¹⁴⁹ One lesbian immigrant reported feeling unsafe while staying in another LGBTI shelter in Cape Town because South African residents threatened to go to the police and report her lack of legal documentation.¹⁵⁰ Numerous refugees and asylum seekers even reported that a shelter administrator at this LGBTI shelter openly discriminated against black shelter residents.¹⁵¹ They recalled stories of this administrator making black residents clean in the shelter and perform other tasks for their meals, while other white residents were not asked to do so.¹⁵²

Additionally, the location of shelters proves problematic for homeless LGBTI refugees and asylum seekers. The shelters are often located in unsafe areas or townships where they are particularly susceptible to discriminatory violence.¹⁵³ Tiwonge, a refugee from Malawi, was twice attacked in unrelated events while walking back at night to a transgender safe house in a township outside of Cape Town.¹⁵⁴ During the second assault, she was stabbed by two men who screamed, “You destroyed our country of Malawi,” referencing the publicity her gender identity attracted to her home country when she was arrested

and convicted of sodomy and indecency, sparking international condemnation.¹⁵⁵

B. Safety in Housing

Over 80 per cent of the interviewed refugee and asylum seekers have experienced discrimination by neighbours, landlords, and roommates because of their sexual orientation or nationality.¹⁵⁶ The six interviewees who had not suffered such mistreatment explained that they either were in the closet, were “not apparently gay,” lived in expensive suburbs, or resided in gay-friendly homes or neighbourhoods.¹⁵⁷ While more affluent neighbourhoods and inner-city suburbs are relatively safer, most refugees and asylum seekers reside in the lower income and less secure townships in and around the city.¹⁵⁸

1. Discrimination in the Townships

Over half of the refugee and asylum seeker interviewees have lived in townships since moving to South Africa, namely the townships of Khayelitsha, Mitchell’s Plain, Delft, Joe Slovo, Mandalay, Nyanga, Manenberg, and Gugulethu.¹⁵⁹ High crime rates and vicious xenophobic attacks are commonplace in such townships and numerous LGBTI refugees and

149 Interview with Jean Claude, *supra* note 101.

150 Interview with Mari, *supra* note 72.

151 See e.g., Interviews with Beyonce, *supra* note 95; Interview with Albert, *supra* note 96.

152 *Id.*

153 See generally Interview with Tiwonge, in Cape Town, South Africa (Mar. 18, 2013); Interview with Junior Mayema, *supra* note 84.

154 Interview with Tiwonge, *supra* note 153.

155 *Id.* Tiwonge and her boyfriend were the first “same-sex” couple to seek to be married in Malawi. The couple were engaged and made a public commitment to marriage in a ceremony in Malawi. They were arrested and sentenced to serve 14 years in jail. Following outcry from the international human rights community, they were pardoned by the president of Malawi. Amy Fallon, ‘Malawi frees jailed gay couple’, *The Guardian* May 29, 2010, <http://www.guardian.co.uk/world/2010/may/29/malawi-frees-jailed-gay-couple>.

156 Twenty-eight of the 34 refugee and asylum seeker interviewees revealed experiencing mistreatment by neighbours, landlords, or housemates. See, e.g., Interview with Cleopatria, *supra* note 72; Interview with Masani (pseudonym), *supra* note 72; Interview with Boniface, *supra* note 116.

157 See Interview with Stanley, in Cape Town, South Africa (Mar. 20, 2013); Interview with Dube, in Johannesburg, South Africa (Mar. 20, 2013); Interview with Elton, *supra* note 75; Interview with Roy, *supra* note 75; Interview with Tafadzwa, *supra* note 112; Interview with Tino, *supra* note 88.

158 However, discrimination based on sexual orientation still persists within suburbs and upper-class communities. See, e.g., Interview with Saafi, *supra* note 96 (explaining that while he lives in the suburb of Woodstock, he still suffers discrimination because of his sexual orientation); Interview with Rodney, *supra* note 89; Interview with Junior Mayema, *supra* note 84. See Integrated Rural and Regional Development, Human Sciences Research Council, Pretoria, *Desktop Study in Support of the Millennium Development Goals: A Research Report for the UNHCR* (2005)11; PASSOP, *supra* note 1, at 7; see also Marguerite Duponchel, *Who’s the Alien? Xenophobia in Post-Apartheid South Africa*, UNU-WIDER Working Paper No. 2013/003 (2013) 20; see also OECD, *Territorial Reviews: Cape Town, South Africa* (2008) 94–96; Andrew Tucker, *Queer Visibilities: Space, Identity and Interaction in Cape Town* (2009) 106.

159 See, e.g., Interview with Prince, in Cape Town, South Africa (Mar. 19, 2013); Interview with Flavirina, *supra* note 91; Interview with Mussa, *supra* note 90; Interview with David, *supra* note 103; Interview with Jean Claude, *supra* note 101; Interview with Junior Miteo, *supra* note 75; Interview with Masani (pseudonym), *supra* note 72; Interview with Tiwonge, *supra* note 153.

asylum seekers are victims of gender-based violence, including sexual assaults targeting LGBTI individuals commonly referred to as “corrective-rapes,”¹⁶⁰ and other homophobic assaults.¹⁶¹ Many interviewees stated that they feared for their personal safety when living in or passing through these townships.¹⁶² For example, one Congolese interviewee disclosed that five men raped him in Mitchell’s Plain.¹⁶³ The victim noted that Mitchell’s Plain is extremely unsafe because attackers will readily kill their targets.¹⁶⁴ Such reported violence is not limited to Cape Town. Somali asylum seeker Abraham was kidnapped after witnessing a murder in Pretoria.¹⁶⁵ The attackers subsequently beat and raped him, causing him to contract HIV.¹⁶⁶

Despite describing his home in Delft as “unsafe, a desperate situation, a shack,” and “like a chicken coop,” asylum seeker Boniface stated that the township was his only option because he could not afford housing elsewhere.¹⁶⁷ Similarly for countless other LGBTI refugees and asylum seekers, many have no choice but to reside within these townships owing to the low cost of housing and their inability to secure meaningful

employment.¹⁶⁸

The townships in South Africa are described as “very xenophobic.”¹⁶⁹ Townships like Khayelitsha are known to be particularly dangerous for LGBTI foreign nationals.¹⁷⁰ Anthoni, a Zimbabwean asylum seeker, observed that some South Africans believed that “foreigners brought gay to South Africa.”¹⁷¹ As a result, some locals repeatedly instigate fights with LGBTI foreigners.¹⁷² Junior Miteo, a Congolese citizen, stated “I came to South Africa because it is not allowed in my country to be gay. Now that I am here, it’s not free.”¹⁷³ He also noted, “Xenophobia is everywhere in South Africa. They don’t want you.”¹⁷⁴

Interviewees stated that South Africans in townships purposely target foreigners to steal money and their phones, often while threatening to murder the individual.¹⁷⁵ Masani, a Ugandan lesbian who has lived in Khayelitsha, Mitchell’s Plain, and Mandalay, revealed that she was robbed on multiple occasions.¹⁷⁶ The perpetrators, who are usually South African, would threaten to kill her if she refused to hand over her cell phone or other possessions.¹⁷⁷ Chance,

160 See Miranda A.H. Horvath et al (eds), *Handbook on the Study of Multiple Perpetrator Rape: A Multidisciplinary Response to an International Problem* (2013) 27–28 (“In South Africa the term ‘corrective rape’ has emerged to describe the rape of women who are known to be or suspected of being lesbian in an attempt to make them heterosexual . . . [and] is also utilized in the 2010 National Coalition of Anti-Violence Programs . . . to describe . . . the rape of transgender people when they disclose their gender identity.”); *We’ll Show You You’re a Women*, *supra* note 19, at 2 (describing “corrective rape” as “a phenomenon in which men rape people they presume or know to be lesbians in order to ‘convert’ them to heterosexuality”).

161 See Institute for Security Studies, *South African Crime Quarterly* (Mar. 2013) 5–8; UNHCR, ‘South Africa: 2013 UNHCR Country Operations Profile’, <http://www.unhcr.org/pages/49e485aa6.html>; Human Rights Watch, ‘South Africa: No Arrests in Lesbian Murder Case’, May 2, 2011, <http://www.hrw.org/news/2011/05/02/south-africa-no-arrests-lesbian-murder-case>.

162 See, e.g., Interview with Cheyenne, *supra* note 75; Interview with Cleopatria, *supra* note 72; Interview with Masani (pseudonym), *supra* note 72.

163 Interview with Prince, *supra* note 159.

164 See *id.*

165 Interview with Abraham, *supra* note 105.

166 *Id.*

167 Interview with Boniface, *supra* note 116.

168 See, e.g., Interview with Masani (pseudonym), *supra* note 72; Interview with Cleopatria, *supra* note 72; Interview with Flavirina, *supra* note 91; Interview with Mussa, *supra* note 90.

169 See Interview with Saafi, *supra* note 96; Interview with Junior Mayema, *supra* note 84; Interview with Cheyenne, *supra* note 75; Interview with Beyonce, *supra* note 95.

170 See Interview with Masani (pseudonym), *supra* note 72; see also Social Justice Coalition, ‘Zille Must Appoint Inquiry into Khayelitsha Policing’, *Politicsweb* Nov. 30, 2011, <http://www.politicsweb.co.za/politicsweb/view/politicsweb/en/page71654?oid=269638&sn=Detail&pid=71654>.

171 Interview with Anthoni, in Cape Town, South Africa (Mar. 19, 2013). Anthoni, a 35 year old from Zimbabwe, arrived to South Africa around 2007 and lived in an apartment with friends during the height of the xenophobic attacks. His home was broken into in 2008. He and his roommates were all beaten and their belongings were stolen. He reported the incident to the police and was taken to a military base where he lived in a refugee camp for 4 months. He was forced to leave his home and all belongings behind. The police reported that they had no leads on the attackers.

172 See *id.*

173 Interview with Junior Miteo, *supra* note 75.

174 *Id.*

175 See, e.g., Interview with Albert, *supra* note 96; Interview with Beyonce, *supra* note 95; Interview with Masani (pseudonym), *supra* note 72; Interview with Junior Miteo, *supra* note 75.

176 Interview with Masani (pseudonym), *supra* note 72.

177 *Id.*

a native Burundian, specified that he was robbed and verbally harassed because he was a foreigner.¹⁷⁸ The interviewees also expressed concerns over repeated home burglaries by their neighbours.¹⁷⁹ Without refugee or other identity documents in South Africa, asylum seekers often are unable to open bank accounts¹⁸⁰ and are thus forced to keep cash on hand.¹⁸¹ Stanley, a Zimbabwean asylum seeker explained, “Asylum seekers cannot get a bank account without refugee status. So, asylum seekers keep money at their home. This makes them targets for attacks and robberies.”¹⁸² These thefts occur even when the interviewees step out for only a few minutes.¹⁸³ Boniface once left his home for less than five minutes and returned to find that someone had taken his DVD player.¹⁸⁴ Interviewees reported that if they left for longer than a couple of hours, they would return home to broken locks and missing items such as television sets, computers, passports, and wallets.¹⁸⁵ The victims, however, do not feel they can report such crimes to the police for fear of further mistreatment by neighbours and law enforcement officials.¹⁸⁶

The refugee and asylum seekers’ experiences also illustrate that, beyond the prevailing homophobic and xenophobic attitudes, they struggle due to language barriers.¹⁸⁷ Boniface mentioned, “South Africans call you names. They speak their own language even

though they speak English; so, if you don’t answer back in the local language, they know you are foreign.”¹⁸⁸ He recalled, “When I was in a shop in Delft, I asked the shopkeeper for bread in English and she would not serve me. When I asked why she would do that to me, she told me to learn the local language.”¹⁸⁹ The shopkeeper, however, spoke English to the white customers who entered the shop. A taxi driver once explained to Boniface that as long as he is in South Africa, he must learn Zulu, one of the South African languages.¹⁹⁰ Zimbabwean interviewee Tafadzwa was able to avoid some societal abuse stemming from his nationality because he speaks several South African languages.¹⁹¹ He noted, “There is a lot of discrimination against foreigners in Cape Town. But, people don’t necessarily know that I am a foreigner; this only becomes clear when I speak English.”¹⁹²

Even some within other marginalised groups in South Africa attempt to marginalise LGBTI refugees and asylum seekers.¹⁹³ Despite most interviewees having fled to Cape Town to escape state-sponsored and societal persecution of LGBTI persons,¹⁹⁴ several refugees and asylum seekers indicated that others from their home countries mistreat them because of their sexual orientation or gender identity.¹⁹⁵ David, a Congolese citizen, explained that many refugees and asylum seekers from the Democratic Republic

178 Interview with Chance (pseudonym), *supra* note 75.

179 See interview with Masani (pseudonym), *supra* note 72; Interview with Flavirina, *supra* note 91; Interview with Boniface, *supra* note 116.

180 See Cape Town Refugee Centre, *Refugee Information Guide* (2012) 7, available at <http://www.ctrc.co.za/upload/Asylum%20Application%20process.pdf> (“Most banks will allow opening a bank account with a refugee identity document.”); ‘South Africa: Police Target Foreign Traders in Limpopo’, *IRIN* Aug. 17, 2012, <http://www.irinnews.org/printreport.aspx?reportid=96130> [hereinafter ‘Police Target Foreign Traders’].

181 See, e.g., Interview with Masani (pseudonym), *supra* note 72; Interview with Stanley, *supra* note 157; Interview with Pukkie, *supra* note 95; see also ‘Police Target Foreign Traders’, *supra* note 180.

182 Interview with Stanley, *supra* note 157.

183 See Interview with Flavirina, *supra* note 91.

184 Interview with Boniface, *supra* note 116.

185 See *id.*; Interview with Mussa, *supra* note 90.

186 See, e.g., Interview with David, *supra* note 103; Interview with Cleopatria, *supra* note 72; Interview with Albert, *supra* note 96; Interview with Abraham, *supra* note 105.

187 See Interview with Abraham, *supra* note 105.

188 Interview with Boniface, *supra* note 116.

189 *Id.*

190 *Id.*; see also Bronwyn Harris, ‘Xenophobia: A New Pathology for a New South Africa?’, in Derek Hook et al (eds), *Psychopathology and Social Prejudice* (2002) 170, 173; see also SouthAfrica.info, ‘The Languages of South Africa’, <http://www.southafrica.info/about/people/language.htm#.UYfa2iv5khl> for a list of South Africa’s official languages.

191 Interview with Tafadzwa, *supra* note 112.

192 *Id.*

193 See, e.g., Interview with Albert, *supra* note 96; Interview with David, *supra* note 103; Interview with Cleopatria, *supra* note 72.

194 See PASSOP, *supra* note 1; *State-sponsored Homophobia*, *supra* note 1; see, e.g., Interview with Masani (pseudonym), *supra* note 72; Interview with Roy, *supra* note 75; Interview with Anthoni, *supra* note 171; Interview with Chance (pseudonym), *supra* note 75; Interview with David, *supra* note 103.

195 See Interview with Albert, *supra* note 96; Interview with Chance, *supra* note 75; Interview with David, *supra* note 103.

of Congo are “extremely homophobic.”¹⁹⁶ When he was living in a predominantly Congolese area of Khayelitsha, he recalled community members who would throw stones at him and beat him because he was gay.¹⁹⁷ Albert also admitted that he is too afraid to enter into certain townships due to the severity of homophobic sentiments felt within the Congolese population in South Africa.¹⁹⁸

Moreover, several interviewees stated that some South African LGBTI individuals in their neighbourhoods reject them due to xenophobia.¹⁹⁹ They revealed that some South African LGBTI individuals will manipulate or exploit LGBTI foreigners.²⁰⁰ Two asylum seekers asserted that there are some South African sexual minorities who will solicit LGBTI refugees and asylum seekers for sex work under false promises of compensation by money, food, or employment.²⁰¹ Four interviewees also encountered several LGBTI South Africans who refused to associate with them, stole from them, or jeered at them for reasons of national origin.²⁰²

2. Violence in or Near the Home

Countless lesbian and transgender refugees and asylum seekers in South Africa become victims of gender-based hate crimes and sexual violence against sexual minorities in or around where they live.²⁰³ However, those responsible for these crimes are rarely prosecuted.²⁰⁴ It has been reported that law enforcement officials have reacted with indifference toward reports of rape of LGBTI persons and often do not pursue the attackers to resolve the cases.²⁰⁵ Furthermore, the South African government currently does not classify crimes against sexual minorities as a “hate crime” warranting heightened sentencing.²⁰⁶ On occasion, the perpetrators are even praised as heroes.²⁰⁷

Some interviewees emphasised the frequency with which lesbians in South Africa become victims of sexual violence.²⁰⁸ They stated that several of their lesbian refugees and asylum seeker friends had been targets.²⁰⁹ In early 2012, one lesbian interviewee was raped due to her sexual orientation.²¹⁰ As she was walking back to her home, six men sexually assaulted

196 Interview with David, *supra* note 103.

197 *Id.*

198 Interview with Albert, *supra* note 96.

199 See Interview with Albert, *supra* note 96; Interview with Cheyenne, *supra* note 75; Interview with Junior Mayema, *supra* note 84; Interview with Mari, *supra* note 72.

200 See, e.g., Interview with David, *supra* note 103; Interview with Flavirina, *supra* note 91; Interview with Uche, *supra* note 78.

201 See Interview with David, *supra* note 103; Interview with Flavirina, *supra* note 91; Interview with Uche, *supra* note 78.

202 See, e.g., Interview with Albert, *supra* note 96; Interview with Junior Mayema, *supra* note 84; Interview with Cheyenne, *supra* note 75; Interview with Mari, *supra* note 72.

203 See ‘Gay Asylum Seekers Speak of Discrimination in S. Africa’, AFP June 26, 2012, <http://www.google.com/hostednews/afp/article/ALeqM5jKOp-2RLDYVqFg5-vrWTX45bxEJg?docId=CNG.07def31d5314889d95b-675d5ac81c934.2d1>; *We’ll Show You You’re a Woman*, *supra* note 19, at 44 (“Lesbians and transgender men live in constant fear of harassment as well as physical and sexual violence.”)

204 See Mary Zeiss Stange et al (eds), *Encyclopedia of Women in Today’s World* 1 (2011) 722 [*hereinafter Women in Today’s World*]; Roderick Brown, ‘Corrective Rape in South Africa: A Continuing Plight Despite an International Human Rights Response’, *Annual Survey of International and Comparative Law* 18 (2012) 45, 46, 48–54; *We’ll Show You You’re a Woman*, *supra* note 19, at 18 (noting that an estimated 88 per cent of rape cases in South Africa are unreported).

205 See, e.g., Interview with Masani (pseudonym), *supra* note 72; Interview with Cleopatria, *supra* note 72; see also *We’ll Show You You’re a Woman*, *supra* note 19, at 48 (stating that “[p]olice response to lesbians and transgender men is also sometimes marked by inefficiency, corruption, inaction, and even complicity with perpetrators”).

206 Although South Africa’s 2000 statute, Promotion of Equality and Prevention of Unfair Discrimination (PEPUDA), prohibits harassment and hate speech against LGBTI persons, sexual orientation is excluded from the section that enhances sentencing for crimes against certain classes, such as race and gender. See generally PEPUDA, *supra* note 30; see also Tiffani Wesley, ‘South Africa: Classifying ‘Corrective’ Rape As a Hate Crime’, *AllAfrica* Mar. 26, 2012, <http://allafrica.com/stories/201211261208.html>; Brown, *supra* note 198. Human rights advocates urge the South African government to enact legislation criminalising hate crimes against sexual minorities. See Brown, *supra* note 178, at 63.

207 See Kate Muwoki, ‘Rape is Rape’, Huffington Post Apr. 2, 2013, http://www.huffingtonpost.com/kate-muwoki/rape-is-rape_1_b_2980866.html.

208 See Interview with Albert, *supra* note 96; Interview with Cheyenne, *supra* note 75; Interview with Cleopatria, *supra* note 72; Interview with Masani (pseudonym), *supra* note 72.

209 See Interview with Masani (pseudonym), *supra* note 72.

210 See *id.*

her, declaring, “We want to show you that you’re a lady, not a man.”²¹¹ When she subsequently contacted law enforcement about the incident, the authorities mocked and ridiculed her for her LGBTI status.²¹² She explained, “It is very bad in South Africa. It is dangerous to be a lesbian and many are being killed. Lesbians are being raped a lot and the police don’t take ‘corrective rape’ cases seriously. People are dying in silence.”²¹³

Lesbian asylum seeker Cleopatria twice suffered violent assaults in South Africa.²¹⁴ One night, as Cleopatria and her friends left a township bar to return home, two men attacked them.²¹⁵ The men yelled, “You’re stealing our women, we’ll show you how to be a real woman.”²¹⁶ In another incident, four men beat and raped Cleopatria.²¹⁷ She recalled, “The men dumped my body and left me to die.”²¹⁸ Although Cleopatria informed the police of the attack, the officials did not investigate further into the case.²¹⁹ Her perpetrators were never prosecuted.²²⁰

Masani disclosed that others living within her community frequently verbally and physically abuse her due to her gender and sexual orientation.²²¹ While living in Khayelitsha, Masani was walking inside the township with her partner when four men attacked her, shouting at her, “Why you playing with our girlfriends.”²²² Though the incident occurred during broad daylight with onlookers nearby, no one intervened. It is reported that bystanders generally do not involve themselves in confrontations roused

by xenophobia or homophobia.²²³ Like Cleopatria, Masani’s reports to the police were met with indifference.²²⁴

3. Discrimination at Home

Several interviewees report discrimination in their search for housing and threats to their personal safety once inside their homes.²²⁵ Some South African landlords are unwilling to rent to LGBTI refugees and asylum seekers.²²⁶ Interviewee Jean Claude explained, “When landlords see I am gay, they would change their tone as they open the door. They pretend the room is not available.”²²⁷ David stated that more than five landlords have denied him housing because he is gay.²²⁸ Congolese asylum seeker Teddy admitted feeling compelled to bring home a fake girlfriend to prevent his landlord and neighbours from suspecting that he is gay.²²⁹

In the instances homeowners rent to LGBTI refugees and asylum seekers, they will often charge higher rent, deny the renter privacy, or even verbally or physically harass the LGBTI foreign national.²³⁰ One Somali interviewee’s Nigerian housemates constantly harass him because he is gay.²³¹ He stated that they will slap him and mock him by calling him a woman.²³² In a recent event, Albert went to the hospital after suffering a homophobic and violent attack in his own home by his landlord’s son-in-law.²³³ Similarly, asylum seeker Marc reports that his South African landlady’s

211 See *id.*

212 *Id.*

213 *Id.*

214 Interview with Cleopatria, *supra* note 72.

215 *Id.*

216 *Id.*

217 *Id.*

218 *Id.*

219 *Id.*

220 *Id.*

221 Interview with Masani (pseudonym), *supra* note 72.

222 *Id.*

223 See *id.*

224 *Id.*

225 See, e.g., *id.*; Interview with Chance (pseudonym), *supra* note 75; Interview with Junior Mayema, *supra* note 84.

226 See *supra* note 167 and accompanying text.

227 Interview with Jean Claude, *supra* note 101.

228 Interview with David, *supra* note 103.

229 Interview with Teddy, *supra* note 95.

230 See, e.g., Interview with Masani (pseudonym), *supra* note 72; Interview with Saafi, *supra* note 96; Interview with Beyonce, *supra* note 95; Interview with Jean Claude, *supra* note 101; Interview with Marc, *supra* note 75.

231 See Interview with Saafi, *supra* note 96.

232 See *id.*

233 See Leitner Center, ‘Press Release: Leitner Clinic Calls for Investigation into Assault Against LGBTI Asylum seeker in Cape Town, South Africa’ (Apr. 10, 2013), <http://www.leitnercenter.org/news/96/>. Albert and his roommate were living in their rented room for approximately four months when their landlord suddenly told them that she wanted

boyfriend beats him because he is gay.²³⁴

Gay asylum seeker Saafi's former landlord, upon discovery of Saafi's LGBTI status, demanded that he either "immediately move out or pay higher rent."²³⁵ Junior Mayema revealed that his landlord has beaten him three times, frequently threatens to evict him, and has barged into his home without permission on multiple occasions.²³⁶ Cleopatria's landlord also shouts out homophobic slurs at her and her LGBTI roommates.²³⁷ Anthoni stated that in some townships, landlords will charge South Africans R500 and foreigners R1500 for the same room.²³⁸ Masani also revealed that a former landlady increased her rental rate because she was a foreigner.²³⁹ Additionally, she has had past landlords that would enter into her home without permission and rummage through and take her possessions.²⁴⁰

Moreover, interviewees stated that homeowners would not allow them to have guests over due to their LGBTI status.²⁴¹ Suspecting that he was gay, one landlord completely barred Albert from having company.²⁴² Likewise, Cleopatria was evicted from a home for having LGBTI visitors over.²⁴³ The proprietor of Junior Mayema's current home, cognizant of his sexual orientation, only allows female

guests and prohibits all male visitors.²⁴⁴ Ethiopian asylum seeker Robel's landlord not only refuses him the right to have guests, but also institutes an 8:00 PM curfew and will deny him entry into his home if he returns at a later time.²⁴⁵ Some interviewees were forced to sneak in guests because neighbours would complain to the landlords, thus further motivating landlords to forbid their LGBTI tenants from inviting friends to their homes.²⁴⁶

C. Interactions with Police

Despite legal protection in South Africa protecting LGBTI refugees and asylum seekers from discrimination, interviewees stated that police rarely enforce these anti-discrimination laws.²⁴⁷ Discrimination and lack of interest on behalf of law enforcement leave LGBTI refugees and asylum seekers vulnerable in their homes and neighbourhoods, especially when they are forced to live in dangerous townships and neighbourhoods where violent discrimination is prevalent.²⁴⁸ Often when LGBTI refugees and asylum seekers report crimes to the police they are met with inaction.²⁴⁹ Multiple interviewees explained that often when they

them out of the house immediately, offering no explanation as to why. When Albert and his roommate were unable to find new housing with immediate vacancy, the landlord agreed to let them stay one more month. However, his landlord starting leaving the house alarm on late into the day and refused to give Albert the code to turn off the alarm, so he was unable to leave his room until she turned off the alarm each day. When Albert made the decision to leave his room one morning in April 2013, triggering the alarm, the landlord's son-in-law erupted in violence. The son-in-law screamed, "Why should we let these homosexual dogs in the house? Today someone is going to die." He continued, "Stupid, dirty homosexual. You're bringing your dirty behavior in this house." The man then reached for a crystal bowl, smashed it over Albert's head, and ran to the kitchen for a knife. Albert managed to escape and reported the assault to the police. From the police station, he was transported to the hospital where he received treatment for a severe head injury. Following the attack, Albert found himself homeless and still in pain from his injury, wandering the streets in search of a place to stay.

²³⁴ See, e.g., Interview with Marc, *supra* note 75; interview with Cleopatria, *supra* note 72; Interview with Robel, in Cape Town, South Africa (Mar. 21, 2013); Interview with Tiwonge, *supra* note 153.

²³⁵ Interview with Saafi, *supra* note 96.

²³⁶ Interview with Junior Mayema, *supra* note 84.

²³⁷ Interview with Cleopatria, *supra* note 72.

²³⁸ Interview with Anthoni, *supra* note 171.

²³⁹ Interview with Masani (pseudonym), *supra* note 72.

²⁴⁰ *Id.*

²⁴¹ See, e.g., Interview with Robel, *supra* note 238; Interview with Masani (pseudonym), *supra* note 72; Interview with Tino, *supra* note 88; Interview with Cleopatria, *supra* note 72.

²⁴² Interview with Albert, *supra* note 96.

²⁴³ Interview with Cleopatria, *supra* note 72.

²⁴⁴ Interview with Junior Mayema, *supra* note 84.

²⁴⁵ Interview with Robel, *supra* note 238.

²⁴⁶ See Interview with Albert, *supra* note 96; Interview with Cleopatria, *supra* note 72; Interview with Mussa, *supra* note 90.

²⁴⁷ See e.g., Interview with Cleopatria, *supra* note 72; Interview with Abraham, *supra* note 105; Interview with David, *supra* note 103; Interview with Albert, *supra* note 98; see also *South African: Discrimination of LGBTI*, *supra* note 17; *We'll Show You You're a Woman*, *supra* note 19, at 44.

²⁴⁸ See *South African: Discrimination of LGBTI*, *supra* note 17; *We'll Show You You're a Woman*, *supra* note 19.

²⁴⁹ See Interview with Albert, *supra* note 98; Interview with Masani (pseudonym), *supra* note 72; Interview with Junior Miteo, *supra* note 75.

call the police to report a crime, the police take hours to arrive to investigate.²⁵⁰

Pukkie, from Zimbabwe, claims that when police officers hear his accent on the phone, they lose interest in his case.²⁵¹ Pukkie once reported to police that four burglars robbed his home and slashed his throat.²⁵² The officers informed Pukkie via text message just one day later that his case was closed.²⁵³ When he went to the police station to press his case further the officers refused to reopen his case and told him, “We know you moffies²⁵⁴ lie too much.”²⁵⁵ As one interviewee states, “There is no point in reporting things to the police because they commit the same type of discrimination as other South Africans. They may take the report as a formality, but they do not follow through.”²⁵⁶

Lack of interest by the police in pursuing sexual violence claims is a problem for both male and female LGBTI refugees and asylum seekers.²⁵⁷ Lesbian refugees and asylum seekers are particularly vulnerable as they are often victims of sexual assault.²⁵⁸ As a result of discriminatory attitudes, police officers do not take reports of sexual assaults targeting the LGBTI community seriously.²⁵⁹ One lesbian refugee explains that police often respond with additional harassment when speaking with victims, asking questions such as, “How can you enjoy sex with ladies?”²⁶⁰ Male LGBTI refugees who are sexually assaulted face similar reactions from law enforcement.²⁶¹ When

asylum seeker, Prince, who was raped by five men, sought help from law enforcement, the response from the officer was, “Why are you gay?”²⁶² There was no investigation into the attack.²⁶³

Often, police officers themselves are the perpetrators of violence.²⁶⁴ Uche, a native Nigerian, stated that refugees and asylum seekers face harassment from police officers on the street.²⁶⁵ He believes that for refugees and asylum seekers, “If you see police people, you just have to run.”²⁶⁶ Another interviewee echoed Uche’s concerns, explaining that police have attacked him in bars and restaurants as well.²⁶⁷ In one incident at a gay bar, an officer attempted to rape him in the bathroom.²⁶⁸ Moreover, some LGBTI refugees and asylum seekers do not feel safe from police in their own home.²⁶⁹ Junior recalls an incident where about twenty police officers broke into his home and beat him, leaving him with severe injuries.²⁷⁰ The officers searched for drugs in the house where Junior lived, although he is not a drug user, was completely unconnected to the supposed drug activity, and was never charged with any crime.²⁷¹

Additionally, police officers sometimes unfairly profile and target LGBTI refugees and asylum seekers by stopping such individuals on the street and demanding to see legal documentation.²⁷² David was once stopped while out walking with his refugee and asylum seeker friends, and while no one in the group had their legal documentation with them, David was

250 *Id.*
 251 Interview with Pukkie, *supra* note 95.
 252 *Id.*
 253 *Id.*
 254 ‘Moffie’ is a derogatory Afrikaans term for an LGBTI individual.
 255 *Id.* See also Interview with Masani (pseudonym), *supra* note 72; Interview with Abraham, *supra* note 105.
 256 *Id.*
 257 Interview with Anthoni, *supra* note 171 (stating, “[t]here is no point in reporting things to the police” because the police are “human beings too and commit the same type of discrimination [as other South Africans]. They may take the report as a formality, but they do not follow through”).
 258 See Interview with Masani (pseudonym), *supra* note 72; see also *We’ll Show You You’re a Woman*, *supra* note 19, at 44.
 259 See Interview with Prince, *supra* note 159; Interview with Masani (pseudonym), *supra* note 72; see also *We’ll Show You You’re a Woman*, *supra* note 19, at 44.
 260 Interview with Masani (pseudonym), *supra* note 72.
 261 Interview with Prince, *supra* note 159.
 262 *Id.*
 263 *Id.*
 264 See Interview with Uche, *supra* note 78; Interview with Junior Mayema, *supra* note 84; Interview with Junior Miteo, *supra* note 75; see also *South Africa: Discrimination of LGBTI*, *supra* note 17.
 265 Interview with Uche, *supra* note 78.
 266 *Id.*
 267 Interview with Junior Mayema, *supra* note 84.
 268 *Id.*
 269 See Interview with Junior Miteo, *supra* note 75.
 270 *Id.*
 271 *Id.*
 272 See, e.g., Interview with Roy, *supra* note 75; Interview with Denzel in Cape Town, South Africa (Mar, 21 2013); Interview with David, *supra* note 103.

the only one who was arrested.²⁷³ David explains that since he was dressed very femininely, it was clear to the officers that he was gay.²⁷⁴ During the arrest the officers mocked and insulted him, telling him, “You’re gay, go back to your country.”²⁷⁵

Conclusion

South Africa’s legal system mandates equal treatment of all individuals residing within its borders, regardless of race, sex, gender, sexual orientation, ethnicity or national origin. Unfortunately, the

legal safeguards alone are insufficient as societal attitudes are often incongruent with the nation’s anti-discrimination laws. Thus, advocacy is needed to increase awareness of the obstacles facing the LGBTI refugee and asylum seeker community, with the goal of aligning the nation’s anti-discrimination laws with its practices. Specifically, advocacy is needed to ensure compliance by DHA officials, employers, landlords, and law enforcement officers with their legal duty to abstain from discriminating against individuals on the basis of gender, sexual orientation, and nationality.

RECOMMENDATIONS

TO THE NATIONAL IMMIGRATION BRANCH AND THE DEPARTMENT OF HOME AFFAIRS AND REFUGEE RECEPTION OFFICE:

- Provide RRO and DHA officers with LGBTI-specific education and training.
- Train Security Officers on South African general anti-discrimination laws, including the relevant provisions under PEPUDA.
- Educate RRO and DHA officers on the validity of “sexual orientation” as grounds for refugee and asylum status applications.
- Hold RRO and DHA employees more accountable, by requiring applicants to fill out evaluations on the quality of service from Officers and Security Personnel in the DHA.
- Enforce penalties for incidents of bribery and corruption by DHA Officers.
- Lessen the burdens resulting from the Section 22 permit renewal process. Specifically:
 - Extend the length of all Section 22 permits beyond a 1 or 3-month period.
 - Extend the permitted renewal date from one day to a period of one week.

TO THE COMMISSION FOR CONCILIATION, MEDIATION, AND ARBITRATION, AND THE LABOUR COURT OF SOUTH AFRICA:

- Enforce the Labour Court and CCMA rulings that declare that the Section 22 permit provides a legal right to work.
- Oversee bookkeeping of financials and resources spent by the Labour Court.
- Organise a system to oversee the implementation of CCMA and Labour Court decisions, to ensure enforcement of orders.

TO ORGANISATIONS SEEKING TO HELP REFUGEES:

- Assist LGBTI refugees to obtain proper asylum documentation.
- Provide education programmes regarding the renewal dates for Section 22 or Section 24 permits in order to avoid the R2 500 fine the DHA charges for expired permits.
- Assist LGBTI refugees in accessing resources for housing, labour, and education programmes.

²⁷³ Interview with David, *supra* note 103.

²⁷⁴ *Id.*

²⁷⁵ *Id.*

- Provide mental health services, including individual and group counselling sessions.
- Provide employment assistance, including job search tactics, CV development, interview training, and access to online sources.
- Provide education and training programmes on tenant rights under the RHA and assist tenants in obtaining legal representation in housing courts and tribunals.
- Implement advocacy programmes to educate landlords on housing laws, specifically RHA's prohibition of unfair practices in negotiating or terminating leases²⁷⁶ and the rights of tenants to privacy and visitors.²⁷⁷
- Provide education and training programmes on employee rights and assist tenants in obtaining legal representation in Labour Court and under the CCMA.
- Increase employer awareness of the safeguards established in South Africa's asylum laws for LGBTI individuals and asylum seekers with work permits.
- Increase collaboration among LGBTI organisations and refugee organisations and among NGOs and local shelters.
- Implement stricter policies in shelters to protect LGBTI refugees and asylum seekers who face homophobia, xenophobia, and racism from shelter residents and administrators.
- Offer training for shelter personnel regarding the laws in place prohibiting discrimination against LGBTI residents.
- Establish a new shelter exclusively for LGBTI asylum seekers and refugee residents.
- Develop an LGBTI and refugee network to provide housing and employment support, including notification of employment or housing opportunities that are safe and available, or problematic employers or landlords.
- Help fund small business ventures by LGBTI refugees and asylum seekers.
- Establish outreach to and advise individuals abroad interested in offering independent donations to help LGBTI refugees relocate to South Africa.

276 See Rental Housing Act 50 of 1999 § 3 (1) (S. Afr.).
 277 See *id.* §§ 3 (2)-(4).

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