

National Coalition for Gay and Lesbian Equality
Equal Rights Project

Sexual Orientation and Sexual Diversity in the Workplace

A Draft Code of Good Practice

Prepared by the Equal Rights Project of the NCGLE as a basis for discussion by NCGLE affiliates, the broader gay and lesbian community, trade unions, staff associations, employers and their organisations, the government and other relevant institutions.

Introduction

South Africa is the first and the only country in the world to guarantee constitutional equality to its gay and lesbian citizens.

Even though this is the case, there are still laws, practices and policies which outlaw and discriminate against gay and lesbian people. For example, many employers do not give benefits to same-sex partners of their gay and lesbian employees. Most employers do, however extend such benefits to spouses of their married employees.

There are many other forms of discrimination gay and lesbian people are victims of in the workplace and elsewhere.

1. Background Information

The NCGLE is working on a Code of Good Employment practice to guide employers and employees on how to deal with sexual diversity and related issues in the workplace. This Code is being developed from the point of view of employment equity and employment law. Employment law considered important here is the Labour Relations Act of 1995 (LRA), the Employment and Occupational Equity Bill (EOEB) and the Basic Conditions of Employment Bill (BCEB).

The proposed code will be in keeping with the country's Constitution and the LRA. Education, training of relevant role players in the workplace are the main recommendations of the draft Code. These should be based on non-discrimination and equal enjoyment of benefits as guaranteed by the LRA and the Constitution.

The Code is recommended for private and public sector employers of all sizes. The Code is a broad framework which can be adapted to meet the specific needs of a particular workplace. The Code should be attached to

the LRA and the EOEB. The Code places a duty on employers and employees to negotiate and implement appropriate employment policies in consultation with gay and lesbian employees and organisations.

The implementation of this Code will ensure that every workplace does not discriminate on the basis of sexual orientation. Implementing the Code is a joint responsibility of employers, the government and employee organisations. The duty of gay and lesbian employees and organisations will be to oversee the implementation of the Code by employers, the government and employee organisations.

2. Sexual Orientation and the Employment Contract

2.1 gay and lesbian employees or prospective employees shall not be treated differently from other employees or prospective employees simply because of their sexual orientation.

2.2 gay and lesbian employees and prospective employees shall be treated in a just, humane and non-discriminatory manner.

2.3 employers, employees and their respective organisations shall acknowledge that conducive and fair employment opportunities are necessary for all employees.

3. Recruitment, continued employment, and termination of employment

Pre-employment interviews and other examinations should be solely to determine functional performance and ability of a prospective employee to perform the requirements of a job.

In this respect:

- a person's sexual orientation (and marital status) shall not be a pre-condition of employment;
- if an employee makes his/her sexual orientation known voluntarily it shall not be a basis for refusing to conclude or to continue or to renew an employment contract;
- gay and lesbian employees shall be governed by the same contractual obligations as all other employees;
- an employee's sexual orientation shall not be used as a justification for the non-performance of duties agreed to by the employer and the employee.

- no employee shall be dismissed or have his/her employment terminated merely on the basis of his/her sexual orientation, nor shall his/her sexual orientation influence retrenchment procedures.

4. Promotion, Training and Development.

- 4.1 an employee's sexual orientation shall not be a criterion for a decision to promote, train and develop an employee.
- 4.2 all human resource and labour relations training of employees should be sensitive and include sexual diversity as a workplace issue.

5. Leave and Performance

- 5.1 employees with same-sex partners shall be entitled to non-discriminatory leave benefits currently enjoyed by married employees.
- 5.2 an employee's medical, personnel or other records held by the employer should not indicate in any way the employee's sexual orientation without the written consent of the employee.

6. Benefits

Employees and their partners (gay, lesbian and heterosexual) who are not married in terms of Customary Law and/or the Marriage Act of 1961 do not have access to employment benefits which married employees and their spouses currently enjoy.

Refusing employment benefits on the basis of marital status is both unconstitutional and unlawful in terms of the Constitution of the Republic of South Africa (Section 9(3),(4)) and the Labour Relations Act of 1995 (Section 1 of Schedule 7). Employment benefit packages comprise a substantial portion of an employees' financial compensation. The denial of these benefits to employees who are in gay or lesbian partnerships, or to employees who are in heterosexual partnerships, means that these employees receive substantially less compensation than do their heterosexual married colleagues.

In view of this, a responsibility falls on employers, employees and the government to create a viable non-discriminatory approach to employment benefits.

The following steps are critical to protect employees' benefits and workplace rights:

6.1 An employee's sexual orientation and marital status should not be a requirement for admission to all employment benefit schemes.

6.2 All employees with same-sex partners and in heterosexual relationships should have access to employment benefits.

6.3 Employers, the state, private and public institutions responsible for administering employee benefits such as :

- medical aid and health related benefits
- group life assurance
- pensions and provident funds
- housing benefits
- unemployment insurance
- bursaries, training and study subsidies
- disability and accident benefits

shall be responsible for ensuring that viable non-discriminatory policies are developed. This should apply to all employment benefits relating to spouses, children and/or partners and dependants.

6.4 In cases where an employer is unable to ensure that non-discriminatory policies are followed, the employer should seek to ensure that the policies are changed, or should find an agency which provides the same benefits on a non-discriminatory basis.

6.5 All relevant statutory and non-statutory institutions shall ensure that delay in obtaining such benefits is reduced to a minimum.

7. Workplace Grievance and Disciplinary Procedures

7.1 A gay/lesbian employee has the same rights, and the same duties, as other employees.

7.2 Where discrimination based on an employee's sexual orientation, the employee shall have recourse to agreed mechanisms and remedies for redress.

7.3 A gay/lesbian employee shall be subject to disciplinary procedures as in all other cases of the transgression of the employment contract.

8. Workplace Education and Training on Sexual Diversity in the Workplace

- 8.1 Employers, employees and their representative organisations should agree on education programmes aimed at preventing sexual orientation discrimination in line with other education programmes on anti-discrimination on grounds such as race, gender and disability. Employers, employees and their respective organisations should ensure that these programmes are implemented at the workplace.
- 8.2 The education programmes mentioned in 8.1 should be conducted in languages, and take into account levels of education and literacy, that are appropriate for the workforce.
- 8.3 Educational strategies shall be based on consultation between employers, employees, their representative organisations and where appropriate, government and non-governmental organisations with expertise on sexual orientation issues, counseling and advice. Regular evaluation and revisions should be conducted and where necessary, changes should be implemented in consultation with all relevant stakeholders.
- 8.4 Attendance at such education programmes should be compulsory for all employees and management. The education programmes should take place during paid working hours.
- 8.5 Education programmes should utilise strategies that are sensitive and that promote understanding, tolerance and respect for all employees.
- 8.6 Education programmes shall inform employers and all employees of the provisions of employment laws and codes on non-discrimination and the rights and duties of employers and employees. A government approved Code of Good Practice should be easily available in every workplace.
- 8.7 Where possible and appropriate, employers should assist in providing education and support systems for the dependants and employees who may have various problems related to their sexual orientation and which may affect their performance at the workplace.

9. Confidentiality

- 9.1 All employees have the legal right to confidentiality about their sexual orientation
- 9.2 An employee should not be obliged to inform an employer or fellow employees of his/her sexual orientation.

9.3 Confidentiality regarding all information about the sexual orientation of an employee or prospective employee must be maintained and respected, unless disclosure is legally required.

9.4 If an employee informs an employer of his/her sexual orientation, the employer may not disclose this to any other employee (including human resources and medical personnel) without that employee's written and express consent. A breach of confidentiality in this respect should be subject to disciplinary procedures.

9.5 An employee's sexual orientation should not be required or reflected on any routine human resources or medical report without the employee's written consent.

9.6 Trustees and administrators of benefit funds may not disclose the sexual orientation of an employee to an employer without the employee's written and informed consent.

10. Prejudices and fears of fellow employees, management and clients

10.1 It is the responsibility of an employer in consultation with employee organisations to ensure that all employees are educated about sexual diversity issues in the workplace so as to minimise discrimination and irrational fears.

10.2 Refusal to work with an employee on the basis of his/her sexual orientation shall be regarded as a breach of the employment contract subject to a disciplinary procedure.

11. Dispute Resolution

11.1 Employers, employees and their representative organisations are encouraged to develop and refine the principles in this Code of Good Practice into detailed workplace policies and programmes suitable and relevant to each workplace.

11.2 Any dispute between an employer and an employee in relation to or arising from the application of the Code should be subject to the provisions of the Labour Relations Act of 1995.