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Organisation of Lesbian and Gay ActIVists

P. O. Box 7315

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Cape Town

South Africa

22 September 1990

. Cde Brigitte Mabandla

Convener

ANC Gender Commission

Dear Cde Brigitte

We hereby enclose for the Gender Commission's  
information and consideration OLGA's submission on the  
Constitutional Guidelines.

Yours in the struggle

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Derrick Fine

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22 September 1990

Cde Zola Skweyiya

Convenor ANC Constitutional Committee

' . Legal and Constitutional Affairs Department

Dear cde Zola and colleagues

We refer to our letter to you dated 27 April 1990, in which we advised your department that we had set In) a working group to look into the Constitutional Guidelines. we hereby enclose our submission, Which essentially involves the proposed amendhent of the Preamble and Bill of'BEghts so as to make reference to isexual orientation'.

We are continuing with further work in this area, but wish our submission to be considered and, we hope, incorporated at this stage, as we understand that the first draft of the revised guidelines/proposed constitution is under preparation for circulation and further discussion.

. Kindly note that we have kept our submission short and to the point, but we would be readily available to discuss the content thereof, or to provide further details or information, should this be needed.

We look forward.to the committeeis response and to further cooperation in this matter.

Yours in the struggle

Derrick Fine

cc Cde Frene Ginwala (Member, Women's League).

Cde Brigitte Mabandla (Convenor, Gender Commission).

Cde Nelson Mandela (Deputy-President).

Cde Thabo Mbeki (Director, International Affairs).

Cde Essa Moosa (Convener, Bill of Rights Commission).

Cde Dullah Omar (Member, Constitutional Committee).

Cde Albie Sachs (Member, Constitutional Committee).

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#### OLGA'S PROPOSED AMENDMENTS

to the

CONSTITUTIONAL GUIDELINES/DRAFT CONSTITUTION

of the

AFRICAN NATIONAL CONGRESS

Ngte: CHBA'S submission is arranged under the following  
headings:-

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#### 1. INTRODUCTION

Our country has never had a Bill of Rights to protect people from oppression, prejudice and discrimination. In making our submission, we are deeply conscious of the fact that the vast majority of South Africans have been denied basic social, economic and political rights for very many years. Member of the International Lesbian and Gay Association (ILGA)

As activists, we are committed to building a non-racial, non-sexist and democratic South Africa, and we sincerely hope that, in future, all South Africans, including ourselves as lesbian women and gay men, will be entitled to fundamental human rights and to be protected against violations thereof.

We are mindful of the fact that questions concerning gender and sexual orientation are complex and sensitive in nature, and yet they involve important issues of principle, such as the right not to be discriminated against. WE, accordingly, make our submission in a comradely spirit and in the hope that our proposed amendments will be incorporated in the first draft of the ANC's proposed new constitution/Revised guidelines, which we understand is currently being prepared for circulation and discussion.

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In this document, we use the internationally most widely accepted terms 'lesbians', 'gay men' and 'sexual orientation'.

The term 'lesbians' refers to women who love, and are emotionally and sexually attracted to, people of the same gender.

t The term lgay meni refers to men who love, and are emotionally and sexually attracted to, people of the smegmwmmn

i The term isexual orientation' refers to the sexual inclination of (i) lesbians and gay men (sometimes referred to as a lhomosexual' orientation), or (ii) heterosexual women and men, or (iii) people who have a bisexual (homosexual and heterosexual) orientation.

## 2. OLGA - OUR OONSTITUENCY AND AIMS

OLGA is a Cape Town-based non-racial and non-sexist organisatnnu of progressive lesbians and gay men, and is affiliated to the United Democratic Front in the Western Cape.

OLGA was formed in 1987 and, as with sister organisations such as GLOW (Gay and Lesbian Organisation of the Witwatersrand), is based on the principle of non-racialism and non-sexism, precisely because we are committed to fighting all forms of oppression, and because being lesbian or gay cuts across all barriers, not only of race and gender, but also of class, culture and religion.

One of OLGA's primary objectives has been to draw lesbians and gay men into the democratic movement and, in so doing, to politicise sympathetic elements of this constituency. At the same time, OLGA has sought to support the many lesbian and gay activists who find it difficult to be open about their sexual orientation in the democratic movement, because of their fear of the reaction of fellow-activists, who are often prejudiced and lack understanding. As will be appreciated, the problem of coming out (being open about one's sexual orientation) also presents difficulties in the workplace, in the home and, especially for township-based lesbian and gay comrades, in the community at large. Through the distribution of media, having a visible presence at various political forums and events, and by giving inputs or running workshops for organisations on socialisation/lesbian and gay issues, OLGA has tried to create an awareness that lesbians and gay men do not have horns, but are indeed ordinary' people fighting alongside fellow-South Africans for justice, equality and democracy. In addition, OLGA holds regular discussion forums and video evenings for lesbian and gay activists, and sees one of its roles in the near future as giving whatever support is possible to lesbian and gay comrades returning from exile.

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### 3. SUPPORTIVE ANC STATEMENTS

To our knowledge, the supportive statements by ode Thabo Mbeki in November 1987, followed by more extensive comment by ode Frene Ginwala, marked the first time that senior ANC figures had publicly committed the ANC to respecting and upholding lesbian and gay rights.

Cde Mbeki stated:

" The ANC is indeed very firmly committed to removing all forms of discrimination and oppression in a liberated South Africa.... That commitment must surely extend to the protection of gay rights."

Cde Ginwala commented:

The ANC is a broad church.... Our membership reflects South African society and overwhelmingly the oppressed majority within which there are gays and lesbians, but also within which there are people who do not have, as yet, a developed understanding of the need to eradicate all forms of discrimination against gays and lesbians in society.... There has been a longstanding ANC policy against all forms of discrimination.... ANC policy towards gays and lesbians, and towards other groups in South Africa which are discriminated against, has to be the same because it is an issue of principle enshrined in our Freedom Charter. The raison d'être of the ANC's existence is to fight discrimination and deprivation of gays and lesbians cannot be excluded from that process." (our italics)

More recently, cde Nelson Mandela, at a press conference in Stockholm in March 1990, was asked to comment on the attitude of the ANC to progressive lesbian and gay organisations in South Africa:

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Cde Mandela replied:

We have already indicated that we are presently addressing the issues of uniting all anti-apartheid forces, drawing no distinctions whatsoever concerning anti-apartheid organisations. Whether we are going to succeed in bringing about that united front depends on the response of the organisations involved. But all I can assure you is that we will leave no stone unturned in our effort to unite the oppressed people of our country."

IE1 May 1990, cde Albie Sachs situated the oppression of lesbians and gay men in the context of overcoming apartheid, as follows:

What has happened to lesbian and gay people is the essence of apartheid - it tried to tell people who they were, how they should behave, what their rights were. The essence of democracy is that people should be free to be what they are. We want people to be and feel free."

Zhis OLGA submission seeks to build on these commitments and to request that they' be .put into .practice, inter alia, through the enshrining and enforcement of lesbian and gay rights in and under a new constitution.

#### 4. PROCESS FOLLOWED IN DEVELOPING OUR PROPOSALS

These OLGA proposals are a response to the general ANC call for comment on the Constitutional Guidelines and, in particular, to a specific call from cde Albie Sachs for feedback from progressive lesbian and gay organisations.

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After an informal discussion with cde Albie in Landon in January 1990, OLGA set up a discussion forum of lesbian and gay activists on the Constitutional Guidelines. Out of this forum, a Constitutional Guidelines Working Group was set up to research and formulate an OLGA response. A further discussion forum was called to report back on proposals, and meetings were held with odes Albie Sachs and Frene Ginwala when they visited Cape Town in May and August respectively. OLGA's proposals have been circulated for comment via OLGA newsletters, and by way of direct letters to other lesbian and gay organisations for comment and endorsement. To date, the following organisations have endorsed our proposals (as contained in section 5 below):

- t GLOW (Gay and Lesbian Organisation of the Witwatersrand);
- t GALA (Gay and Lesbian Association, University of Cape Town); ;
- t Gay Switchboard (Johannesburg);
- t TOGS (Transvaal Organisation of Gay Sport);
- \$ Gay Library (Johannesburg);
- t COGS (Cape Organisation of Gay Sport);
- t GAIN (Gay AssociatiOh of Inland Natal);
- t GLOS (Gay and Lesbian Organisation of Students, University of Natal, Durban).

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We anticipate further positive responses, but felt that we should not further delay this submission, in case it was too late to be considered for inclusion in the first draft of the revised guidelines/proposed constitution.

#### 5. OUR PROPOSALS

h% are requesting" explicit incorporation in the revised guidelines/draft constitution of the principle of non-discrimination against lesbians and gay men on the basis of their sexual orientation.

In order to implement our submission, we propose amendments to the Preamble to and Bill of Rights of the existing Guidelines, which are underlined as follows:-

t Preamble Paragraph 6:

The Constitution must give firm protection to ;  
the fundamental human rights of all citizens.

There shall be equal rights for all individuals,  
irrespective of race, colour, gender, creed or  
sexual\_gnlentatlgn. In addition, it requires the  
entrenching of equal cultural, linguistic and  
religious rights for all."

t Bill of Rights and Affirmative Action Clause lh':

' The Constitution shall include a Bill of Rights  
based (H) the Freedomx Charter. Such a Bill of  
Rights shall guarantee the fundamental human  
rights of all citizens, irrespective of race,  
colour, gender, creed or aexnalJnientaLiQn, and  
shall provide appropriate mechanisms for their  
protection and enforcement."

A more detailed motivation for the inclusion of 'sexual\_orientation' (as defined in the Note on Terminology in the Introduction above) follows in the Motivation section below.

It will be noted that we have also suggested the word 'gender' instead of 'sex', as we believe that it is a more accurate and appropriate term, which is not confined to the realm of 'sex'. 'Gender' then contrasts neatly with 'sexual orientation' which, as defined above, is not confined to a lesbian or gay orientation, but refers to all people, whether they are homosexual, heterosexual or bisexual.

We also recommend, without further motivation herein, the addition of two further bases for non-discrimination, namely 'ethnicity' and 'disability'.

#### OUR MOTIVATION

The following seven points summarise our motivation for our proposals:

(a) WWW

we submit that the right not to be discriminated against is a basic human right that should be consistently applied to all individuals. Non-discrimination on the basis of race, colour, gender or creed will presumably be applied on an individual basis, regardless of the number of individuals affected.

What we are requesting is the extension of this same principle to lesbians and gay men as individuals through the inclusion of sexual orientation as proposed. The history of oppression of lesbians and gay men, together with our daily experience of prejudice and discrimination, has taught us that it cannot be assumed that non-discrimination will be practised. As a result, it is submitted that explicit, rather than implicit, protection against discrimination is required.

In short, we submit that lesbian and gay rights are fundamental human rights, which should be recognised under the aegis of the right not to be discriminated against, one of the so-called 'second generation' social rights. Incorporation of sexual orientation in the Bill of Rights would confirm the ANC's long commitment to fighting discrimination and oppression on all fronts (as outlined by Odes Mbeki, Ginwala, Mandela and Sachs above).

(b) W

The reality of the situation in a present and future South Africa, as in all other societies, is that a notable percentage of citizens are not heterosexual. (Average estimates put the figure at ten per cent, allowing for the fact that many lesbians, gay men or bisexuals are forced by circumstances to repress their sexual orientation).

Acceptance of this reality, through including our proposed amendments, would be a graphic recognition of the principle (as styled by ode Albie Sachs) of ithe right to be the same and the right to be different'.

we submit that the right to be diffErent should include not only practising the religion, culture and language of one's choice, but also the right to choose to lead a2 different lifbstyleie. For us, this would mean having the freedom to form relationships regardless of the gender of one's partner, and having these relationships recognised as legal and natural.

We envisage the recognition of a variety of lifestyles, ranging from heterosexual marriage to various other options, including lesbian and gay relationships, single parenting, customary unions etc. It should be emphasised that it is not our intention to deny or denigrate conventional norms in any way, but, given the diversity of lifestyles in our

country, merely to call for the formal recognition of a number of alternatives.

It is submitted that, through recognising the right to be different in the manner suggested, the ANC would be making a considerable contribution to the creation of a lasting climate of social and political tolerance.

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It is sometimes contended that sexual orientation, and in particular being lesbian or gay, is a purely private matter.

This assumption can perhaps be partially ascribed to the fact that many lesbians or gay men remain in the closet (keep the fact that they are lesbian or gay a secret), precisely because of homophobic attitudes (negative and abusive attitudes to lesbians and gay men).

Another explanation for the relegation of being lesbian or gay to a private matter, is an unintentional conflation of the right to live out one's sexual orientation' with the right to personal privacy'. While conceptually we would support the notion of personal privacy, this way of thinking tends to state that, what takes place in the bedroom between consenting adults, is a private matter that should not be interfered with or legislated upon. What happens in following this approach, is that lesbians and gays are often

reduced to being purely sexual beings, rather than whole human beings, who lead full lives outside of the bedroom. Differently expressed, we submit that being lesbian or gay is very much a public issue in that lesbians and gay men are publicly discriminated against in areas such as the media, employment, the education system, and in terms of public homophobic comments and prejudice. Lesbians and gay men, especially those in longterm committed relationships, are further hamstrung through their relationships not being recognised for the purposes of insurance, taxation, pensions, inheritance etc.

The inclusion of sexual orientation in a EU11 of 'Rights Will not remedy all these matters overnight, but would have the effect of opening up the way for the future protection of lesbians and gay men on a range of day-to-day issues.

(d) . . . .

Only a few years ago, it was argued by some in the democratic movement that gender issues were not really political issues, but were, similarly, just private or side-issues for women to concern themselves with. Nowadays, it would correctly be regarded as politically unacceptable and sexist to hold such views; This change, however, only came about as a result of the relentless efforts of our women's organisations in forcing gender issues onto the mainstream political agenda.

We very proudly adopt a similar approach to our women comrades, in rejecting the argument that lesbian and gay rights are irrelevant issues, which must at least wait until the second phase after political liberation before they might be considered. We submit that such a simplistic two-phase theory', which often tends to reduce the importance of economic and social rights, is misplaced and runs contrary to our commitment to transform our society in an ongoing process on all levels.

In short, we submit that economic and social rights (has second generation' rights), including lesbian and gay rights, need to be integrated and nurtured together with political and civil rights (the traditional first generation' rights) in the process of constructing a new South Africa, free of exploitation and oppression.

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Linked to the notion of recognising the personal as political' is a further motivation, namely the need to recognise the contribution of many lesbian and gay comrades through many years of struggle. The very fact that most lesbian and gay activists have remained committed to the struggle, in spite of often not being fully recognised and respected for who they are, can be ascribed to deep political commitment.

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However, comrades who are not able to be open about their sexual orientation, find that this sometimes has a demotivating effect on their political involvement. One's choice in such a situation is to reduce one's involvement in the struggle or to totally deny one's sexuality for fear of being rejected by heterosexual comrades.

It is submitted that the ANC needs to take the lead in remedying this situation, not just through pushing for constitutional recognition of lesbians and gays in a new national constitution, but within the ANC itself, through creating a climate of openness and in applying these same principles in relation to the ANC's own internal constitution.

(f) Drawing in a broaden lesbian and gay constituency  
If we are to build the ANC into a truly "broad church" (as envisaged by cde Frene Ginwala above), then a signal needs to be sent to those in the broader lesbian and gay constituency who are sympathetic, but not yet actively involved in the struggle, that there is a home for them in the ANC.

A bold move such as recognising and protecting lesbian and gay rights, would clearly signal that the ANC will actively fight discrimination in its own ranks and in a future South Africa. This would open the door to this broader constituency, who would have to find another excuse for not

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joining our ranks! More importantly, it would assure lesbians and gay men of their right to be open about their sexuality and to participate freely at all levels of the organisation and in society at large.

Lesbian and gay rights, according to our information, are not formally acknowledged in the law in any African country. we submit that the ANC should be bold and take the lead in setting an important precedent in paving the way fbr Sbuth Africa to be the first African country to offEr constitutional and legal recognition of" lesbian and gay rights.

A number of European countries have recognised the principle of rmn-discrimination on the basis of sexual orientation, including several strong allies of our movement, namely Norway, Sweden and Denmark. The experience in many socialist countries has, unfortunately, often been disappointing. Examples are the repressive measures introduced by Stalin in the Soviet Union, after Lenin had in fact entirely decriminalised homosexuality, and the vicious persecution of lesbians and gay men in Cuba under Castro.

It is respectfully submitted that the ANC needs to give strong' \_political direction by' showing' that, as an organisation and likely fUture governing party, it is

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prepared to fl gh t oppressi on and prej udi ce , wha tever the source thereof, and thus to help create a climate in which there is freedom from the fbazh generated by" decades of apartheid-rule.

#### 7. SUGGESTIONS FOR ENFORCEMENT

A few brief points will be made, pointing to some of the key implications of enforcing and giving practical effect to a Bill of Rights protecting lesbians and gay men.

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Possible "mechanisms" (as envisaged by draft clause hh' in the Guidelines) for enforcing such a Bill of Rights include a Constitutional Court, an Equal Opportunities

Tribunal/Commission and enl Ombudsperson's Office. Should such institutions be established, it is suggested that lay assessors and officials staffing these forums respectively, should, in hearing and responding to issues pertinent to lesbians and gay men, include lesbians and gay men, or at least people highly sensitive to the issues at hand.

It is submitted that existing laws which criminalise lesbian and gay sexual acts, will have to be repealed or amended so as not to discriminate against lesbians and gay men, for example, the Sexual Offences Act, which discriminates against lesbians and gay men, in that the homosexual age of

consent is set at 19, whereas the heterosexual age of consent remains 16.

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Attention will also have to be given in future to the enactment of protective laws, for example: (i) making it an offence to discriminate or incite hatred against people because of their sexual orientation; (ii) granting legal recognition to lesbian and gay relationships for the purpose of things like inheritance, insurance etc.

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A vital component of the enforcement of constitutional provisions or new/amended laws, especially on sensitive matters, will be public education. This could take place, inter alia, during workshops consulting on and explaining constitutional issues/the contents of the new constitution (as was done in Namibia before and, especially, after independence).

OLGA sees it as its role, together with other organisations, to contribute actively to this education process. Besides running workshops, OLGA is planning a public education campaign to draw up a lesbian and gay charter as an educational tool to explain and get support on the practical issues that affect lesbians and gay men, for example, questions around housing, immigration, health and welfare.

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## 8. CONCLUSION

We conclude our proposals by reiterating that these submissions are made in a comradely spirit. We welcome feedback from the Constitutional Committee, or from the Gender or Bill of Rights Commissions, and we wish to stress that we are readily available to discuss the issues raised, or to provide further details or examples, as required. We are busy with ongoing work in this field and will be in a position to make additional submissions in the future after further consultation.

'In Closing, and in committing ourselves to the building of a human rights culture in our country, we can do no better than quote from COSATU'S 1987 message to all union members:

"If our liberation does not succeed in creating free people, equal to each other in every way, ; then we would not be liberated."