

# Lack of Equal Treatment and Access to Equal Opportunity for LGTBQ People in the United States

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The Williams Institute, founded in 2001, is dedicated to conducting rigorous, independent research on sexual orientation and gender identity law and public policy. A national think tank at the University of California, Los Angeles School of Law, the Williams Institute produces high-quality research with real-world relevance and disseminates it to judges, legislators, policymakers, media and the public.

The Williams Institute, University of California Los Angeles School of Law

## Executive Summary

The Williams Institute, University of California School of Law  
UPR Cycle 2, Session 22,  
Review of United States of America

### Lack of Equal Treatment and Access to Equal Opportunity for LGBTQ People in the United States

1. The United States during the 2010 Universal Periodic Review (UPR) accepted three recommendations that reference sexual orientation and gender identity. Together, recommendations 86, 112, and 116 require the United States to take all necessary measures to comprehensively address discrimination against individuals on the basis of their sexual orientation or gender identity by encouraging the equal treatment of lesbian, gay, bisexual, and transgender (LGBT) people. These requirements supplement existing statutory and constitutional obligations.
2. Evidence indicates that in the United States, however, LGBT people continue to be subject to human rights violations in the areas of employment, poverty, hate crimes, and health. Sexual minority youth and transgender individuals are uniquely vulnerable. Moreover, law enforcement often fails to protect LGBT people and can, in fact, precipitate these forms of discrimination. Continued unequal treatment and barriers to access to justice indicates that the United States is not fulfilling its obligations under the 2010 UPR.
3. This submission relies on expert quantitative, qualitative, and policy analyses based on the best available data.

#### *Summary of Recommendation/Brief statement which to send to USHRN:*

4. The U.S. Government should expand and improve its efforts to collect quality data on the LGBT population and prohibit any form of discrimination on the basis of sexual orientation or gender identity. In addition, the U.S. should create a national human rights institution, or empower a currently existing institution, in compliance with the Paris Principles, to coordinate the monitoring of the living situation of LGBT people in the U.S., for the purposes of determining whether LGBT people have the enjoyment of their human rights.

### **I. Legal Frameworks for the Promotion and Protection of LGBT Rights in the United States**

5. The United States accepted three recommendations pertaining to LGBT people during the 2010 UPR.
  - a. **Recommendation 86:** Undertake awareness-raising campaigns for combating stereotypes and violence against gays, lesbians, bisexuals and transsexuals, and ensure access to public services paying

attention to the special vulnerability of sexual workers to violence and human rights abuses.

- b. **Recommendation 112:** Take measures to comprehensively address discrimination against individuals on the basis of their sexual orientation or gender identity.
  - c. **Recommendation 116:** Continue its intense efforts to undertake all necessary measures to ensure fair and equal treatment of all persons, without regard to sex, race, religion, colour, creed, sexual orientation, gender identity or disability, and encourage further steps in the regard.
6. In addition to these recommendations, relevant legal frameworks include: 1) the Mathew Shepard and James Byrd, Jr. Hate Crimes Prevention Act (HCPA), a federal law protecting individuals from bias-motivated crimes based on their perceived gender, sexual orientation, or gender identity, 2) the Hate Crimes Statistics Act of 1990, which requires the Attorney General to collect data on crimes committed because of a victim's sexual orientation, 3) Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination based on sex, race, religion, and national origin (though some judicial and administrative interpretation has included sexual orientation and gender identity as protected classes, they are not listed in the statute), as well as equal protection and due process requirements of the U.S. Constitution.
  7. Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination based on sex, race, religion, and national origin (sexual orientation and gender identity are not listed, though some courts as well as administrative decisions have concluded that the law covers sexual orientation as well as gender identity), as well as equal protection and due process requirements of the U.S. Constitution which requires fair treatment in many areas of employment, public accommodations and housing.

## II. U.S. Compliance with Legal Obligations and Expectations for LGBT people

### *Employment Discrimination*

8. Currently, there are slightly more than one million LGBT employees working for state and local governments, over two hundred thousand LGBT people working for the federal government, and just under seven million LGBT private employees, accounting for roughly four percent of the American labor force.<sup>1</sup>

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<sup>1</sup> Brad Sears et al., Williams Inst., *Documenting Discrimination Based on Sexual Orientation and Gender Identity in State Employment*, WILLIAMSINSTITUTE.LAW.UCLA.EDU 2 (Sept. 2009), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/ExecutiveSummary1.pdf>

9. Thirty-seven percent of lesbian and gay people, and 90 percent of transgender people, report having faced harassment in the workplace.<sup>2</sup> Yet, employment discrimination on the basis of sexual orientation or gender identity is not prohibited by federal statute or in most state statutes. Aside from interpretation to broaden Title VII, under federal law it is entirely legal to fire someone based on his or her sexual orientation. Only 45 percent of American workers live in a jurisdiction prohibiting sexual orientation discrimination in employment, and only 34 percent of workers live in a jurisdiction prohibiting gender identity discrimination.<sup>3</sup>
10. Public/governmental employees also receive limited constitutional protections from discrimination based on sexual orientation or gender identity.<sup>4</sup> In addition, UPR recommendations 112 and 116 require the U.S. to address discrimination in all forms, including public and private employment. Access to a fair workplace is a basic human right that can be advanced with straightforward change in federal and state policy.

### *Hate Crimes and Law Enforcement*

11. Federal law defines “hate crimes” as those criminal offenses against a person or property motivated in whole or in part by an offender’s bias against a race, religion, disability, ethnic origin, or sexual orientation.
12. The Matthew Shepard and James Byrd, Jr., Hate Crimes Prevention Act of 2009 added protections for LGBT people. The Act gave the federal government authority to prosecute violent hate crimes including violence and attempted violence directed at the LGBT people. The Act provides funding and technical assistance to state, local, and tribal jurisdictions to help them more effectively investigate, prosecute, and prevent hate crimes. In addition, the Act awards jurisdiction to federal officials to pursue hate crimes that local officials decline to pursue.
13. Studies indicate that sexual orientation-based hate crimes make up approximately 30 percent of the reported hate crimes in the United States.<sup>5</sup> This number is especially alarming because LGBT people make up an estimated 3.5 percent of the American population.<sup>6</sup> These statistics may not

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<sup>2</sup> Jennifer C. Pizer, Brad Sears, Christy Mallory, and Nan D. Hunter, “Evidence of Persistent and Pervasive Workplace Discrimination Against LGBTQ People: The Need for Federal Legislation Prohibiting Discrimination and Providing for Equal Employment Benefits,” 45 LOY. L.A. L. REV. 715 (2012).

<sup>3</sup> Lee Badgett et al., Ctr. for Am. Progress & Williams Inst., *An Executive Order to Prevent Discrimination Against LGBT Workers*, WILLIAMSINSTITUTE.LAW.UCLA.EDU 4 (Feb. 2013), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBTExecutiveOrder-Feb-2013.pdf>

<sup>4</sup> Sears et al., *supra* note 1, at 1

<sup>5</sup> Rebecca L. Stotzer, Williams Inst., *Comparison of Hate Crime Rates Across Protected and Unprotected Groups – An Update*, WILLIAMSINSTITUTE.LAW.UCLA.EDU 1 (Jan. 2012), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Stotzer-Hate-Crime-Update-Jan-2012.pdf>

<sup>6</sup> *Id* at 2

- fully represent the actual number of hate crimes against LGBT people because state and local agencies are not required to report hate crimes to the FBI.<sup>7</sup> In addition, a large number of LGBT victims do not report their victimization to the authorities because of fear of further victimization.<sup>8</sup>
14. Ten out of every 100,000 LGBT people in the U.S. report having had a hate crime committed against their persons.<sup>9</sup> This statistic is especially significant given the fact that sexual orientation-motivated hate crimes against persons tend to be more violent and are more likely to require hospitalization than other types of hate crimes directed at other minority groups.<sup>10</sup> Gay men in particular are especially vulnerable to being victimized. Gay men face the highest rates of physical assaults and other types of crimes against their persons.<sup>11</sup> Gay men report the greatest risk of being the victims of hate-motivated physical violence when compared with lesbians, bisexuals, Blacks, and Jews, with 26 in 100,000 gay men reporting hate crimes against persons.<sup>12</sup>
  15. To increase our understanding of hate crimes against LGBT people, data collection efforts by state and local law enforcement agencies must be improved and expanded.
  16. Regarding law enforcement, a well-trained police force is central to compliance with human rights standards. However, recent studies indicate areas for improvement in how police officers interact with LGBT people. For example, 31 percent of survivors of same-sex partner violence experienced verbal abuse from the police, and over time the trend seems to be getting worse.<sup>13</sup>
  17. Transgender women and people of color are consistently targeted by LGBT hate-violence. Only a small proportion of these individuals seek police assistance, however, because they have themselves experienced police hostility.<sup>14</sup> The Violence Against Women Act, which is LGBT inclusive, may help ensure the human rights of LGBT people.

## Poverty

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<sup>7</sup> Id

<sup>8</sup> National Coalition of Anti-Violence Programs, *Lesbian, Gay, Bisexual, Transgender, Queer and HIV-Affected Hate Violence in 2013* (2014).

<sup>9</sup> Kuehnle, K., & Sullivan, A. (2003). Gay and lesbian victimization: Reporting factors in domestic violence and bias incidents. *Criminal Justice and Behavior*, 30, 85-96; Winer, A. S. (1994). Hate crimes, homosexuals, and the Constitution. *Harvard Civil Rights – Civil Liberties Law Review*, 29, 387-438.

<sup>10</sup> Stotzer, *supra* note 5, at 3

<sup>11</sup> Stotzer, *supra* note 5, at 1

<sup>12</sup> Stotzer, *supra* note 5, at 1

<sup>13</sup> Andrew Park & Adam P. Romero, Williams Inst., *Universal Periodic Review of the United States UPR Sub-group on Civil Rights and Racial and Ethnic Discrimination Issues*, WILLIAMSinSTITUTE.LAW.UCLA.EDU 2 (July 2014), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/wi-UPR-statement-jul-2014.pdf>

<sup>14</sup> Id.

18. Many LGBT people are below or near the federal poverty line, and LGBT people continue to be economically disadvantaged and at higher risk for poverty compared to non-LGBT people.<sup>15</sup> More than one in four LGBT adults (29%), approximately 2.4 million people, are likely to have experienced a time in the last year when they did not have enough money to feed themselves or their family.<sup>16</sup>
19. In another indication of poverty, same-sex couples are more likely to receive government cash assistance than different-sex couples.<sup>17</sup> In addition, variables that affect poverty such as education, geography, race, and gender tend to negatively affect same-sex couples or LGBT adults more than different-sex couples or heterosexual adults.<sup>18</sup>
20. Children of same-sex couples are especially vulnerable to poverty compared to children of different-sex couples. Almost one in four children living with a male same-sex couple and 19 percent of children living with a female same-sex couple are in poverty, compared to 12 percent of children living with married different-sex couples.<sup>19</sup> African American children in gay male households have the highest poverty rate (52%) of any children in any household type.<sup>20</sup>
21. Poverty can constitute a human rights violation in three ways: 1) Disparate rates of poverty can indicate underlying violations, such as employment discrimination or exclusion from education, 2) poverty can cause subsequent violations such as inability to access justice or health, and 3) poverty itself can constitute a violation if it becomes severe enough to constitute a social exclusion. In any case, it is the duty of the United States to monitor the human rights situation of LGBT people through data collection and analysis.

## Health

22. Since the adoption of the Affordable Care Act, the percentage of LGBT adults without health insurance has declined. However, LGBT adults are still more likely to be uninsured than their non-LGBT counterparts.<sup>21</sup> About 25 percent

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<sup>15</sup> M.V. Lee Badgett, Laura E. Durso, & Alyssa Schneebaum, The Williams Institute, "New Patterns of Poverty in the Lesbian, Gay, and Bisexual Community" (June 2013), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/LGB-Poverty-Update-Jun-2013.pdf>; Randy Albelda, M.V. Lee Badgett, Gary J. Gates, and Alyssa Schneebaum, The Williams Institute, "Poverty in the Lesbian, Gay Bisexual Community" (March 2009).

<sup>16</sup> Gary J. Gates, Williams Inst., *Food Insecurity and SNAP (Food Stamps) Participation in LGBT Communities*, WILLIAMSINSTITUTE.LAW.UCLA.EDU 1 (Feb. 2014), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Food-Insecurity-in-LGBT-Communities.pdf>

<sup>17</sup> Badgett, Durso, Schneebaum, *supra* note15

<sup>18</sup> Id.

<sup>19</sup> Id.

<sup>20</sup> Id. Children of same-sex couples do not necessarily identify as LGBTQ.

<sup>21</sup> Gary J. Gates, *In U.S., LGBT More Likely Than Non-LGBT to Be Uninsured*, Gallup Well-Being (Aug. 26, 2014), <http://www.gallup.com/poll/175445/lgbt-likely-non-lgbt-uninsured.aspx>.

of LGBT adults struggle to afford healthcare.<sup>22</sup> Moreover, LGBT adults are less likely to have a place where they can seek consistent medical care and are more likely to not seek medical attention when needed due to financial constraints.<sup>23</sup> Note that this disparity in access to better health and health care is correlated with the financial disparity between LGBT and non-LGBT adults.

23. LGBT women are most at risk when it comes to accessing health care.<sup>24</sup> Compared to non-LGBT women, LGBT women are more likely to struggle to afford healthcare or medicine (19% vs. 29%).<sup>25</sup> In addition, LGBT women (29%) are almost twice as likely as non-LGBT women (16%) to lack a personal doctor.<sup>26</sup>

### *LGBTQ Youth*

24. LGBTQ<sup>27</sup> youth are especially vulnerable group in the United States. Of the estimated 3.2 million LGBTQ youth in the U.S., half are considered to be at-risk youth.<sup>28</sup> They are more likely to experience adverse health outcomes than non-LGBTQ youth and are more likely to self-mutilate, experience depression, and engage in suicide ideation, planning, and attempts.<sup>29</sup>
25. According to a new study in the *American Journal of Public Health*, 23 percent of sexual minority youth compared with seven percent of heterosexual youth had attempted suicide in the year prior to being surveyed.<sup>30</sup> The same study also isolated and compared serious suicides attempts—those that result in serious injury and require medical treatment. The study found that sexual minority youth were four times as likely as heterosexual youth to commit serious suicide attempts.<sup>31</sup>
26. LGBTQ youth disproportionately engage in behaviors that experts have identified as putting youth at high risk for involvement with the juvenile justice system.<sup>32</sup> LGBTQ youth, for example, are at higher risk of experiencing bullying, absenteeism, and other school-related problems, as well as depression, drug use, and involvement in certain types of crimes than their

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<sup>22</sup> Id.

<sup>23</sup> Id.

<sup>24</sup> Id.

<sup>25</sup> Id.

<sup>26</sup> Id.

<sup>27</sup> Q stands for those who identify as queer and/or are questioning their sexual identity as LGBT.

<sup>28</sup> Christy Mallory et al., Williams Inst., *Ensuring Access to Mentoring Programs for LGBTQ Youth*, WILLIAMSINSTITUTE.LAW.UCLA.EDU 1 (Jan. 2014), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Access-to-Youth-Mentoring-Programs.pdf>

<sup>29</sup> Wendy B. Bostwick et al., *Mental Health and Suicidality Among Racially/Ethnically Diverse Sexual Minority Youths*, Williams Institute (July 2014), <http://williamsinstitute.law.ucla.edu/research/safe-schools-and-youth/ajph-jul-2014/>

<sup>30</sup> Id.

<sup>31</sup> Id.

<sup>32</sup> Mallory, *supra* note 28, at 10

non-LGBTQ counterparts.<sup>33</sup> This risk is exacerbated by a lack of support at home and in school. LGBTQ youth rank non-accepting families as the most important problem in their lives; in addition, more than 70 percent of LGBTQ youth report feeling unsafe at school due to their sexual orientation or gender expression.<sup>34</sup> Indeed, LGBTQ youth are twice as likely to consider dropping out of school and are more likely to end up homeless or in foster care as compared to non-LGBTQ youth. Moreover, of the 1.6 million at-risk LGBTQ youth, just over 1.3 million have never had structured mentorship and just over six hundred thousand have never had a mentor of any kind.<sup>35</sup> Recommendation 86 would require the U.S. government to combat the stereotypes the LGBTQ youth face.

27. The lack of accepting families and schools diminishes LGBTQ accessibility to a support system, which might address underlying risky behavior, as they are left isolated to deal with severe psychosocial problems that can often become life threatening. All these factors, including selective law enforcement, contribute to the overrepresentation of LGBTQ youth in the juvenile justice system.<sup>36</sup> While seven percent of youth generally identify as LGBTQ, almost 14 percent of youth in custody identify as LGBTQ.<sup>37</sup>

### **III. Recommendations**

#### *Legislation to comply with human rights standards*

28. Federal and state governments should prohibit employment discrimination on the basis of sexual orientation or gender identity in both the public and private sectors.
29. Federal and state governments should recognize same-sex relationships to the extent such relationships are recognized for opposite sex-couples, including removing bans on same-sex marriage.
30. Federal and state governments should adopt anti-bullying laws to reduce harassment and violence against LGBTQ youth in schools, foster care, social services agencies, family court, shelters, and the juvenile justice system.

#### *Human rights monitoring mechanisms*

31. The United States should create a national human rights institution, or empower a currently existing institution, in compliance with the Paris Principles, to coordinate the monitoring of the living situation of LGBT people in the U.S., for the purposes of determining whether LGBT people

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<sup>33</sup> Id. at 7

<sup>34</sup> Id. at 1

<sup>35</sup> Id. at 2

<sup>36</sup> Id. at 9

<sup>37</sup> Id. at 1



have the enjoyment of their human rights. This body should have the authority to investigate, adjudicate, and formulate responses to human rights concerns involving sexual orientation or gender identity.

32. The United States should expand and improve its efforts to collect quality data on the LGBT population, including but not limited to demographic, economic, geographic, and health characteristics. For example, the United States should add sexual orientation and gender identity measures to the Decennial Census and other federal and state surveys.<sup>38</sup> These data would enable the U.S. to better understand, assess, and remedy the adverse social, economic, and health disparities LGBT people experience.

### *Youth*

33. All levels of government should encourage LGBTQ-focused youth mentoring programs in order to help address the challenges and vulnerabilities many of these youth face.

### *Law Enforcement*

34. The United States should support training of law enforcement officers to appropriately respond to requests for assistance by LGBT people, including training on LGBT-cultural competence; the DOJ should revise its “Guidance Regarding the Use of Race by Federal Law Enforcement Agencies” to include sexual orientation, gender identity, gender expression, immigration status, and housing status; and the Uniform Crime Report and the United States Department of Justice’s National Crime Victimization Survey should include questions regarding the sexual orientation and gender identity of both survivors and offenders.<sup>39</sup>

### *Midterm Review*

35. The United States should participate in a UPR Midterm Review. Conclusion

### *Summary*

36. LGBT people continue to be subject to human rights violations in the areas of employment, poverty, hate crimes, and health. Continued unequal treatment and barriers to access to justice indicates that the U.S. is not fulfilling its obligations under the 2010 UPR. Therefore, the U.S. should expand and improve its efforts to collect quality data on the LGBT population and

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<sup>38</sup> See SMART report for suggested questions for identifying sexual orientation. Elbert Almazan et al., SMART & Williams Inst., *Best Practices for Asking Questions about Sexual Orientation on Surveys*, WILLIAMSINSTITUTE.LAW.UCLA.EDU (Nov. 2009), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/SMART-FINAL>

<sup>39</sup> Park & Romero, *supra* note 13,

prohibit any form of discrimination on the basis of sexual orientation or gender identity.