UCT Inclusivity Policy for Sexual Orientation

Document summary

Effective date		Last updated	
Policy owner	University of Cape Town Council		
Policy oversight	Deputy Vice Chancellor: Transformation		
Approved by		Reviewed by	
Enquiries	HIV/AIDS, Inclusivity & Change Unit (hereafter referred to as HAICU)		

Table of Contents

1. Preamble to Sexual Orientation Policy

1.1 Purpose

The purpose of this policy is to ensure that UCT's institutional response reflects the principles enshrined in *The Constitution of the Republic of South Africa of 1996,* specifically section 9 of the Bill of Rights*,* which states that "everyone [as] equal before the law" and prohibits "unfair" discrimination on the basis of sex, gender and sexual orientation. The legal obligations imposed by section 9 of the Constitution is operationalised by the various provisions of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA).

This policy contains the minimum standards and guidelines that govern interaction by the University of Cape Town entities, staff and students in relation to diversity and fluidity of sexual orientation. It aims to ensure consistency in engagement and create an environment that respects and celebrates differences regardless of an individuals' self-identified sexual orientation. The policy recognizes the potential negative, exclusionary and marginalizing impact of rules, practices, traditions, attitudes and (known or unknown assumptions) prevalent in the institution and accept that this may send a signal that some staff and students do not count equally because they identify themselves or are identified by others as part of the sexual minority. This policy sets out guidelines to be followed by University institutions when they adopt or review rules, plans and practices. The guidelines also aim to inform and educate UCT staff and students to assist them in making the appropriate choices when deciding on what terminology to use in teaching practice; communication, health care and administrative services.

The policy encourages best practice in order to ensure that UCT complies with its constitutional and legal obligations and to work towards the creation of an environment in which all individuals can flourish regardless of their sexual orientation differences. Good practice guidelines are detailed in four sections, namely: teaching practice (language use and teaching delivery); communication and media; institutional culture and service provision (training and development).

1.2 Applicable to

The policy applies to all UCT staff and students, governance structures, societies, clubs and all other third parties rendering services to/at the university.

1.3 Legal framework

The University of Cape Town has a constitutional and legal duty to take positive steps to create an environment in which staff and students will flourish and will be able to reach their full potential, regardless their race, sex, class, ability status, gender, sexual orientation or other relevant attributes or

characteristics. Section 9(3) of the South African Constitution of the Republic of South Africa, 1996 prohibits the state and any person (including a juristic person) from unfairly discriminating, either directly or indirectly, against anyone on one or more grounds, including "race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth". This is not a closed list of grounds on which discrimination can occur. Any discrimination on any ground similar to those listed will be recognised by a court; discrimination on the ground of HIV status has been recognised as such a ground. South Africa's Constitutional Court held in *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* (CCT11/98) [1998] ZACC 15; 1999 (1) SA 6; 1998 (12) BCLR 1517 (9 October 1998) at para 21) that the concept "sexual orientation" as used in section 9(3) of the 1996 Constitution must be given "a generous interpretation".

The constitutional obligation contained in section 9(3) not to discriminate against anyone is also contained in the relevant provisions of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA). PEPUDA binds UCT as well as all staff and students who work or study at UCT. The provisions of the Act also trump other legislative obligations imposed on UCT and its staff and students (section 5(2)). Section 6 of PEPUDA prohibits the State and any person from unfairly discriminating against any person. Discrimination is defined in section 1 as any act or omission, including a policy, law, rule, practice, condition or situation which directly or indirectly imposes burdens, obligations or disadvantage on; or withholds benefits, opportunities or advantages from, any person on one or more of the prohibited grounds. The prohibited grounds include sexual orientation. Thus any policy, act or any failure to act by UCT which *either directly or indirectly* impose burdens or disadvantages on some because of their sexual orientation or withholds benefits, opportunities and advantages from them, will constitute discrimination. Rules, practices, habits or attitudes which might appear to be neutral but which will impact disproportionally on individuals because of their sexual orientation will constitute indirect discrimination (*City Council of Pretoria v Walker* (CCT8/97) [1998] ZACC 1; 1998 (2) SA 363; 1998 (3) BCLR 257 (17 February 1998)). Section 13(2) of PEPUDA states that when an individual shows that a person or institution has discriminated on one of the grounds listed (including on the ground of "sexual orientation"), the discrimination will be presumed to be unfair and thus unlawful. In such a case UCT would have to produce evidence to prove that the discrimination was justified and that it was not unfair to discriminate against non-heterosexual students, staff and visitors in this manner. Section 14 of PEPUDA lists various factors that a court will take into account to determine whether UCT has shown that the discrimination was not unfair. This is not a closed list of factors, but the factors often guide a general proportionality assessment to determine whether the discrimination is fair (and thus legally valid) or unfair (and thus unlawful). These factors include: (a) whether the discrimination impairs or

is likely to impair human dignity of the group being discriminated against; (b) the impact or likely impact of the discrimination on the complainant; (c) the position of the complainant in society and whether he or she suffers from patterns of disadvantage or belongs to a group that suffers from such patterns of disadvantage (d) the nature and extent of the discrimination; (e) whether the discrimination is systemic in nature; (f) whether the discrimination has a legitimate purpose; (g) whether and to what extent the discrimination achieves its purpose; (h) whether there are less restrictive and less disadvantageous means to achieve the purpose; (i) whether and to what extent the respondent has taken such steps as being reasonable in the circumstances to accommodate diversity.

The negative feelings or prejudices harboured towards a discriminated group by some members of a community (whether animated by religious beliefs or not) will never constitute a valid reason to justify discrimination. In *Hoffmann v South African Airways* (CCT17/00) [2000] ZACC 17; 2001 (1) SA 1; 2000 (11) BCLR 1235; [2000] 12 BLLR 1365 (CC) (28 September 2000) at para 37) the Constitutional Court confirmed this principle stating that: "*Prejudice can never justify unfair discrimination.*" PEPUDA also imposes a positive obligation on an institution like UCT to take reasonable steps to accommodate the diverse needs students who are marginalised or vulnerable because of their sexual orientation. The Constitutional Court held *MEC for Education: Kwazulu-Natal and Others v Pillay* ((CCT 51/06) [2007] ZACC 21; 2008 (1) SA 474 (CC); 2008 (2) BCLR 99 (CC) (5 October 2007) at para 72-73) that "failing to take steps to reasonably accommodate the needs" of people on the basis of their sexual orientation (or any other relevant ground) will amount to unfair discrimination. PEPUDA requires respect for difference and imposes a duty on institutions like UCT to implement fundamental changes in institutional policies, rules, practices and habits to ensure that seemingly neutral rules, practices or behaviours do not perpetuate the exclusion and marginalisation of sexual minorities.

The Constitutional Court defined the constitutional ideal which should guide the implementation of these positive measures (and hence also the sexual orientation policy) as follows (see *Minister of Home Affairs and Another v Fourie and Another* (CCT 60/04) [2005] ZACC 19; 2006 (3) BCLR 355 (CC); 2006 (1) SA 524 (CC) (1 December 2005) at para 60):

"A democratic, universalistic, caring and aspirationally egalitarian society embraces everyone and accepts people for who they are. To penalise people for being who and what they are is profoundly disrespectful of the human personality and violatory of equality. Equality means equal concern and respect across difference. It does not presuppose the elimination or suppression of difference. Respect for human rights requires the affirmation of self, not the denial of self. Equality therefore does not imply a levelling or homogenisation of behaviour or extolling one form as supreme, and another as inferior, but an acknowledgement and

acceptance of difference. At the very least, it affirms that difference should not be the basis for exclusion, marginalisation and stigma. At best, it celebrates the vitality that difference brings to any society…. The acknowledgement and acceptance of difference is particularly important in our country where for centuries group membership based on supposed biological characteristics such as skin colour has been the express basis of advantage and disadvantage. South Africans come in all shapes and sizes. The development of an active rather than a purely formal sense of enjoying a common citizenship depends on recognising and accepting people with all their differences, as they are. The Constitution thus acknowledges the variability of human beings (genetic and socio-cultural), affirms the right to be different, and celebrates the diversity of the nation. Accordingly, what is at stake is not simply a question of removing an injustice experienced by a particular section of the community. At issue is a need to affirm the very character of our society as one based on tolerance and mutual respect. The test of tolerance is not how one finds space for people with whom, and practices with which, one feels comfortable, but how one accommodates the expression of what is discomfiting."

In implementing the positive measures required by the Constitution and the provisions of PEPUDA, the University is required to take cognizance of other Constitutional Rights, including the right to freedom of religion. However, the right to freedom of religion cannot be used as a justification for discriminating against individuals on the basis of their sexual orientation. This means that a sexual orientation policy cannot interfere in the intensely private religious sphere, while the religious beliefs of some cannot be used as a justification for continuing to discriminate against sexual minorities. The Constitutional Court explained the need to accommodate both personal religious freedom and the duty not to discriminate as follows (*Minister of Home Affairs and Another v Fourie and Another* (CCT 60/04) [2005] ZACC 19; 2006 (3) BCLR 355 (CC); 2006 (1) SA 524 (CC) (1 December 2005) at para 94):

"In the open and democratic society contemplated by the Constitution there must be mutually respectful co-existence between the secular and the sacred. The function of the Court is to recognise the sphere which each inhabits, not to force the one into the sphere of the other. Provided there is no prejudice to the fundamental rights of any person or group, the law will legitimately acknowledge a diversity of strongly-held opinions on matters of great public controversy. I stress the qualification that there must be no prejudice to basic rights. Majoritarian opinion can often be harsh to minorities that exist outside the mainstream. It is precisely the function of the Constitution and the law to step in and counteract rather than reinforce unfair discrimination against a minority. The test, whether majoritarian or

minoritarian positions are involved, must always be whether the measure under scrutiny promotes or retards the achievement of human dignity, equality and freedom."

1.4 Definitions

Terms	Definition
Asexual	Someone who does not experience sexual attraction. Asexuality is a sexual orientation characterized by a persistent lack of sexual attraction toward any gender.
Assigned pronouns	The commonly accepted pronouns that others use to describe or refer to a person based on actual or perceived gender.
Bisexual	A person who is attracted to two sexes (usually male and female) or two genders (usually men and women), but not necessarily at the same time or equally.
Gay	A label or identity a man/boy who is attracted to other men/boys may choose for himself. It is possible for a man/boy to have sexual and romantic feelings for other men/boys but not consider himself gay.
Heteronormative/ Heteronormativity	A culture and/or belief system that assumes that people fall into distinct and complementary sexes and genders and that heterosexuality is the normal sexual orientation. A heteronormative view is one that involves the alignment of biological sex, sexuality, gender identity, and gender roles.
Heterosexism	The assumption that all people are/or should be heterosexual. Those that identify as male or female may have a heterosexual orientation. Some male or female heterosexual groups may consciously or unknowingly assert heterosexist privilege, commonly referred to as heterosexism. Heterosexism excludes the needs, concerns, and life experiences of sexually diverse people while it gives unearned advantages to heterosexual people. It is often a subtle form of oppression that reinforces the silence and invisibility of the LGBTIAQ+.
Heterosexuality	A sexual orientation specific to male or female individuals who feel attracted to like-minded people that identify with the gender binary of male or female. This definition is specific to only male and females.

	For example a bigender individual may be attracted to another gender but that does mean the person identifies as heterosexual.
Homophobia	The fear, dislike, and/or hatred of same-sex or bisexual relationships or those who love and are sexually attracted to those of the same gender, both genders, or transgender. Homophobia includes prejudice, discrimination, harassment, and acts of violence brought on by fear or hatred. It occurs on personal, institutional, and societal levels.
Homosexuality	A sexual orientation in which a person feels attracted to people of the same gender.
Inclusive Language	The use of generic language to avoid imposing limitations or assumptions on others. For example, saying "your partner" instead of "your boy/girlfriend"; in order not to impose assumptions regarding a person's sexual identity. At the core of this definition is the belief that all sexual orientations and gender identities are equally valid and that every effort should be made to include this diversity through language, imagery, teaching content, and engagement.
Lesbian	Lesbian - A label or identity that a woman/girl who is attracted to other women/girls may choose for herself. Such identities should be freely chosen and not forced onto someone by others.
Preferred or chosen pronouns	Self-selected pronouns for how an individual prefers to be referenced. While there are emerging lexicons and pronouns, it is best to ask the individual how one self-references.
Queer sexualities	In South Africa there are a variety of local terms that people use to describe their diverse sexualities. Queer in this context can be used as both an umbrella term to describe sexual or gender diversity, but also as a broad and flexible term that does not force the user to identify themselves with only one label or single out one label over another. For some people, the political use of the term queer is to signal rejection or resistance to heteronormative sex/gender/sexual identity system. Queer can also be used as an identity label to highlight intersecting struggles on the basis or gender, sexuality, race, class, culture and dis/abilities.
Safe Space	A place where people who identify within the LGBTIA+ communities feel comfortable and secure in being who they are. In this place, they can talk about the

	people with whom they are involved without fear of being criticized, judged or ridiculed for who they are. Safe spaces promote the right to be comfortable in one's living space, and work environments, despite one's personal attributes or characteristics.
Self-identifying	The term 'self-identifying' emphasises that everyone has a right to identify with one or more sexual orientation at any point in time. The term self-identity abandons the heteronormative function of having to 'declare' one's sexual orientation, in order to seek acceptance of others. Self-identification authenticates self-expression and self-acceptance while simultaneously, rejecting an imposition to be externally controlled, defined, or regulated.
Sexual orientation	A person's emotional and/or sexual and/or physical, attraction towards another person.
Structural Discrimination	Structural discrimination (also referred to as indirect discrimination) refers to practices, rules, norms and behaviours within institutions and social structures which may not explicitly refer to a person's sexual orientation or other characteristic, but nevertheless have the effect of denying rights or opportunities to members of marginalised groups, limiting the access to equal opportunities. Structural discrimination can occur both intentionally and unintentionally. The term is also used in relation to more informal practices that have become embedded in everyday organisational life and effectively become part of the system. It is important to remember that the key element in structural discrimination is not the intent but the effect of keeping populations in marginalised and subordinate positions.
UCT	University of Cape Town
UCT entity	A faculty, department, school, centre, division, group, unit, office, service, centre, or other organisational entity; an official staff or student grouping.

2. Policy summary

In support of UCT's transformation mandate, it is important that a holistic response be established to govern each functional area of the university. These areas are categorised into four sections.

1. **Teaching Practice**
2. **Communication and Media**
3. **Institutional Culture**
4. **Service Provision (training and development)**

3. Policy guidelines

Under the ambit of The Constitution of the Republic of South Africa Act 108 of 1996, the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA) and the United Nations Yogyakarta Principles of 2006 and the human rights framework applied at the University of Cape Town and enunciated above in the context of sexual orientation, this policy articulates the positive obligations imposed on UCT to give effect to its legal duties and provides guidelines for engagement by UCT staff and students in order to create an enabling environment that is sensitive to and inclusive of all sexual orientations.

4. Teaching Practice (Language use and teaching delivery)

In order to comply with the legal obligations imposed by PEPUDA academic staff and tutors are strongly encouraged to review their language and lecture content to ensure that inclusive, neutral, non-discriminatory language is being used. Examples of inclusive teaching practice would be using generic terms that do not reinforce heterosexism. For example, instead of using language that assumes every household has a mother and a father, it would be more inclusive to refer parent/s; or talk about diverse families, which will signal that heterosexual relationships are not the norm and that queer relationships or families are equally valid.

Teaching content should, where reasonably possible, include literature that reflects sexual diversity in the academic curriculum in order to provide a holistic reflection of society. HAICU will collaborate with staff to share knowledge about inclusive teaching practice and related discourse. Where reasonably possible, efforts should be made in terms of integrating literature content that can represent more than one sexual orientation. HAICU will offer workshops to staff seeking to incorporate a diverse array of queer inclusive literature into their framework of engagement and teaching.

5. Communication and Media

Under the framework of this policy, communication and media, by UCT staff, students, entities and third parties, should, where possible, adopt appropriate language, and/or imagery to promote the inclusion of all sexual orientations and related partnerships.

6. Institutional Culture

This section seeks to ensure that within the UCT administrative structures the inclusion of all sexual orientations is respectfully managed. University management has the obligation to take positive steps to change the environment. The compulsory training of student leaders must also include sensitization training in the student leadership induction programme. Orientation handbooks and related workshops should share information about UCT's commitment towards the inclusion of all self-identifying students. HAICU will offer sensitization workshops to UCT student leaders, staff and third parties to promote the inclusion of all sexual orientations.

7. Revision of policies, codes of conduct, rules and practices

In order to comply with the provisions of PEPUDA, all codes of conduct, rules and practices applicable to students and staff at UCT must be reviewed to identify seemingly "neutral" codes, residence policies, rules or practices that discriminate indirectly against individuals because of their sexual orientation. Focusing on the possible impact or effect of seemingly neutral codes, rules or practices, such a review must be conducted with the aim of eradicating indirect forms of discrimination by entities, staff and students at UCT in order to bring UCT into compliance with the PEPUDA and to avoid future litigation and to create an inclusive environment in which codes, rules or practices do not marginalise, exclude or otherwise disadvantage individuals merely because their sexual orientation does not conform with a supposedly heterosexual norm.

8. Service Provision (eg. Training and development or health care)

UCT Wellness, as an example of service provision at UCT should continue to have a progressive stance in the management of self-identifying students. The student wellness staff members are encouraged to stay abreast of health practitioner knowledge for self-identifying students on campus.

UCT should constantly strive to improve its health and wellness services in this regard to ensure inclusive sexual health care is provided.

9. Policy adherence

Failure to adhere to this policy will be deemed non-compliant. When an individual or entity within the university feels that forms of communication, conduct and/or treatment are counter to this policy they may take appropriate measures to hold the relevant persons/ units accountable via the Discrimination and Sexual Harassment Office and the Ombud. HAICU will offer safe spaces and/or educational support to affected individuals and/or entities to increase inclusion, engagement and critical reflection about sexual diversity.

10. Roles and responsibilities

Roles	Responsibilities
HIV/Aids, Policy and Implementation Committee (HAPI)	This committee is convened each quarter to discuss student and staff health and wellness, inclusion and diversity. This committee, via HAICU, will provide oversight of the policy implementation and monitoring.
HIV/AIDS, Inclusivity & Change Unit (UCT)	Programmatic implementation and research of UCT's HIV/AIDs and Inclusivity response. Development, enhancement and monitoring the areas of UCT's sexual diversity and institutional culture response. Sensitization Workshops conducted in collaboration with UCT stakeholders, that serve as educational spaces to expand awareness and promote inclusivity on UCT's campus. Consultative forums: administration and output management Policy implementation
Student Committee's and Societies	Working in collaboration HAICU, student committee's and societies will have a coordinated approach to sexualities workshops and sensitization to ensure that a unified institutional response is maintained
Orientation Committee	OCC meetings to review first year programme to ensure that resources are

Roles	Responsibilities
	appropriate and student leaders are sensitized
DVC Transformation	Policy oversight and governance

11.Related links

1. UCT Intellectual Property Policy
2. Code of Conduct
3. UCT Values: A Statement of Values for the University of Cape Town and its Members
4. UCT Policy and Rules on Internet and Email Use
5. Critical Incident Communications Protocol.
6. UCT Social Media Register (available from CMD)
7. Guidelines for the Use of Social Media (available from www.uct.ac.za)
8. UCT Sexual Offences Policy
9. UCT HIV/AIDS Policy
10. Racism and Racial Harassment Policy

Review period of the adopted Sexual Orientation policy: Every year

It is necessary to review the policy annually to keep abreast of academic practice and nascent research - in the areas of institutional responses, language and health and support services.

Version	Change type	Amendments	Approved by	Signed	Date
V.1			DVC Transformation		