**Alternative Report**

Submitted for the 121st session of the Human Rights Committee

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Young Queer Alliance

Mauritius



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# ABBREVIATIONS

|  |  |
| --- | --- |
| AABB | American Association of Blood Banks |
| AMA | America’s Blood Centres and the American Medical Association |
| AIDS | Acquired Immune Deficiency Syndrome |
| CRC | Convention on the Rights of the Child |
| CSD | Civil Status Division |
| DHQ | Donor Health Questionnaire |
| EOC | Equal Opportunities Commission |
| FDA | Food and Drugs Allied |
| GMHC | Gay Men’s Health Crisis |
| GRID | Gay Related Immune Deficiency |
| HIV | Human Immunodeficiency Virus |
| HRC | United Nations Human Rights Committee |
| IBBS | Integrated Biological and Behavioural Surveillance Survey |
| LGBT | Lesbian, Gay, Bisexual and Transgender |
| LGBTQIA | Lesbian, Gay, Bisexual, Transsexual, Queer, Intersex, Asexual |
| LRC | Law Reform Commission |
| MSM | Men having Sex with Men |
| NGO | Non-Governmental Organisation |
| NHRC | National Human Rights Commission |
| OHCHR | Office of the High Commissioner Human Rights |
| UPR | Universal Periodic Review |
| YQA | Young Queer Alliance |

# LIST OF CASES

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# EXECUTIVE SUMMARY

The present submission is prepared by the Young Queer Alliance for the consideration of the United Nations Human Rights Committee as an additional source of information to the fifth periodic report of the Republic of Mauritius (CCPR/C/MUS/5).

This alternative report, therefore, aims to:

1. shed light on actions taken by the State Party in applying the International Covenant on Civil and Political Rights;
2. draw attention on cases of deviation from the Covenant if any;
3. cater for the absence of information in replying to the HRC’s ‘List of Issues’; and,
4. cover key issues affecting the LGBTQIA community in the Republic of Mauritius.

The sources of data used in the drafting of this Report includes Hansard, Government websites, newspapers, e-news, replies and statements from institutions, and documentation and publications from Non-Governmental Organisations (NGOs). A detailed list of sources has been compiled in the ‘Reference’ section of this Report.

# 1.0 Introduction

The present report has been prepared by the Research Centre of the Young Queer Alliance (YQA) for the consideration of the United Nations Human Rights Committee as an additional source of information to the fifth periodic report of the Republic of Mauritius (CCPR/C/MUS/5).

YQA is a non-profit, non-governmental and apolitical organisation, which works against homophobia, biphobia and transphobia, and for the recognition and well-being of Lesbian, Gay, Bisexual, Transgender, Queer, Intersex, Asexual (LGBTQIA) community in Mauritius. The organisation was founded in 2014 and is open to young people aged 14 to 29 years. It counts around 50 members and more than 1500 beneficiaries from all regions across Mauritius.

Members of the YQA act on behalf of the organisation in a voluntary and unpaid capacity. People employed by the YQA on a full-time or part-time basis are remunerated from the Global Fund against AIDS. Other sources of revenue for the financing of activities of the YQA are membership fees, donations and sponsorship.

## 1.1 HRC “list of issues”, concluding observations, general comments and jurisprudence

The United Nations Human Rights Committee (HRC) has requested the State Party, i.e. the Government of the Republic of Mauritius to:

1. explain whether it has taken any measures to fight homophobia and to empower affected individuals about their rights[[1]](#footnote-1);
2. indicate whether it has taken measures to forbid discrimination based on sexual orientation or gender identity in contexts other than that of employment;
3. provide figures on complaints made to the Equal Opportunity Commission (EOC) and on investigations into any cases of discrimination based on sexual orientation and gender identity;
4. provide more information on section 250 of the Criminal Code, by virtue of which “any person who is guilty of the crime of sodomy or bestiality shall be liable to penal servitude for a term not exceeding five years” and to indicate whether the State Party plans to amend that section; and,
5. provide detailed information on the involvement of representatives of civil society and non-governmental organizations in the preparation of the State Party’s report.[[2]](#footnote-2)

It is to be highlighted that as at date,

1. Since there has been no complaints from individuals of Mauritius concerning sexual orientation and gender identity to bodies of the United Nations, there has hence, been no jurisprudence emanating from the United Nations Treaty Bodies on sexual orientation and gender identity for Mauritius (OHCHR, 2017);
2. following its consideration of the fourth periodic report of Mauritius (CCPR/C/MUS/2004/4), the HRC has issued no concluding observations, concerning sexual orientation and gender identity at its 2278th meeting (CCPR/C/SR.2278) held on 31 March 2005. Nevertheless, at the above-mentioned meeting, the HRC, regarding the ill-treatment and deaths of persons in custody and in prisons attributable to Police Officers, has:
   1. recommended to the Republic of Mauritius to ensure that investigations into all violations under articles 6, 7 and 10 of the International Covenant on Civil and Political Rights are carried out;
   2. advised that, depending on the findings of the investigations, the perpetrators of such violations should be prosecuted and compensation paid to the victims;
   3. stated that the Republic of Mauritius should ensure that the victims have access to genuinely independent bodies for investigating those complaints; and,
   4. further invited the Republic of Mauritius to provide in the ensuing report, a detailed statistics on the number of complaints against State officials, the nature of the violations, the State departments involved, the number and nature of the investigations and the action taken, as well as the compensation granted to the victims.[[3]](#footnote-3)
3. in its General Comment No. 35 (HRC, 2017), the HRC has, in respect to Article 9 of the International Covenant on Civil and Political Rights, explained that the Article guarantees the right to the security of persons – including lesbian, gay, bisexual and transgender persons. The right to security of person protects individuals against intentional infliction of bodily or mental injury, regardless of whether the victim is detained or non-detained. This right obliges States parties to, *inter alia*, take measures to prevent future injury and to take measures in response to past injury such as by enforcing criminal laws or for example, by responding “appropriately to patterns of violence against categories of victims such as […] violence against persons on the basis of their sexual orientation or gender identity”; and to take appropriate measures in response to death threats against persons in the public sphere.

## 1.2 The State Party’s Reply

The State Party, in its reply[[4]](#footnote-4) to the “list of issues”,

1. stated that one legislative measure has been taken through the Equal Opportunities Act 2012 to prevent discrimination including on the grounds of sexual orientation;
2. informed that since the Equal Opportunities Act 2012 binds the State, changes can be effected in form of changes in policies and regulations or even amendments to existing acts;
3. gave a tabular breakdown of cases on the grounds of sexual orientation at the EOC;
4. gave a brief on Section 250 of the Criminal Code of Mauritius (point 50);
5. mentioned probable unspecific amendment to the Criminal Code to provide for a better legal framework for dealing with sexual offences (point 51);[[5]](#footnote-5) and,
6. reported at paragraph 102, that the preparation of the periodic reports on all Human Rights Conventions, including that of the Covenant was prepared in consultation with all the stakeholders, including representatives of the civil society and non-governmental organisations.

However, the State Party

1. **did not respond** to the request made by the HRC, in particular, measures taken *per se* by the State Party, to fight homophobia and measures taken to empower the victims of homophobia about their rights;
2. did not indicate whether it has taken measures to forbid discrimination based on sexual orientation or gender identity in **contexts other than that of employment**;
3. has remained evasive on the nature of investigations into any cases of discrimination based on sexual orientation and gender identity at the EOC;
4. provides a misconstrued and unsubstantiated brief on Section 250 of the Criminal Code of Mauritius (point 50);
5. gives no information with regards to the amendment and/or decriminalisation of sodomy through repealing of Section 250 of the Criminal Code;
6. does not provide information as to whether amendment to Criminal Code in State Party reply point 51 consists of decriminalisation of consensual sodomy among of age of consent persons;
7. provides no details regarding measures taken to empower affected individuals about their constitutionally guaranteed rights as per ***Articles (3), (5) and (9)*** of the Constitution of Mauritius;
8. submits no information on measures to include gender identity and expression in legislations and policies;
9. makes no mention of the harmonisation of legislations in a non-discriminatory manner on equal age of consent for consensual sexual-acts among persons of any sexual orientation or gender identity;
10. gives no information with regards to gender identity and gender expression as requested; and,
11. has failed to provide detailed information of the involvement of all the stakeholders involved, including representatives of the civil society and of non-governmental organisations, in the preparation of the Report.

## 1.3 YQA’s Response

The YQA would like to bring to the attention of the HRC that (a) as an organisation that is officially and legally registered with the Registry of Association since the year 2014 and having one of its main objectives, to advocate for LGBTQI rights and promote better conditions for LGBTQI persons; (b) as an organisation that is actively involved in the fight against homophobia, biphobia and transphobia, and for the recognition and well-being of the LGBTQIA community in Mauritius and which is regularly liaising with different governmental bodies, it was at no point approached by the State Party or involved in the preparation of its report.

The absence of detailed information on the involvement of representatives of civil society and non-governmental organizations in the preparation of the State Party’s report demonstrates that the report was prepared in an arbitrary and unilateral manner.

For the purpose, this Report will examine five specific areas as follows:

1. violence and hate speech against persons based on their sexual orientation and gender identity;
2. blood donation;
3. marriage equality/ civil partnership; and,
4. decriminalisation of consensual same-sex sexual acts among people of age of consent.

# 2.0. Violence and hate speech against persons based on their sexual orientation and gender identity (Article 2, Article 9, Article 16, Article 17, Article 20, Article 23)

## 2.1 Background

Violence due to homophobia and transphobia is a lived reality for many LGBT persons living in Mauritius. The YQA recently carried out a survey[[6]](#footnote-6) on the *“Socio-economic conditions of LGBT people in Mauritius”* (YQA, 2017). The aim of the survey was, *inter alia*, to understand how LGBT rights and queer youth issues can better be addressed in the Republic of Mauritius

An alarming 60.2% of respondents of the survey reported being victims of discrimination, stigmatisation and/or violence due to their sexual orientation and/or gender identity. Furthermore, from among the top five priorities proposed to be included on the LGBT agenda in Mauritius during the next five years, protection from violence, hate crimes and discrimination (61.0%) was ranked as second priority by respondents while anti-bullying policies at schools/universities was voted as the third priority (58.8%) by the respondents, hence, depicting the actual need faced by LGBT persons in Mauritius.

Respondents reported that cases of violence against them as a result of their sexual orientation and/or gender identity occur in various spheres of the society but mainly at home, in schools, in public transport and on the streets. Few respondents reported that such cases of violence occur in universities, at workplaces, at hospitals or at police stations.

Two such cases are reported in the boxes below.

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| **Case 1: Witchcraft**  On the 11 June 2016, a young person named David was referred to the YQA for emergency sheltering because he was kicked out of his house due to his homosexuality.  David narrated the situation to the YQA. An extract is reproduced below:  *“I was kicked out of the house when my parents got to know that I am homosexual. My family is quite religious and they believe that they could exorcise ‘homosexuality’ from my body. My grandmother practiced ‘witchcraft’ on me and I became depressed.*  *Since they could not change my homosexuality, I was kicked out of the house.*  *I stayed in Mandirs and slept on the cold floor for some days. On other days, I slept on the beaches without any roof over me. A friend got to know of my situation and referred me to the Young Queer Alliance for support since he learnt that YQA was providing emergency sheltering…”*  YQA followed the admission procedures to offer emergency sheltering to David, who was the first young LGBT person to be a shelter beneficiary, thereat. David joined the shelter on 12 June 2016.  Young people organised to provide David with clothing and food. David stayed at the shelter until YQA was able to ensure that he had a job and could cater for his basic needs without any support.  **Note:**   1. *Names and identifying details have been changed to protect the privacy of individuals and ensure their security.* 2. *The narration was done by David in creole, the local language spoken in Mauritian. The translation has been done by YQA as accurately as possible.* 3. *A ‘Mandir’ is a Hindu temple.* |

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| **Case 2: Hate speech at Gay Pride 2017**  On 03 June 2017, the 12th edition of the Gay Pride was celebrated in Mauritius. The event was marked by the presence of some 20 anti-LGBT supporters who acted violently towards the LGBT persons present at the march.  Despite the presence of the Police Force to deter violent actions, some altercations occurred between the anti-LGBT supporters and people who formed part of the Gay Pride.[[7]](#footnote-7)  As at now, no legal sanctions have been taken against the anti-LGBT supporters who acted violently. |

The findings of the above-mentioned survey is corroborated by the results of the “Integrated Biological and Behavioural Surveillance Survey (IBBS) for Men having Sex with Men (MSM)” conducted in 2012 by the Ministry of Health and Quality of Life and other stakeholders of the Republic of Mauritius, which reports that 80% of MSM are victims of verbal harassment and around 10% of MSM are victims of physical abuse.

In addition to the above, human rights defenders and organisations are also the targets of hate crimes as a result of their work of defending the rights of LGBT persons. A case of a death threat (among others) received by the President of YQA is detailed in the Box below.

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| **Case 3: Death threats against the President of YQA in 2014**  During the last months of the year 2014, a local newspaper, “5-plus” published an interview of the N. A. F., President of the YQA on homosexual rights in Mauritius.[[8]](#footnote-8) This interview led to an escalating number of online threats against the interviewee.    On the 18 November 2014, the interviewee was contacted by the Collectif Arc-en-Ciel which proposed to alert the media and politics about the death threats and to advocate around the need for homophobia to be considered as aggravating circumstances for hate crimes.    On the 19 November 2014, a representative from Human Dignity Trust sent an e-mail to the interviewee to inform that they had obtained news of the death threats against the President of the YQA during their media scans. The Trust proposed to help in case the concerned person required emergency aid. |

Furthermore, on the 29January 2017, an e-mail was sent to the Minister of Public Infrastructure and Land Transport, and some of its staff to tarnish the image of N. A. F., President of the YQA. **Despite several staffs of the Ministry being in copy of the e-mail, no action were taken**.

The findings and cases at section 2.1 above clearly demonstrate the need for concrete actions to be taken by the Government of the Republic of Mauritius in applying the International Covenant on Civil and Political Rights.

## 2.2 Equal Opportunities Commission (EOC)

The Republic of Mauritius has undertaken a legislative measure with the enactment of the Equal Opportunities Act in 2012 to prevent discrimination including on the grounds of sexual orientation. However, this is not tantamount to either measures taken to fight homophobia or to measures taken to empower the victims of homophobia about their rights.

As highlighted by the State Party in its report, “an act of discrimination would mean a less favourable treatment suffered by any individual”. An act of homophobia, on the other hand, would be defined as prejudice against LGBT persons. Homophobia often has the potential consequence of leading to hate crimes. Therefore, LGBT persons, who have been victims of discrimination as a result of homophobia, may refer their case to the EOC, which, may after investigation, make such recommendations for redress and to empower the victim’s rights. However, LGBT persons, who have been victims of homophobic acts, for example bullying on social media as a result of that person’s sexual orientation and/or identity, would not be able to seek protection or redress from the EOC.

It can, therefore, be concluded that only partial protection is being provided against homophobia in specific cases, which is contrary to the spirit of Article 9 of the International Covenant on Civil and Political Rights therefore. The State Party has, hence, failed to provide adequate protection to individuals against intentional infliction of bodily or mental injury, by enforcing criminal laws.

## 2.3 Complaints received at the Equal Opportunities Commission

The State Party has provided a tabular breakdown of complaints received at the level of the EOC, on the basis of on sexual orientation for the period from January 2014 to April 2017. However, the breakdown provided is only descriptive and does not serve the purpose of examining whether concrete actions have been taken, whether progress has been achieved, whether homophobic actions have been fought, whether victims of homophobia empowered about their rights or the rights of LGBT persons better protected.

Of the data provided, it should also be highlighted that the State Party has provided no information with regard to:

1. the number of complaints received whereby the complainant has been victim of homophobia;
2. the nature of the complaints received;
3. the status of each of the complaint filed;
4. recommendations made by the EOC for each of the complaint;
5. action taken by concerned institutions following the recommendation of the EOC and time taken for actions to be implemented;
6. action taken by the EOC in cases where recommendations made have not been implemented; and,
7. details as to how the victims have been empowered about their rights.

## 2.4 Amendment of the Criminal Code Act 1838

The definition of “racial hatred” adopted by section 282 of the Criminal Code Act 1838 of Mauritius is based on social group as follows:

*“Any person who, with intent to stir up contempt or hatred against any section or part of any section of the public distinguished by* ***race, caste, place of origin, political opinions, colour or creed*** *- ”* [emphasis added]

The above definition is clearly restrictive, has a limited scope and is outdated. By simple definition, hate crimes, are criminal acts that are motivated by hatred or prejudice against an individual or a group because of their membership to a particular social group. The Criminal Code Act 1838, however, makes no mention of ‘sexual orientation’ or ‘sexual identity’ as a social group. Hence, hate motive or prejudiced opinion as the basis of criminal acts against an individual based on their sexual orientation and gender identity cannot be considered as an aggravating factor for criminal sentences under the Criminal Code Act 1838.

Due to the absence of laws to protect LGBT people from hate crimes, coupled with the lack of political and institutional trust, ostracism, family repercussions and high levels of stigma and discrimination towards people due to their sexual orientation and/or gender identity, cases where LGBT people are victims of hate crimes are not reported at police stations.

Furthermore, often, where law enforcing officers or enforcement agencies are aware of open-cases, they do not act due to legislative failures. A case of discrimination against persons based on their sexual orientation and/or identity is depicted in the Box below.

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| **Case 4: Mental depression faced by Vikram**  In November 2016, a young gay person named Vikram was admitted at a national hospital as he was suffering from mental trauma. At the hospital, Vikram confessed to the healthcare officers that he is gay. A Hindu female personnel working at the said hospital told him that if she were gay, she would have committed suicide. This added to the mental trauma of Vikram. The adverse situation of Vikram was confirmed by one of the contacts of the YQA who works at the hospital.    Vikram’s father wanted to disown him from the family inheritance due to his sexual orientation, although the former was still dependent on the family for a living. He became a victim of verbal abuse and harassment at his house, and these often led to heated and violent discussions.  Around February 2017, the YQA visited Vikram following a call from the latter’s father. There was in fact another heated discussion at Vikram’s place. The visit occurred on a Sunday afternoon. After nearly three hours of lengthy family counselling, matters settled and Vikram felt emotionally more stable.  Today, Vikram’s family accepts his sexual orientation and they are supportive of his choices.  **Note:**   1. *Names and identifying details have been changed to protect the privacy of individuals and ensure their security.* |

Complete and adequate measures have thus, not yet been taken by the State Party to fight homophobia and to empower affected individuals about their rights.

The amendment of Section 282 of the Criminal Code Act 1838 of Mauritius that would recognise hate crimes fuelled by homophobia, would be one concrete measures that the Government of the Republic of Mauritius could take to fight homophobia. Such an amendment would

1. act as a security blanket to LGBT persons who might be victim of homophobia;
2. send a strong message to potential perpetrators against any hate crime fuelled by homophobia; and,
3. ensure that hate crimes committed as a result of homophobia would be sentenced appropriately under sections of the law that deal specifically with the subject matter and incur equivalent punishment, hence, bringing justice to victims.

## 2.5 Brutality by Law Enforcement Agencies

The YQA has conducted training sessions with Police Officers to introduce to, and sensitise law enforcement officers about, concepts such as sexual orientation and gender identity, in a bid to ensure that LGBT persons seeking assistance of Police Officers are treated with dignity, without discrimination and in a non-homophobic manner.

However, it was felt that in several cases, Police Officers remain non-conversant with human rights issues of sexual orientation and gender identity and they have their own stereotypes, prejudices and negative attitudes towards LGBT people. Furthermore, non-recognition by state of people of “other genders” than male and female bar these persons from having equal recognition and treatment before law and is in violation with Articles 16 and 17 of the Covenant. Case 5 depicts such an instance whereby a complaint of police harassment and brutality against a transgender person which occurred at a police station, was filed at the National Human Rights Commission. The case was widely reported by the local media.

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| **Case 5: Transgender Person - Giovani and Police Brutality**    *Le Defi*, a local newspaper, reported that on 19 September 2016, a transgender person named Giovani was insulted, humiliated and brutalised by the Central Investigation Division of Quatre Bornes and the Police Officers of Sodnac. The person, who worked as peer educator for the organisation Association VISA G, reported being unjustly arrested.    Giovani narrated that at the police station, Police Officers asked him to undress himself for corporal search. Police Officers thereafter, asked Giovani to do a sort of “top-model” walk and rubbed the police stick in between his thighs. Association VISA G working for transgender persons in Mauritius condemned this attitude.  On 16 September 2016, Giovani made a complaint at the National Human Rights Commission for insults, humiliation and police brutality.    The U.S. Department of State further reported that Police Officers “arrested a young transvestite allegedly for no reason. Police took the victim to the Sodnac police station where police strip searched him and forced him to parade naked in front of Police Officers who mocked him. The victim filed a complaint with the NHRC, and at year’s end the investigation was ongoing.”    **Sources:**   1. *United States Department of State, 2015, pg. 15* 2. *Defimedia,* <http://webtv.defimedia.info/2015/09/19/humilie-il-porte-plainte-le-travesti-lapolis-fer-mwa-mars-touni-dan-stasyon> |

Prejudice, stereotypes, legislative failures, stigmatisation, homophobic political and religious discourses and discrimination do not trigger proper investigation (if any) of such crimes. Law enforcement agencies do not necessarily recognise hate crimes towards LGBT persons as existent and do not have any programs of prevention of hate crimes against LGBT people. Despite the few short-term training courses that the YQA delivered to Police Officers, to our knowledge, no special training package has been contemplated at the level of the police department and the State does not document any statistics on hate crimes based on sexual orientation and gender identity.

In its report, the State Party has not provided any information regarding information and status update on the complaint filed at the National Human Rights Commission on the alleged police brutality against the transgender person; and any information on measures to include gender identity and expression in legislations and policies. Furthermore, the State Party has not provided a detailed statistics on the number of complaints against State officials, the nature of the violations, the State departments involved, the number and nature of the investigations and the action taken, as well as the compensation granted to the victims[[9]](#footnote-9), as requested by the HRC at its 2278th meeting (CCPR/C/SR.2278) held on 31 March 2005, regarding the **ill-treatment** and deaths of persons in custody and in prisons attributable to Police Officers.

In the absence of such crucial information, the YQA is not in a position to advance whether in respect to the case of Giovani as per Case 5 above, and in respect to any other case,

1. the State Party has taken any measures to fight homophobia and to empower affected individuals about their rights;
2. the State Party has duly implemented the recommendations made by the HRC, at its 2278th meeting (CCPR/C/SR.2278) held on 31 March 2005, regarding the **ill-treatment** and deaths of persons in custody and in prisons attributable to Police Officers, as follows:
   1. that investigations into all violations under articles 6, 7 and 10 of the International Covenant on Civil and Political Rights are carried out;
   2. that, depending on the findings of the investigations, the perpetrators of such violations should be prosecuted and compensation paid to the victims; and,
   3. that the victims have access to genuinely independent bodies for investigating those complaints.

It should nevertheless be highlighted that, however few they might be, the YQA has narratives of LGBT persons recounting instances where Police Officers have acted in solidarity with them.

## Recommendations by Other Institutions

In 2009, during the first Universal Periodic Review (UPR), the Collectif Arc-en-Ciel, a Non-Government Organisation based in Mauritius that fights against homophobia and the various forms of discrimination linked to sexual orientation, reported cases of violence perpetrated against LGBT persons, namely, hate speech, illegal confinement by parents, physical threats and attempt of being confined to a mental institution.[[10]](#footnote-10)

In 2013, Geoffrey Robertson, Queen’s Counsel to the Privy Council, submitted a preliminary report entitled “Media Law and Ethics in Mauritius” wherein he proposed that hate speech in the media targeting, *inter-alia,* sexual orientation be made an offence under Mauritian laws.[[11]](#footnote-11)

In 2016, the Law Reform Commission (LRC) of Mauritius, in its Interim Report on “Reform of Criminal Code” suggested that Section 282 of the Criminal Code of Mauritius be revised to include sexual orientation as a social group on aggravating circumstances grounds.[[12]](#footnote-12)

## Recommended Questions

The YQA recommends that the following specific questions be put to the State Party:

1. to inform whether the he State Party considers the LGBT people as a social group;
2. in the event LGBT people are considered as a social group by the State Party, whether violence against the LGBT people is punished as a crime committed with aggravating circumstances under Section 282 of the Criminal Code of Mauritius;
3. provide details about the number of reported cases of discrimination and violence against LGBT persons which have been registered by the State Party in the past five years;
4. inform of measures taken by the State Party to protect LGBT people from violence;
5. submit details of the status of the investigation carried out by the NHRC of Mauritius on the “police brutality against transgender person” dated 2015 and outcomes thereof; and,
6. inform of steps that have been taken by the State Party to include sexual orientation and gender identity in the Mauritian legislations, as per the recommendations made by the LRC of Mauritius in its 2016 Interim Report on “Reform of Criminal Code”.

## Recommendations

The YQA recommends the following in respect to actions to be taken by the State Party:

1. the State Party should amend the Criminal Code 1838 of Mauritius and any such other legislation as may be applicable, by inserting direct indication of the hate motive against people based on their real or perceived sexual orientation, gender identity and gender expression as aggravating circumstances;
2. the State Party should maintain a database of hate crimes committed against vulnerable groups, including against LGBT people, with key details such as the qualification of the case, the timing of its consideration, the results of the investigation and punishment to the perpetrators;
3. amend the Constitution of Mauritius and such other legislations as may be applicable, by inserting direct indication of the recognition of the “other gender” and of their rights;
4. provide the possibility of “gender change” on documents change for transgender people;
5. the State Party should develop and implement policies and programmes (e.g. training courses) for public officers and law enforcement officers to address cases of hate crimes towards LGBT persons; and,
6. the EOC and the NHRC should, in their annual reports, publish a list of cases relating to the LGBT persons, if any, with details such as the status of the matter under consideration, recommendations made and status of implementation of recommendations.

# Blood donation ban (Article 2, Article 26, Article 27)

## 3.1 Background

Since 1977, under the Food and Drugs Allied (FDA) policy, those who practice same-sex relations across the globe are consistently barred from donating blood. The Human Immunodeficiency Virus (HIV), formerly known as the Gay Related Immune Deficiency (GRID) or the gay plague in the 1980s, has been a matter of public health safety concern. With lack of information around the HIV epidemic, the ban on homosexuals to donate blood has since, been maintained by the FDA.

With increased scientific research, in-depth understanding of HIV and the Acquired Immune Deficiency Syndrome (AIDS), and technological and medical advancement, public health systems have developed more comprehensive, effective and efficient detection, prevention and treatment methods around HIV. Countries such as Argentina, Brazil, Canada, South Africa and the United Kingdom amongst others have thus, either engaged in a complete lifting on the ban on homosexuals from donating blood or have adopted a partial ban through time-deferral.

The removal of the ban in Mauritius however, took longer to be implemented. The question *“Are you/were you engaged in homosexual activity?”* figured on the Donor Health Questionnaire (DHQ) which was administered by the Ministry of Health and Quality of Life to all individuals as a pre-screening prior to blood donation in the Republic of Mauritius. As a result, individuals who revealed having been engaged in homosexual activity in the questionnaire, were banned from donating their blood.

Following the passing of the Equal Opportunities Act 2012, the YQA lodged a complaint at the EOC regarding the inherent discrimination present in the DHQ, against LGBT persons based on their sexual orientation and gender identity. Further details on the case are provided at *Case 6: Blood Donation* below.

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| **Case 6: Blood Donation**  In June 2012, a complaint was, thus, lodged at the EOC against the Blood Donors Association and the Ministry of Health and Quality of Life, whereby, the complainant (N.A. F.) alleged that by being permanently disqualified from donating blood, he was discriminated against on the basis of his sexual orientation.  The complainant further alleged that part of the questionnaire discriminated against homosexuals as a group of persons and also stigmatised them as having ‘dirty blood’ as compared to heterosexuals.  The EOC reported that in most developed countries, emphasis was laid on a “certain sexual activity” as opposed to targeting a “certain group of individuals” and concluded the following;  *“The Commission accordingly found that the questionnaire used by the Blood Donors Association for blood donation in Mauritius* ***discriminates against homosexuals in Mauritius****.”[[13]](#footnote-13)*  The matter was resolved on 19 November 2014 through conciliation. T**he alleged discriminator conceded that the wording of the questionnaire violated the Equal Opportunities Act 2012**. |

The Ministry of Health and Quality of Life duly amended its policy and website in 2013 to indicate that individuals who have had same-sex sexual activity could donate blood. Subsequently, in 2014, the complete ban on homosexuals donating their blood was successfully changed to a partial ban on MSM donating their blood. This was hence, the first-ever successful case to be lodged at the EOC pertaining to sexual orientation.

There are anecdotal reports, however, that health officials still prevent LGBTI persons from donating blood (US Department of State, 2015: 15).

Despite a win on the above case, the YQA believes that statically, blood donated by MSM does not pose a higher risk of contracting HIV than blood donated by individuals other than MSM of the Republic of Mauritius.

In the year 2014, the YQA wanted to conduct a blood drive. As per established procedures, the YQA sought and obtained the required authorisation from the Ministry of Health and Quality of Life to conduct the blood drive. However, upon the understanding that the YQA works with homosexuals, the concerned Ministry withdrew the authorisation to conduct the blood drive without providing any justification.

The matter was in 2014, laid before the EOC. The case was discarded in the year 2016 on the grounds of public health and safety concern. The YQA believes that the decision was taken contrary to the spirit of the Equal Opportunities Act 2012. Furthermore, the Commission in its report of findings, wrote: *“Complainant is the President of an entity known as Young Queer Alliance (YQA) which, we understand, regroup, defend and promote the rights of persons who* ***have chosen to be different from others in terms of their sexual orientation”****…”*[emphasis added].

The choice of the words used by the EOC in its official report, in particular, the section “have chosen”, is suggestive of the fact that the EOC has not taken the said decision in a rational and objective manner, true to the spirit of the Act under which it operates. Rather, the choice of words used by the institution evidences that the decision taken by the EOC was influenced by the bias, prejudices and values of those at decision-making level of the said institution.

Additionally, it may reasonably be suggested that due diligence may not have been carried out in the said case in view of the fact that prior to reaching to the conclusion that **‘persons choose to be different from others in terms of their sexual orientation’**, the EOC should have properly documented itself. The YQA has addressed a letter to the Government of Mauritius to request that the EOC is impartial in the discharge of its duties.

The above clearly demonstrates that when public institutions are governed by officers who are partial and have prejudices against social groups, such institutions, which should act as watchdogs against abuses of human rights, impede and deny access to justice, especially towards vulnerable persons and small human rights organisations working to defend and promote the interests of LGBT people.

In the case of the ban on blood donation, it is thus, to be concluded that the State Party did not take adequate measures to forbid discrimination based on sexual orientation or gender identity in contexts other than that of employment. Furthermore, in discarding the case on the blood drive in the year 2016, the EOC became party to an unjust decision that was taken by the State Party and in so doing, it acted contrary to the spirit of the Equal Opportunities Act 2012.

## 3.2 Recommendations by Other Institutions

Gay Men’s Health Crisis (GMHC), the American Association of Blood Banks (AABB), the Red Cross, and the America’s Blood Centres and the American Medical Association (AMA) have proposed that instead of a ban targeting people, the ban should be targeted towards risk behaviours.

## 3.3 Recommended Questions

The YQA recommends that the following specific questions be put to the State Party:

1. to provide details about measures taken by the State Party to ensure transparency of hearings at the EOC;
2. to provide details regarding measures taken by the State Party to ensure apolitical, impartial and fair appointment of the Chairperson and members to the Board of the EOC; and
3. to provide specific details about changes in policies and/or regulations that the State Party has taken or intends to take to ensure that the deferral of blood donation is not geared specifically towards specific persons, i.e. “*Male donors: have you had oral/anal intercourse with another male?”* but is instead targeted towards risky sexual behaviour.

## 3.4 Recommendations

The YQA recommends the following in respect to actions to be taken by the State Party:

1. amend the Equal Opportunities Act 2012 to ensure that the appointment of the Chairperson to the EOC is made by the President acting on advice of **both** the Prime Minister and the Leader of the Opposition;
2. amend the Equal Opportunities Act 2012 to ensure that a Jury of Peers is present at all mediation and conciliation hearings in an Observer capacity and is empowered to provide expert opinion to ensure fairness and transparency during hearings;
3. amend the Equal Opportunities Act 2012 to ensure that recommendations provided by the EOC are fully justified and supported by concrete evidence; and
4. amend the Donor Health Questionnaire used by the Ministry of Health and Quality of Life of the State Party by replacing the sentence “*Male donors: have you had oral/anal intercourse with another male?”* with the sentence *“During the past six months, have you engaged into unprotected anal or oral sex with another person?”,* in order to ensure that MSM are not stigmatised.

# 4.0 Marriage equality/Civil partnership (Article 2, Article 14, Article 23, Article 26, Article 27)

## 4.1 Background

Both marriage and civil partnership are legally or formally (resulting from religious or social norms) recognised unions between people as partners. States recognising marriages and/or civil partnerships between its citizens with citizens from other countries ensure that the social, cultural and economic benefits enjoyed by these persons are maintained. These benefits range from rights to housing, spousal social benefits, social-security for spouses, inheritance rights, pension, insurances, loans and institutional rights and benefits. People who do not have these rights to enter into marriage and/or civil partnership are thus, in a disadvantageous position as they do not enjoy the same benefits and rights.

Legal provisions relating to marriage or civil partnership in the Mauritius are as follows:

1. the Civil Status Act 1982 of Mauritius defines ‘marriage’ as civil or religious marriage between two persons but it does not define ‘spouse’ as a person married to another person of another sex;
2. section 5 of the Interpretation and General Clauses Act 1974 states that “… w*ords importing the masculine shall include the feminine and the neuter…”;*
3. the Equal Opportunities Act 2012 defines ‘spouse’ as “*…in relation to a person, means the person to whom he is, or has been, civilly or religiously married…”*; and
4. the Protection from Domestic Violence (amendment) Act 2016 defines ‘spouse’ as “…*a person who has been civilly or religiously married to a person of the opposite sex.”*

According to a recent survey[[14]](#footnote-14) carried out by YQA with on the “Socio-economic conditions of LGBT people in Mauritius” (YQA, 2017), from among the top five priorities to be included on the LGBT agenda in Mauritius during the next five years, **civil partnership/marriage equality was chosen as the first priority** by respondents (73.1%) **while adoption rights was voted their fourth priority** (56.6%), thus, showing the need for a family life by people of the LGBT community.

## 4.2 Registration of same sex marriage in Mauritius

The Civil Status Division (CSD) operates under the *aegis* of the Prime Minister’s Office of the Republic of Mauritius and is responsible for offering services such as the registration of births, deaths, marriages and other matters relating to the civil status of persons in Mauritius and for the issue of civil status certificates.

On 27 July 2015, the CSD of the Republic of Mauritius refused to register the marriage of two same-sex individuals on the basis that the laws of Mauritius do not recognise marriage between people of same-sex.

By refusing to register the marriage of LGB (Lesbian, Gay and Bisexual) persons, the CSD becomes responsible of an alleged case of violation of the Equal Opportunities Act 2012, with strong arguments of non-definition of spouse and marriage as persons of different sexes.

The refusal of the CSD to register the marriage of two persons of the same sex was lodged as a complaint at the EOC in the year 2015. In 2016, the newly-appointed Chairperson[[15]](#footnote-15) of the EOC stated that same-sex marriage is not recognised under Mauritian law and a formal reply was issued to the complainant stating that the State does not recognise same sex marriage. Further details are at Case 7 below.

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| **Case 7: Marriage Equality case at the Equal Opportunities Commission**  **27July 2015:** A same-sex couple (aged 21 and 25 respectively) went to the Civil Status Division of Mauritius to get their marriage registered. The same-sex couple was accompanied by two persons who are also activists in the LGBTQI struggle in Mauritius.  **27July 2015:** Upon refusal of their marriage to be registered, the couple and the two persons who accompanied them filled separate complaints at the EOC, regarding direct and indirect discrimination committed against them on the basis of sexual orientation.  **11 August 2015:** The EOC acknowledged the complaint of one of the same-sex partner.  **26 August 2015:** The EOC acknowledged the complaint of the other partner.  **14 October 2015:** The couple had a hearing on the case that they had respectively lodged.  **07 June 2016:** The EOC replied to the case stating that:  *“2. An examination of your complaint has revealed that same does not comply with section 30 of the Equal Opportunities Act as there is no provision in our laws for civil marriage of two persons of the same sex.*  *3. Consequently, we are not in a position to pursue this matter any further.”*  **16 July 2016:** One of the partners replied to the EOC stating that: *“I wish to inform your commission that the complaint has not been resolved.”* |

The Republic of Mauritius posits itself as the crossroad for the economic and tourism sectors for Asian countries, the African Continent and Europe. In this context, it is to be expected that same-sex couples in a civil partnership or married couples come to Mauritius for business, leisure or tourism activities. **In parallel, YQA has reports of the non-registration by the CSD LGBT Mauritians citizens have also migrated to other countries whereby civil partnership and marriage between same sex couples are recognised.**

The former British High Commissioner posted to the Republic of Mauritius was accompanied by his partner. He was “openly gay and attend[ed] official functions with his husband as his civil partner (Office of the Director of Public Prosecutions, April 2017: 2).

On the basis of the above, the YQA therefore, advances that the State Party has not taken appropriate and adequate measures to forbid discrimination based on sexual orientation or gender identity in contexts other than that of employment. Rather, it has ensured, through the amendment of existing legislations[[16]](#footnote-16), the legal discrimination against people on the ground of their sexual orientation.

## 4.3 Recommendations by Other Institutions

In 2009, during the first UPR, the Collectif Arc-en-Ciel recommended that in the light of the introduction of the Equal Opportunities Bill (2008), it was hoped that the bill shall allow for the legal acknowledgement of homosexual couples and their equal rights concerning adoption, inheritance rights and procedures, medical and social advantages, taxes, etc.[[17]](#footnote-17)

In 2013, during the second UPR, the State Party noted that the United Kingdom urged the Republic of Mauritius to take further measures to prevent discrimination based on sexual orientation, and that the Equal Opportunities Act allow legal acknowledgement of homosexual couples and their human rights.

## 4.4 Recommended Questions

The YQA recommends that the following specific questions be put to the State Party:

1. to request statistics and details from the State Party regarding the number of cases of demand to register same-sex marriage in Mauritius at the CSD;
2. details about measures taken by the State Party to ensure that provisions of the Equal Opportunities Act 2012 are upheld with regards to marriage equality in terms of provision of non-discriminatory services by government institutions and bodies;
3. measures taken by the State Party to provide equal and non-discriminatory treatment to LGBT persons in terms of their right to form a civil union without prejudice towards their sexual orientation;
4. clarify whether the State Party recognises the civil statuses of foreign persons (non-citizen to non-citizen marriages and/or civil partnership or non-citizen to citizen marriages and/or civil partnership) coming to its country, including details about the parenting, child, civil partnership and spousal status;
5. details about measures taken by the State Party to amend the Protection from Domestic Violence (amendment) Act 2016 in order to recognise marriage and/ or civil partnerships of same-sex couples in the definition of ‘spouse’ - including all LGBTQIA relationships in order to provide protection for all under this grouping – despite correspondence sent to the parent Ministry to include same-sex couples;
6. provide details about measures taken by the State Party to ensure transparency of hearings at the EOC;
7. provide details regarding measures taken by the State Party to ensure apolitical, impartial and fair appointment of the Chairperson and members to the Board of the EOC; and,
8. details about steps taken by the State Party to include sexual orientation and gender identity in Mauritian legislations, in the light of, *inter-alia*, recommendations made at section 4.3 above.

## 4.5 Recommendations

The YQA recommends the following in respect to actions to be taken by the State Party:

1. enact a civil partnership legislation that would enable LGBT persons to enter into civil partnership and enjoy the same rights and benefits as married couples of the opposite sex;
2. change policy/regulations at the CSD so that marriage and/or civil partnership between same-sex individuals (citizens and/or non-citizens) are recognised and subsequently, registered;
3. amend the Protection from Domestic Violence (amendment) Act 2016 in order to recognise marriage and/ or civil partnerships of same-sex couples in the definition of ‘spouse’;
4. amend provisions of the Equal Opportunities Act 2012 to ensure that the appointment of the Chairperson to the EOC is made by the President acting on advice of **both** the Prime Minister and the Leader of the Opposition; and
5. amend provisions of the Equal Opportunities Act 2012 to ensure that a Jury of Peers is present at all mediation and conciliation hearings in an Observer capacity and is empowered to provide expert opinion to ensure fairness and transparency during hearings.

# 5.0 Decriminalisation of consensual same-sex sexual acts among people of age of consent (Article 2, Article 17, Article 24,)

## 5.1 Background

In Mauritius, there is no law *per se* which criminalises the identity of being a homosexual. However, the Equal Opportunities Commission Interim Report 2012 states that homosexuality, that is sodomy, is illegal.

Section 250 of the Criminal Code 1838[[18]](#footnote-18) of Mauritius makes reference to ‘Sodomy’ and ‘Bestiality’, which have been amalgamated together under a single section and is hence, suggestive of the fact that the two acts, through different are being treated as being of similar severity.

According to the US Department of State (US Department of State, 2015), the law in Mauritius does not specifically criminalize consensual same-sex sexual activity. However, it criminalizes sodomy among both same-sex and heterosexual couples.[[19]](#footnote-19)

The age of consent for consensual sexual acts varies in many countries. In Mauritius, the age of consent is 16 years (Sexual Offences Act 2003). This is viewed as being controversial in light of the facts that

1. Mauritius is signatory to the Convention on the Rights of the Child (CRC), which defines a 'child' as a person below the age of 18, unless the laws of a particular country set the legal age for adulthood younger, but which nevertheless encouraged States to review the age of majority if it is set below 18 and to increase the level of protection for all children under 18; and,
2. there is lack of harmonisation of local laws such as the Sexual Offences Act 2003 and the Child Protection Act 1995 of Mauritius, in so far as age of consent and provisions of the CRC are concerned.

The Constitution of Mauritius guarantees the following:

1. ***Article 3:*** Fundamental rights and freedoms of the individual *“…the right of the individual to protection for the privacy of his home and other property…”*;
2. ***Article 5:*** Protection of right to personal liberty; and
3. ***Article 9:*** Protection of privacy of home and other property *“(1) Except with his own consent, no person shall be subjected to the search of his own person or his property or the entry by others on his premises..”*

Section 250 of the Criminal Code of Mauritius is in itself unconstitutional as it goes against ***Articles (3), (5) and (9)*** of the Constitution of Mauritius in so far as, sodomy, as long as it is conducted between consenting adults, is a matter of freedom and privacy of these individuals. The State, therefore, cannot interfere in the private life of individuals as long as the act has been conducted by consenting adults. Furthermore, the right to engage in such sexual activity relates to bodily integrity.

On 7 December 2016, *Le Défi,* a local newspaper,reported that an individual aged 17 years, engaged in the act of sodomy consensually, with another person of the same sex aged 15 years. The former was convicted for the crime of sodomy.[[20]](#footnote-20)

In 2007, an attempt to introduce a sexual offences bill failed. The bill, altogether with defining acts of sexual violence, would have decriminalised sodomy. During that time, Mr P. K. Jugnauth of the Mouvement Socialiste Militant (MSM) party, who is also the current Prime Minister of the Republic of Mauritius, opposed the decriminalisation of sodomy in view of the fact that it promoted immorality. To quote[[21]](#footnote-21):

*“…and MSM leader Pravind Jugnauth has already at the outset opposed the depenalization of consensual sodomy, qualifying it as immoral and saying that Government’s move was a tell-tale sign of a society that was losing its values?”*

According to the recently survey[[22]](#footnote-22) carried out by the YQA on the “Socio-economic conditions of LGBT people in Mauritius” (YQA, 2017), from among the priorities proposed to be included on the LGBT agenda in Mauritius during the next five years, respondents chose as their sixth priority decriminalisation of sodomy (41.3%).

In light of the above, the State Party, therefore, has made no amendment to existing contradictions that exist in its laws regarding sodomy. Furthermore, it has not given any indication of its plan to amend section 250 of the Criminal Code. This could be viewed as deliberate inaction by the State Party and in so doing, individuals of the LGBT community are being unfairly targeted and treated in light of their basic freedom and rights to engage in consensual sexual activity with persons of age of consent.

## 5.2 Recommendations by Other Institutions

The LRC, in its Issue of June 2007, gave substantive arguments for the decriminalisation of sodomy as per human rights treaty obligations, the United Nations Covenant on Civil and Political Rights and precedent cases in other jurisdictions.

In 2009, during the first UPR, the Collectif Arc-en-Ciel denounced the penalisation of sodomy that was maintained in Mauritius. Collectif Arc-en-Ciel stated that the law applied to both homosexuals and heterosexuals. Since the organisation believed that sodomy is a sexual practice like any other, and that the State cannot interfere in the sexual life of two consenting adults, it wished to see this law definitely abrogated.[[23]](#footnote-23)

In 2013, during the second UPR, the State Party noted, *inter-alia,* with other human rights provisions, that Australia, Canada and Ireland, recommended repealing sections of the Criminal Code of Mauritius that criminalised consensual homosexual activity.

In 2017, the Director of Public Prosecutions has advanced that Article 250 of the Crininal Code of Mauritius might not be constitutional.[[24]](#footnote-24)

## 5.3 Recommended Questions

The YQA recommends that the following specific questions be put to the State Party:

1. to provide details about the number of cases of sodomy that have been reported to law enforcement agencies, with information about the number of sodomy cases concerning same-sex persons, as well as the status of these cases;
2. inform of measures that the State Party has taken to ensure that provisions of the Constitution of Mauritius are upheld especially with regards ***Articles (3), (5) and (9)***;
3. inform of measures that the State Party has taken to amend the Protection from Domestic Violence (amendment) Act 2016 in order to recognise marriage and/ or civil partnerships of same-sex couples in the definition of ‘spouse’; and,
4. provide details about steps that have been taken to include sexual orientation and gender identity in Mauritian law.

## 5.4 Recommendations

The YQA recommends the following in respect to actions to be taken by the State Party:

1. decriminalise consensual sodomy between consenting individuals of legal age, especially in the light of existing constitutional provisions;
2. harmonise conflicting legislations on sexual offences and child protection for individuals of different statuses including their gender identity and expression and their sexual orientation to be in line with the Constitution of Mauritius and Human Rights instruments; and,
3. implement age-appropriate comprehensive, non-judgemental and inclusive sexuality education for young people in formal (e.g. educational) and informal settings.

# 6.0 Concluding Remarks

In the view of inclusive and diverse State Report representative of stakeholders of Civil Society,

The YQA further recommends that the following specific questions be put to the State Party:

1. that a list of all representatives of the civil society and of non-governmental organisations, which were involved in the preparation of the Report, be submitted to the HRC alongside the State Party report; and,
2. the contact details of the representatives of the civil society and of non-governmental organisations, which were involved in the preparation of the Report should also be submitted to the HRC.

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1. CCPR/C/MUS/Q/5, page 2, paragraph 9, ‘Non-discrimination (arts. 2, 25 and 26)’. [↑](#footnote-ref-1)
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4. CCPR/C/MUS/Q/5/Add.1 [↑](#footnote-ref-4)
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13. Equal Opportunities Commission, Interim Report, May-October 2012 [↑](#footnote-ref-13)
14. Note: YQA is in the process of finalising the Report. Same may be made available upon request. [↑](#footnote-ref-14)
15. In 2016, there was a change in the appointment of the Chairperson and members of the EOC, further to a change in Government after the general elections of 2014. [↑](#footnote-ref-15)
16. Protection from Domestic Violence Act, amended in 2016 to define ‘spouse’ as “…a person who has been civilly or religiously married to a person of the opposite sex.” [↑](#footnote-ref-16)
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18. The code is a legacy of the colonial era of Mauritius. [↑](#footnote-ref-18)
19. Mauritius 2015 human rights report, US Department of State [↑](#footnote-ref-19)
20. Le Défi: Accusé de sodomie par un copain - le suspect, âgé de 17 ans : «nous nous aimons…» [↑](#footnote-ref-20)
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