

**3rd CYCLE UNIVERSAL PERIODIC REVIEW
BOTSWANA'S UPR – ADVOCACY SHEET**

SITUATION OF LGBTI PERSONS IN BOTSWANA

Brief Assessment of the Implementation of the Cycle 2 of the UPR

In 2013, during the 2nd UPR Cycle, Botswana received 9 recommendations focusing on LGBT issues, but all the recommendations were noted. The recommendations requested the government to take steps to eliminate discrimination on the basis of sexual orientation and engagement in dialogue to repeal laws, which criminalize consensual adult same-sex relations. Botswana took note of the recommendations citing two reasons: Christianity as the reason for criminalization: the lack of readiness of the nation and the need to educate the public before criminalization occurs.

National framework

Botswana Penal Code, Sections 164, 165 and 167 criminalizes adult consensual same-sex sexual activities with a penalty of 7 years imprisonment. However, there are laws that recognize sexual orientation. The Employment Act as amended by Act no.10 of 2010) explicitly prohibits discrimination in the workplace on the basis of sexual orientation.

In addition, the National Strategic Framework for HIV/AIDS speaks to combating stigma and discrimination against particular groups, although the strategy does not mention explicitly LGBT persons as one of the groups whose vulnerability to HIV/AIDS may be increased by stigma and discrimination. HIV programs have been put in place to address the HIV needs of LGBT community.

On the 29th of April 2016, the organization Lesbians, Gays and Bisexuals of Botswana (LEGABIBO) was registered after a lengthy court case seeking recognition as an LGBTI organization and freedoms of association, expression and the right to protection by law.

The rights most commonly violated:

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| Right to non-discrimination | Right to freedom of expression |
| Right to protection by law | Right to privacy |
| Right to health | Right to education |

Challenges	Cases, facts, comments, impacts
<p>Conviction of LGBT persons based on Sections 164, 165 and 167</p> <p>Consensual adult same-sex sexual activities are criminalized through Sections 164, 165 and 167 of the Botswana Penal Code. Due to criminalization LGBTI persons face stigma and discrimination in social, political, family and healthcare settings. Despite claims in the past that these Sections are benign, LGBT have been denied services, access to justice when their</p>	<p>In 2016, a gay man was convicted of violation of Section 164 of the Penal Code. The individual was sentenced to three and a half years but in September 2016 the victim was accorded “<i>presidential pardon</i>” and released from prison after serving several months of the three-year sentence.</p> <p>Criminalization increases vulnerability to blackmail and extortion, stigmatization of LGBT as “un-apprehended criminals” resulting in</p>

<p>rights have been violated. In 2016 there was a conviction based on this Section.</p>	<p>constant fear of arrest, prosecution and conviction.</p>
<p>Stigma and discrimination towards Transgender persons while accessing health services</p> <p>Transgender persons continue to face stigma and discrimination when seeking health services. There is evident discord between the legal environment and practice. Healthcare workers continue to deny LGBT persons access to healthcare because of the general assumption that <i>homosexuality</i> is illegal therefore giving and LGBTI person health services is breaking the law.</p>	<p>Healthcare workers deny LGBT access to health because their national identification documents do not reflect their true gender. When trans persons seek health service from facilities, they run the risk of being arrested based laws against impersonation and attaining by false pretenses. In addition, healthcare workers use religion and culture as legitimate reasons to discriminate against LGBT persons, and are refused treatment because of sexual orientation.</p>
<p>Denial of education based on gender identity</p> <p>Schools continue to subject students who are LGBT to discrimination and bullying. Students who are seen as different in terms of gender identity are subjected to more bullying than others and no action is taken against bullying. There is no national anti-bullying policy for schools hence schools not adopting anti-bullying policies and practices.</p>	<p>In 2016, a transgender student in a senior school in Gaborone was refused to write his final examinations because he was not wearing a school uniform assigned to female students. The matter was challenged in Court through the support of NGOs. In 2017, the judge ordered that it was illegal for the school authorities to have denied the child access to sit for his final examinations because of his gender identity. Although the court recognized that gender identity should not be a ground for denying education, this ruling came too late after a child was denied the right to education based on gender identity.</p>
<p>Homophobia and Transphobic attacks against LGBT persons</p> <p>Botswana has been ranked highly in the Afrobarometer tolerance index at 43%. Despite this high tolerance, the religious and culturally conservatives Batswana (People of Botswana) hold the general assumption that <i>homosexuality</i> is illegal, immoral and Un-African. These assumptions exacerbate discrimination and intolerance amongst older generations and people who reside in rural areas. Discrimination based on religious inclination that gay, lesbian, bisexual or same sex sexual activities are not acceptable in Christian beliefs continues to influence the public attitudes and governments' commitment to decriminalization. These have resulted in homophobic attacks by the media, politicians and religious leaders.</p>	<p>In 2016, the leader of the US-based Faithful Word Baptist Church, Steven Anderson, came to Botswana to initiate a church that among other things aims to speak against <i>homosexuality</i> spreading hatred towards LGBT persons. The pastor went on national radio calling LGBT person's pedophiles, ungodly and that they must be killed.</p> <p>Caine Youngman, a gay LGBTI activist participated in the debate with Pastor Anderson and was victim of humiliation, homophobic attacks and violations on national radio as a result of hate speech inciting homophobia from some religious sectors. Civil Society in partnership with Religious leaders of progressive churches instigated a petition to Government to deny the pastor entrance into Botswana because he would likely instigate hatred towards fellow Botswana citizens. The Pastor was declared a Prohibited Immigrant and deported based on the Immigration Act Section 7(F). The general</p>

	provisions in the Constitution are used as a means of non-discrimination to protect the LGBTI persons. However, the lack of explicit protections of LGBT in the Botswana laws against hate speech and homophobia false short in protecting LGBT persons.
<p>Exclusion of Gender Identity and the Law</p> <p>Transgender persons experience discrimination because Botswana laws and policies are silent about gender identity. Transgender persons are issued identity documents, whether passports or Omang (National Identity Card), that do not reflect their true identity. Consequently, Transgender persons including those who are gender non-conforming face stigma and discrimination and are denied their human dignity. It is on record that two (2) transgender persons were refused to change gender marker in their National Identity Documents.</p>	<p>In August 2017, the High Court of Botswana in a case of <i>ND v Attorney General of Botswana</i> protected the dignity of a transman where the court ordered the Registrar to change the gender marker on the identity document of a transgender person after years of Court battle.</p> <p>In 2014 a transgender activist, Ricki Kgositau, brought a case before the courts seeking legal recognition of her gender identity. The case is still before the High Court of Botswana.</p> <p>In the case of <i>ND v The State</i> the court has upheld the dignity of transgender person in recognizing their gender identity, however without specific legislation to address trans persons rights are not fully protected.</p>

RECOMMENDATIONS

1. To review in consultation with Civil Society working with the LGBTI community, the sections 164, 165 and 167 of the Penal code with the aim to decriminalize consensual adult same-sex activities.
2. To commit a budget to support CSOs that implement initiatives that disseminate information on LGBT persons among the general public as a way of preventing stigma and discrimination and paving way for decriminalization
3. To explicitly include sexual orientation and gender identity as listed grounds of non-discrimination in Section 3 of the Constitution.
4. Ensure enactment of specific legislation that addresses homophobia and hate speech and enable LGBT persons to access justice where such rights have been infringed.
5. Adopt national legislation that allows transgender persons and gender non-conforming to change the gender marker in their national identity documents so as to uphold dignity.
6. To train law enforcement officers, healthcare workers and the general public on sexual orientation and gender identity issues in order to prevent discrimination and homophobia.
7. To support efforts made by civil society in educating the general public and changing mindsets on LGBT issues; openly condemning discrimination of LGBT; disseminating positive court decisions that protect the human rights of LGBT persons.

ADVANCED QUESTIONS

What measures are in place to ensure that the death penalty law does not extended to actions committed against same-sex sexual activities law as criminalized in Botswana's Penal Code?

What measures are in place to ensure that the current programs that target Key Populations in ensuring access to HIV services will not be used as means to target LGBT persons, bearing in mind that same-sex sexual activities are criminalized and these programs can potentially increase vulnerability.

CONTACT INFORMATION

This paper was prepared as a joint advocacy paper for Botswana LGBTI Coalition and the National NGO UPR Working Group. For more information send an email to the Botswana LGBTI Coalition Convener, Lesbians, Gays and Bisexuals of Botswana (LEGABIBO) ceo@legabibo.org.