

**SITUATION OF LGBTI PERSONS IN BOTSWANA**

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

In 2013, during the 2<sup>nd</sup> UPR Cycle, Botswana received 9 recommendations focusing on LGBT issues, but all the recommendations were noted.<sup>1</sup> 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 imprisonment for a term not exceeding 7 years. However there are laws that recognize sexual orientation; i.e 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<sup>2</sup> 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 29<sup>th</sup> 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, freedoms of association, expression and the right to protection by law.

**The rights most commonly violated:**

**Right to non-discrimination**

**Right to freedom of expression**

**Right to protection by law**

**Right to privacy**

**Right to health**

**Right to education**

<b>Challenges</b>	<b>Cases, facts, comments, impacts</b>
<p><b>Conviction of LGBT persons based on Sections 164, 165 and 167</b></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 rights have been violated. In 2016 there was a conviction based on this Section.</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 constant fear of arrest, prosecution and conviction.</p>
<p><b>Stigma and discrimination towards Transgender persons while accessing health services</b></p> <p>Transgender persons continue to face stigma and discrimination when seeking health services. There is evident discord between the legal environment and</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 on laws against impersonation and attaining by false pretenses. In addition healthcare workers use</p>

<sup>1</sup> Countries that made recommendations: United Kingdom, Australia, Canada, Czech

Republic, Argentina, Netherlands, Spain, Slovakia, France

<sup>2</sup> Republic of Botswana The Second Botswana National Strategic Framework for HIV and AIDS 2010-2016 (2009)

<p>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>religion and culture as legitimate reasons to discriminate against LGBT persons, and are refused treatment because of sexual orientation<sup>3</sup>.</p>
<p><b>Denial of education based on gender identity</b></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<sup>4</sup> 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>

### **Homophobia and Transphobic attacks against LGBT persons**

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 *homosexuality* 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.

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 *homosexuality* spreading hatred towards LGBT persons. The pastor went on national radio calling LGBT person's pedophiles, ungodly and that they must be killed. 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)<sup>5</sup>. The general 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.

### **Exclusion of Gender Identity and the Law**

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

In August 2017 the High Court of Botswana in a case of *ND v Attorney General of Botswana*<sup>6</sup> 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.

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.

In the case of *ND v The State* 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.

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<sup>3</sup> Accountability and redress for discrimination in healthcare in Botswana, Malawi and Zambia

<sup>4</sup> UNESCO regional on GBV in Schools

<sup>5</sup> Immigration Act of Botswana

<sup>6</sup> *ND vs Attorney General of Botswana*