

## DISCRIMINATION AND EXCLUSION OF LGBT PERSONS IN BOTSWANA

### Recommendations of the 29<sup>th</sup> Pre-session of the 3<sup>rd</sup> cycle of UPR

#### 1. Presentation of LEGABIBO

Lesbians Gays and Bisexuals of Botswana is an LGBTI organization registered to defend the human rights of LGBTI. The organization was registered in April 29<sup>th</sup> 2016 after a 3-year court case, challenging refusal to register the organization.

#### 2. National Consultations

LEGABIBO is part of the UPR NGO Working Group, which presented a submission during the 2<sup>nd</sup> UPR, a Mid-term Report and advocated with the government to implement the UPR recommendations and facilitated the quarterly Working Group consultations with CSO, members of the LGBTI community and government. Consultations were also done with Botswana LGBTI Coalition, which LEGABIBO is the Convener, comprising 6 LGBTI and Human Rights Organizations.

#### 3. Plan of the statement

This statement will focus on the following issues: 1. Non-discrimination – decriminalization of consenting adult same-sex sexual activities 2. Educating the General Public on LGBT issues 3. Addressing homophobia perpetuated by religious and cultural perceptions 4. Gender Identity and the Law 5. Denial of education based on gender identity 6. Discrimination in Healthcare settings 7. Access to Justice

#### 4. Statement

During the 2<sup>nd</sup> Cycle Review of the UPR, Botswana accepted 111 and noted 61 recommendations, 9 of these were focusing on LGBT issues<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.

##### i) Non-discrimination

###### (a) Follow up on the 2<sup>nd</sup> Cycle

Since the last UPR, the government of Botswana has not taken any step to decriminalize consensual same-sex sexual activities. 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 was later accorded “presidential pardon” (September 2016).

Despite the lack of commitment to decriminalize consensual same-sex activities, there are several developments that recognize sexual orientation including the Employment Act as amended by Act no.10 of 2010. In addition the National Strategic Framework on HIV/AIDS recognizes LGBT needs in relation to HIV/AIDS further cementing government’s readiness to address the needs of LGBTI persons. On the 29<sup>th</sup> of April 2016, the organization

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<sup>1</sup> Countries that made recommendations: United Kingdom, Australia, Canada, Czech Republic, Argentina, Netherlands, Spain, Slovakia, France

Lesbians, Gays and Bisexuals of Botswana (LEGABIBO) was registered after a lengthy court case seeking recognition as an LGBTI organization.

#### *Recommendations*

- a) To review Sections 164, 165 and 167 of the Penal code to decriminalize same-sex activities among consenting adults
- b) To support the initiatives that address HIV and uphold the dignity of LGBT persons through decriminalization

### **ii) Awareness raising on LGBTI issues**

Since the last cycle, the government of Botswana has not taken measures to educate the general public on the human rights of LGBT persons as a process towards decriminalization. There is neither evidence that Botswana is not ready for decriminalization nor that they have no information on LGBTI matters. This reluctance points to the lack of political will.

#### *Recommendations*

- (c) 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
- (d) 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.

### **iii) Homophobic and Transphobic attacks against LGBT persons**

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. This has resulted in homophobic attacks by the media, politicians and religious sector. 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 and 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 Botswanan citizens. The Pastor was declared a Prohibited Immigrant and deported based on the Immigration Act Section 7(F)<sup>2</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

Although the LEGABIBO registration case has emphasized that the Protection in Section 3 of the Constitution is inclusive of sexual orientation, not many government officials are aware of this and continue to discriminate against LGBT individuals.

#### *Recommendations*

- (e) To explicitly include sexual orientation and gender identity as listed grounds of non-discrimination in Section 3 of the Constitution.
- (f) Ensure enactment of specific legislation that addresses homophobia and hate speech and enable LGBT persons to access justice where such rights have been infringed.

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

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<sup>2</sup> Immigration Act of Botswana

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 Document), 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. A more recent development is that in August 2017 the High Court of Botswana in a case of *ND v Attorney General of Botswana*<sup>3</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.

#### **v) Denial of education based on gender identity**

In 2016, a transgender student in a senior school in Gaborone was refused to sit for final examinations because he was not wearing a school uniform assigned to female students. In 2017, the judge ordered that it was illegal for the school authorities to have denied the child access to sit for 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.

#### *Recommendations*

(g) Ensure enactment of specific legislation that addresses bullying to enable LGBT persons to access justice where such rights have been infringed.

#### **vi) Discrimination in Healthcare settings**

Although there is a progressive policy environment in relation to the access to health, LGBT persons continue to face stigma and discrimination when they seek health services. There is evident discord between the legal environment and practice. Healthcare workers continue to deny LGBT access to health because their national identification documents do not reflect their true gender. When trans persons seek health services from facilities, they run the risk of being arrested based on 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<sup>4</sup>.

#### *Recommendation*

(h) To train healthcare workers and the general public on sexual orientation and gender identity issues in order to prevent discrimination and homophobia.

#### **vii) Access to justice**

The legal protection and commitments in policies and laws are not explicit about access to justice for LGBT persons. As a result service providers including healthcare workers and the police deny LGBT persons protection based on the assumption that being LGBT is illegal. Discrimination of being an LGBT person is prohibited in broad terms, and there are no specific protections for LGBT. The lack of education on LGBT issues for service providers compromises access to justice. LGBT persons wait a longtime to access justice as their experiences of human rights violations go through court process and long term legal battles.

#### *Recommendations*

(i) To establish complaints mechanisms that are based on the principle of equality and non-discrimination that are accessible to LGBT without fear of discrimination.

(j) To train law enforcement officers on sexual orientation and gender identity issues.

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<sup>3</sup> ND vs Attorney General of Botswana

<sup>4</sup> Accountability and redress for discrimination in healthcare in Botswana, Malawi and Zambia