

Transgender Rights in Botswana

Rights under the Constitution of Botswana

Sections 3-19 of the Constitution set out the fundamental rights and freedoms of the individual. While section 3 does not include gender or sexual orientation as prohibited grounds of discrimination, it does include sex.

The rights under the Constitution must be read in conjunction with the rights set out in the African Charter and the International Covenant on Civil and Political Rights.

Fundamental Human Right	Where is it in the Constitution?
Fundamental rights and freedoms	Section 3
Right to life	Section 4
Right to personal liberty	Section 5
Protection from torture, inhuman or degrading treatment	Section 7
Right to privacy	Section 9
Rights of an accused person	Section 10
Freedom of expression	Section 12
Freedom of association and assembly	Section 13
Protection from discrimination	Section 15

Changing your Gender Marker

There is no specific law that allows transgender persons in Botswana to change the gender marker in their identity documents or passports. However, there are provisions in the **National Registration Act 26 of 1986**, that could be used by transgender persons to change the sex description in their identity document:

- **Section 16** deals with a material change in a person's particulars. It reads:

"1) Where the registrar is of the opinion that any change in the particulars relating to a registered person materially affects his registration, he shall record the change and notify the Registrar of National Registration of the circumstances and recommend that the person concerned should be issued with a new identity card.

(2) The Registrar of National Registration shall, if he is satisfied that the change materially affects the person's registration, cancel the identity card issued to that person and issue a new identity card to him.

(3) The particulars relating to the new identity card and its holder shall be recorded in the national

register and the register of the area in which that person is registered.”

- **Section 17 of the National Registration Act** allows a person to update their photograph in their identity card. **Sections 17(1)** and **17(2)** state that:

“(1) Every registered person may, whenever he is satisfied that his personal appearance has changed so as to make it likely that his identity as certified by the identity card may be questioned, apply to the registrar of the area in which he is registered for the issue of a new card with a more recent photograph and shall, when issued with a new identity card by the Registrar of National Registration, surrender his existing identity card to the registrar to be cancelled and destroyed.

(2) The registrar of the area in which the person is registered and the Registrar of National Registration shall cause the changes to be recorded in the relevant registers.”

- **Section 13 of the Births and Death Registration Act 48 of 1968** allows a person to change their forename/s. A person can apply, if they are 21 years or older. Their parent or guardian would have to apply on their behalf if they are younger than 21 years. **Section 13(3)(a)** states that:

“... the Registrar must be satisfied that the person has a settled wish and intention to be and to continue to be generally known by the new forename or forenames either in substitution for or in addition to the forename or forenames under which his birth was registered.”

- **Section 12** of the Act allows a person to alter a surname on a birth register.

Your Rights in the Workplace

- The **Employment Amendment Act 10 of 2010** amended section 23(d) of the Employment Act to add gender, sexual orientation and health status (including HIV/AIDS status) as prohibited grounds on which an employer cannot terminate a contract of employment.
- A new **section 23(e)** was introduced, which provides general protection against discrimination. It states that an employee cannot be fired for “any other reason which does not affect the employee’s ability to perform that employee’s duties under the contract of employment”
- The **Botswana National Code of Practice on HIV/AIDS and Employment**, and the **Code of Good Practice: HIV/AIDS and Employment (Trade Disputes Act)**, protect the rights of employees with HIV.

Criminalisation and Harassment

There is no law in Botswana which makes it illegal to be transgender. The Court of Appeal in the LEGABIBO case further made it clear that: *“There is no legislation in Botswana that prohibits anyone from being lesbian, gay or bisexual ... It is not, however, and never has been a crime in Botswana to be gay.”*¹⁹

Despite this, public officials often use other laws – especially the Penal Code – to harass transgender people and to subject them to arbitrary arrest and detention.

¹⁹ The LEGABIBO judgment at paras 56 and 62.

Sections 164, 165 and 167 of the Penal Code prohibit consensual sexual acts between same-sex partners for men and women:

- **Section 164** refers to “unnatural offences”, which refers to consensual and non-consensual acts of anal penetration.
- **Section 167** criminalises any act of “gross indecency” between persons – in public or in private.

Transgender persons have also been detained under **nuisance-related charges**:

- **Section 176** of the Penal Code sets out the offence of common nuisance.
- **Section 179** allows authorities to prosecute “**idle and disorderly persons**”. This includes someone who “publicly conducts himself in a manner likely to cause a breach of the peace”, and someone who “without lawful excuse does any indecent act.”
- Transgender persons – especially those who are engaged in sex work – also face harassment under the “**rogues and vagabond**” provision in **section 182** of the Penal Code.

The government must be able to justify, in terms of the law, any discriminatory treatment of transgender people – otherwise acts by its officials will be arbitrary and illegal.

The **Domestic Violence Act 10 of 2008** offers protection to transgender people when they experience violence at the hands of family members, their romantic or sexual partners, or from people with whom they share a house:

- The law defines an applicant as “any person” subjected to an act of domestic violence. This requires that the applicant was in a domestic relationship with the perpetrator. Domestic relationship is defined to include persons who were cohabiting, family members, persons who shared a residence, and persons in an actual or perceived intimate or sexual relationship.
- Domestic violence includes emotional, verbal and psychological abuse – as well as intimidation and harassment. An applicant can apply for a restraining order, occupancy order, or tenancy order under the Act.

Access to Sexual and Reproductive Health

Botswana does not offer gender reassignment surgery. Hormone therapy is available at government hospitals – but it is usually at the discretion of medical staff, who often have transphobic views. Some doctors and nurses believe that being transgender is a lifestyle choice rather than an intrinsic part of a person’s gender identity. Often transgender persons have to undergo invasive tests before they can access hormone therapy.

The country’s **National Strategic Framework for HIV and AIDS 2010-2016** includes in its guiding principles ensuring equal access to health and social support services regardless of race, creed, religious or political affiliation, sexual orientation or socio-economic status. It specifically mentions MSM and gay men as key populations who should be accommodated when developing programmes to address HIV.