

“The law needs to change, we want to be free”

The impact of laws criminalising same-sex relationships in Botswana



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we want to be free”**

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relationships in Botswana**

May 2018

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About the Africa Regional Grant on HIV

The Global Commission on HIV and the Law (GCHL) issued its landmark report, *Risks, Rights & Health*, in July 2012, making important recommendations for using the law to respond to HIV in an evidence-informed, rights-based manner. Since the release of the report, UNDP working in partnership with UN Member States, civil society, UNAIDS co-sponsors, the UNAIDS Secretariat and other partners, has supported the advancement of the Commission's recommendations in at least 88 countries. In Africa, UNDP is Principal Recipient of the Africa Regional Grant on HIV – Removing Legal Barriers, a programme generously funded by the Global Fund to Fight AIDS, Tuberculosis and Malaria (GFATM) to advance the GCHL's recommendations. The grant addresses human rights barriers to health faced by vulnerable communities in Africa and facilitates access to lifesaving health care, with the overall goal of strengthening the legal and policy environment to reduce the impact of HIV and TB on key populations, including men who have sex with men and transgender people, in Africa.

The grant is the first of its kind and covers 10 countries including Botswana, Côte d'Ivoire, Kenya, Malawi, Nigeria, Senegal, the Seychelles, Tanzania, Uganda and Zambia. The grant also works at continental level and regional levels with the African Union and key Regional Economic Communities (SADC, ECOWAS, EAC) to promote alignment of national laws and policy with regional and international human rights commitments. UNDP works in collaboration with four African civil society organisations – the AIDS and Rights Alliance for Southern Africa (ARASA), ENDA Santé, Kenya Legal and Ethical Issues Network on HIV and AIDS (KELIN) and the Southern Africa Litigation Centre (SALC).

About the Report

The Global Fund's *Strategy in relation to Sexual Orientation and Gender Identities* recognises the disproportionate impact of HIV on men who have sex with men and transgender people, and the barriers created by marginalisation and criminalisation of people due to sexual orientation, on access to health care and the fight against AIDS, TB and malaria.

This report seeks to identify the impact of criminalisation of same-sex sexual acts on the lives of LGBT persons in Botswana and make evidence-based recommendations for law review, based on its findings. In this way, it supports the goals of the GFATM Africa Regional Grant, namely to strengthen national evidence-based law, access to justice and law enforcement, in order to, *inter alia*, support improved access to and delivery of HIV and TB services for key populations.

Authorship and acknowledgement

This report was researched and written by Kitty Grant and supplemented by Anneke Meerkotter from the Southern Africa Litigation Centre (SALC). The report was edited by the United Nations Development Programme, and Anneke Meerkotter, with comments by Tashwill Esterhuizen from SALC and Anna Mmolai-Chalmers from Lesbians, Gays and Bisexuals of Botswana (LEGABIBO). Interviews conducted for the report were carried out and transcribed by Lame Olebile, Botho Maruatona, Yame Kehitile, Pearl Magashula, Bradley Fortuin and Chantel Fortuin. We want to thank all the individuals who gave their time to be interviewed for this report. We would like to thank the British embassy in Botswana and the Open Society Initiative of Southern Africa (OSISA) for its ongoing support of LEGABIBO and the rights of LGBT persons in Botswana.

Foreword

“Members of the gay, lesbian and transgender community, although no doubt a small minority, and unacceptable to some on religious or other grounds, form part of the rich diversity of any nation and are fully entitled in Botswana, as in any other progressive state, to the constitutional protection of their dignity.”

Court of Appeal, Attorney General v Rammoge and 19 Others (the LEGABIBO judgment)¹

All persons regardless of their sexual orientation, gender identity and expression are entitled to fundamental rights and freedoms and have the right not to be discriminated against, harassed or abused. All persons are born as equal human beings, with inherent dignity, and are entitled to be treated with respect. Once we accept that fundamental human rights apply to all persons it provides a basis upon which lesbian, gay, bisexual and transgender (LGBT) persons can enforce and assert their rights. This was the position of the Botswana Court of Appeal when it decided in favour of the registration of the LGBT organisation, Lesbians, Gays and Bisexuals of Botswana (LEGABIBO).

Subsequently, the Botswana High Court has ordered the government to change the gender marker on the identification document of a transgender individual.² In doing so, the High Court held that:

“...the State has a duty to uphold the fundamental human rights of every person and to promote tolerance, acceptance and diversity within our constitutional democracy. This includes taking all necessary legislative, administrative and other measures to ensure that procedures exist whereby all State-issued identity documents which indicate a person’s gender/sex reflect the person’s self-defined gender identity.”

High Court of Botswana, ND v Attorney General of Botswana³

The Botswana government has agreed to abide by these court decisions.⁴ These developments illustrate great progress in the recognition of the rights of lesbian, gay, bisexual and transgender persons in Botswana. What remains is to critically consider the Penal Code provisions which criminalise consensual same-sex sexual acts. This report summarises available research on the impact of these criminal laws on the daily lives of LGBT individual in Botswana. It is timely to ensure an informed debate about the continued relevance of these laws in a society which recognises the universal rights of every person, including the right to choose a sexual partner.

Signed

Maithamako Anna Mmolai-Chalmers

¹ CACGB-28-14, 16 March 2016, para 60.

² *ND v Attorney General of Botswana and Another*, MAHGB-000449-15, 29 September 2017.

³ *ND v Attorney General of Botswana and Another*, MAHGB-000449-15, 29 September 2017, para 80.

⁴ Republic of Botswana (2018) *National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21*, Human Rights Council, A/HRC/@G.6/29/BWA/1, January 2018, para 52.



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Acronyms and abbreviations

ACHPR	African Commission on Human and Peoples' Rights
AMSHeR	African Men for Sexual Health and Rights
ARASA	AIDS & Rights Alliance of Southern Africa
CAL	Coalition of African Lesbians
CSO	Civil society organisation
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Commission of Jurists
LEA	Legal Environment Assessment
LEGABIBO	The Lesbians, Gays & Bisexuals of Botswana
LGBT	Lesbian, gay, bisexual and transgender persons
SALC	Southern African Litigation Centre
SOGI	Sexual orientation and gender identity
STI	Sexually transmitted infection
UN	United Nations
UNAIDS	Joint United Nations Programme on HIV and AIDS
UNDP	United Nations Development Programme
UNDP RSCA	United Nations Development Programme Regional Service Centre for Africa

Glossary of terms

Bisexual

A sexual identity and orientation. Bisexual people have a romantic and/or sexual attraction to people of the same and opposite sex – not necessarily at the same time, and not necessarily an equal amount of attraction for each gender.

Discrimination

The unjust or prejudicial treatment of different categories of people on various grounds, including race, age, social status, marital status, health status, sex, sexual orientation, and gender (including gender identity, expression, and presentation).

Gender

Social and cultural expressions shown through behaviours, mannerisms, dress and activities. Masculinity and feminism are the most commonly known genders. Socially constructed characteristics may vary, according to the times and society or group to which one belongs.

Gender affirming treatment

Can include counselling and psychosocial support, hormone replacement treatment, gender affirming surgery (also known as sex reassignment surgery) – to bring one's physical characteristics in line with one's gender identity.

Gender identity

Refers to a person's innate, deeply felt psychological identification as a man, woman, or sometimes in between – which may or may not correspond to the person's body or sex assigned at birth. An internalised representation of gender roles and awareness from infancy, which is reinforced during adolescence.

Gender non-conforming

A person who does not conform to the binary male-female categories that society prescribes; transgender people, for example, are gender non-conforming – but others who are not transgender might also fall into this category.

Heterosexual

A person attracted to people of the opposite gender, romantically and/or sexually, where the gender of the attracted person is the key to the attraction.

Homosexual

A sexual identity and orientation; a person attracted to people of the same gender, romantically and/or sexually, where the gender of the attracted person is the key to the attraction.

Homophobia

Irrational fear of homosexual feelings, thoughts, behaviours, or people, and an undervaluing of homosexual identities – resulting in prejudice, discrimination and bias against homosexual individuals.

Human rights

Human rights are universal, fundamental, inalienable rights, which all human being are entitled to regardless of their race, gender, sexual orientation, gender identity, age, social class, national origin, occupation, talent, religion, or any other personal factor. All individuals are entitled to human rights – simply because they are human.

Human rights instruments

International human rights instruments are treaties and other international documents relevant to international human rights law and the protection of human rights in general.

Inalienable rights

Rights that cannot be forfeited (given up), transferred or lost.

Intersex

Being born with ambiguous sex characteristics (chromosomes, genitals and/or reproductive organs). Many variations exist; intersex is not one category, but includes many different ways someone might defy the medical definitions of “male” and “female”.

Lesbian

A sexual identity and orientation; a woman attracted to other women, romantically and/or sexually.

Men who have sex with men (MSM)

A sexual practice irrespective of sexual orientation or identity. An MSM can be a heterosexual, bisexual, homosexual or transgender man. This term is technical and is not necessarily an identity.

Sex

The biological, hormonal, and chromosomal characteristics referred to as male and female. While medical and scientific advances indicate that the concept of sex incorporates a wider spectrum of characteristics beyond the traditional qualifications of “male” or “female”, individuals are still legally defined as either “male” or “female”.

Sexual orientation

Pattern of romantic and/or sexual attraction to a person of the opposite gender, same gender, or more than one gender.

Transman

A transgender man or female-to-male (FTM) is assigned female biological characteristics at birth, but his gender identity is male; always use male pronouns when referring to a transman.

Transphobia

Irrational fear of transgender feelings, thoughts, behaviours or people, and an undervaluing of transgender identities – resulting in prejudice, discrimination and bias against transgender individuals. Where transphobia includes homophobia, we speak of homophobia and transphobia.

Transwoman

A transgender woman, or male-to-female (MTF) is assigned male biological characteristics at birth, but her gender identity is female; always use female pronouns when referring to a transwoman.

Transgender

An umbrella term which is often used to describe people whose gender expression or gender identity differs from their biological sex or their gender assigned at birth. The umbrella term is used to describe a wide range of identities and experiences – including transsexuals, FTM persons, MTF persons, transvestites, cross-dressers, two-spirits, gender-queers, and many more.

Transsexual

This refers to people who wish to undergo hormone replacement therapy and/or gender affirming surgery, to align their bodies to their gender identity.

Women who have sex with women (WSW)

A sexual practice irrespective of sexual orientation or identity. A WSW can be a heterosexual, bisexual, homosexual or transgender woman. This term is technical and is not necessarily an identity.



Executive summary

Lesbian, gay, bisexual and transgender (LGBT) people in Botswana experience stigma, discrimination and violations of their basic rights in their daily lives. They report verbal abuse and harassment – derisive, humiliating words, hate speech and public calls for rejection, exclusion and even violence – coming from their most intimate family members, those service providers they rely on for their health and safety and right up to the nation’s top political and religious leaders. They are beaten, murdered, sexually assaulted and raped. They are bullied at school and shunned by the religious community. They are humiliated in the workplace, sometimes not hired and other times dismissed because of their sexual orientation, gender identity or gender expression. In the health care setting, they are ridiculed or shamed, their confidentiality is breached, they receive inferior / sub-standard care, conditional access to services and, at times, outright denial of health care and threats of police reports. Law enforcement officials are reportedly a source of various forms of stigma, discrimination and rights violations, including harassment, intimidation, threats of violence, physical and sexual violence, arbitrary arrest and detention, extortion or blackmail.

In Botswana, sections 164, 165 and 167 of the Penal Code effectively criminalise adult consensual same-sex sexual activity. These laws infringe upon the rights of LGBT persons to be treated equally and without discrimination, violating their rights to dignity, privacy, personal liberty and freedom of expression and impact on their health rights.

The criminalisation of consensual same-sex sex furthermore appears to contribute to stigma, discrimination and violence against LGBT persons by allowing government officials and the broader public to violate the rights of LGBT persons with a sense of impunity. The criminal provisions, although ‘gender-neutral’, disproportionately impact upon LGBT persons.

As a result of the criminal laws, the stigmatised context they create and the way in which the laws are enforced, LGBT persons don’t seek out justice for these human rights abuses. They often prefer to remain invisible and undetected, for fear of further stigma, violence and arrest.

Experiences of stigma, discrimination, exposure and threats of reports also discourage them from accessing health care services. When accessing health care, they often conceal their sexual orientation and don’t speak openly about their health issues which may result in misdiagnosis and inadequate treatment and care. They fear complaining about poor treatment from health care providers and the reprisals that may follow. This places their health at further risk.

This report summarises various research studies on the impact of criminalisation of same-sex sexual acts on the lives of LGBT persons. The report further draws directly on the perspectives of LGBT persons themselves to illustrate the impact of the criminal laws. Decriminalising consensual adult same-sex sex is a human rights imperative, consistent with Botswana’s international, regional and national human rights commitments and necessary in order to respect, protect, promote and fulfil the rights of LGBT persons in Botswana.

Introduction

Existing evidence shows that lesbian, gay, bisexual and transgender persons in Botswana experience high levels of stigma, discrimination, violence and other human rights violations in their daily lives. The evidence indicates that laws criminalising “unnatural sexual offences” appear to be gender-neutral, yet disproportionately impact on LGBT persons.

A 2017 legal environment assessment (LEA) for HIV and TB in Botswana⁵ confirmed, amongst other things, that these criminal laws strip LGBT persons of their basic rights to equality, non-discrimination, privacy and dignity, fuel societal stigma and discrimination, impact on their mental and physical health and well-being and create barriers to access to services, such as health care, and access to justice in Botswana.

The LEA follows a steady trajectory by the government of Botswana to protect the rights of LGBT persons. For example, in 2010 the government passed the Employment (Amendment) Act 10 of 2010 which inserted into the Employment Act sexual orientation as a ground on which dismissal is prohibited.⁶ The Second National Strategic Framework for HIV and AIDS 2010-2017/2018 at the same time provided that a guiding principle of the national response to HIV is upholding human rights “by promoting dignity, non-discrimination and welfare of all people, whether infected or affected by HIV and AIDS and ensuring equal access to health and social support services regardless of race, creed, religious or political affiliation, *sexual orientation* or socio-economic status.”⁷ Most recently, the government of Botswana gave its commitment to implement court decisions giving beneficiaries their rights and undertook to engage in ongoing review of national laws “to address discrimination of marginalised and disadvantaged groups in society such as refugees, lesbians, gays, bisexuals, transgender and/or intersex persons, domestic workers, sex workers, asylum seekers and foreign inmates.”⁸

Building on the findings of the LEA and its recommendations for law and policy reform, this report draws together the existing research and evidence on the impact of laws criminalising consensual same-sex sex in Botswana (and in the region, where relevant) and confirms the need for ongoing law, policy and programmatic review and reform to consolidate gains and better protect the rights of LGBT persons in Botswana.

This report aims to provide government, including those in the executive, legislature and judiciary, as well as civil society organisations (CSOs) and human rights activists, with an overview of the impact of the laws in Botswana that criminalise consensual same-sex sexual acts.

⁵ Republic of Botswana: Ministry of Health and Wellness and UNDP (2017) *Assessment of Legal and Regulatory Framework for HIV, AIDS and Tuberculosis*, 104-106.

⁶ Section 23(d) of the Act.

⁷ Republic of Botswana (2010) *The Second Botswana National Strategic Framework for HIV & AIDS 2010-2016* (subsequently extended to 2017/2018), 21.

⁸ Republic of Botswana (2018) *National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21*, Human Rights Council, A/HRC/@G.6/29/BWA/1, January 2018, para 52.

The report sets out:

- The various forms of stigma, discrimination, violence and other human rights violations experienced by LGBT persons in Botswana, including direct examples from national and regional research, case studies and interviews;
- Botswana laws criminalising consensual same-sex sex and how they are applied to LGBT persons;
- The impact of the criminal laws on stigma, discrimination and human rights violations and access to justice and services, such as health care;
- Recommendations for action in order to protect the rights of all persons in Botswana, including LGBT individuals.



Section 1: Do LGBT persons in Botswana experience stigma and discrimination?

In 2017, Afrobarometer reported that while Botswana is an increasingly tolerant nation, with people who affirm the basic freedoms and human rights of all persons to say what they think, associate with any organisation they choose to and vote for the candidate of their choice, many do not support freedom of sexual orientation.⁹ The results of the Afrobarometer survey noted that 56% of Botswana either strongly disliked or somewhat disliked the idea of living next to a neighbour who is homosexual.¹⁰ Interestingly, the attitudes of Botswana were much more tolerant in urban areas with 39% indicating that they would not care who their neighbours were, and 7% indicated that they would like homosexual neighbours.¹¹ These results were similar to those of the 2014 survey. The 2014 results were further disaggregated according to education, age and religion.¹² The survey indicated that persons with post-secondary and secondary education were significantly more tolerant of homosexuals than those with primary education or no formal education.¹³ Similarly, the intolerance levels were much lower in younger individuals than in older persons.¹⁴ Tolerance levels were the same irrespective of whether people engaged in religious practices daily, weekly, rarely or never.¹⁵

This section of the report considers evidence of the various and often intersecting human rights violations experienced by LGBT persons in Botswana including:

- Verbal harassment and abuse;
- Physical harassment and abuse, including murder;
- Sexual abuse, including rape;
- Discrimination in health care (including verbal and physical abuse, breaches of confidentiality, inferior / sub-standard care, denial of health care services, conditional access to health care services and reporting / the threat of reporting LGBT persons to the police);
- Discrimination in the workplace; and
- Harassment and abuse from law enforcers, including harassment, intimidation, threats of violence, physical and sexual violence, arbitrary arrest and detention, extortion or blackmail.

⁹ Lekorwe, M et al (2017) “Summary of results, Botswana: Round 7” *Afrobarometer*, 73.

¹⁰ Lekorwe, M et al (2017) “Summary of results, Botswana: Round 7” *Afrobarometer*, 73.

¹¹ Lekorwe, M et al (2017) “Summary of results, Botswana: Round 7” *Afrobarometer*, 73.

¹² Lekorwe, M and Moseki, K (2014) “Botswana affirm their personal freedoms but disapprove of same-sex relationships” *Afrobarometer*, Dispatch No. 8, 2014, 18.

¹³ Lekorwe, M and Moseki, K (2014) “Botswana affirm their personal freedoms but disapprove of same-sex relationships” *Afrobarometer*, Dispatch No. 8, 2014, 18. Intolerance towards homosexuals based on participants’ educational level: post-secondary (34%), secondary (55%), primary (71%), no education (72%).

¹⁴ Lekorwe, M and Moseki, K (2014) “Botswana affirm their personal freedoms but disapprove of same-sex relationships” *Afrobarometer*, Dispatch No. 8, 2014, 18. Intolerance towards homosexuals based on participants’ age: 50 and older (73%), 30-49 years (55%), 18-29 years (48%).

¹⁵ Lekorwe, M and Moseki, K (2014) “Botswana affirm their personal freedoms but disapprove of same-sex relationships” *Afrobarometer*, Dispatch No. 8, 2014, 18.

Verbal harassment and abuse

“I experience a lot of scolding from society. They make a lot of homophobic statements and this leaves me feeling like I do not belong in this country because even the law itself cannot protect me.” (Gaborone)

“I have experienced a lot of verbal violence from people who, assuming I am gay, call me names such as ‘matanyola’ at the bus rank. I think they were calling me that because I was wearing a colourful jacket. I was hurt and felt really disrespected.” (Chadibe)

“I have experienced a lot of homophobia in my life, a lot of verbal assaults.” (Maun)

“I fear physical assault on the streets because I endure a lot of verbal assault on a daily basis.” (Maun)

LGBT persons in Botswana report stigmatising verbal harassment, ridicule and abuse from their families, communities, co-workers and others.¹⁶ This behaviour is echoed and arguably legitimised by more public, derogatory statements made by political and religious leaders. As far back as 2008, in a Shadow Report to the Human Rights Committee, LEGABIBO cited numerous examples of hate speech by political and religious leaders in Botswana who state that homosexuality is not only unlawful, but is foreign to Botswana culture, shocking, “unethical and unbiblical” and “barbaric” in terms of social norms, religion and culture.¹⁷ In a 2011 submission to the Africa Regional Dialogue on HIV and the Law, a representative of LEGABIBO again cited various media reports of homophobic and insulting remarks made by political leaders.¹⁸

In their statements, some political and religious leaders have recommended varying punitive responses to LGBT persons, including that they required exposure, public rejection, punishment and/or therapy.¹⁹

The Evangelical Fellowship of Botswana, a coalition of evangelical churches, in its “crusade” against homosexuality, called on “all Christians and all morally upright persons within the four corners of Botswana to reject, resist, denounce, expose, demolish and totally frustrate any effort by whoever to infiltrate such foreign cultures of moral decay and shame into our respectable, blessed and peaceful country.”²⁰ In 2013, a pastor of the Evangelical Fellowship of Botswana wrote a newspaper article claiming that homosexuals have “warped and depraved mind[s]”, likening homosexuality to bestiality and comparing the advocacy of gay rights to the rights of “rapists, robbers, murderers and alcoholics” as well as “other behavioural deviants and criminals.”²¹

¹⁶ LEGABIBO (2013) *LGBT health and wellness needs assessment in three locations in Botswana*.

¹⁷ BONELA and LEGABIBO (2008) 5-6.

¹⁸ LEGABIBO (2011) *Submission to the Africa Regional Dialogue of the Global Commission on HIV and the Law*, 3-4 August 2011. At the time, LEGABIBO cited newspaper reports quoting the Deputy Speaker of the National Assembly as saying that “Just like Mugabe, I hate gays” and the then Minister Oliphant Mfa saying “Homosexuality is rubbish.” See also Canada: Immigration and Refugee Board of Canada (2014) *Botswana: treatment of sexual minorities by society and the government; legal recourse and protection available to sexual minorities who have been subjected to ill-treatment (2006-March 2014)*, 9 April 2014, BWA104810.E.

¹⁹ Tabengwa, M and Nicol, N (2010) 341.

²⁰ Tabengwa, M and Nicol, N (2010) 341.

²¹ Mmegi, 23 August 2013 cited in Canada: Immigration and Refugee Board of Canada, *Botswana: treatment of sexual minorities by society and the government; legal recourse and protection available to sexual minorities who have been subjected to ill-treatment (2006-March 2014)*, 9 April 2014, BWA104810.E.

Despite these homophobic public statements, there have also been some positive pronouncements. Former President Festus Mogae, has been particularly vocal on the need to protect the rights of LGBT persons as part of HIV prevention efforts.²² In June 2014 Botswana also backed the African Commission on Human and People's Rights resolution on protecting persons from violence based on their sexual orientation or gender identity.²³ More recently, in September 2016, then President Khama ordered the deportation of American pastor Steven Anderson for spreading hate speech against LGBT persons.²⁴

“While I admit that the West often push their agendas on Africa, which we must be wary of, I also believe that we must, as Africans, admit that the world is changing and we must move with the times. This means often abandoning some of our long-held convictions about life, if the need arises. In my long interaction with LGBT groups and extensive research, I have come to the realisation that we are limited in our knowledge and must be open to new discoveries. I have been converted.”

Festus Mogae, Former President of Botswana (1998-2008)

Physical and sexual violence, harassment and abuse

Discrimination against LGBT persons includes acts of physical as well as sexual violence, and LGBT persons in Botswana report not only acts of violence, but the fear of violence. Generally it is estimate the exact extent of targeted violence against LGBT persons because few States have systems in place to record such incidents, when reported such incidents are not always taken seriously, and because many incidents remain unreported due to fear of reprisals and distrust in the police.²⁵

“A transwoman friend of mine was beaten up by men in Block 9. She came to tell me about it and we took her to the police and the hospital. She was hurt really badly. She experienced a lot of transphobia. It is not safe for her to walk even to the shops.” (Gaborone)

At continental level, the African Commission on Human and People's Rights (ACHPR) has specifically recognised and condemned the increasing incidents of violence and human rights violations in Africa in its Resolution 275 on protection against violence and other human rights violations against persons on the basis of their real or imputed sexual orientation or gender identity.²⁶ At a regional level, the AIDS & Rights Alliance of Southern Africa (ARASA) has reported that violence against LGBT persons is pervasive, multi-faceted, and often goes unpunished.²⁷

In Botswana, LEGABIBO has reported physical aggression, harassment and abuse, including extreme violence and murder, against LGBT persons from communities and even their own families, partners,

²² Pheage, T (2015) “Good leadership is about people – Festus Mogae” *Online Africa Renewal*.

²³ Potts, A (2014) “Botswana joins international call to protect LGBTI human rights” *Gay Star News*, 17 June 2014.

²⁴ “Botswana LGBT leader on hate pastor deportation: ‘I am proud of my government’”, 20 September 2016, *Mambagirl News*.

²⁵ WHO (2015) 40.

²⁶ ACHPR Resolution 275, 55th Ordinary Session, Luanda, Angola, May 2014. Available at <http://www.achpr.org/sessions/55th/resolutions/275/> [Accessed 26 February 2018]. See also AMShEr and CAL (2013) *Violence based on perceived or real sexual orientation and gender identity in Africa*.

²⁷ ARASA (2016) *Identifying Injustice: Law and Policy on Sexual Orientation, Gender Identity and HIV in Africa*; WHO (2015) *Sexual health, human rights and the law*, 23.

or partners' families.²⁸ Pilot findings from Müller's LGBT health study has found that LGBT persons in Botswana experience higher levels of violence than that reported for the general population – in the study, **42% of LGBT respondents had experienced physical violence in their lifetime and 25% had experienced physical violence in the past year.**²⁹ This should be compared with the 2017 Afrobarometer survey where 20% of participants or someone in their family had been physically attacked in the past year.³⁰

ARASA's 2016 research into human rights violations on the basis of SOGI also reported that in Botswana and other southern African countries,³¹ LGBT persons have been murdered, raped, beaten, assaulted, harassed and targeted due to their real or imputed sexual orientation, gender identity and/or gender expression. Acts of violence were often committed by family members or others who perceived the individual's sexual orientation or gender identity as inconsistent with social or cultural expectations.³² SALC's 2016 research also found instances of physical violence from family members on disclosure of a person's sexual orientation or gender identity.³³

"My former husband used to verbally abuse me. It started with words and him insisting that I will teach my daughter how to be a lesbian...then it escalated to him punching me." (Francistown)

*"I had a fight with my brother after he found out that I dated boys. He was hitting me and kicked me on the head."*³⁴

"In 2015, a friend in Form 3, a gay feminine boy, was beaten up. He didn't say he was gay nor had he ever been with any boy. People automatically assumed that he was gay. Some of his classmates beat him up. He reported to his father who is a truck driver. His father told him that he had warned him not to dress like women."

(Palapye)

Baral et al's study of HIV and human rights amongst gay men and men who have sex with men in Malawi, Namibia and Botswana found that 11.6% of men who have sex with men reported being raped by another man, with similar rates in each of the countries.³⁵ Müller's pilot study has found that **41% of LGBT persons reported experiencing sexual violence in their lifetime, and 22% had experienced sexual violence in the past year.**³⁶ Sexual violence and the targeted rape of lesbian women is likewise reported to be common in several countries in eastern and southern Africa,³⁷ and has found to be a risk for lesbian women in Botswana.

²⁸ LEGABIBO cited in Canada: Immigration and Refugee Board of Canada (2014); LEGABIBO (2013).

²⁹ Müller et al (2018) *The LGBT Health Study (forthcoming publication)* which compares findings with earlier studies by Machisa & van Dorp (2012) *The Gender Based Violence Indicators Study Botswana*, and Tsai et al (2011) "Prevalence and correlates of forced sex perpetration and victimisation in Botswana and Swaziland" *American Journal of Public Health* 101 (6) 1068-1074, amongst the general population.

³⁰ Lekorwe, M. et al (2017) "Summary of results, Botswana: Round 7" *Afrobarometer*, 9.

³¹ Namely Malawi, Namibia, South Africa, Swaziland, Zambia and Zimbabwe.

³² ARASA (2016).

³³ SALC (2016) *Accountability and Redress for Discrimination in Health care in Botswana, Malawi and Zambia*, 99.

³⁴ SALC (2016) 99.

³⁵ Baral et al (2009) "HIV Prevalence, Risks for HIV Infection, and Human Rights among Men Who Have Sex with Men (MSM) in Malawi, Namibia, and Botswana" *PLoS ONE* 4(3): e4997.

³⁶ Müller et al (2018).

³⁷ Human Dignity Trust (2016) *Breaking the Silence* notes that the targeted rape of lesbians and bisexual women is reported to be common in Kenya, Zimbabwe, Uganda and South Africa.

“I had an incident in 2013 of sexual assault. I defended myself and consequently hurt the guy who was assaulting me.... I was later traced by the police just to find out that the guy who assaulted me opened a case of physical assault against me.” (Maun)

“When my aunt went on one of her trips, the husband started asking me if I had found a girlfriend...When I was in my room, he came over and told me that as a nurse, he was taught to understand people’s bodies. He started touching me sexually, groping my breasts and tried to force himself on me. I told him ‘no’. He got aggressive and threatened to kill me should I tell my aunt about what happened,” (Maun)

“In college I had started a new relationship and had just moved in with the girl to share the room. A week later a group of guys who had wanted to date this girl... came to our dorm and said they wanted to fix us. We put up both of our beds against the door so they wouldn’t open.” (Francistown)

The interviews conducted for this report supports the finding that the fear of violence, including sexual violence, is a major concern for LGBT persons. For lesbian women the fear of sexual violence is pervasive. LGBT persons’ experience of fear of violence appears to be far more prevalent than in the general population.³⁸

“Because I am a lesbian, the one thing I am most afraid of is sexual assault” (Gaborone)

“Corrective rape terrifies me” (Francistown)

“I am definitely afraid of physical and sexual violence... a lot of my gay friends have experienced physical violence at the hands of men.” (Maun)

³⁸ Lekorwe, M et al (2017) “Summary of results, Botswana: Round 7” *Afrobarometer*, 54. When asked whether participants have in the past two years personally feared or experienced violence in their community, 11% said they feared violence but did not experience it and 4% said they feared violence and had experienced it.

Discrimination in health care

“A lot of public health care workers teach people that gays bring HIV because of their illegal sexual conduct. We are not safe because everyone wants to violate your rights because of that section. Even health care workers are more interested in how we personally have sex and how our parents have responded to our sexual orientation.” (Palapye)

Health care workers in Botswana have been reported as reinforcing societal stigma against LGBT individuals, treating them in a stigmatising and discriminatory manner.³⁹

Research by Baral et al found that 5.1% of respondents across Botswana, Malawi and Namibia had been denied health care because of their sexual orientation.⁴⁰ In Botswana, LEGABIBO’s 2013 needs assessment found that 14% of respondents reported being denied health care services and only 25% reported disclosing their sexual orientation to health care providers.⁴¹ Müller’s pilot study has found that **28% of LGBT respondents reported being denied health care because of their sexual orientation or gender identity.**⁴²

Discrimination in health care ranges from instances of abusive and derogatory language, breaches of confidentiality, providing inferior / sub-standard care and conditional access to health care services, to outright denial of health care and threats of police reports.⁴³ SALC’s 2016 research into discrimination within health care settings in Botswana, Malawi and Zambia documented various instances of insulting treatment of LGBT patients in health care facilities, including receiving inferior or sub-standard treatment, counselling and care and conditional access to services (such as being denied access to services without bringing a sexual partner to the facility or having to test for HIV in order to get treatment).⁴⁴ Müller’s pilot study found that **56% of LGBT respondents reported being treated with less respect because of their sexual orientation or gender identity and that 39% had been called names or insulted in a health care facility.**⁴⁵

“The first time I decided to go for HIV testing with my partner... they told us they don’t know such couples. This conversation took place in the waiting area and it was embarrassing for us. She insisted that it is either I go on alone because they only know couples as heterosexual and that is the only way they could assist us. We decided to leave...” (Maun)

“The nurse told her that the things she was doing were illegal but she will do her a favour and not report her to the police. Instead she referred her to her church for help.” (Gaborone)

³⁹ Müller et al (2018); PEPFAR (2016) *Botswana: PEPFAR Gender Analysis*.

⁴⁰ Id.

⁴¹ LEGABIBO (2013).

⁴² Müller et al (2018).

⁴³ See Müller et al (2018); ARASA (2016); SALC (2016) 97-100; WHO (2015) 23.

⁴⁴ SALC (2016).

⁴⁵ Müller et al (2018); WHO (2015) 23.

Breaches of confidentiality are also reported. In a 2016 research report, ARASA noted reports of many breaches of confidentiality against LGBT patients, citing an example of a young gay man who sought treatment for an anal sexually transmitted infection (STI). The nurse summoned several other nurses to the patient's room to see the person with an STI "where it is not supposed to be" and subsequently refused treatment to the patient.⁴⁶

"One participant who is feminine presenting said he went to a clinic with general chest pains. As he was explaining to the attending nurse, she was looking at him strangely at first. She then called in another nurse and started talking rudely about him right there in his presence, laughing about his appearance and 'gay' behaviour, his health issue totally forgotten."⁴⁷

Additionally, LGBT persons also report being unable to access health care services that target their specific health care needs, for various reasons including the unavailability of appropriate services and trained health care workers, their inability to disclose their sexual behaviour and concerns for their confidentiality.⁴⁸

"I cannot access health care services adequately from service providers because of my sexuality because there are no guidelines including me [as a gay man] in the treatment policy but rather it is tailored to the general public. I cannot openly discuss my sexuality when seeking health services because my act is criminalised and I can't even come out to my family. Life is really hard for me." (Gaborone)

Discrimination in employment

Despite protective labour legislation prohibiting discrimination on the basis of sexual orientation,⁴⁹ CSOs in Botswana report cases of discrimination in employment, ranging from harassment and requests to modify their appearance and behaviour, to dismissals based on a person's sexual orientation or gender identity.⁵⁰ Discussing the experiences of lesbian women in Botswana, an International Commission of Jurists (ICJ) report notes the women who were dismissed as a result of their sexual orientation seldom made reports to the labour authorities due to fear and lack of knowledge of the protective measures available.⁵¹ The report further notes a fear to disclose sexual orientation to a prospective employer for fear of losing an employment opportunity.⁵²

"I was told twice by my Executive Director and later by a Board member that I needed to reduce the LGBT content on my Facebook page because the members of our organisation are starting to complain." (Maun)

Transgender individuals face additional difficulties at the workplace because there is often an incongruence between their gender identity and expression and the gender marker on their identification documents.⁵³ A recent decision of the High Court of Botswana held that the refusal to change the

⁴⁶ ARASA (2016) 99.

⁴⁷ SALC (2016) 97.

⁴⁸ ARASA (2016); SA LC (2016).

⁴⁹ Employment Amendment Act No. 10 of 2010, section 23(d) and (e).

⁵⁰ ARASA (2016).

⁵¹ ICJ (2013) 50.

⁵² ICJ (2013) 50.

⁵³ ICJ (2013) 51.

Applicant's gender marker on his identification was a violation of his constitutional rights.⁵⁴ It is hoped that this decision will result in a change in policy and the increased ability of transgender individuals to change their gender marker without having to resort to litigation.

“Non-recognition of the identity of the Applicant (and other transgender persons) denies him equal protection of the law, thereby leaving him extremely vulnerable to harassment, violence and sexual assault in the public space, airports, at home and also by the police. This can also result in extreme discrimination in all spheres of society, especially in the field of employment, education and health care.”

High Court of Botswana, ND v Attorney General of Botswana⁵⁵

Harassment and abuse from law enforcers

Law enforcement officials are reportedly a source of various forms of stigma, discrimination and rights violations for LGBT persons, including harassment, intimidation, threats of violence, physical and sexual violence, arbitrary arrest and detention, extortion or blackmail.

Research by Baral et al in Botswana, Malawi and Namibia found that 10.5% of respondents had been beaten by the police.

LEGABIBO's 2013 needs assessment found that LGBT persons face arrest, illegal detention and criminal charges regularly, reinforcing findings by African Men for Sexual Health and Rights (AMSHeR) and the Coalition of African Lesbians (CAL) showing that arbitrary arrest and detention were commonplace occurrences for LGBT persons across Africa, based on factors such as a person's appearance, mannerisms, style of speech and general conduct rather than sexual conduct prohibited in penal provisions.⁵⁶ Research conducted by the International Commission of Jurists (ICJ) in 2013 found reports of transwomen in Botswana being singled out for abuse by police and detained for fraud because of their identity documents.⁵⁷

“The police find it OK to arrest transwomen and say they are cross dressing. It's just like a gay man cross-dressing, they find it a nuisance. The law doesn't say anything about it. That person is expressing their gender identity.”⁵⁸

⁵⁴ ND v Attorney General of Botswana and Another, MAHGB-000449-15. 29 September 2017.

⁵⁵ ND v Attorney General of Botswana and Another, MAHGB-000449-15. 29 September 2017, para 130.

⁵⁶ AMSHeR and CAL (2013).

⁵⁷ ICJ (2013) Women's Access to Justice in Botswana, 51.

⁵⁸ ARASA (2016) 96.

Section 2: Does the law protect LGBT persons sufficiently?

Protective provisions in the law

Botswana Constitution

3. Fundamental rights and freedoms of the individual

Whereas every person in Botswana is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his or her race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest to each and all of the following, namely-

- (a) life, liberty, security of the person and the protection of the law;*
- (b) freedom of conscience, of expression and of assembly and association; and*
- (c) protection for the privacy of his or her home and other property and from deprivation of property without compensation,*

the provisions of this Chapter shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest.

7. Protection from inhuman treatment

(1) No person shall be subjected to torture or to inhuman or degrading punishment or other treatment.

9. Protection for privacy of home and other property

(1) Except with his or her own consent, no person shall be subjected to the search of his or her person or his or her property or the entry by others on his or her premises.

12. Protection of freedom of expression

(1) Except with his or her own consent, no person shall be hindered in the enjoyment of his or her freedom of expression, that is to say, freedom to hold opinions without interference, freedom to receive ideas and information without interference, freedom to communicate ideas and information without interference (whether the communication be to the public generally or to any person or class of persons) and freedom from interference with his or her correspondence.

13. Protection of freedom of assembly and association

(1) *Except with his or her own consent, no person shall be hindered in the enjoyment of his or her freedom of assembly and association, that is to say, his or her right to assemble freely and associate with other persons and in particular to form or belong to trade unions or other associations for the protection of his or her interests.*

15. Protection from discrimination on the grounds of race, etc.

(1) *... no law shall make any provision that is discriminatory either of itself or in its effect.*

(2) *... no person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority.*

(3) *... the expression “discriminatory” means affording different treatment to different persons, attributable wholly or mainly to their respective descriptions by race, tribe, place of origin, political opinions, colour, creed or sex whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.*

18. Enforcement of protective provisions

(1) *... if any person alleges that any of the provisions of sections 3 to 16 (inclusive) of this Constitution has been, is being or is likely to be contravened in relation to him or her, then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the High Court for redress.*

The Constitution of Botswana has a bill of rights,⁵⁹ which guarantees the fundamental rights and freedoms of all people, without discrimination on any grounds (including the ground of “sex”) to, amongst others, the rights to life, liberty and security of the person, privacy and freedom of conscience, of expression and of assembly and association.⁶⁰ The Court of Appeal in the case of *Attorney General v Rammoge and 19 Others*, confirmed that every person in Botswana is entitled to constitutional rights, irrespective of their sexual orientation or gender identity.⁶¹

“Members of the gay, lesbian and transgender community, although no doubt a small minority, and unacceptable to some on religious or other grounds, form part of the rich diversity of any national and are fully entitled in Botswana, as in any other progressive state, to the constitutional protection of their dignity.”

Court of Appeal, Attorney General of Botswana v Rammoge and 19 Others⁶²

⁵⁹ Constitution of Botswana, Chapter II.

⁶⁰ Constitution of Botswana, 1996, section 3.

⁶¹ *Attorney General of Botswana v Rammoge and 19 Others*, Botswana Court of Appeal, 16 March 2016, CACGB-128-14, para 60: “Fundamental rights are to be enjoyed by every person ... To deny any person his or her humanity is to deny such person human dignity.”

⁶² *Attorney General of Botswana v Rammoge and 19 Others*, Botswana Court of Appeal, 16 March 2016, CACGB-128-14, para 60.

The Botswana Court of Appeal has clarified that the criminalisation of consensual same-sex sexual acts cannot be used as a justification for denying persons rights on the basis of their sexual orientation: “*It is not, however, and never has been a crime in Botswana to be gay*”.⁶³

As a result of the *Rammoge* judgment, LGBT persons are also entitled to advocate for law reform and form associations.

“There is nothing unlawful about advocating for a change or changes in the law. That is the democratic right of every citizen.”

Court of Appeal, Attorney General of Botswana v Rammoge and 19 Others⁶⁴

Following this decision, the Botswana High Court explicitly stated that there was also a duty on the State to protect the rights of transgender individuals.⁶⁵

The only law in Botswana which specifically provides for the rights of lesbian and gay persons is the Employment Act. The Employment Amendment Act 10 of 2010 added gender, sexual orientation and health status as prohibited grounds on which an employer cannot terminate a contract of employment.⁶⁶ Section 23(e) was further added to state 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. Although at first glance the Act only seeks to afford protection based on sexual orientation, it is submitted that the prohibited ground of “gender” and the addition of section 23(e) can be read to show the discrimination based on gender identity is also prohibited. Such an interpretation would be in line with the recent decision of the Botswana High Court on gender identity.

“...the recognition of the Applicant’s gender identity lies at the heart of his fundamental right to dignity. Gender identity constitutes the core of one’s sense of being and is an integral part of a person’s identity. Legal recognition of the Applicant’s gender identity is therefore part of the right to dignity and freedom to express himself in a manner he feels psychologically comfortable with.”

High Court of Botswana, ND v Attorney General of Botswana⁶⁷

When it comes to violence there has also been some recent developments which now extends protection of the law to LGBT persons who have experienced violence.

Section 141 of the Penal Code has been amended to make the definition of rape gender neutral and to extend beyond vaginal penetration to penetration without consent of a sexual organ or instrument into the person of another for sexual gratification.⁶⁸

The Domestic Violence Act 10 of 2008 should also be of assistance to LGBT persons who experience violence from family members, romantic or sexual partners, or from people with whom they share a house. The Act has a broad definition of “domestic relationship” and “domestic violence” includes emotional, verbal and psychological abuse, intimidation and harassment.

⁶³ *Attorney General of Botswana v Rammoge and 19 Others*, Botswana Court of Appeal, 16 March 2016, CACGB-128-14, para 62 and 76.

⁶⁴ *Attorney General of Botswana v Rammoge and 19 Others*, Botswana Court of Appeal, 16 March 2016, CACGB-128-14, para 64.

⁶⁵ *ND v Attorney General of Botswana and Another*, MAHGB-000449-15. 29 September 2017.

⁶⁶ Section 23(d).

⁶⁷ *ND v Attorney General of Botswana and Another*, MAHGB-000449-15. 29 September 2017, para 85.

⁶⁸ *Chanda v The State* 2007 (1) BLR 400 (CA).

Because it is not a crime to be homosexual, an LGBT person has the right to access any complaints mechanism when they have experienced stigma and discrimination, including the police, Botswana Health Professions Council, Nursing and Midwifery Council of Botswana and Office of the Ombudsman.⁶⁹

Therefore, LGBT persons are entitled to a) protection of all their fundamental rights and freedoms, including the right to dignity and to associate freely, b) specific protection in the workplace, c) remedies in cases of sexual and domestic violence, and d) support from the State to facilitate access to justice including access to complaints mechanisms.

Harmful provisions in the law

Despite the above protections, Botswana's Penal Code retains provisions inherited during the period of British colonisation,⁷⁰ criminalising consensual sex between persons of the same sex in sections 164, 165 and 167.

“Any person who:

(a) has carnal knowledge of any person against the order of nature;

(b) has carnal knowledge of any animal; or

(c) permits any other person to have carnal knowledge of him or her against the order of nature,

is guilty of an offence and is liable to imprisonment for a term not exceeding seven years.”

Section 164 of the Penal Code

Section 165 criminalises attempts to commit the same offences and are punishable with up to five years of prison.

The Botswana Court of Appeal has defined “carnal knowledge against the order of nature” as anal sex⁷¹ and both parties committing such acts can be held criminally liable.⁷² In *Gaolete v The State*,⁷³ the High Court sets forth some of the legal requirements to establish a criminal case under sections 164 and 165. For a conviction under section 164, there must be evidence that (1) there was “carnal knowledge,” defined by the court as sexual intercourse and (2) the carnal knowledge must have been “against the order of nature.” To meet these requirements, there must be at least slight penetration per anum. The other party can be male or female.

“Any person who, whether in public or private, commits any act of gross indecency with another person, or procures another person to commit any act of gross indecency with him or her, or attempts to procure the commission of any such act by any person with himself or herself or with another person, whether in public or private, is guilty of an offence.”⁷⁴

Section 167 of the Penal Code

⁶⁹ SALC (2016) 48-59.

⁷⁰ Ako (2010) *The Debate on Sexual Minority Rights in Africa: A Comparative Analysis of the Situation in South Africa, Uganda, Malawi and Botswana*; Human Rights Watch (2008) *This Alien Legacy: The Origins of “Sodomy Laws” in British Colonialism*.

⁷¹ *Kanane v The State* 2003(2) BLR 64 (CA).

⁷² Penal Code Chapter 8:01, sections 164(a) and (c).

⁷³ 1991 BLR 325 (HC).

⁷⁴ Penal Code, Chapter 8:01, section 167.

The 1998 process of revising the Penal Code resulted in section 167's expansion to a 'gender-neutral' version that also criminalises sexual conduct between women.⁷⁵ Given the private nature of the acts criminalised, the law is seldom enforced, giving the courts limited opportunity to interpret the provisions.⁷⁶

The case of *Kanane*,⁷⁷ which went on from 1994 through to a Court of Appeal hearing in 2003, challenged the constitutionality of the Penal Code provisions. Kanane, an adult male citizen of Botswana, was charged with engaging in unnatural acts and indecent practices between males under section 164 and, in the alternative section 167 of the Botswana Penal Code. He challenged the constitutionality of the criminal laws on the grounds that the provisions infringed his constitutional rights to non-discrimination and privacy. The Court of Appeal held that section 167 could no longer be deemed to be unconstitutional because it was amended to be gender-neutral. Regarding section 164 the Court of Appeal held that the time has not yet come to decriminalise same-sex sexual acts between consenting adults.

The UN Human Rights Council has observed that by criminalising same-sex sex, Botswana was violating its obligations under the International Convention on Civil and Political Rights (ICCPR). These laws have been found to violate the ICCPR's articles 2 and 26 (equality and non-discrimination), article 17 (right to privacy) and articles 19, 21 and 22 (freedom of expression, assembly and association). In 2008, the Human Rights Committee, on review of Botswana's report, noted that Botswana criminalised same-sex sex in violation of the ICCPR's rights to equality before the law and privacy, and recommended that Botswana decriminalise consensual same-sex activities between adults.⁷⁸

⁷⁵ BONELA and LEGABIBO (2008). Penal Code Amendment Act 5 of 1998.

⁷⁶ Tabengwa, M and Nicol, N (2010).

⁷⁷ *Kanane v The State* 2003(2) BLR 64 (CA).

⁷⁸ UN Human Rights Committee (HRC), *Consideration of reports submitted by States parties under article 40 of the Covenant: International Covenant on Civil and Political Rights: concluding observations of the Human Rights Committee: Botswana*, 24 April 2008, CCPR/C/BWA/CO/1, para 22.

Section 3: How does criminalisation of same-sex sexual acts impact on the rights of LGBT persons?

The criminal laws infringe on constitutional rights

“I am painfully aware of how my relationship will always be under scrutiny and perhaps always threatened by a law that sanctions the state, and the general public, to look into my bedroom, to interrogate my sexual and romantic life, and feel justified in doing so.” (Maun)

Criminalising consensual sex infringes upon the rights of LGBT persons in Botswana to be treated equally, without discrimination on the basis of their sexual orientation and gender identity. It furthermore infringes upon their rights to privacy and personal liberty, limiting their ability to have sex freely⁷⁹ and creating a fear of exposure, discrimination, violence and arrest.⁸⁰ Criminalisation also impacts on the way that LGBT persons feel about themselves and their world. Muller’s recent research in Botswana has found that criminalisation, stigma, prejudice and discrimination experienced in society and within health care links to increased levels of mental health problems,⁸¹ suicidal behaviour⁸² and substance use amongst LGBT persons living in Botswana.⁸³

“I have experienced a lot of discrimination from the society, peers and churchmates. This has impacted my life negatively and even my mental health. The society should accept the fact that we are humans and we have the right and freedom of expression without being oppressed and discriminated against.” (Kanye)

⁷⁹ UN Human Rights Council, *Discrimination and violence against individuals based on their sexual orientation and gender identity*, 4 May 2015, A/HRC/29/23.

⁸⁰ Müller et al (2018).

⁸¹ Müller et al (2018), comparing findings with a study by Gupta et al (2010) “Depression and HIV in Botswana: A Population-based study on gender specific socioeconomic and behavioural correlates” *PLoS one* 5(12), e14252.

⁸² Müller et al (2018); comparing findings with a study Machisa & van Dorp (2012).

⁸³ Müller et al (2018); this is discussed in further detail in the section on health rights, below.

The criminal laws cause further stigma, discrimination and violence

“This law also gives basically everyone the permission to violate my rights and treat me as a pariah. I feel reduced to a pariah by this law and less of a human being.” (Maun)

Various recent research studies have reported on the impact of criminalisation on stigma and discrimination against LGBT persons in Botswana.⁸⁴ Müller’s pilot research in Botswana finds that the criminal provisions ‘codify’ sexual orientation and gender-identity related stigma, prejudice and discrimination into the Penal Code, contributing to high levels of violence experienced by lesbian, gay, bisexual, transgender and intersex people living in Botswana.⁸⁵

A study from Nigeria showed that men who have sex with men experienced higher levels of verbal harassment and blackmail after the enacted men of Same-Sex Marriage Prohibition Act in 2014.⁸⁶ Similarly, in Botswana, human rights organisations have noted that the criminal prohibition, homophobic public statements and the lack of protection from discrimination leads to a perception that LGBT persons have no rights in a context of ongoing violations of the political, social or economic rights of LGBT persons.⁸⁷

This is comparable to findings globally. The UN Human Rights Committee has repeatedly recognised that the existence of criminal provisions criminalising same-sex sex, even when not enforced, arguably strengthen, legitimise and perpetuate social stigma, homophobia and rights violations against LGBT persons in a culture of officially ‘sanctioned’ inaction and impunity.⁸⁸ The Human Rights Council has noted the link between criminalisation and homophobic hate crimes, police abuse, torture and family and community violence.⁸⁹ The Special Rapporteur on health has noted that “sanctioned punishment by States reinforces existing prejudices, and legitimises community violence and police brutality directed at affected individuals.”⁹⁰ The Special Rapporteur on extrajudicial executions has furthermore noted that criminalisation increases social stigmatisation and makes LGBT persons “more vulnerable to violence and human rights abuses, including death threats and violations of the right to life, which are often committed in a climate of impunity.”⁹¹

I feel like I am not human because it is like everyone can do whatever they want to me and there is nothing I can do.” (Francistown)

⁸⁴ PEPFAR (2016); ARASA (2016); Republic of Botswana: Ministry of Health and Wellness and UNDP (2017).

⁸⁵ Müller et al (2018).

⁸⁶ Schwartz et al (2015) “The immediate effect of the Same-Sex Marriage Prohibition Act on stigma, discrimination, and engagements on HIV prevention and treatment services in men who have sex with men in Nigeria: analysis of prospective data from the TRUST cohort” *Lancet HIV*, 2015 Jul; 2(7) e299-306.

⁸⁷ ARASA (2016); ICJ (2013); Ako (2010).

⁸⁸ UN Human Rights Council (2015); ICJ (2013).

⁸⁹ UN Human Rights Council (2015).

⁹⁰ A/HRC/14/20, para 20. See also the concluding observations of the Human Rights Committee on Togo (CCPR/C/TGO/CO/4), para 14, and E/CN.4/2000/3, para 116.

⁹¹ A/57/138, para 37.

The criminal laws create the impression it is illegal ‘to be gay’

The Penal Code provisions in Botswana create the erroneous public perception that being homosexual is criminal.⁹² The Penal Code criminalises sexual activity, not sexual orientation.

“The law is not clear... You still get people at clinics and police stations telling you that homosexuality is illegal because people think I’m doing illegal things... I feel like it affects my freedom. You become afraid of homophobic responses from clinics. I have been told many times that homosexuality is illegal.” (Francistown)

“...our police officers, who are supposed to be enforcing the law, don’t understand the law as it is.” (Maun)

“...[T]hey immediately cite the law and explain that being lesbian or gay is not allowed in Botswana. People use this law to discriminate against homosexuals without understanding the law entirely.” (Maun)

“People who are doing all of this violence ba ikaagile ka the law. They believe that they are doing this because they feel they are backed up by the idea that we are illegal.” (Francistown)

“In one case a young woman was beaten by several young men on the basis of her gender expression. When she reported the case to the police, they laughed and informed her that it is not possible for her to open a case because ‘homosexuality is illegal’.”⁹³

The vague and broad reach of the law has also impacted upon the work of LGBT organisations, as was seen in the government’s refusal to register LEGABIBO. The Botswana Court of Appeal set aside the refusal to register and clarified the misconception that homosexuality is a crime, emphasising that the Penal Code criminalising consensual sexual acts committed between persons of the same sex do not extend to criminalising LGBT persons themselves.

“For the public, it was basically a shock to know that being LGBT was not criminalised. What that meant for me was that it created a platform for the LGBT community to stand up for themselves.” (Gaborone)

⁹² UN Human Rights Council (2015); ICJ (2013).

⁹³ ARASA (2016) 97.

The criminal laws, stigma and discrimination block access to justice for LGBT persons

“In one case in Maun, while reporting a rape case in which the perpetrator was male, a gay man was informed by the police that he would be arrested for ‘sodomy’ if he proceeded with the case.”⁹⁴

Within the context of the vague provisions criminalising same-sex sex, stigma, discrimination and human rights violations, LGBT persons in Botswana report being unable to report to the police and access remedies for violations.⁹⁵ Reasons cited for this include police inaction,⁹⁶ fear of breaches of confidentiality, family reprisals, arrest, injustice, victimisation and further violence, as well as a lack of knowledge and information.⁹⁷ ARASA’s 2016 research into injustice against LGBT persons in southern Africa found that individuals who do report, often do not disclose their sexual orientation due to the criminalisation of same-sex sex and fear of discrimination.⁹⁸ This fear of reporting has meant that there is limited documentation and identification of instances where a person’s sexual orientation was a factor leading to the violence, limiting the government’s response to hate crimes.⁹⁹

“I tried to report experiences of assault to the manager of the establishment I work in but nothing came of it and it discouraged me to go to the police. We live in fear of complaining because everyone thinks we are illegal...” (Francistown)

“I didn’t take anything to the police...Firstly I know that it is illegal to get involved in a sexual affair with people of the same sex. And on top of that, I was really shy because if I got caught, my secret would be revealed and I wouldn’t be comfortable to interact with others.” (Gaborone)

“The police officer even told me to stop acting effeminate and this alone, I felt, violated my rights because judgement had already been made based on my physical appearance.” (Gaborone)

“I didn’t take the issues to the police because I was afraid of being stigmatised by the police.” (Chadibe)

LEGABIBO’s 2013 needs assessment found that LGBT persons were afraid of reporting instances of intimate partner violence, due to stigma and discrimination from authorities.¹⁰⁰ Of the 23.8 % of respondents in 2013 who disclosed that there had been physical violence in their relationships, 53.8 % said they reported to police but were not taken seriously.¹⁰¹

⁹⁴ ARASA (2016) 97.

⁹⁵ LEGABIBO (2013); ARASA (2016); ICJ (2013); Human Dignity Trust (2016).

⁹⁶ ARASA (2016) 96, reports LGBT individuals saying that cases are not taken seriously, not pursued or are “lost”.

⁹⁷ SALC (2016); ARASA (2016); ICJ (2013); Human Dignity Trust (2016) 25, notes that “Lesbians will not ordinarily report incidents of sexual violence or domestic violence for fear of being identified as homosexual by the authorities.” ICJ (2013) 50 notes that lesbian women have expressed fear that disclosing their sexual orientation will result in them losing in custody disputes.

⁹⁸ ARASA (2016).

⁹⁹ ICJ (2013) 50.

¹⁰⁰ See also ICJ (2013) 50.

¹⁰¹ LEGABIBO (2013). This can also be compared with the experiences of the general population where only 22% of persons surveyed in the Afrobarometer report thought they would not be assisted if they took a matter to the police. Lekorwe, M et al (2017) “Summary of results, Botswana: Round 7” *Afrobarometer*, 41.

“There are examples of a gay man going to a police station, having been assaulted by their partner and they are told that what they are doing is illegal and that they should go home and ‘talk issues out’.” (Gaborone)

“A lady friend of mine was beaten up by her mother, pastor, two uncles and father for close to five hours.... When the police found out about her sexual orientation, one of the police officers insisted that they should go back to reconcile with her parents.” (Gaborone)

“I had an incident in 2013 of sexual assault...For fear of discrimination I did not report the case but I was later traced by the police just to find out that the guy who assaulted me opened a case of physical assault against me. When I got there I told my side of the story and no one wanted to believe me. We were taken for HIV testing and DNA testing and I had to take post-exposure prophylaxis for 30 days and it gave me nightmares. I had to frequent the police station to be questioned only to find that my assaulter kept changing his statement. Eventually they decided to charge us both with contravening section 164.” (Maun)

The criminal laws limit access to health care

“We remain deeply concerned by the atmosphere of disapproval, even hate that prevails in Botswana. By the very fact of being gay, we live a sense of being on the fringes and isolated. Being in a state of mind where you constantly fear being ‘discovered’ thinking outing yourself by telling the truth about being raped or having an anal STI, it is extremely difficult to ‘come out’ to a health care worker or to the police. The attitude we experience from these service providers is that we are abnormal and acting outside the approval of the law, therefore we have experienced the most demeaning and dehumanising treatment ranging from being judged to being insulted. It is extremely discouraging to go back to seek help after such an experience.”¹⁰²

The Court in the *Kanane* case was of the view that maintaining criminal sodomy laws would have the effect of reducing HIV prevalence. This is contrary to the view expressed by the Human Rights Committee in *Toonen v Australia*, and contrary to findings relating to the impact of criminalisation on health, and access to health care services in Botswana, set out below.

In the *Toonen* case, the Committee noted that the criminalisation of same sex sexual practices “could not be considered a reasonable means or proportionate measure to achieve the aim of preventing the spread of HIV.”¹⁰³ In fact, as the State party in that case commented, “statutes criminalising homosexual activity tend to impede public health programs by driving underground many of the people at the risk of infection.”¹⁰⁴ The Committee concluded that criminalisation would appear to run counter to the implementation of effective education programmes in respect of HIV prevention and there is no link between the continued criminalisation of homosexual activity and the effective control of the spread of HIV.”¹⁰⁵

¹⁰² GCHL (2012) *Report of the Africa Regional Dialogue of the Global Commission on HIV and the Law*, 3-4 August 2011, Pretoria, South Africa.

¹⁰³ *Toonen v Australia*, Communication no. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994).

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

The Special Rapporteur on health observed that “criminal laws concerning consensual same-sex conduct, sexual orientation and gender identity often infringe on various human rights, including the right to health.”¹⁰⁶ The Human Rights Council noted that the criminalisation of homosexuality may deter individuals from seeking health services for fear of revealing criminal conduct, and results in services not reflecting the specific needs of LGBT persons.¹⁰⁷ In Nigeria, Schwartz et al (2015) found that men who have sex with men were more afraid to seek health care and were less likely to go for HIV testing, care and treatment after the Same-Sex Marriage Prohibition Bill was signed into law.¹⁰⁸ A southern Africa regional study also noted that sexual minority women did not disclose their sexual orientation or gender identity to health care providers as a result of concerns of confidentiality, homophobia and stigma and their previous negative experiences.¹⁰⁹ The study concluded that legislative change was key to improving sexual minority women’s health.¹¹⁰

In Botswana, evidence suggests that criminal laws, and the accompanying stigma, discrimination and rights violations experienced by LGBT persons, including within health care facilities, marginalise LGBT persons, making them afraid of accessing and using health care services and impacting upon their health.¹¹¹ This was recognised by the Botswana government itself: its Global AIDS Response Progress Report to the Joint United Nations Programme on HIV/AIDS (UNAIDS) noted that “[s]tigma and discrimination are major constraints to universal access and utilisation of HIV and AIDS services,”¹¹² and the recent Legal Environment Assessment found that criminalisation impedes access to health services by “driving vulnerable and marginalised individuals underground and away from public services.”¹¹³

Gay men and men who have sex with men are at higher risk of HIV exposure globally,¹¹⁴ and this holds true for Botswana where HIV prevalence amongst gay men and men who have sex with men has been reported at 19.7% in 2009¹¹⁵ and at 13.1% in 2012.¹¹⁶ Studies by Baral et al in Botswana, Malawi and Namibia found strong associations between experiences of discrimination and fear of seeking health services; in the study, 19.2% of gay men and men who have sex with men were afraid to seek health care services.¹¹⁷ LEGABIBO’s 2013 needs assessment showed that 20.5% of respondents were afraid to seek services due to fear of stigma.¹¹⁸ A 2015 study found that over 20.5% admitted being afraid to seek health services and that less than 25% of LGBT persons disclosed their sexual orientation to health workers,

¹⁰⁶ A/HRC/14/20 at para 6.

¹⁰⁷ UN Human Rights Council (2015); WHO (2015) 23, 40.

¹⁰⁸ Schwartz et al (2015).

¹⁰⁹ Muller A and Hughes T (2016) “Making the invisible visible: a systematic review of sexual minority women’s health in southern Africa, *BMC Public Health* 16:307.

¹¹⁰ Muller A and Hughes T (2016) “Making the invisible visible: a systematic review of sexual minority women’s health in southern Africa, *BMC Public Health* 16:307.

¹¹¹ See, for example, PEPFAR (2016); SALC (2016); ARASA (2016); Republic of Botswana: Ministry of Health and Wellness and UNDP (2017).

¹¹² Government of Botswana (2014) *Progress Report of the National Response to the 2011 Political Declaration of Commitments on HIV and AIDS 2014*.

¹¹³ Republic of Botswana: Ministry of Health and Wellness and UNDP (2017) 102.

¹¹⁴ UNAIDS (2014) *The Gap Report*.

¹¹⁵ Baral et al (2009).

¹¹⁶ Botswana Ministry of Health (2012) *Mapping, Size Estimation and Behavioural and Biological Surveillance Survey*.

¹¹⁷ Baral et al (2009).

¹¹⁸ LEGABIBO (2013).

limiting access to services and the overall efficacy of interventions to reduce HIV in Botswana.¹¹⁹ SALC's 2016 research on human rights violations in the health care setting in Botswana, Malawi and Zambia found that criminal laws and the accompanying stigma and discrimination led to LGBT persons avoiding treatment and concealing their identities and their health issues when accessing health care.¹²⁰

Services also fail to meet the needs of gay men and men who have sex with men in a criminalised context.¹²¹ Service providers have reported that it is difficult to openly provide services for people in same-sex relationships in a criminalised context; state media messages ignore same-sex issues and gay men and men who have sex with men are an "invisible" population as a result.¹²² Botswana health laws, policies and guidelines fail to address LGBT populations adequately,¹²³ particularly with regard to HIV prevention, and awareness raising,¹²⁴ and there is inadequate funding for services for gay men and men who have sex with men in Botswana.¹²⁵

Recent research in Botswana furthermore shows that criminalisation impacts on mental health status, by contributing to violence, discrimination and disparities in mental health amongst LGBT persons. Müller's pilot study found higher levels of mental health problems,¹²⁶ suicidal behaviour¹²⁷ and substance use amongst LGBT persons living in Botswana than in the general population, as a result of stigma, prejudice and discrimination experienced in society and within health care. The study found that 39% of LGBT respondents were classified as depressed, 45% had thought of committing suicide at some point in their life, and in the preceding year 26% had thought of committing suicide and 21% had tried to commit suicide.

Respondents in SALC's research examining accountability and redress for health care violations found that LGBT patients found it difficult to access justice for health care violations in a criminalised context. They feared breaches of confidentiality (with regard to their health status and/or their sexual orientation and gender identity) and feared reprisals arising from instituting complaints.¹²⁸

¹¹⁹ Bachidzi, K and Mmolai-Chalmers, A (2015) *Report on baseline study on human rights, HIV-related stigma and discrimination among key populations*.

¹²⁰ ARASA (2016).

¹²¹ GCHL (2012); ARASA (2016); UN Human Rights Council (2015).

¹²² ARASA (2016).

¹²³ ARASA (2016).

¹²⁴ Bachidzi, K and Mmolai-Chalmers, A (2015).

¹²⁵ PEPFAR (2016).

¹²⁶ Müller et al (2018) comparing findings with a study by Gupta et al (2010).

¹²⁷ Müller et al (2018) comparing findings with a study by Machisa & van Dorp (2012).

¹²⁸ SALC (2016).

Section 4: Should the offences which criminalise consensual same-sex sexual acts be scrapped?

The stigma and discrimination faced by LGBT persons as a result of criminalisation shows that Botswana should decriminalise adult consensual same-sex sex. Such a move will lead to a range of positive effects, including reducing stigma and discrimination and improving access to justice and health care for LGBT persons.

“We are not asking for any extraordinary treatment but to be afforded the same rights as everyone has.” (Gaborone)

In the *Kanane* case, the Court of Appeal stated that “[g]ay men and women do not represent a group or class which at this stage has been shown to require protection under the Constitution.”¹²⁹ They furthermore held that “the time has not yet arrived to decriminalise homosexual practices even between consenting adult males in private.”¹³⁰ The court referred to a lack of evidence showing that public opinion has so changed or developed to warrant such a change in legislation.¹³¹ According to the court, its decision reflects the interest of the public, which “must always be a factor in the court’s consideration of legislation.”¹³² However, this decision failed to recognise that the law itself influences what public opinion is.

In the more recent *Rammoge* case the Court of Appeal affirmed the constitutional rights of LGBT persons and cited the Kenyan case of *Gitari* in which the Kenyan court held that “in a representative democracy,” the government is “restricted from determining which convictions and moral judgements are tolerable.”¹³³

The fact that according to *Rammoge* every person’s rights are protected under the Constitution suggests that a violation of rights can no longer be justified simply by reference to public opinion. Nevertheless, the Court of Appeal in *Rammoge* also suggested that there has been a softening of public opinion.¹³⁴

¹²⁹ *Kanane v The State*, 2003; Tabengwa, M and Nicol, N (2013).

¹³⁰ *Kanane v The State*, 2003.

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Eric Gitari v Non-Governmental Organisations Co-ordination Board and 4 Others* [2015] eKLR.

¹³⁴ *Attorney General of Botswana v Thuto Rammoge & 19 Others* [2016] CACGB-128-14 *Botswana*, Court of Appeal, paras 51-52. “They were able, in my view, to lead compelling evidence that attitudes in Botswana have, in recent years, softened somewhat on the question of gay and lesbian rights. Parliament itself has, by Act No. 10/2010 amended section 23(d) of the Employment Act Cap 47:07 to forbid the termination of an employee’s contract of employment on grounds of sexual orientation; national policies on HIV/AIDS recognize gays and lesbians as a vulnerable group requiring special support; and organisations such as BONELA have been registered which openly campaign for the rights of the LGBTI community. This Court, too, can take notice of a far more open public debate on these issues in recent years. While strong dissenting views are still expressed by religious and other groups, some prominent politicians have begun to speak out in support of gay and lesbian rights. This was a subject which only a few years ago was a virtual taboo for public discussion, unless to condemn homosexuality outright. The Minister’s answering affidavit, too, is free of any homophobic nuance, and refers only to enforcement of the law as he sees it. He encourages the respondents, in his correspondence, to have his decision tested by the Court if they disagree with it. In terms of timing, it may be that this general softening of attitude towards the LGBTI community has developed in the years that followed the adoption in 1997 of the national Vision 2016, and the widespread dissemination of the Vision document. One of the pillars of the Vision was that Botswana would be recognised as a ‘Compassionate, Just and Caring Nation’.”

In Botswana, it is clear that the laws prohibiting consensual same-sex sexual acts infringe a range of human rights. Penal Code provisions criminalising same-sex acts have a normative influence upon public opinion towards LGBT individuals in Botswana. Thus, many people find it difficult to recognise LGBT persons whilst laws exist which criminalise their sexual relationships. These laws further serve to sanction public opprobrium by political and religious leaders and discrimination by families, communities and service providers and appears to legitimise official inaction as well as violence and wrongful arrest by police officers.

“If the law changed then this would also change the mind-set of many people.”

(Maun)

Notably, however, particularly in private, LGBT persons do report some increased level of acceptance and tolerance by families, friends and communities.

“My mother loved me very much but she immediately changed after I came out. She started to treat me badly. Two years later she finally wanted to understand my sexual orientation. We started to talk and I gave her time to adjust.” (Maun)

“When coming out my family respected me even more than before. I became the role of the person who people go to when they have problems.” (Gaborone)

“People are homophobic when they are in a group setting but individually they are not. People become homophobic because they think everyone else is.”

(Palapye)

It is important to note that public opinion was neither a factor in the legislature’s decision to amend the Employment Act to provide protection for LGBT persons, nor in the judiciary’s emphatic recognition of the rights and dignity of LGBT individuals.

Repealing section 164 in accordance with international, regional and national human rights obligations, will promote the rights to dignity, equality, non-discrimination, privacy and personal liberty of LGBT persons in Botswana as well as contribute towards reducing rights violations, improving access to justice and strengthening the health and welfare of all LGBT persons in Botswana.

“If that could change, I think it would help a lot of us because right now LGBT people are living in boxes, in confined spaces psychologically, socially and emotionally because of the fear of discrimination and the fear of what the law implies.” (Maun)



Recommendations

The report endorses the recommendations made to Botswana by the United Nations Human Rights Committee. It furthermore endorses the recommendations made by the GCHL internationally, as well as recommendations made at national level by the Republic of Botswana Ministry of Health and Wellness and UNDP (2017) *Assessment of Legal and Regulatory Framework for HIV, AIDS and Tuberculosis*, for strengthening human rights protection for effective health responses.

In particular, the following recommendations for reducing stigma and discrimination, protecting the rights of LGBT individuals in law and policy and promoting access to justice and strengthened law enforcement are highlighted:

- Repeal sections 164, 165 and 167 of the Penal Code to decriminalise consensual adult same-sex sex. Non-consensual sexual acts will remain criminalised under the broader definition of rape in section 141 of the Penal Code.
- Sensitise law enforcement officials, health workers, parliamentarians, judges, lawyers, national human rights institutions, service providers and other key stakeholders on the rights of LGBT persons and the appropriate handling of complaints brought by LGBT persons. All persons must be treated with respect and dignity irrespective of their sexual orientation and gender identity.

LGBT respondents from a 2016 SALC report recommended the following to ensure that they can effectively access complaints mechanisms:

- *Guaranteed confidentiality from the complaints mechanisms;*
- *Immunity from criminal prosecution when laying complaints of human rights violations;*
- *Improved access to legal aid services for the LGBT community;*
- *A complaints mechanism that specifically deals with the issues faced by the LGBT community;*
- *Secret complaints options through suggestion boxes and helplines;*
- *Clear guidelines on how to report a complaint and what to expect from the process;*
- *Information on the ethical and legal responsibilities of health care workers; and*
- *Clear sanctions for discriminatory behaviour by health care workers to ensure the complaints process can work as an effective deterrent.*¹³⁵

¹³⁵ Republic of Botswana: Ministry of Health and Wellness and UNDP (2017) *Assessment of Legal and Regulatory Framework for HIV, AIDS and Tuberculosis*, 107.

- Strengthen, implement, monitor and hold health workers accountable to policies and guidelines to ensure the protection of the health rights of LGBT persons to non-discriminatory, voluntary, confidential and quality health care services.
- Strengthen, implement, monitor and hold law enforcement officials accountable to policies and guidelines to ensure non-discriminatory access to justice, thorough investigation and, where appropriate, prosecution of all cases of violence, abuse, victimisation and other offences against LGBT persons. This should include improving documentation of violence perpetrated against LGBT persons to monitor hate crimes.
- Strengthen effective legal mechanisms for reporting cases of violence, abuse and victimisation, including by strengthening legal support services and alternative complaints mechanisms for LGBT persons to report violations within the work environment, health care sector and law enforcement environment.
- Develop, implement and monitor health policies, guidelines, plans and frameworks to ensure access to health care by LGBT persons.
- Develop programmes and campaigns to reduce stigma and discrimination and increase awareness and understanding of LGBT rights to the broader public and within specific sectors, including through evidence-based sensitisation and advocacy of political (parliamentarians, executive and judiciary) and religious leaders.



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APPEAL OF BOTSWANA





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