



Eswatini's 3rd Universal Periodic Review 39th Session (October- November 2021)

Submission by:

Southern Africa Litigation Centre

And

Eswatini Sexual and Gender Minorities

March 2021

The Southern Africa Litigation Centre (SALC) is a regional non-governmental organisation which was established in 2009. SALC promotes and advances human rights and the rule of law in Southern Africa, primarily through strategic litigation support.

Eswatini Sexual and Gender Minorities (ESGM) is a human rights community-based advocacy organisation with the goal to advance the protection of human rights of lesbian, gay, bisexual, transgender and intersex persons in the kingdom of Eswatini. The organisation further works on reducing the harm that affects the wellbeing of Emaswati based on sexual orientation and gender identity/expression.



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Introduction

This submission has been prepared by the Southern Africa Litigation Centre (SALC) and Eswatini Sexual and Gender Minorities (ESGM).

The issues raised in this submission relate to the following:

- Freedom of association
- Right to health
- Women’s rights
- Rights of LGBTQIA+ persons

Freedom of Association

Several laws interfere with the right to freedom of association in Eswatini.

The Public Service Act No. 37 of 2018 provides that a public officer shall not hold office with a political formation or organisation.¹

¹ Public Service Act No. 37 of 2018, s 51.



Amendments to the Suppression of Terrorism Act in 2017 did not address concerns raised in the High Court judgment which declared previous provisions unconstitutional.² The various applicants, in that case, remain on restrictive bail conditions and the State continues to actively pursue the appeal.³ Some of these activists belong to the Peoples' United Democratic Movement (PUDEMO), which organisation was declared a terrorist organisation in 2008. Most recently, in May 2019, someone was charged under the Act for showing allegiance to PUDEMO.⁴ An act is excluded from being an act of terrorism if it is committed as part of an advocacy, protest, demonstration, dissent or industrial action and is not intended to result in any harm.⁵ That said, the Suppression of Terrorism Act is so loosely worded that it inhibits the right to freedom of expression, association and assembly. For example, where a legitimate protest or demonstration is organised by a designated terrorist group, a person who attends such an event could still potentially be guilty of the offence of giving support to a terrorist group, even though no terrorist act is planned for or at the event, and risk 15 years' imprisonment.⁶

The King's Proclamation of 1973, which disbanded the Constitution and prohibited political parties, continues to create a climate that stifles freedom of association. Even though the Constitution of 2005 which supersedes the Proclamation, allows for freedom of association, there remains a perception that political parties are banned. This is reinforced by the designation of PUDEMO as a terrorist group and the continued arrest of persons for belonging to PUDEMO despite them not being involved in any terrorist activities.⁷ Due to the perception that parties are banned, some political parties struggle to open bank accounts or convene meetings freely.

The Constitution provides for the right to freedom of association, yet section 79 has been interpreted to exclude political parties from the electoral process, although individual members of political parties are able to contest the elections in their personal capacities.⁸ During the 2018 elections period, some political organisations have tried to persuade the government to at least allow individual candidates to express their affiliation to political parties during the election campaigning period in order to promote steps towards political plurality. A lack of political opposition in parliament means that there are limited checks on the powers of the executive.

² *Maseko and Others v Prime Minister of Swaziland and Others* (2180/2009) [2016] SZHC 180 (16 September 2016).

³ *The Prime Minister of Swaziland & Others v Thulani Maseko & Others* App. Case No. 73/16. The appeal has been pending since 2016. The Chief Justice has advised that there is no quorum in the Supreme Court to hear the appeal.

⁴ Anneke Meerkotter, "Questionable sedition charges quell freedom of expression in Eswatini" 22 July 2019 (retrievable [here](#)) (last retrieved 12 February 2020)

⁵ Suppression of Terrorism Act No. 3 of 2008 s 2(3)(b) (retrievable [here](#)) (last retrieved 12 February 2020); Suppression of Terrorism (Amendment) Act No. 11 of 2017.

⁶ Suppression of Terrorism Act of 2008 s 11(a), s 20.

⁷ Anneke Meerkotter, "Questionable sedition charges quell freedom of expression in Eswatini" 22 July 2019 (retrievable [here](#)) (last retrieved 12 February 2020)

⁸ The Constitution of Swaziland, in section 79 provides that "[t]he system of government for Swaziland is a democratic, participatory, tinkhundla-based system which emphasises devolution of state power from central government to tinkhundla areas and individual merit as a basis for election or appointment to public office." Section 25 provides, *inter alia*, that "A person has the right to freedom of peaceful assembly and association."

Lack of opposition also heightens the possibility that key legislative decisions, including decisions relating to the need to improve human rights, are taken with little debate. For example, in April 2019, the King announced a change in the country's names, using his purported prerogative powers and without consulting with the public. The courts have also used frivolous procedural arguments to dismiss such cases of public importance.⁹

There is currently no law in place which provides for the registration of political parties and other associations that have objectives of conducting advocacy or democracy work or defending sex workers and LGBTQIA+ persons' rights. In September 2019, the State formally rejected the registration of an LGBTQIA+ group, Eswatini Sexual and Gender Minorities, as a non-profit company, including on the basis that the organisation does not satisfy a "communal or group interest", that it allegedly encourages same-sex relationships, and that the law does not prohibit discrimination based on sexual orientation.¹⁰ ESGM and its members filed an application to contest the registrar's claims; they have argued that the Registrar's refusal violated ESGM members' rights to dignity, to associate and express themselves freely, to be treated equally and not to be discriminated against.¹¹ ESGM is represented by human rights lawyer Thulani Maseko and supported by the Southern Africa Litigation Centre. The Eswatini High Court heard arguments in October 2020, and ESGM is still awaiting judgement.¹²

All Swazi Nation land vests in the King and individuals do not have individual title to it. The position of citizens who fall into disfavour with the King or his chiefs is accordingly precarious. This explains the reluctance of citizens to freely express political opinions or affiliate with political parties, when doing so can result in significant sanctions including their eviction.

Recommendations

- A. The State should formally repeal the 1973 Proclamation which banned political parties.**
- B. The State should review the Suppression of Terrorism Act (as amended) to include provisions allowing organisations to challenge an order listing them as terrorist before such order is finalised, and to narrow provisions which infringe on freedom of expression and assembly.**
- C. The State should withdraw the existing designation of political parties as terrorist groups and withdraw charges faced by their members for simply being members of such parties.**
- D. The State should engage with political parties in a productive dialogue on the creation of a multi-party democracy.**

⁹ *Shabangu and Others v Elections and Boundaries Commission and Others* (805/2018) [2018] SZHC 169 (31 July 2018) (retrievable [here](#)), which case sought to allow political parties to at least be able to associate themselves with certain candidates and for candidates in the election to express their political party affiliation, if any.

¹⁰ *Mamba Online*, Luiz DaBarros, "Eswatini government officially rejects LGBTI group" 15 September 2019 (retrievable [here](#))

¹¹ *Melusi Simelane N.O. & Others v Minister of Commecr & Industry & Others* HC Case No. 1897/19.

¹² Available [here](#); (last accessed 15 February 2021)

- E. The State should reform the Swazi Administration Act No. 79 of 1950.**
F. The State should attend to the concerns raised concerning the 2013 and 2018 elections, in the Commonwealth Elections Report of 2013¹³
G. The Register of Companies should register any association which meets the requirements set out in the law.

Right to Health

The government seeks to attain Universal Health Coverage – where every person will have access to equitable, affordable and quality health care, irrespective of age, gender, and socio-economic status.¹⁴ The World Health Organisation, in its assessment of Eswatini’s ability to achieve Universal Health Coverage, noted important areas to improve, including: declining national immunisation coverage; an inadequate workforce and retention of skilled staff; urban bias in provision of services; gaps in the implementation of the Essential Health Care Package; insufficient government spending on health, and weak health financing monitoring.¹⁵ The national health budget for the 2019/2020 financial year is estimated to be E2.2bn, which fails to meet the 15% budget allocation threshold for health as required by the Abuja Declaration on HIV, Tuberculosis and Other Related Infectious Diseases.¹⁶

Frequent medicine shortages are reported. For example, in 2019, psychiatric nurses in eSwatini have threatened to release their mentally-ill patients, fearing that drug shortages to subdue their charges may present a danger to their safety. The drug shortage, including medicines running out in public hospitals and clinics, is part of a nationwide health crisis after the government failed to pay suppliers.¹⁷ In addition, the health sector has suffered a strain under the current Covid-19 pandemic. The Swaziland Democratic Nurses Union (SWADNU) President, Bheki Mamba said the union was aware that the country had run out of some medical drugs. Mamba said with this, they were expecting that COVID-19 death cases would likely increase as the medication to treat underlying diseases was not available.¹⁸

¹³ Commonwealth Observer Mission to Swaziland National Elections (2013) (retrievable [here](#)) (last accessed 12 February 2020)

¹⁴ Budget Speech, 2019 pg. 25.

¹⁵ World Health Organisation “Swaziland: Universal Health Coverage - Leaving No One Behind in the Kingdom of Eswatini” 13 February 2019 (retrievable [here](#)) (last retrieved 10 February 2020)

¹⁶ Budget Speech, 2019 pg. 25. Abuja Declaration on HIV/AIDS, Tuberculosis and Other Related Infectious Diseases, adopted at African Summit on HIV/AIDS, Tuberculosis and Other Related Infectious Diseases, Abuja, Nigeria, 24-27 April 2001, OAU/SPS/ABUJA/3, (retrievable [here](#)) (last retrieved 10 February 2020)

¹⁷ eSwatini psychiatric nurses threaten to release patients as drug shortage bites, available [here](#). (last accessed on 24 March 2021)

¹⁸ Another drug shortage hits eSwatini, available [here](#). (last accessed on 24 March 2021)



Eswatini still has the highest HIV prevalence in the world.¹⁹ HIV prevalence is estimated at 27.4% of the adult population.²⁰ It is estimated that 85% of people living with HIV are on antiretroviral treatment.²¹ Although increased access to publicly funded antiretroviral treatment helped, the stigma attached to the HIV pandemic remains high and serves as a barrier to HIV treatment and testing. Knowledge about HIV prevention among young people also remains low.²² The widespread effects of HIV need to be addressed with adequate budgetary allocations to assist those affected.

While much attention has been given by sub-Saharan governments, including Eswatini, to communicable diseases such as HIV, other diseases, such as diarrhoeal diseases, malaria and TB and non-communicable diseases (NCDs), have remained neglected for many decades. Many studies note an unnoticed, unrecorded and unabated increase in non-communicable conditions mainly diabetes mellitus, cardiovascular disease, hypertension, respiratory problems and HIV-related cancers like Kaposi's sarcoma. The associated major risk factors are alcohol and tobacco consumption, physical inactivity and unhealthy diet. It is concluded that a rise in non-communicable conditions in the country requires an intersectoral approach to ensure effective and sustainable prevention and control.²³ Despite this, the pattern in the last years has remained unchanged.²⁴

In particular, the country has experienced a growing number of cases of cervical cancer linked to the high rates of HIV prevalence.²⁵ Women are disproportionately affected by Eswatini's HIV epidemic: of the 210,000 people living with HIV in 2018 (190,000 adults), 120,000 were women. Within the entire population, 35.1% of all women are living with HIV, compared to 19.3% of men.²⁶ The country's National Health Policy noted that cervical cancer accounts for 43.1% of all cancer among women.²⁷ However, treatment including chemotherapy and radiotherapy are not available, and hysterectomies for cervical cancer can only be performed

¹⁹ Chepkemai, Joyce "Countries With the Highest Rates of HIV/AIDS" *WorldAtlas*, 21 January 2019, (retrievable [here](#)) (last retrieved 10 February 2020)

²⁰ UNAIDS "Country Factsheets: Eswatini, 2017" (retrievable [here](#)) (last retrieved 10 February 2020). Men aged 15-49 years have an estimated HIV prevalence rate of 19.3%, whilst women are estimated to have a prevalence rate of 35%.

²¹ Ibid.

²² Ibid. Knowledge about HIV prevention among young people aged 15-24 is estimated at 49.53%, based on MICS data of 2014.

²³ WHO, "Addressing key determinants of non-communicable diseases using an intersectoral approach: the Swaziland experience" 2013 (retrievable [here](#)) (last retrieved 10 February 2020)

²⁴ World Health Organisation, "Non-communicable Diseases (NCD) Country Profiles, 2018" (retrievable [here](#)) (last retrieved 10 February 2020)

²⁵ James Howlett "Swaziland to Use IAEA Recommendations to Address its Growing Cancer Burden" International Atomic Energy Agency, 2017 (retrievable [here](#)) (last retrieved 10 February 2020)

²⁶ Global Information and education on HIV and AIDS in eSwatini, available [here](#). (last accessed on 24 March 2021).

²⁷ Kingdom of Eswatini, Ministry of Health and Social Welfare, *Swaziland National Health Policy* pg. 8. (retrievable [here](#)) (last retrieved 10 February 2020)



in a handful of public hospitals.²⁸ This reiterates the need to make treatment available in private and public hospitals.²⁹

Comprehensive sexual education is not provided for in schools. Women are not allowed to make decisions in a marriage about whether to have children and are supposed to always be accompanied by their husband or a male family member to medical visits when concerning sexual and reproductive health issues.

Because abortions are illegal in most of the circumstances, it is difficult to say accurately how many unsafe abortions are performed in the country. There is also the risk of being arrested in the event one attempts or succeeds to have an abortion.³⁰ In August 2018, the Times of Swaziland reported that every month, nurses at the Raleigh Fitkin Memorial Hospital in Manzini attended more than 100 cases of young women who had committed illegal abortions. Many of the deaths were the result of haemorrhaging, while others resulted from the patient's delay in seeking medical treatment for other complications stemming from illegal terminations. However, even in medical cases which are permitted by law, it is very difficult to access abortion services as the medical staff is afraid of the charges, as performing, receiving or participating in an abortion carries a maximum sentence of life imprisonment. While section 15(5) of the Constitution permits abortions on medical and therapeutic grounds, and in cases where the pregnancy resulted from rape, there are no formal regulations in place. Doctors still risk criminalisation in practicing medical abortions in those cases.

The quality of health services in Eswatini is inadequate, including the capacity of medical staff, emergency medical services and equipment, especially in rural areas. One-stop centres for victims of gender-based violence have been established, but they still need to be properly equipped (rape kits) and supported with adequately trained doctors and nurses to ensure the SODV Act's implementation. No other psycho-social services for rape survivors are provided at a decentralised level. There is a lack of health facilities which are accessible and equipped for persons with disabilities (i.e. no ramps to access buildings, no Braille printed material, no sign-language interpreters). Traditional healers remain unregulated.

As of 26 January 2021, Eswatini confirmed 16 709 cases of COVID-19 and 640 deaths within its borders.³¹ The Covid-19 Pandemic situation in Eswatini has put a massive strain on the health system, anecdotal evidence has shown that health care workers do not have sufficient personal protective equipment (PPE), and hospitals are filled to capacity, without enough

²⁸ Howlett J "Swaziland to Use IAEA Recommendations to Address its Growing Cancer Burden" International Atomic Energy Agency, 2017 (retrievable [here](#)) (last retrieved 10 February 2020). See also Malambo N "It Would have been Better if I had Never Known: Why Swazi Women Avoid Cancer Screening" International Development Research Centre, 2017 (retrievable [here](#)) (last retrieved 10 February 2020); Medicins Sans Frontieres, "International Activity Report, 2018" (retrievable [here](#))

²⁹ Southern Africa Litigation Centre *Tackling Cervical Cancer Services for Women in Southern Africa*, October 2012 (retrievable [here](#)) (last retrieved 10 February 2020)

³⁰ *Swazi Media Commentary* "Swaziland: Kingdom's Confused Law on Abortions" 27 March 2018 (retrievable [here](#)) (last retrieved 10 February 2020)

³¹ Available [here](#): (last accessed on 18 March 2021)



resources such as oxygen/ventilators for patients who have contracted the virus. The already existing poor health systems have only worsened as a result of the pandemic. The government needs to put measures in place to ensure that patients can access hospitals or be effectively quarantined in the event of contracting the virus.

Recommendations

- A. The State must ensure adequate quantity and quality of health services, including emergency medical services and equipment, both in public and private facilities, health services and facilities in prisons and in the clinics of rural areas.**
- B. The State should amend all legislation in the health and employment sectors to include provisions prohibiting discrimination against persons based on health status, disability, gender identity or sexual orientation.**
- C. Health facilities and services should be easily accessible to people with disabilities.**
- D. The State should amend the existing training manual that is used by the ministry of health to train clinicians about Key Populations, to reflect the LGBTQIA+ community in full, and should permit and provide access to gender affirming health services and medicinal products for all genders.**
- E. The State should take adequate action to address the risk factors for non-communicable diseases and their determinants and make cervical cancer treatment available.**
- F. The State should adhere to the Swaziland National Multisectoral HIV and AIDS Health Strategic Framework of 2018-2023.**
- G. The State should decriminalise abortion and provide safe abortion and post-abortion care services. As a temporary measure, the State should guarantee safe medical abortions in the cases contemplated in the Constitution and provide guidelines for doctors on the procedures for abortions.**
- H. The State should ensure the decentralisation of maternity services to rural clinics and improve the quality of maternity services.**
- I. The State should properly equip one-stop centres and decentralise other psycho-social services for rape survivors and ensure that police posts function properly as GBV referral mechanisms.**
- J. The State should ensure that there are no stock outs in clinics of essential medicines and antiretroviral medication.**
- K. The state should ensure that there are sufficient resources available for PPE's for essential workers, as well as create temporary health care facilities in order for Covid-19 patients to receive adequate health care services.**
- L. The government must provide access to sex education, including access to information and tools for sexual reproductive health rights and ensure respect the rights of women and girls to make autonomous decisions concerning their health and their bodies. The State should create youth friendly health centres for easy access to such services.**
- M. Traditional medicine practices need to be regulated and controlled to avoid malpractices and abuse.**



Women and Children's Rights

Under Swazi customary law, children under the age of 18 can be forced into 'arranged marriages' ("kutekwa"). Even though section 37 of the Sexual Offences and Domestic Violence Act, and section 15 of the Children's Protection and Welfare Act indirectly prohibit forced marriages, especially of children, the customary practice is still in effect. There is an urgent need to finalise the Marriages Bill to clearly prohibit child marriages.

Women do not enjoy the same rights as men to seek separation, divorce or annulment of marriage under Swazi Law and Custom. Currently, it is complicated to divorce or to annul a customary marriage, and it is further incongruent with section 20 of the Constitution which prohibits discrimination based on gender. The abolition of marital power by the High Court is a step in the right direction; however, Swazi law and custom still creates a patriarchal dynamic e.g., if a man dies, the woman needs the consent of the deceased husband's family to re-marry, whilst a man can take a wife as he pleases. Moreover, in case of separation, divorce or annulment of marriage, women and men do not have reciprocal rights and responsibilities towards their children, as the children "belong" to the father according to Swazi Customary Law, in contradiction with the Children Protection and Welfare Act which ascribed duties to both parents equally.

Because Swazi Law and Customary law is not codified, it proves impossible to monitor and regulate the interrelation (equality and respect) between men and women, and subsequently leaves women open to abuse. Codification will assist to bring customary law in line with the Constitution. It will help resolve the many issues relating to the divorce and annulment, as well as the estate sharing. Section 34 of the Constitution specifically requires that parliament, as soon as possible, enact legislation regulating the property rights of spouses. Section 252 of the Constitution further notes that only Swazi customary law which is not repugnant to natural justice or morality is recognised as valid law in the country.

Under Eswatini Law, mothers are not permitted to confer their citizenship to their children under the same conditions as their fathers. Eswatini's Constitution stipulates that any child born inside or outside Eswatini prior to 2005 only acquire Eswatini citizenship from at least one Eswatini parent by descent. However, children born after 2005 only acquire citizenship from their father, unless the child was born out of wedlock and has not been claimed by the father in terms of Customary law.³²

According to Swazi law and custom, separation or divorce is always biased. Men can initiate divorce when the woman has committed adultery or if she is said to have been practicing witchcraft, but a woman cannot initiate divorce. Matters relating to Swazi law and custom are not admissible in the High Court unless the parties exhausted the traditional structures which tend to be biased towards men and takes time.

³² Ibid. Article 6(g) reads "a woman shall have the right to retain her nationality or to acquire the nationality of her husband".



When a woman is in mourning and wearing a garment specific to mourning, she is excluded from entering specific government spaces. Widows are treated differently, especially in public offices. A woman who lost her husband is considered unclean and often asked to leave her job. Harmful practices of property grabbing and “kungenwa” by the in-laws increase the vulnerability of women and children.

When the house is in a matrimonial extended family place, the house does not belong to the deceased husband but his father. When a widow re-marries, she is not entitled to assets of her previous marriage. Where the sister is married, her share is disputed at family level by brothers. The argument is that she cannot take assets to people who do not belong to the family by blood. Her inheritance is where she married.

Women are politically marginalised, and the authorities have not met the goal of having 30 representatives of Parliament being women. In 2018 only two women were directly elected to the House of Assembly, and with the addition of the women appointed by the King and elected to the Senate by the House of Assembly, as well as the election of four more women, resulting from the new legislation, Eswatini still fall short of the quota.

In Eswatini, women still experience high rates of teenage pregnancy, inadequate access to education, health care and adequate housing and ways in which customary and religious laws are used to justify discrimination against women.³³

Since March 2020, when the Covid-19 virus was declared a global pandemic, schools in Eswatini have been closed. This means that children in public schools have not been receiving any formal education.³⁴ This has resulted in schoolgirls falling pregnant or being subjected to abuse, rape and childhood pregnancies. Home schooling is not a practical means of education for many children who live in rural areas as the Government does not have the financial means to provide infrastructure for online learning, nor do parents have the means to afford to access Wi-Fi and other technical equipment required for online learning. It has been reported that school pupils have started growing cannabis as a means to occupy themselves whilst schools have been closed. A pupil was reported as saying, “With schools closed, I had to do something to make money rather than sit idle at home.”³⁵

Recommendations

- A. The State should expedite the finalisation of and consultation on the Marriages Bill and Matrimonial Property Bill. These laws should be aligned with the Constitution and Maputo Protocol.**
- B. The State should finalise amendments to the Administration of Estates Act.**

³³ International Commission for Jurist, 'Eswatini: women still face obstacles to enjoy their rights' (16 December 2020) available [here](#) last accessed on the 1st of March 2021.

³⁴ [Further information on this can be accessed here](#) (last accessed 22 February 2021).

³⁵ Further information can be accessed [here](#) (last accessed 24 March 2021)



- C. There is a need for the customary marriage process to be codified, so that it is aligned with legislative protections and the Constitution.**
- D. The State should identify court judgments (precedents) in favour of women in the dissolution of marriages (under traditional and common laws) forming part of instruments to be considered in the administration of estates even when cases appear before traditional courts.**
- E. The rights and assets of all women in polygamous marriages should be protected.**
- F. The State should put in place legislative measures that gives equal citizenship rights between mothers and fathers over their children.**

Discrimination against LGBTQIA+ persons

Studies in the region confirm that institutionalised criminalisation of consensual same-sex sexual acts reinforces stigma and produces exclusion and marginalisation of LGBTQIA+ persons in families, churches, educational, health care and employment contexts. Such criminalisation further results in low self-esteem, higher suicide rates, substance abuse, mental illness, anxiety, and stress.³⁶ Stigma and discrimination expose LGBTQIA+ people in the region to violence and abuse at all levels.³⁷

In 2019, the Registrar of Companies refused to make a decision in the application for registration of the Eswatini Gender and Sexual Minorities Association.³⁸ Upon being compelled to give reasons the Registrar and the Government considered the objectives of the association as being to encourage the common law offence of sodomy, among other reasons. As mentioned above, the refusal precipitated ESGM and its members to file an application to contest these claims. They argue that the Registrar’s refusal violated ESGM members’ rights to dignity, to associate and express themselves freely, to be treated equally and not to be discriminated against. ESGM is represented by human rights lawyer, Thulani Maseko and supported by the Southern Africa Litigation Centre. The Eswatini High Court heard arguments in October 2020, and ESGM is still awaiting judgement.³⁹

According to the Southern Africa Trans Diverse Situational Analysis,⁴⁰ it is a common but inaccurate belief in Eswatini that trans-diverse people do not exist. This belief has resulted in abuse against the community going unnoticed. There is stigma, discrimination, abuse, and

³⁶ Müller, A., Daskilewicz, K. and the Southern and East African Research Collective on Health (2019) “Are we doing alright?” Realities of violence, mental health, and access to healthcare related to sexual orientation and gender identity and expression in Eswatini: Research report based on a community-led study in nine countries” Amsterdam: COC Netherlands (retrievable [here](#)) (last retrieved 11 February 2020)

³⁷ See “What Is the Data Telling Us?” in *Rights, Evidence and Action: Human Rights Violation*, Annual Report KP Reach (2016), p6 (retrievable [here](#)) (last retrieved 10 February 2020)

³⁸ *Melusi Simelane N.O. v Minister of Commerce and Industry & Two Others* HC Case No. 1257

³⁹ Available [here](#) (last accessed 15 February 2021)

⁴⁰ *AIDS Accountability*, “Southern Africa Trans Diverse Situational Analysis Accountability to reduce barriers to accessing health-care” (2016) (retrievable [here](#)) (last retrieved 10 February 2020).



violence, both structurally and through individual acts.⁴¹ Trans-diverse people are often stigmatised and discriminated against, especially in the health care setting. This stigma results in a fear to seek medical attention when needed. They cannot access medical treatment or hormones as their health needs are not recognised by the Government. The inability to change gender markers on identity documents also makes it difficult for trans-diverse individuals when they face harassment and ill-treatment anywhere such documents have to be presented, including, but not limited to, school registration, filing police reports, seeking employment, and applying for housing.

In 2011, a transgender person was (allegedly) violated while serving a 7-year prison custodial sentence. For safety reasons we have chosen not to disclose her identity. The prison authorities denied her request to be kept in a female cell or be accommodated in a solitary facility. Due to the fact that she was forced to live in a cell with male inmates, she was both sexually and physically violated by the inmates. Some of the prison officials also violated her simply on the basis of her gender identity. At the time of her admission to the correctional institution she was taking hormone therapy supplements for her trans-gendering process. She informed the prison authorities that she intended to continue with the supplements. She was denied continuation. She is now instituting civil proceedings for the violation of her rights at the hands of the correctional/prison authorities.

These human rights abuses usually go unreported. When reported to the police, there is a high chance of the cases not being brought before the magistrate/courts systems by the police.⁴² This means LGBTI persons must rely on private litigation to get remedy for any human rights abuse.

The provision of health care services to LGBTQIA+ individuals is very scarce, which is a result of stigma and discrimination. The reproductive health rights of LGBTQIA+ persons are not respected as the health service is gender binary based. Trans-diverse people are not recognised and not included in the National Health Policy; they cannot access medical supplements/ hormones. Lesbian women do not have access to dental dams amongst other things as the Government only provides condoms. The country needs to create an environment that allows gender-affirming healthcare.⁴³

⁴¹ Kayla Glover, a young lesbian woman, was murdered with an axe outside a club on 15 March 2015. Jabu Pereira, “Anti-gay attacks on the rise in Swaziland”, *Mail and Guardian*, 20 March 2015 (retrievable [here](#)) (last retrieved 10 February 2020); Convicting the accused, the Chief Justice concluded “it is apparent from the evidence that the attack and assault upon the deceased was not provoked, and the accused was not acting in self-defence. It was a brutal attack on an innocent defenceless woman by a bully who has no regard for the right and sanctity of life.” The conviction was affirmed on appeal. *Mamba v Rex* (02/2017) [2018] SZSC 12 (9 May 2018).

⁴² Lived experiences of LGBTI persons in Eswatini; stories (available [here](#)) including of a Trans Man who reported a case and never got his day in court.

⁴³ There is an existing training manual that is used by the Ministry of Health to train clinicians about Key Populations, however there is a need to revise the language, so that it is reflective of the LGBTQIA+ community in full.



Recommendations

- A. The State should decriminalise the common law offence of sodomy, which prohibits consensual same-sex sexual acts among adults. The definition of rape in the new Sexual Offences and Domestic Violence Act includes anal rape and the law is accordingly sufficient to deal with non-consensual cases.
- B. The State should take measures to reduce discrimination against LGBTQIA+ persons and ensure the punishment of the perpetrators of abuse and discrimination.
- C. The State should facilitate a legal change of the gender marker on identity documents of transgender persons.
- D. The State should ensure that LGBTQIA+ persons are able to register associations.
- E. The State shall create an environment and regulations that allows gender affirming healthcare, including correct language in the training manuals used by the Ministry of Health.