



Key issues related to sexual
orientation, gender identity
and expression identified by
a community consultation
in Zambia.



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Transbantu Association Zambia (TBZ) is a not-for-profit Transgender and Intersex-led organisation that was founded in 2008 and registered in 2012. TBZ is committed to creating an enabling environment where Trans-diverse and Intersex people enjoy their full potential, access social justice and opportunities through advocacy, education, empowerment, law and policy work in Zambia. TBZ works to inform, educate and sensitise trans and intersex persons, particularly young people, families and their support structures. TBZ supports the trans and intersex community in Zambia through outreach and practical support, including peer support groups, counselling and emergency shelter. TBZ advocates for policies and practices that respect the human rights of trans and intersex people.

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The Southern Africa Litigation Centre (SALC), established in 2005, aims to promote and advance human rights, democratic governance, rule of law and access to justice in Southern Africa through strategic litigation, advocacy and capacity strengthening. SALC works in Angola, Botswana, Democratic Republic of Congo, Eswatini, Lesotho, Malawi, Mozambique, Namibia, South Africa, Tanzania, Zambia and Zimbabwe.

Authorship and acknowledgement

This report was researched and written by Prof Alex Müller and Dr Talia Meer, with legal additions by Anneke Meerkotter from the Southern Africa Litigation Centre (SALC). The report was edited by Sean Reggee from TBZ, Anna Mmolai-Chalmers, Anneke Meerkotter and Kauthar Lee from SALC. We want to thank all the individuals who gave their time to participate in the community consultation for this report. The research was made possible through the support of the Global Equality Fund.

SOUTHERN AFRICA LITIGATION CENTRE

Second Floor, President Place
1 Hood Avenue, Rosebank
Johannesburg
South Africa, 2196

e-mail: info@salc.org.za
tel: +27 (0) 10 596 8538
www: www.southernafricalitigationcentre.org,
twitter: @follow_SALC

Electronic copies of this report can be found at: www.southernafricalitigationcentre.org

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ACHPR	African Commission on Human and Peoples' Rights
AIDS	Acquired Immunodeficiency Syndrome
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
COVID-19	Coronavirus Disease of 2019
HIV	Human Immunodeficiency Virus
HRC	Human Rights Commission of Zambia
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
KP	Key Population
LEA	Legal Environment Assessment
LGBTI+	Lesbian, Gay, Bisexual, Transgender and Intersex
MSM	Men who have Sex with Men
NASF	National HIV & AIDS Strategic Framework
NGO	Non-Governmental Organisation
PrEP	Pre-Exposure Prophylaxis
SALC	Southern Africa Litigation Centre
SOGIE	Sexual Orientation and Gender Identity and Expression
STI	Sexually Transmitted Infection
TBZ	Transbantu Association Zambia
UDHR	Universal Declaration of Human Rights
UN	United Nations
UN HR	United Nations Human Rights Committee
WHO	World Health Organisation

6 Understanding sexual orientation, gender identity and gender expression: definitions and key concepts

Cisgender	Describes a person whose sense of personal identity and gender corresponds with the sex they were assigned at birth.
Gender	Gender refers to the socially constructed roles, behaviours, expressions, and identities of girls, women, boys, men, and gender diverse people. It influences how people perceive themselves and each other, how they act and interact, and the distribution of power and resources in society. Gender is usually conceptualised as a binary (girl/woman and boy/man), yet there is considerable diversity in how individuals and groups understand, experience, and express it. ¹
Gender expression	The presentation of a person's gender through physical appearance and behaviour – including dress, hairstyles, accessories, cosmetics – and mannerisms, speech, behavioural patterns, names, and personal references. ² A person's gender expression may or may not conform to that person's gender identity.
Gender identity	Each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including names, dress, speech, and mannerisms. ³
Gender non-conforming person	Someone who does not conform to the gender norms that are expected of them, regarding their gender expression or presentation, behaviour, preferences, and roles. Gender non-conforming people often identify under the transgender umbrella.
Homophobia	The fear and hatred of or discomfort with lesbian, bisexual or gay people because of their actual or perceived sexual orientation, usually based on negative stereotypes of homosexuality.
Sex	Sex refers to a set of biological attributes in humans and animals. It is primarily associated with physical and physiological features, including chromosomes, gene expression, hormone levels and function, and reproductive/sexual anatomy. Sex is usually categorised as female or male but there is variation in the biological attributes that comprise sex and how those attributes are expressed. ⁴
Sexual orientation	Each person's capacity for profound emotional, affectional, and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender. ⁵
Transgender	An umbrella term for people whose gender identity and/or expression is different from cultural expectations based on the sex they were assigned at birth, including gender non-conforming people. Being transgender does not imply any specific sexual orientation. Therefore, transgender people may identify as straight, gay, lesbian, bisexual, etc. ⁶
Transgender man	A person who identifies as a man but was assigned a female sex at birth.
Transgender woman	A person who identifies as a woman but was assigned a male sex at birth.
Transphobia	The fear and hatred of or discomfort with transgender people because of their actual or perceived gender identity, usually based on negative stereotypes of gender diversity.

¹ Canadian Institute of Health Research (2015).

² Yogyakarta Principles plus 10 (2017).

³ Preamble, Yogyakarta Principles (2007).

⁴ Canadian Institute of Health Research (2015).

⁵ Preamble, Yogyakarta Principles (2007).

⁶ Lobell, K. O. (2019) "Glossary on Gender Identity and Sexual Orientation" The Society for Human Resource Management.

Introduction and background

In March 2021, the Southern Africa Litigation Centre (SALC) and Transbantu Association Zambia (TBZ) held a consultation with individuals who identified as lesbian, gay, bisexual, transgender and intersex (LGBTI+) in Lusaka, Zambia. Due to the travel restrictions and precautions necessitated by the global COVID-19 pandemic, the consultation combined an in-person and online meeting. Local stakeholders met in Lusaka, whilst Zambians from other parts of the country, including Kitwe, Livingstone and Mongu, and SALC partners joined the meeting from their respective locations online. At this consultation, LGBTI+ community members, affiliated with Transbantu Association Zambia, shared their lived experiences and identified numerous instances of discrimination and social exclusion related to their sexual orientation and/or gender identity and expression (SOGIE).

This research brief reviews the socio-legal framework of Zambia and contrasts the lived experiences that surfaced in the community consultation against Zambia's constitutional and international obligations. In doing so, it aims to provide a foundation for advocacy. The research brief shows that whilst Zambia's constitutional and international obligations protect people from violence and discrimination, these protections are not implemented by the government of Zambia concerning discrimination based on sexual orientation and/or gender identity and expression. The research brief argues that given the levels of discrimination and violence that LGBTI+ Zambians experience due to their sexual orientation and gender identity and expression, the Zambian government has failed to protect them according to its constitutional and international obligations.

The research brief builds on the lived experiences of LGBTI+ people that were shared during the community consultation. It reviews other research and literature to contextualise these lived experiences. It should be noted, however, that there is a severe lack of rigorous and independent research on LGBTI+ peoples' social and economic circumstances and health in Zambia. This seems to be partly because the restrictive context makes getting permission, setting up and conducting research on LGBTI+ issues within the country challenging. However, reports from community-based organisations, international NGOs, and diplomatic agencies within the country do provide valuable insight into the situation of LGBTI+ people in Zambia, along with a few important recent studies.

The consultation took place on 16 March 2021 in Lusaka for Zambian LGBTI+ people to share their experiences and identify the issues that should be taken up in this research brief. The consultation

was facilitated by TBZ, in collaboration with SALC. It was in the form of a guided group discussion centred around five key questions:

- As a person who identifies as LGBTI+, what are your main concerns at the moment?
- How does your sexual orientation or gender identity (you identifying as LGBTI+) affect your life, positively and negatively?
- How do your sexual orientation and gender identity affect your interactions with public institutions (schools, government offices, social services, etc.)?
- What do you appreciate about your life?
- What should happen to improve your living circumstances?

On the day of consultation, the participating LGBTI+ community members discussed a range of topics. To respect the confidentiality of the meeting and to protect community members from negative repercussions, the authors of the research brief took detailed notes but anonymised all participants.

The research brief groups experiences into thematic groups and contextualises them against the socio-legal realities of Zambia. All quotes from the community consultations are included verbatim to reflect participants' views as they were expressed. Occasionally these are edited for clarity. It further compares these experiences with existing literature and research. In doing so, it aims to provide an analysis of the ways in which sexual orientation and gender identity and expression in Zambia influence individual life chances and social inclusion. The research brief then analyses the lived experiences of LGBTI+ Zambians against the obligations of the Zambian Constitution and international treaties and the rights inherent to all citizens of Zambia.

Sexual orientation and gender identity and expression in Zambia

Same-sex sex and the legal framework

In Zambia, same-sex sexual activity is illegal. As with many colonies of the British Empire, Zambia was governed by the Penal Code of its colonial occupiers, aspects of which persisted after independence in 1964.

Section 155 of Zambia's Penal Code⁷ criminalises sex between men with a penalty of fifteen years to life imprisonment.

Any person who-
 (a) *has carnal knowledge of any person against the order of nature; or*
 (b) *has carnal knowledge of an animal; or*
 (c) *permits a male person to have carnal knowledge of him or her against the order of nature;*
commits a felony and is liable, upon conviction, to imprisonment for a term not less than fifteen years and may be liable to imprisonment for life.

Section 156 of the Penal Code criminalises any attempt to commit "unnatural offences" prohibited under section 155 with a maximum penalty of fourteen years imprisonment:

Any person who attempts to commit any of the offences specified in section 155 commits a felony and is liable, upon conviction, to imprisonment for a term of not less than seven years but not exceeding fourteen years.

Section 158(1) criminalises acts of "gross indecency" between men, and section 158(2) is repeated to address "gross indecency" between women. Both have a minimum of seven to a maximum penalty of fourteen years imprisonment.

(1) Any male who, whether in public or private, commits any act of gross indecency with a male child or person, or procures a male child or person to commit any act of gross indecency with him, or attempts to procure the commission of any such act by any male person with himself or with another male child or person, whether in public or private, commits a felony and is liable, upon conviction, to imprisonment for a term of not less than seven years and not exceeding fourteen years.
(2) Any female who, whether in public or private, commits any act of gross indecency with a female

child or person, or procures a female child or person to commit any act of gross indecency with her, or attempts to procure the commission of any such act by any female person with himself or with another female child or person, whether in public or private, commits a felony and is liable, upon conviction, to imprisonment for a term of not less than seven years and not exceeding fourteen years.

Under section 158(3) of the Penal Code, if "indecent practices" are committed by a minor under the age of 16 with another minor of the same sex, they could instead be sentenced to community service or ordered to undergo counselling, "as the court may determine in the best interests of the child".

Other sections of the Penal Code used to harass LGBTI+ populations include:⁸

- *Section 178(e) refers to "every person who, without lawful excuse, publicly does any indecent act."*
- *Section 178(f) refers to a person who "publicly conducts himself in a manner likely to cause a breach of the peace".*
- *Section 178(g) refers to a person who "in any public place solicits for immoral purposes."⁹ All these persons are deemed to be idle and disorderly persons and are liable to imprisonment for one month or to a fine not exceeding 60 penalty units or to both.*
- *Section 181(d) sets out the offence of being "a rogue and vagabond". The first offence carries a jail term of three months. Every subsequent offence means imprisonment for one year.*

A recent study showed that the criminalisation of same-sex sexual activity is also a liability for many transgender and intersex individuals who – while they may not personally identify as gay or lesbian – often are perceived to be homosexual.¹⁰

Public norms and attitudes

Politicians often have to tread a careful line between defending human rights and satisfying or diffusing the perceived, and often less tolerant religious and traditional views of their supporters. Whilst such 'trapeze acts' take place throughout the world, relating to a whole range of issues, it can be seen more pronounced in the context of LGBTI+ rights.

An inevitable legacy of colonial rule has been that undemocratically entrenched traditional and religious institutions are able to wield significant influence with the political elite. Politicians rely on

⁷ Penal Code Act No. 42 of 1930 (Cap. 255).

⁸ SALC (2017) *Laws and Policies Affecting Transgender Persons in Southern Africa*, 47.

⁹ This offence was addressed by the High Court in *People v Kasonkomona*, Lusaka High Court, HPA 53/2014 (2015). The Court held that the element of

soliciting requires persistent impertunation.

¹⁰ Johnston, T. (2014) *Proud & Healthy. An Overview of Community-based Needs Assessments on Sexual Health of LGBTI+ in Southern Africa* (Report 1/14), Amsterdam: COC Netherlands.

the ability of these institutions to influence public opinion and to draw voters. Whilst religious and traditional institutions often play a positive role in supporting social cohesion in communities, they have also been seen to mainstream arguments in a manner that discourages critical dialogue and where a rights discourse is often missing. This has the effect of limiting the engagement by communities in pertinent issues that affect their lives. In the context of LGBTI+ rights, there is no easy fit between religious and traditional views and the human rights discourse, which underpins new constitutional democracies.

Sexual and gender diversity is a current and contentious topic in Zambia, and this is reflected in its laws, politics, social context, and media representations. Rooted in a long history of British colonial Christian missions, Zambia's social and political life is characterised by a strong Christian identity.

Zambia became independent from British rule and gained democracy on 24 October 1964. During the reign of Kenneth David Kaunda, the first democratic president, a system of one-party democracy was introduced under the United National Independence Party (UNIP). Opposition to one-party rule eventually led to multiparty elections in 1991, putting opposition leader Frederick Chiluba of the Movement for Multi-Party Democracy (MMD) in power. Chiluba, a born-again Christian, was supported by the fast-growing Pentecostal movement in the country, and in December 1991, he declared Zambia a Christian nation.¹¹ Van Klinken postulates that this narrative was deliberate to promote a sense of unity in a linguistically and ethnically diverse country.¹² This declaration was incorporated into the preamble to the Zambian Constitution in 1996.¹³ President Chiluba was also fiercely homophobic, referring to homosexuality as "the deepest level of depravity".¹⁴

Because Pentecostal churches are central to Zambia's legal and policy environment, it creates an effect that has been referred to as "Pentecostal nationalism".¹⁵ These American-style evangelical

churches have increasingly dominated religious practice in Zambia. In 1980, there were 515,000 (9%) evangelical Christians in Zambia, which rose to 800,000 (12.6%) in 1990 and leapt to 2.2 million (25%) in 2000.¹⁶ These churches are especially outspoken against sexual and gender diversity, often framing this stance as central to their doctrine and practice. This has had an especially negative effect on public attitudes. There is also evidence that religious leaders directly incite violence, urging the public to take the law into their own hands and calling for mob retaliation against LGBTI+ people.¹⁷ Thus, through Pentecostal nationalism, heterosexuality has become a national value and its defence a political currency.

According to Afrobarometer, Zambians have some of the lowest levels of tolerance towards people of different sexual orientations in Africa, with only 4% of persons surveyed expressing tolerance.¹⁸ In the sixth round of the World Values Survey, 73% of Zambians cited homosexuals as a group they would not want as their neighbours.¹⁹ Further, 57% said homosexuality was never justifiable. Unsurprisingly then, negative views about LGBTI+ people are frequently expressed in public discourse. Mass media contributes to shaping public opinion. Mainstream media tends to follow the line established by churches and the State and essentially portrays LGBTI+ people sensationistically as deviant and law-breaking, focusing on sex, scandal and arrests. For example, a newspaper article describing a single, isolated gay man's experiences provoked a vast national controversy.²⁰ Church leaders, NGO officials, students and professors, and professional politicians stepped forward to voice their horror of homosexuality. The vice-president and ultimately the president of the country joined the condemnations.²¹

Because LGBTI+ issues are highly politically charged, when the rights of LGBTI+ persons are debated with community and opinion leaders making homophobic statements in the media, it is usually in an effort to win widespread sympathy by speaking against LGBTI+ identities.²² It is believed

¹¹ van Klinken, A. S. & Phiri, E. (2020) "The Empire Speaks Back: Zambian Responses to European Union LGBTI+ Rights Diplomacy" in Derks, M. & van den Berg, M. (eds) *Public Discourses about Homosexuality and Religion in Europe and Beyond*, New York: Palgrave Macmillan, 309-324.

¹² van Klinken, A. (2016) "Pentecostalism, Political Masculinity and Citizenship: The Born-Again Male Subject as Key to Zambia's National Redemption" *Journal of Religion in Africa*, Vol. 46, 129-157, 138.

¹³ The Constitution of Zambia, 1991, amended by Act No. 3 of 2016.

¹⁴ Bongmba, E.K. (2016) "Homosexuality, Ubuntu and Otherness in the African Church" *Journal of Religion and Violence*, Vol. 4 No. 1, 15-38, 18.

¹⁵ van Klinken, A. S. & Phiri, E. (2020)

¹⁶ Grossman G. (2015) "Renewalist Christianity and the Political Saliency of LGBTs: Theory and Evidence from Sub-Saharan Africa" *The Journal of Politics*, 77(2): 337-51.

¹⁷ DiDiRi Collective (2013) *DiDiRi Collective Literature Review: LGBTI+ Rights and Health*, Johannesburg: Hivos South Africa.

¹⁸ Howard, B. (2020) "All in this Together: Africans Tolerant on Ethnic, Religious, National, but not Sexual Differences", *Afrobarometer* Dispatch No. 362.

¹⁹ Dionne, K. Y., Dulani, B., & Chunga, J. (2014) *Research Note: Attitudes toward Homosexuality in Sub-Saharan Africa, 1982-2012*, Unpublished manuscript.

²⁰ The Centre for Human Rights (2007) *Shadow Report on Zambia's Initial State Report to the African Commission on Human and Peoples' Rights*, Pretoria: University of Pretoria.

²¹ Ibid.

²² Wahman, M. & Drury, A. C. (2018) "Leverage, Diplomacy, and African Lesbian, Gay, Bisexual, Transgendered, and Intersex Rights: Malawi and Zambia Compared" *Journal of Human Rights*, 17(5): 622-641.

that alternative and more diverse representation of LGBTI+ people is discouraged by fear of State reprisal or reader backlash.²³ A recent study also asserts that social media may be fuelling surges in hate speech in Zambia.²⁴

Civil society advocacy: gains and backlashes

There is a nascent LGBTI+ civil society in the country, with organisations like Transbantu Association Zambia gaining visibility. However, until recently, Zambia's LGBTI+ organisations were often timid as cultural norms, and legal restrictions limit active advocacy.²⁵ Cautiousness has been necessitated by the constant risk of harassment or arrest.²⁶ Similarly, due to low levels of political leverage and donor pressure, funding is primarily channelled to silent diplomacy and domestic NGO support that avoids public engagement and advocacy.²⁷ Further, there is a risk that external funding will support the perception that foreign interests control these groups and that sexual and gender diversity is foreign to Zambia. This is a constant concern that is factored into LGBTI+ activism in Zambia, as described by one NGO member during the community consultation:

People are calling our identities, expressions a westernised thing. So, anything they see as foreign is going to trigger a reaction, and then we are going to experience violence. Because it is not what it's supposed to do. Every action has an equal and opposite reaction – we need to think about it – going to inform a lot of other questions, is it about you as individuals, or about the public, or about your socialisation?

Despite this complex situation, organisations have an increasing role in networking and supporting LGBTI+ people and have a considerable social media presence.²⁸

The quote above also highlights the close connection between international advocacy and diplomacy by international bodies and other governments and how this affects the climate within Zambia, putting LGBTI+ people at the forefront of questions about national identity and sovereignty. In 2012, then UN Secretary-General,

Ban Ki-Moon, visited Zambia and suggested that sexual orientation be addressed in the new Constitution, which was being drafted at the time. The Zambian government responded that it had no plans to decriminalise same-sex sex and disagreed that LGBTI+ rights are enshrined in international law. Even the Human Rights Commission of Zambia (HRC) argued against protecting marginalised groups from discrimination:

as this Constitution is supposed to be a reflection of the will of the Zambian People, the Human Rights Commission acting in the interests of the Zambian people is bound to raise certain concerns. It must be noted that human rights are universal, but their enjoyment is not absolute. It is subject to the cultural, moral, religious, legal, economic and social context of the community/country in which they apply. Limitation of the enjoyment of individual human rights is permissible for the protection of the greater good of society.²⁹

Contradictorily, while ensuring that sexual orientation is not recognised as a possible ground of discrimination protected by the Constitution, the HRC in Zambia has also spoken out against discrimination against LGBTI+ people.³⁰ Van Klinken (2017) argues that this can be understood as an attempt to negotiate the tensions between the commitment to human rights, on the one hand, and the politicised Christian character of the country, on the other.³¹

Since Ban Ki-Moon's visit, the status and activities of LGBTI+ people have remained a frequent topic of hostile public conversation. The Law Association of Zambia (LAZ) has stated that it is impossible to respect LGBTI+ rights as long as the current legislation criminalises same-sex acts and that people who engage in protecting LGBTI+ rights face penal sanctions.³² Still, over the years, there has been greater enforcement of the Penal Code and more negative and sensational media attention. LGBTI+ people and their allies continually face intimidation, arrests, and harassment from the State. Politicians and activists working to advance gay rights face harsh criticism and personal attacks, including accusations of being anti-Christian and un-Zambian.³³

²³ The Other Foundation (2017) *Canaries in the Coal Mines: An Analysis of Spaces for LGBTI+ Activism in Zambia*.

²⁴ Green, M. C. (2014) "From Social Hostility to Social Media: Religious Pluralism, Human Rights and Democratic Reform in Africa" *African Human Rights Law Journal*, 14(1): 93-125.

²⁵ Currier, A. (2012) *Out in Africa: LGBT Organizing in Namibia and South Africa*, Minneapolis: University of Minnesota Press.

²⁶ Oberth, G. (2014) *The Civil Society Priorities Charter: Good Practice for Global Fund Country Dialogue*, Cape Town: AIDS Accountability International.

²⁷ Wahman & Drury (2018).

²⁸ The Other Foundation (2017).

²⁹ Human Rights Commission of Zambia (2012) *Submission to the Technical Committee on Drafting the Zambian Constitution*.

³⁰ DiDiRi Collective (2013).

³¹ van Klinken, A. (2017) "Sexual Orientation, (Anti-)Discrimination and Human Rights in a 'Christian Nation': The Politicisation of Homosexuality in Zambia" *Critical African Studies*, 9(1): 9-31.

³² Swedish International Development Cooperation Agency (2014) *The Rights of LGBTI+ People in Zambia*, Stockholm: SIDA.

³³ van Klinken, A. S. (2013) "Gay Rights, the Devil and the End Times: Public Religion and the Enchantment of the Homosexuality Debate in Zambia" *Religion* 43(4): 519-40.

Persecution of LGBTI+ persons

In March 2013, former President Edgar Lungu (then a Minister) made several statements bordering on hate speech against LGBTI+ persons.³⁴ On 7 April 2013, Paul Kasonkomona was arrested outside Muvi TV station after he appeared on a television programme, the Assignment, where he spoke about the rights of LGBTI+ persons. Kasonkomona was charged with an offence in terms of section 178(g) of the Zambian Penal Code which provides that "every person who in any public place solicits for immoral purposes" is deemed an idle and disorderly person. Kasonkomona was eventually released on bail on 11 April 2013.

These events led to many sensationalist reports by a media eager to sell papers. That same month, the police released a statement noting that homosexuality is a serious offence in Zambia and that members of the public should report anyone involved in the practice to the police. Kasonkomona's arrest and ongoing court proceedings had the effect of silencing many critical voices on human rights issues for fear of similar persecution.

In October 2013, the long-awaited trial of Kasonkomona, proceeded in the Lusaka Magistrates Court in Zambia. The prosecution led the evidence of Reverend Pukuta Mwanza, the Director of the Evangelical Fellowship of Zambia. Mwanza testified that he had not personally watched the programme on 7 April 2013 but had received a call late that evening from the Chairperson of the National AIDS Council, alerting him to the programme. At the time, the Chair of the National AIDS Council was Pentecostal pastor Bishop Dr Joshua Banda, who is also a board member of the Evangelical Fellowship of Zambia.³⁵ Zambia's Vice President, Guy Scott, in an interview with the UK's Guardian newspaper, said: "The problem with this guy going on television was that we had to do something because if we had done absolutely nothing we would have got a bollocking from all these evangelical churches plus damn idiots. On the other hand, we didn't want to give him a particularly hard ride."³⁶

The State appealed Kasonkomona's eventual acquittal, and on 15 May 2015 the High Court confirmed his acquittal, reiterating the ruling of the magistrate which distinguished between soliciting

someone to engage in same-sex sexual acts, which is currently a criminal offence in Zambia, and advocating for the rights of persons.

In May 2013, two young men were brought to a police station in Kapiri Mposhi after an interaction with their neighbour. The police were quick to charge them under section 155 of the Penal Code and the media were even quicker to start spinning lies about the accused, claiming that they were engaged to be married or caught in the act. With each new news report the stories about the accused were further embellished and by June 2013, Magistrate Mbuzyi had to order the media to refrain from spreading rumours and conducting a trial by media. The two men were refused bail as a direct result of the media reports that were circulated about them. During the trial, these reports proved to be untrue. The impact of negative media has been lasting. Throughout the trial, the defence's lawyers were unable to access evidence held by the prosecution, including witness statements and medical reports.³⁷ This basically amounted to a trial by ambush. The trial commenced on 10 June 2013 and the prosecution eventually concluded its case on 24 January 2014 after numerous postponements. The prosecution called eight witnesses, none of whom had any direct or indirect knowledge of sexual relations between the two accused. The police officers who testified relied on hearsay evidence without having conducted investigations. The medical evidence presented in the trial also reflected a lack of objectivity by State medical officers. The accused spent the next year behind bars waiting for their trial to be concluded. They were finally acquitted on 3 July 2014.³⁸

The men in Kapiri Mposhi were not the only victims of anti-gay rhetoric. Subsequently there were several reports of people who had been brought to the police at the instance of community members. The impact of such arrests, even if the persons are subsequently released or acquitted, is dire. In many cases going back to the person's home or family after an arrest is not an option. The threat associated with allegations of homosexuality will always hang over them.

The US Department of State Human Rights Report on Zambia observed that rather than submitting cases for trial, police on several occasions arrested suspected LGBTI+ persons on bogus charges, detaining them in jail for at least a night, and in

³⁴ Meerkotter, A. (2013) "Arrest of Gay Rights Activist Amid Increased Anti-Gay Rhetoric in Zambia" *polity.org.za*, 10 April 2013.

³⁵ van Klinken, A. (2016) "Pentecostalism, Political Masculinity and Citizenship: The Born-Again Male Subject as Key to Zambia's National Redemption" *Journal of Religion in Africa*, Vol. 46, 129-157, 136, 138.

³⁶ Meerkotter, A. (2013) "Trial of Paul Kasonkomona Points to Politically Motivated Arrest" Southern Africa Litigation Centre, 18 October 2013.

³⁷ Nkonde S.B. & Ngwira W. (2014) "Accused's Rights and Access to Prosecution Information in Subordinate Courts in Zambia" in *Using the Courts to Protect Vulnerable People: Perspectives from the Judiciary and Legal Profession in Botswana, Malawi and Zambia*, 47-56, SALC.

³⁸ Meerkotter, A. (2013) "Reflections on the Case of Two Men Accused of Sodomy in Zambia" Southern Africa Litigation Centre, 4 July 2014.

most cases demanding bribes before release.³⁹ When cases were taken to court, they often failed to meet the burden of evidence. However, considerable harm had already been done, with LGBTI+ people experiencing humiliation, harassment and imprisonment.

In March 2014, two men in Chisamba were accused of sodomy on the basis of an alleged relationship.⁴⁰ They were eventually acquitted in April 2015.

In June 2016 a transgender woman was convicted of sodomy, and on 9 September 2016 she was sentenced to 15 years imprisonment. In November 2017, the Zambian Court of Appeal affirmed the magistrate's court conviction and sentenced her to 15 years with hard labour. She was pardoned in May 2020.⁴¹

In August 2017, two men were arrested in Kapiri Mposhi and charged with sodomy. They were convicted in the subordinate court a year later. The case was remitted to the Lusaka High Court for confirmation and sentencing, and on 27 November 2019, the Court sentenced them each to 15 years imprisonment. The US ambassador to Zambia strongly criticised the decision. The Zambian government responded fiercely, with Foreign Minister Malanji asserting that Ambassador Foote was essentially "questioning the Zambian Constitution" and President Lungu stating: "We are saying no to homosexuality. Why should we say we are going to be civilised if we allow it... are you saying that we're very primitive now because we're frowning on homosexuality? Even animals don't do it, so why should we be forced to do it? ... because we want to be seen to be smart, civilised and advanced and so on."

In May 2020, the two men were pardoned by President Lungu, along with nearly 3,000 inmates, to commemorate Africa Freedom Day.⁴²

This conflict between the US ambassador and the Zambian State and the previous incident with Ban Ki-Moon demonstrates how LGBTI+ rights have become a key site for both the global north and the Zambian State to assert their own identities in contrast to each other. In this way, Zambian national identity is forged through homophobic discourses contiguous with colonial and missionary rhetoric and legislation "while simultaneously expressing decolonization through resistance to contemporary forms of western hegemony".⁴³ This places LGBTI+ Zambians in a very precarious position.

The following section examines the lived realities of LGBTI+ Zambians under these social and political circumstances.

³⁹ United States Department of State, *2017 Country Reports on Human Rights Practices – Zambia*.

⁴⁰ Mweetwa, S. "Chisamba Teacher Denies Sodomy" *Times of Zambia*, 18 March 2014.

⁴¹ Government Gazette No. 6874, Vol. LVI, No. 43, 22 May 2020.

⁴² Government Gazette No. 6874, Vol. LVI, No. 43, 22 May 2020.

⁴³ van Klinken & Phiri (2020).

The lived experiences of LGBTI+ persons in Zambia

As in other contexts, LGBTI+ persons living in Zambia experience prejudice, discrimination, rejection, stigma, and violence based on their sexual orientation and/or gender identity and expression in workplaces, housing, access to education and healthcare, and through frequent harassment of members and their families including threats via text message and e-mail, vandalism, stalking, and outright violence.⁴⁴ SOGIE-related marginalisation interacts with and reinforces other marginalisations. These experiences vary in frequency, severity, and impact due to individuals' identities and social factors, such as gender, class or rurality.

In this section of the research brief, lived experiences of LGBTI+ people are presented and contextualised against the evidence from existing research conducted in Zambia. The section draws on findings from a recent study called the 'Are We Doing Alright?' study,⁴⁵ as well as other documented research evidence.⁴⁶ Together, the findings show the wide range of ways SOGIE-related stigma and discrimination play out and the various ways in which it negatively impacts people's opportunities, life chances and life trajectories.

Education

In a 2013 study of 'sexual minority groups' in Zambia, where 82% of the 450 respondents were aged 18–25 years, all participants had primary or secondary schooling; as compared to the general population of young people in Zambia in 2013, in which 90% of 20–24-year-olds had at least some primary or secondary education.⁴⁷ In the sample of the 'Are We Doing Alright?' study,⁴⁸ levels of education were high: 89% had completed secondary education, and more than one-third of

all participants had completed a post-secondary educational degree (37%). There was a significant difference between cisgender and gender minority participants, with almost one in five gender minority participants having not finished secondary school (18%).

Zambian LGBTI+ youth experience bullying and discrimination at school.⁴⁹ Organisations often report that individuals live in poverty because of being denied educational opportunities, leaving school because of discrimination and violence, or being turned away from employment.⁵⁰

During the community consultation, participants mentioned feeling discriminated against and unsafe in educational institutions:

For me, it was disappointing that just two weeks ago, I was in psychology class, the lecturer who is tutoring us was tutoring about SOGI, but the homophobia that was coming out in class was scary.

This person's experience resonated with other participants. Another young person echoed this concern, highlighting concern about being singled out for non-normative gender presentation:

For now, I am doing classes online, but my worry is about physical classes. In one of my lectures, where the lecturer mentioned, 'This is a guy who wears earrings.' And I look at myself and think, 'This is how I look too'.

Discrimination and unsafe learning environments have long term effects on the wellbeing of LGBTI+ people and their economic opportunities. These consequences are discussed further in the following sections.

Economic marginalisation and discrimination

The 'Are We Doing Alright?' study found that many LGBTI+ Zambians struggled with financial precarity.⁵¹ Almost half were unemployed (49%),

⁴⁴ UNDP, National HIV/AIDS/STI/TB Council of Zambia (2019).

⁴⁵ The 'Are We Doing Alright?' study was conducted by researchers from the University of Cape Town in South Africa, in collaboration with the Zambian organisations Friends of Rainika, Lotus Identity and Transbantu Association Zambia. The study interviewed 353 Zambians who identified as lesbian, gay, bisexual or transgender about their mental health and wellbeing, access to healthcare and experiences of violence. The full research findings are published as: Müller, A., Daskilewicz, K. & 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 Zambia: Research Report based on a Community-led Study in Nine Countries*. Amsterdam: COC Netherlands.

⁴⁶ See, for example, van Klinken & Phiri (2020); Armstrong (2019); UNDP (2019).

⁴⁷ Kiefer L, Witola H, Hansende D, Handema R,

Siantombo N. (2013) *Report of the Study on HIV Prevention for Sexual Minority Groups in Zambia*. Lusaka: Panos Institute for Southern Africa. Compare with the *Zambia Demographic and Health Survey 2018* (2020) 34, in which 44% of women and 38% of men have attended or completed primary school, and 43% of women and 50% of men have attended or completed secondary school. Higher education is relatively rare; only 6% of women and 8% of men have attended or completed a higher education.

⁴⁸ Müller et al. (2019).

⁴⁹ UNDP, National HIV/AIDS/STI/TB Council of Zambia (2019).

⁵⁰ UNDP (2017). *Final Report of the Desk Review and Stakeholder Consultations on Human Rights Status of People of Diverse Sexual Orientation and Gender Identity (SOGI) in Zambia*. Lusaka: UNDP Zambia and Office of the United Nations High Commissioner for Human Rights; The Other Foundation (2017); Transbantu Association Zambia (2014).

⁵¹ Müller et al. (2019).

which is very high compared with the 11.6% unemployment rate in the general Zambian population reported by the World Bank in 2017.⁵² Almost a quarter of participants (23%) held informal jobs without contracts. Fifty-five percent said they did not have enough money to cover their basic needs.⁵³

Housing is also an indicator of economic status. Although the 'Are We Doing Alright?' study found that 94% of Zambian participants lived in formal, stable housing structures, such as houses or apartments, housing security was poor. Only 7% of participants owned their own home, and almost half rented (49%). However, another 44% lived in shared housing without paying rent (for example, with family or friends), suggesting that they had relatively little control over their housing situation. Trans and gender diverse participants were significantly more likely to live in informal housing than cisgender participants.

At the community consultation, LGBTI+ Zambians expressed concern about how SOGIE can create economic barriers. For example, a lesbian woman pointed out that although the idea of having a comfortable job is cultivated through school and social expectations, due to discrimination, she finds her employment options severely restricted.

Completing education tertiary [or] secondary level, we dream of having white-collar jobs. But if someone like me cannot step into that office, where do I use my gift? I find myself discriminated against because of what I do: 'You are a lady, you cannot fix cars'. I can't get a job out there. I cannot use my hands. What is the solution for me?

She points out that on the one hand, ideas about good society and respectability mean that people who are read as non-conforming do not easily get white-collar jobs, but for lesbian woman, their gender also excludes them from traditionally masculine jobs that are more technical or physically laborious.

Another person notes that trans people face limited options and discrimination in seeking employment and do not have access to basic economic services, such as banking.

When trans and intersex people do not conform to social expectations, this affects access to employment and economic independence. It is a great concern for me, I can't find a bank account, I can't access it.

The importance of economic independence was also highlighted as a significant concern for community participation and belonging. One participant pointed out that for LGBTI+ people, who are often ostracised by and alienated from their communities because they do not fulfil expected roles and norms, economic self-reliance and reliability can be important to limit the alienation of SOGIE identity and establish their social value and identity within their communities.

Before, when I had nothing, my parents and community did not see me. Now that I have something, my aunt respects my pronoun; my mother does not ask where the father of my child is. Economic independence is also about belonging to the community. When I was in school, it was 'You must not do that', but when you bring home a loaf of bread, you become independent.

Of course, economic independence is also crucial for an individual's self-worth, which may be especially true when combined with the affirming effects of community approval.

I feel good, but I feel bad when they discriminate against me. But I feel good when people are encouraging me. I fix cars, I do mechanics, I can dig a foundation, I can help out building a house, I can cut hair – self-empowerment!

International evidence, including existing data from Zambia, found that economic development and LGBTI+ inclusion is mutually reinforcing. While LGBTI+ people benefit from economic inclusion and opportunities, fuller enjoyment of human rights and better LGBTI+ participation can contribute to a country's economic development.⁵⁴

Harassment and violence

The aggressive legal, social, and political environment and LGBTI+ people's civic alienation clearly affects their safety. Zambian LGBTI+ people face intolerance, discrimination, harassment, threats, and violence due to their sexual orientation and gender identity and expression.⁵⁵ Verbal, physical and sexual violence, as well as an apparent air of permissiveness about such violence, seems to be widespread in Zambia.⁵⁶

A 2013 study among LGBTI+ Zambians reported that 52% of the male respondents and 61% of the female respondents indicated that they experienced verbal and physical harassment because of their sexual orientation.⁵⁷ In another

⁵² World Bank (2021) *Unemployment, total (% of total labour force; modelled ILO estimate) based on the ILOSTAT database. See also Zambia Demographic and Health Survey 2018* (2020): indicating employment rates of men (75%) and women (45%).

⁵³ Müller et al (2019).

⁵⁴ Badgett, M.V. L., Waaldijk, K. & van der Meulen Rodgers, Y. (2019) "The Relationship between LGBT Inclusion and Economic Development: Macro-Level Evidence" *World Development*, 120: 1-14.

⁵⁵ UNDP, National HIV/AIDS/STI/TB Council of Zambia (2019).

⁵⁶ UNDP (2017); The Other Foundation (2017); Transbantu Association Zambia (2014); Armstrong, R., and Zulu, J.

(2019) "Applying the Social Determinants of Health Lens to the Situation of Young Key Populations in Zambia: What Can It Tell Us about What We Could Do?" *Journal of Global Health Reports*, 3. Müller, A., Daskilewicz, K., Kabwe, M.L. et al. (2021) "Experience of and Factors Associated with Violence Against Sexual and Gender Minorities in Nine African Countries: A Cross-Sectional Study" *BMC Public Health* 21, 357.

⁵⁷ Kiefer, L., Witola, H., Hansende, D., Handema, R. & Siantombo, N. (2013) *Report of the Study on HIV Prevention for Sexual Minority Groups in Zambia*, Lusaka: Panos Institute for Southern Africa.

study that focused on young Zambian men who have sex with men, 75% of participants had experienced violence.⁵⁸ More than half (57%) believed the violence was related to their sexuality. One third (31%) had experienced intimate partner violence. Half (52%) of participants reported ever being forced to have sex, of which 36% reported that this had occurred more than once. Almost half (48%) reported having physically hurt someone else, including a partner, and 36% had forced another person (usually a friend or partner) to have sex.

The 'Are We Doing Alright?' study also confirms that violence against LGBTI+ Zambians is widespread: 70% of Zambian participants had been verbally harassed or insulted because of their sexual orientation or gender identity.⁵⁹ In the community consultation, one participant remembered a recent instance of intimidating harassment:

As I was looking for lodges, I came across a group of guys. A guy stood up and looked at me and said, 'I love to see you naked'. That scared me. Looking at that, that freaked me out. I had to leave the place. Safety and security are my main concerns.

In the 'Are We Doing Alright?' study, 53% of LGBTI+ participants had been physically assaulted, and 34% had experienced sexual violence. Participants who identified as transgender or gender non-conforming were at higher risk: 85% of gender minority participants had experienced verbal harassment at some point in their life, and more than half (60%) in the previous year, 64% had ever been physically assaulted, and 50% had ever experienced sexual violence.⁶⁰

The 'Are We Doing Alright?' study compared the levels of violence experienced by LGBTI+ people to violence experienced by women in the general population. Compared to the general population, the LGBTI+ participants in the study experienced much higher levels of sexual violence. Based on the findings of the 2013 Zambian Demographic and Health Survey,⁶¹ and compared to women in the general population, lesbian women experienced 2.5 times more sexual violence; transgender women almost three times more sexual violence, and bisexual women experienced more than three times more sexual violence in their lifetime.⁶²

These alarmingly high figures speak to a milieu of violence and trauma that is mainly unacknowledged or addressed. The definition of rape in the Zambia Penal Code refers only to

"unlawful carnal knowledge of a woman or girl"⁶³ and excludes gender diverse and male victims.⁶⁴ This is a significant shortcoming, which has knock-on effects on how society and individuals recognise sexual violence, protect and act against it, and how institutions, including justice and healthcare, can address it.

Because association with LGBTI+ identity is heavily stigmatised, there are also frequent instances of bribery and extortion, where the threat of exposure is used as leverage.⁶⁵ This was mentioned as a concern for participants in the community consultation, as described by one NGO worker:

Issues that have been affecting me, thinking of the past two months.. A lot of blackmail and extortion has been occurring in communities. Some people on social media platforms have been exchanging messages and pictures to get to know each other. Those pics have been used to blackmail people.

Such blackmail is grounded on the threat of outing someone's sexual orientation or gender identity, which, in the Zambian context of heavy SOGIE-related stigma, is a severe risk for LGBTI+ people's wellbeing and social inclusion. Reports show that at times, extortion and bribes are also aided by the police.⁶⁶

LGBTI+ people have little recourse against such violence and victimisation. Far from being protective or helpful, police play an active role in exposing perceived deviance and criminality and frequently harass LGBTI+ people, or those perceived to be so, including the several instances of arrest and detention without cause mentioned in the previous section. The following quote illustrates the arbitrariness that LGBTI+ people risk when interacting with law enforcement:

Police only use their own judgment to decide to charge people of diverse sexual orientation and gender identity as they usually don't have evidence.⁶⁷

In this context, LGBTI+ people are afraid to engage with the law enforcement and legal system for fear that disclosing their identities could lead to arrest or extortion:

Because of the law, it is impossible to engage with [law] enforcers as they could have us arrested upon invitation to the meeting.⁶⁸

⁵⁸ Armstrong, R., Silumbwe, A. & Zulu, J. M. (2020) "Mental Health, Coping and Resilience among Young Men who have Sex with Men in Zambia" *Culture, Health & Sexuality*, 10: 1-15.

⁵⁹ Müller, A. et al. (2019). Müller, A., Daskilewicz, K., Kabwe, M.L. et al. (2021) "Experience of and Factors Associated with Violence Against Sexual and Gender Minorities in Nine African Countries: A Cross-Sectional Study" *BMC Public Health* 21, 357.

⁶⁰ Ibid.

⁶¹ Central Statistical Office Zambia, Ministry of Health Zambia, & ICF International (2014) *Zambia Demographic and Health Survey 2013-14*.

⁶² Müller et al. (2019).

⁶³ Penal Code, section 132.

⁶⁴ SIDA (2014).

⁶⁵ UNDP (2017); The Other Foundation (2017); Transbantu Association Zambia (2014).

⁶⁶ Fabeni, F., Johnson, C. A., Nana, J. (n.d) *The Violations of the Rights of Lesbian, Gay, Bisexual and Transgender Persons in Zambia*, submitted to the Human Rights Committee, Partners for Justice & IHLHRC.

⁶⁷ Zambian LGBTI+ activist, quoted in UNDP & National HIV/AIDS/STI/TB Council of Zambia (2019), 114.

⁶⁸ LGBTI+ activist in Lusaka, cited in UNDP National HIV/AIDS/STI/TB Council of Zambia (2019), 114.

Consultations during the UNDP Legal Environment Assessment in Zambia also found that:

Access to justice for [...] violations is often limited. Vulnerable and key populations have insufficient awareness and understanding of their rights, as do service providers and law enforcement officials. Access to legal support services to enforce rights is inaccessible to many in need.⁶⁹

Further, lawyers are frequently unwilling to take on cases of LGBTI+ persons because of professional and social stigma.⁷⁰

Legal representation is usually not possible as most members of the LGBTI+ community may not be able to afford legal services as most lawyers do not provide pro-bono services...especially not for us [transwomen] as they would be contradicting the law.⁷¹

Access to other complaints mechanisms for redress are also limited.

'I am sceptical about the Human Rights Commission. The Human Rights Commission does not carry out their own research on the stigma and discrimination we experience. They have not engaged the transgender community. I would like to see them take a lead so we can trust their complaints mechanism.'⁷²

The lack of recourse to justice makes LGBTI+ Zambians especially vulnerable because not only are they socially sanctioned targets for violence and harassment, but they also have no access to protective or responsive measures. In this context, LGBTI+ organisations play an essential role in assisting victims of violence, blackmail and extortion, as the following NGO representative pointed out in the community consultation:

TBZ has often had to intervene when police demand bribes or extortion instead of assisting survivors of violence.

LGBTI+ people are especially susceptible to intimidation and violence during times of political instability. Zambia held national elections in August 2021 (5 months away at the time of the consultation), and the community consultation reflected a sense of heightened fears about safety in an election year:

I am really scared. Getting towards elections, we are being blamed for a lot of things. Too much politics. Certain political parties are being outed [as being supportive of] LGBTI+.

Moving towards election time, we see a lot of negative media reporting. People we could have

interacted with as allies previously, but when occurrences are happening, there are now fewer voices of defence for our issues.

There is violence at [the] hands of political cadres during the election period, but nobody reports this to law enforcement because they are also afraid of cadres.

My fear is how cases of transwomen being attacked rise before elections. Us transwomen, we are at the highest risk, especially with it being an election year. We have had several cases, and with trans women, we have got a high number of attacks.

NGO staff mentioned a lack of safety resources and support mechanisms to buffer LGBTI+ people against the increased risks during fraught times:

As organisations, we do not have safe spaces or safe houses if occurrences [unrest or violence] are happening. People can't go seek refuge.

It emerged in the consultation that LGBTI+ people feel particularly vulnerable moving around in public. Because individuals cannot rely on the police to ensure safety and security and assist them when in trouble, the general advice given to LGBTI+ people are to stay at home and avoid public spaces as much as possible. For vulnerable LGBTI+ people who are not able to stay at home in turbulent times, one participant expressed the need for support in ensuring protection and security:

We are in an election year, and our freedom of movement is going to be much, much less now. If a possibility [unrest or violence] had to occur, it would be great to have people to help us in sectors of security. There are other members of the community that have no choice but to move because they have to go to work or to an emergency, and they have no choice. So that's a major concern.

Experiencing violence has complex health implications, including injury, unwanted pregnancy, sexually transmitted infections, and long-term mental health consequences, including depression, anxiety, and suicidality. There is thus a need for LGBTI+ affirming counselling and psychosocial support, as well as medico-legal and court preparation services, should survivors decide to report, and cases be brought to trial.

Civic participation

Due to social ostracization, legal exclusion, discrimination and violence, LGBTI+ people in Zambia cannot participate fully in civic life.

⁶⁹ UNDP & National HIV/AIDS/STI/TB Council of Zambia (2019), 111-12.

⁷⁰ UNDP & National HIV/AIDS/STI/TB Council of Zambia (2019), 113.

⁷¹ Trans-woman in Lusaka, cited in UNDP & National HIV/AIDS/STI/TB Council of Zambia (2019), 113.

⁷² Transgender respondents in Lusaka cited in SALC (2016) *Accountability and Redress for Discrimination in Healthcare in Botswana, Malawi and Zambia*, 79.

LGBTI+ organisations cannot easily register as NGOs. At times, organisations have had to decrease their activities and operate clandestinely due to government persecution. One form of political persecution of NGOs is closing their bank accounts, which is crippling for the organisations, the work of LGBTI+ activism, and the individuals that rely on them:

I thought they had closed our bank account again... If movement [NGO] is affected by the closure of bank account, the whole [LGBTI+] movement is affected.

For individual LGBTI+ people, freedom of movement and participation in public life are curtailed because of fear that their gender expression will alert people to their LGBTI+ identity and incite threats of actual violence. One community member, who identifies as a gay man, explained:

Appearance tends to do things. I've already got earrings. I'm pierced. For so long, I wanted an industrial piercing, but I'm scared. I always wonder how people will look at me. People tend to say a lot of things even when you do some makeup or powder because you cannot even walk in the streets because it will trigger people to be violent.

Another community member pointed out that often, gender expression is involuntary. Thus LGBTI+ people, especially those whose gender expression is visibly non-conforming, are unable to control the risk this brings in public places:

The mere expression... How we express ourselves is totally uncontrolled. You can't mask that. And people are able to see 'This person is a lesbian woman'. How you express yourself and how you carry yourself, what do the social norms and contextual norms of Zambia say – you are acting against those norms.

A trans-identifying community member highlighted how non-conforming gender expressions increase trans people's risk of being outed when using bathrooms:

People are passing silly comments, last time I was at ... I entered female toilets, and they said 'What do you want here, you are a boy. Are you a boy or a girl?' That makes me so uncomfortable.

As a result, one participant stated that they simply stay at home, or, if unable to do so, avoided interacting with anyone on the street, and had a constant awareness of their surroundings and potential threats:

About moving around: I try to stay home. I always have exits in place. I try not to take any verbal abuse in the streets, I keep my headset on.

Not being able to move around freely obviously greatly impacts people's ability to conduct their daily lives. This includes doing the many small errands and outings that constitute daily life, such as going shopping, searching for jobs, going to work, visit friends and family. Beyond individual daily life, however, it also restricts LGBTI+ people's access to civic participation, for example, voting in elections. If mobility and visibility are risky for LGBTI+ people, this raises questions about their access to the right to vote. If elections and campaigning raise the risk of violence and intimidation for LGBTI+ people, this impedes their ability to access polling stations safely. This is a significant barrier to the full civic participation of the LGBTI+ population in Zambia.

This is further complicated for trans people, whose gender presentation may not match the gender identifiers on their legal documents. Not having access to appropriate identification documents prevents people from seeking formal employment or accessing government services. This emerged as a critical concern among trans-identifying community members during the consultation. As one participant pointed out, it is challenging to change one's documents:

Because of the way you look and what's on your ID, it becomes a challenge to access a lot of things. If you don't conform to what's [in] your ID, it becomes a challenge to change it. A lot of documentation is required for you to do that, so it is a huge challenge not having an ID that suits you.

Another participant pointed out that a lack of knowledge of the law can impact people's ability to enjoy their rights fully. Individuals cannot challenge discrimination or a lack of access to resources and civil agencies, nor access the law in response to violations if they do not understand the law itself and what they are entitled to:

It is important that we recognise that our lack of understanding of the law affects how we interact with our environment. It is difficult to tell if you've been violated or discriminated against without knowing the law. Gender-based violence cases, intimate partner violence cases are very sensitive issues, sexual violence – it is very difficult for me to pinpoint to realities if I am not aware that these things should not be happening to me.

Family exclusion

A study by UNDP (2017) reported that many LGBTI+ persons experience violations and discrimination from close family members, including beatings, forced spiritual exorcism of the "homosexual spirit", exclusions, disowning and being reported to the police.⁷³

In the 'Are We Doing Alright?' study, although 61% of

⁷³ UNDP (2017).

LGBTI+ Zambians said their family knew about their sexual orientation or gender identity, only half of that (31%) stated that they could go to their family for support.⁷⁴ In a study of mental health among young men who have sex with men, several participants relayed experiences of being threatened by actual physical assault by family members, most often upon suspicion or the discovery of their non-normative sexuality.⁷⁵

Familial rejection and isolation may be emphasised because many LGBTI+ people in Zambia cannot start their own families. Several participants in the consultation raised the issue of limited reproductive rights, including limited access to fertility services and social and legal barriers. One participant highlighted that the ability to have a family is seen as too lofty a goal, and the need for the decriminalisation of same-sex sex is squarely framed as the most pressing and immediate 'big picture' goal for LGBTI+ activism in Zambia.

We've been told to repress feelings about getting married, having children, the bigger picture is decriminalisation.

Whilst a focus on decriminalisation alone may be an important strategic goal, this of course, does not re-shape the individuals' desire to have legally recognised partnerships, have children, and make families.

Healthcare

Healthcare for LGBTI+ people in Zambia is severely lacking, shaped by the criminalisation of same-sex sex and an institutional refusal to acknowledge or address LGBTI+ needs.⁷⁶ Often, healthcare providers' prejudiced attitudes result in a withholding of care or the provision of care in hostile and discriminatory ways, and LGBTI+ peoples' anticipation of poor treatment and subsequent avoidance of the health system.⁷⁷ Further, data on the health of LGBTI+ people is scant, often underestimating health concerns because of LGBTI+ people's low disclosure of their sexual orientation or gender identity due to fear and stigma.

The National HIV & AIDS Strategic Framework (NASF) (2017-2021) defines key populations to include gay men and other men who have sex with men and transgender persons.

Some information exists about men who have sex with men and HIV, but lesbian or bisexual women, transgender or intersex individuals are omitted altogether. The Zambia National HIV & AIDS Strategic Framework (2011 – 2015) indicated that men who have sex with men were estimated to contribute 1% of all new HIV infections in the country at the time.⁷⁸ A 2013 study, using 2006 data, estimated that the HIV prevalence rate among MSM in Zambia is 33%, among the highest in Southern Africa.⁷⁹ However, targeted HIV programming is hindered by the social stigma associated with LGBTI+ identities, with even key policy makers sometimes insisting that gay men do not exist in Zambia.⁸⁰

The HIV & AIDS Strategic Framework states that more empirical evidence on size estimation of MSM and their partners is needed to adequately inform policy and programming.⁸¹ In the 'Are We Doing Alright?' study LGBTI+ people were asked if they were seeking health services for HIV, and over 20% responded that they were receiving HIV treatment at public health facilities, and more than 15% were receiving HIV treatment at private facilities.⁸² This gives us some indication of HIV prevalence in the sample, although this is in all likelihood a low estimate.⁸³ It also found that people who live with HIV are more likely to experience violence than the rest of the study participants.

The 'Are We Doing Alright?' study confirms that LGBTI+ people living in Zambia experience discrimination when accessing healthcare services. Eighteen percent of the LGBTI+ people in the study had been denied healthcare because of their sexual orientation and/or gender identity and expression. More than half of LGBTI+ study participants (53%) had been treated disrespectfully in healthcare facilities because of their sexual orientation and/or gender identity or expression, and 23% reported having been insulted or called names.

A central concern for LGBTI+ people in Zambia is severely limited access to healthcare and resources because of social homo- and transphobia and the criminalisation of these groups. A lack of understanding of LGBTI+ people and appropriate, welcoming facilities, including, for example, accommodation of gender diverse people, is one barrier as highlighted by one community participant:

⁷⁴ Müller et al. (2019).

⁷⁵ Armstrong, R., Silumbwe, A. & Zulu, J. M. (2020).

⁷⁶ UNDP (2017); SALC (2016) *Accountability and Redress for Discrimination in Healthcare in Botswana, Malawi and Zambia*.

⁷⁷ Engender Rights Centre for Justice, Friends of Rainka, Generation Alive, Transbantu Association Zambia, The Lotus Identity, Women's Alliance for Equality, Coalition of African Lesbians Sexual Rights Initiative (2017) *Joint Submission to the Universal Periodic Review for Zambia*; UNDP (2017); Armstrong & Zulu (2019).

⁷⁸ National HIV/AIDS/STI/TB Council Zambia (2010). National HIV & AIDS Strategic Framework 2011-2015.

⁷⁹ Millett, G.A., Peterson, J.L., Malebranche, D. J. et al. (2012) "Common Roots: A Contextual Review of HIV Epidemics in Black Men who have Sex with Men

across the African Diaspora" *The Lancet*, 380(9839): 411-23.

⁸⁰ Zulu, W. (2009) *Men who have Sex with Men (MSM): A Side-lined Population in HIV/AIDS Prevention Programs in Zambia*, 5th IASA Conference on HIV Pathogenesis, Treatment and prevention, International AIDS Society, Lusaka Zambia.

⁸¹ National HIV/AIDS/STI/TB Council Zambia (2017).

⁸² Müller, A., et al. (2019).

⁸³ Compare with the *Zambia Demographic and Health Survey 2018* (2020) 256-261 on HIV prevalence: Overall, 11.1% of women and men aged 15-49 in Zambia are infected with HIV; In urban areas, HIV prevalence is 20.3% among women and 10.6% among men, while the prevalence is 8.9% and 5.0%, respectively, in rural areas.

We go to hospitals when we are unwell. There are lots of challenges, you go there when you are sick, you try to explain the problem to medical personnel, then when they refer you to the ward, they ask questions... "Where are we taking you? Are you male or female? You look different from the way you are telling us". Then when you are in the ward, you visit a toilet, it's a problem.

A lesbian woman focus group respondent in the UNDP & National HIV/AIDS/STI/TB Council of Zambia (2019) Legal Environment Assessment (LEA) pointed out that there is a need to educate healthcare providers across Zambia, not just in urban areas, to sensitise them on the needs of LGBTI+ people:

We need to orient all service providers, including those in rural areas, as we exist everywhere.⁸⁴

Participants at the community consultation explained that prejudiced healthcare workers discriminate based on sexual orientation and gender identity, ridiculing LGBTI+ people, treating them with judgement and scorn, and refusing to honour their right to private and confidential treatment. One community participant pointed out that the mere appearance of a person can determine how they are treated in the healthcare system:

Access to healthcare services... the way they treat us is a challenge according to the way we look.

The LEA focus group discussions with young LGBTI+ populations in 2018 also reported several poor experiences with healthcare providers. These included lack of understanding and prejudiced attitudes of staff at healthcare facilities, including healthcare workers:

Staff at service centres, cleaners, service providers [who call themselves straight] – are not properly oriented to deal with key populations.⁸⁵

The most terrible person for key populations is a nurse, even at PPAZ [Planned Parenthood Association Zambia, usually perceived to be progressive and affirming], the nurse would say you are going to hell.⁸⁶

The health services in Livingstone are messed-up, they don't maintain confidentiality and providers are judgmental... the LGBTI+ community does not know how to take care of themselves.⁸⁷

Other focus group participants also emphasised

the lack of confidentiality that LGBTI+ people must contend with when seeking care:

They talk key populations down and disclose confidential information to the public.⁸⁸

At one facility, transgender identity was disclosed by a facility manager and it went viral...this was at one of the friendly corner services in Livingstone.⁸⁹

A transwoman had an STI and when she went to the clinic, they tested her positive for HIV and the nurse started publicizing her results...⁹⁰

One respondent in the LEA (2019) asserted that to ensure better access for LGBTI+ people to the right to healthcare, the Minister of Health should take a more active stance against discrimination by healthcare workers:

I am asking for my freedom in accessing health services...I have health rights; the Minister should punish providers that discriminate against LGBTI+ people.⁹¹

Researchers point out that the personal impact of abusive treatment is far-reaching and magnified by the inherent nature of the vulnerable position of patients in healthcare encounters, where healthcare workers hold power.⁹² This is especially so for vulnerable groups, who are already stigmatised, and humiliating experiences can be detrimental to wellbeing and breaches of confidentiality can be endangering, resulting in avoidance of the health system altogether.

In addition to significant hostility and poor treatment at healthcare facilities, the (stated or perceived) threat of social persecution and legal prosecution is another important barrier for LGBTI+ Zambians.⁹³ One young man who has sex with other men describes such an experience:

For us, as MSM, they embarrass you and even threaten to report you to the police if you made too much trouble complaining.⁹⁴

Whilst some LGBTI+ Zambians may be able to access health services without disclosing their minority status, this is especially difficult or impossible for gender diverse and trans people, making even seeking care for illness or injury, unrelated to sexual or gender-specific needs, risky. A trans community member explains at the consultation:

When you access healthcare as a transman,

⁸⁴ 18-year-old lesbian woman, cited in UNDP & National HIV/AIDS/STI/TB Council of Zambia (2019), 50.

⁸⁵ Cited in UNDP & National HIV/AIDS/STI/TB Council of Zambia (2019), 53.

⁸⁶ 28-year-old gay man, cited in UNDP & National HIV/AIDS/STI/TB Council of Zambia (2019), 41.

⁸⁷ 22-year-old gay man in Livingstone, cited in UNDP & National HIV/AIDS/STI/TB Council of Zambia (2019), 56.

⁸⁸ Cited in UNDP & National HIV/AIDS/STI/TB Council of Zambia (2019), 53.

⁸⁹ Cited in UNDP & National HIV/AIDS/STI/TB Council of Zambia (2019), 53.

⁹⁰ Lesbian woman in Livingstone, cited in UNDP & National HIV/AIDS/STI/TB Council of Zambia (2019), 50.

⁹¹ 26-year-old gay man, cited in UNDP & National HIV/AIDS/STI/TB Council of Zambia (2019), 50.

⁹² UNDP (2017); SALC (2016); Armstrong & Zulu (2019).

⁹³ SALC (2016).

⁹⁴ 19-year-old male sex worker, cited in UNDP & Nati

sometimes that healthcare will out you. You have a fear of outing through healthcare because your anatomy will reveal your gender identity even if you pass.

Whilst a general attitude of hostility and prejudice deters LGBTI+ people from seeking care, even when they do approach the healthcare system, it may not cater to their specific needs. One crucial example raised in the community consultation is the lack of hormone replacement therapy and gender-affirming care, including access to specialist endocrinologists, for trans and gender diverse people.

A recent Legal Environment Assessment conducted by UNDP, together with the National HIV/AIDS/STI/TB Council of Zambia, found that – *young LGBTI+ populations cannot access comprehensive sexuality education and information that meets their needs, exacerbating their vulnerability to HIV.*⁹⁵

In the UNDP LEA, respondents also highlighted a lack of access to safer sex materials for LGBTI+ people, such as lubricants, and difficulty accessing Pre-exposure Prophylaxis (PrEP).

*Please legalise lubricants...every time we ask for them, they are not available, and we want finger cots and dental dams.*⁹⁶

*I had a hard time accessing PrEP last week, the providers didn't even know how to explain PrEP works and how to use the drugs.*⁹⁷

Whilst NGOs offer some services that can assist LGBTI+ people outside of the mainstream healthcare system, this is not a complete solution as individuals will inevitably need healthcare beyond the scope of what NGOs can offer. This is also true for access to reproductive healthcare. Participants in the community consultation raised their frustration about not being able to access options for conception because whilst these are available, they are not welcoming or accepting of LGBTI+ people. One lesbian woman stated:

There is a fertility clinic down the road, but I am unable to interact with it because I have to bring my partner with me, so I cannot interact with that space. In Zambia, we have IVF [in vitro fertilisation] clinics, but when you go, they tell you that you have to bring your husband.

In general, there is a lack of holistic sexual and reproductive healthcare for LGBTI+ people. This is largely because, according to the Christian framework that circumscribes social norms and the legal system, sexuality and reproduction are seen as exclusively heterosexual. So, for example, the

current comprehensive sexuality education programme in Zambian schools does not include sexual orientation and gender identity issues and does not address the rights and needs of sexual and gender minorities.⁹⁸

The health impact of violence, discrimination, and exclusion

The homophobia and transphobia that LGBTI+ Zambians have described during the community consultation and in other literature, negatively impact their health and wellbeing. The World Health Organisation reports that the health consequences of physical and sexual violence are significant and diverse: they include physical injuries, unwanted pregnancy, sexually transmitted infections, including HIV, higher rates of mental health concerns, including depression and post-traumatic stress disorder, and a higher likelihood of attempting suicide.⁹⁹ Indeed, the 'Are We Doing Alright?' study showed that more than one-third of LGBTI+ Zambians who had experienced violence showed signs of post-traumatic stress disorder. The percentage among gender minority people was significantly higher: 42% of all gender minority participants showed signs of post-traumatic stress (as compared to 26% of cisgender participants).¹⁰⁰

This was also raised as a concern during the community consultation:

We are worried about people's health, people's mental health. I feel it's important to consider it because people go through a lot of stuff, we've had people kill themselves, commit suicide. I am very concerned about mental health.

The study by Armstrong and colleagues explores the mental health of young men who have sex with men to show how external stressors, such as discrimination, harassment and violence, as well as the internal stressors that they trigger, such as feeling the need to conform, and for constant vigilance against violence, contribute to health.¹⁰¹ The authors observed that participants seldom sought support from health services, if at all, and instead relied on their own strategies and resources to address their mental health needs. This was because participants perceived that seeking mental health support would risk further distress if none were available or through poor treatment by the healthcare workers. Self-coping mechanisms included confiding in friends, religion and spirituality, personal affirmation, and worryingly high levels of alcohol consumption.

The 'Are We Doing Alright?' study investigated the impact of criminalising laws and experiences of homophobia and transphobia on the mental health

⁹⁵ UNDP & National HIV/AIDS/STI/TB Council of Zambia (2019), 11.

⁹⁶ Lesbian woman, cited in UNDP & National HIV/AIDS/STI/TB Council of Zambia (2019), 50.

⁹⁷ 23-year-old gay man, cited in UNDP & National HIV/AIDS/STI/TB Council of Zambia (2019), 50.

⁹⁸ UNDP & National HIV/AIDS/STI/TB Council of

Zambia (2019), 103.

⁹⁹ Krug E.G., Mercy J.A., Dahlberg L.L., Zwi A.B. (2002) "The World Report on Violence and Health" The Lancet, 360(9339): 1083-8.

¹⁰⁰ Müller, A., et al. (2019), 47.

¹⁰¹ Armstrong et al. (2020).

and wellbeing of LGBTI+ Zambians.¹⁰² The study found that mental health problems, suicidal behaviour, and substance use among LGBTI+ Zambians were serious. For example, more than half of LGBTI+ Zambians (51%) were classified as currently depressed. By contrast, based on the limited evidence available, the prevalence of depressive disorders in Zambia is known to be around 4%.¹⁰³ Further, in the 'Are We Doing Alright?' study, only 6% of participants said that they had previously been diagnosed with depression, and only half of those were receiving treatment at the time. Of those showing signs of depression, 90% had never been told by a healthcare provider that they have clinical depression.

Similarly, more than half of participants (52%) had some anxiety symptoms, with 5% demonstrating severe anxiety. Of those with severe anxiety, most had never been told by a doctor that they have clinical anxiety. This evidence suggests that a large proportion of LGBTI+ Zambians have not received the healthcare (diagnoses and treatment) that could help them manage their depression and anxiety.

This is especially alarming when put into context with the same study's findings on suicidality.¹⁰⁴ The majority of participants (60%) had thought about ending their life at least once at some point in their life, with more than half of participants (52%) having attempted suicide ever, and almost a fifth of participants (19%) having made such an attempt in the past year.

The 'Are We Doing Alright?' study and research with young men who have sex with men,¹⁰⁵ explains that stigma, prejudice, discrimination and structural stigma (social stigma that is institutionalised or made into law, such as laws that criminalise consensual same-sex sex) lead to stressful social environments for LGBTI+ people.¹⁰⁶

Importantly, researchers emphasise that same-sex sexual orientation and gender diversity are not in themselves mental illness, but that hostile and stressful social environments lead to an increase in mental health problems among LGBTI+ people.¹⁰⁷ The 'Are We Doing Alright?' study concludes that the Zambian Penal Code, which criminalises consensual same-sex acts, likely contributes to these disparities in mental health

status, to high levels of violence, and barriers to access healthcare.¹⁰⁸

Legal framework: the rights of LGBTI+ people in Zambia

Zambia has strong constitutional and international obligations concerning equality, anti-discrimination, and respect for human rights. Respect for human rights is one of the critical pillars of Zambia's Vision 2030. Zambia's Vision for 2030 sees the country –

*aspire for a common and shared destiny, united in diversity, equitably integrated and democratic in governance, promoting patriotism and ethnic integration.*¹⁰⁹

To achieve this vision for all Zambians, the human rights of LGBTI+ Zambians must be respected and protected. This section reviews Zambia's constitutional and international obligations and contrasts them with the lived experiences of LGBTI+ Zambians.

The Constitution of Zambia

Article 8, which lays out national values and principles that apply to the interpretation of the Constitution, the interpretation and enactment of the law, and the development and implementation of State policy,¹¹⁰ expressly lists human dignity, equity, social justice, equality and non-discrimination as key values and principles.¹¹¹

In the preamble to the Constitution, the people of Zambia pledge to –

*UPHOLD the human rights and fundamental freedoms of every person;
COMMIT ourselves to upholding the principles of democracy and good governance;
CONFIRM the equal worth of women and men and their right to freely participate in, determine and build a sustainable political, legal, economic and*

¹⁰² Müller, A. et al. (2019).

¹⁰³ World Health Organisation (2017) *Depression and Other Common Mental Disorders: Global Health Estimates*, Geneva: WHO.

¹⁰⁴ Müller, A. et al. (2019).

¹⁰⁵ Armstrong, R. et al. (2020).

¹⁰⁶ Müller, A., et al. (2019); Armstrong, R. et al. (2020); Meyer, I. (2003) "Prejudice, Social Stress, and Mental Health in Lesbian, Gay, and Bisexual Populations: Conceptual Issues and Research Evidence" *Psychological Bulletin*, 129(5): 674-697; Hatzenbuehler, M. et al. (2014) "Structural Stigma and All-Cause Mortality in Sexual Minority Populations" *Social Science and Medicine*, 103: 33-41; Hendricks, M. L. & Testa, R. J. (2012) "A Conceptual Framework for Clinical Work with Transgender and Gender Nonconforming Clients: An Adaptation of the Minority Stress Model" *Professional Psychology: Research and Practice*, 43(5): 460-467.

¹⁰⁷ Hendricks, M. L. & Testa, R. J. (2012).

¹⁰⁸ The report draws on work about structural stigma –

social stigma that is institutionalised or made into law, such as laws that criminalise consensual same-sex behavior – to analyse the disparities in mental health and wellbeing between LGBTI+ Malawians and Zambians who identify as heterosexual and/or cisgender. For further information, see Müller et al. (2019).

¹⁰⁹ Republic of Zambia (2006) *Vision 2030 – A Prosperous Middle-Income Nation by 2030*.

¹¹⁰ "Article 9: Application of national values and principles: 1. The national values and principles shall apply to the – a. interpretation of this Constitution; b. enactment and interpretation of the law; and c. development and implementation of State policy."

¹¹¹ Constitution of Zambia, "Article 8(d). Article 8: National values and principles: The national values and principles are— a. morality and ethics; b. patriotism and national unity; c. democracy and constitutionalism; d. human dignity, equity, social justice, equality and non-discrimination; e. good governance and integrity; and f. sustainable development."

Article 11 outlines the fundamental rights and freedoms of each person in Zambia:

It is recognised and declared that every person in Zambia has been and shall continue to be entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, place of origin, political opinions, colour, creed, sex or marital status, but subject to the limitations contained in this Part, 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, expression, assembly, movement and association;*
- c) protection of young persons from exploitation;*
- d) protection for the privacy of his home and other property and from deprivation of property without compensation,*

and the provisions of this Part 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 this Part, 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.

It is important to remember that all constitutional provisions apply to LGBTI+ persons in Zambia. The specific provisions discussed below are only highlighted because of their relevance to the lived experiences of LGBTI+ people that have been documented in the previous section.

Zambia has included reference to the dominant religion in its Constitution. However, courts have cautioned against assuming that such reference somehow detracts from the universality of rights.

When assessing the constitutionality of the Penal Code provisions which criminalise same-sex sexual acts, courts in other jurisdictions have held that even where the Constitution refers to a specific religion or God, all rights, including the rights to freedom of religion and freedom of conscience remain intact and enforceable.¹¹²

International human rights law and treaties

Zambia has ratified several major international and regional treaties relating to promoting and protecting human rights and the rule of law. Several of these treaties have been read to include human rights protections based on sexual orientation or gender identity. The following international treaties will be considered in the analysis:

- The International Covenant on Civil and Political Rights (ICCPR), ratified in 1984.
- The International Covenant on Economic, Social and Cultural Rights (ICESCR), ratified in 1984, as well as its General Comments, which operationalise some of the rights laid out in the Covenant.
- The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), ratified in 1985.
- The African Charter on Human and Peoples' Rights (ACHPR), ratified in 1984, including Resolution 275 on Protection against Violence and other Human Rights Violations against Persons based on their actual or imputed Sexual Orientation or Gender Identity.
- The African Charter on the Rights and Welfare of the Child acceded to in 2008.

All these treaties prohibit any form of discrimination. The United Nations Human Rights Council has interpreted CEDAW, ICESCR, and ICCPR as including protections based on sexual orientation and gender identity.¹¹³

The Yogyakarta Principles: Sexual orientation, gender identity and expression in international human rights law

In 2006, a panel of international human rights experts published the Yogyakarta Principles. This guidance document addresses a broad range of international human rights standards and their application to sexual orientation and gender identity issues. In 2017, after reviewing the 2006

¹¹² *Nadan & McCoskar v State*, High Court of Fiji [2005] FJHC 500; *Attorney General v Caleb Orozco and Another* No. 32 of 2016, Belize Court of Appeal (30 December 2019); *Jason Jones v Attorney General of Trinidad and Tobago*, High Court of Justice, Claim No. CV2017-00720, 12 April 2018: "This is not a case about religious and moral beliefs but is one about the inalienable rights of a citizen under the Republican Constitution of Trinidad and Tobago; any citizen; all citizens... This is a case about the dignity of the person and not about the will of the majority or any religious debate. History has proven that the two do not always coincide. To my mind, religious debates are best left to be discussed and resolved in other quarters with persons who subscribe to those particular ideals and for the followers of those ideals to be convinced as to the religiousness, sanctity

or morality of those ideals...

This conclusion is not an assessment or denial of the religious beliefs of anyone. This court is not qualified to do so. However, this conclusion is a recognition that the beliefs of some, by definition is not the belief of all and, in the Republic of Trinidad in Tobago, all are protected and are entitled to be protected, under the Constitution. As a result, this Court must and will uphold the Constitution to recognise the dignity of even one citizen whose rights and freedoms have been invalidly taken away."

¹¹³ See Human Rights Council (2011) *Discriminatory Laws and Practices and Acts of Violence Against Individuals Based on their Sexual Orientation and Gender Identity: Report of the United Nations High Commissioner for Human Rights*, Geneva: OHCHR. A/HRC/19/41.

Principles, the panel published additional principles, which expand on the original document and reflect developments in international human rights law and practice. These new Principles are called The Yogyakarta Principles plus 10. The new document also contains additional State obligations related to areas such as torture, asylum, privacy, health, and the protection of human rights defenders.

The Yogyakarta Principles and the Yogyakarta Principles plus 10 reflect the application of international human rights law to the lives and experiences of persons of diverse sexual orientations, gender identities and gender expressions. They are instructive in defining legal and human rights principles for legislating and implementing the rights of LGBTI+ people. Throughout the following section, the principles relevant to the constitutional and international obligations are reviewed, summarised, and discussed against the current legal framework in Zambia. These principles provide further interpretative guidance for the current legal framework in Zambia.

The following sections review specific rights under the Constitution of Zambia and Zambia's international human rights obligations that are important in the context of the lived experiences of LGBTI+ people. These rights directly speak to the various discriminatory and unequal experiences that LGBTI+ Zambians have had because of their sexual orientation and/or gender identity.

Equality and non-discrimination

In the previous section, LGBTI+ people in Zambia described the discriminatory and unequal treatment they experience in education, healthcare, and society broadly. This section will show that Zambia's constitutional and international human rights obligations should protect people, regardless of their sexual orientation or gender identity, from such discriminatory treatment.

Constitution of Zambia

Freedom from discrimination is entrenched in the Zambian Constitution. Article 8(d) asserts that equality and non-discrimination are national values and principles.

Article 11 of the Constitution entitles Zambians –

to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, place of origin, political opinions, colour, creed, sex or marital status, [...] to each and all of the following, namely life, liberty, security of the person and the protection of the law; freedom of conscience, expression, assembly, movement and association; [...] protection for the privacy of his home and other property [...].

Article 23(1) of the Constitution provides that no law may be discriminatory in itself or in its effect. In terms of Article 23(2) no person shall be treated in a discriminatory manner by the law or a public officer. Article 23 of the Constitution defines discriminatory treatment as –

affording different treatment to different persons attributable, wholly or mainly to their respective descriptions by race, tribe, sex, place of origin, marital status, political opinions colour or creed 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

Article 266 of the Constitution, included in 2016, broadened the definition of discrimination: It defines discrimination to mean "directly or indirectly treating a person differently on the basis of that person's birth, race, sex, origin, colour, age, disability, religion, conscience, belief, culture, language, tribe, pregnancy, health, or marital, ethnic, social or economic status".

Jurisprudence from other countries found that legal provisions that criminalise sex between people of the same sex are discriminatory in effect.

In its 2019 judgment, the High Court of Botswana held that –

denying [LGBTI+ people] right to sexual expression, in the only way natural and available to [them], even if that way is denied to all, remains discriminatory in effect, when heterosexuals are permitted the right to sexual expression, in a way that is natural to them.¹¹⁴

The Belize Court of Appeal dealt with the same criminal provisions and the same umbrella section in the Constitution (section 3 of Belize's Constitution), which permits the limitation of fundamental rights only to respect the rights of others and in the public interest:

It is our view that, consensual sexual intercourse between adult gays or between adult lesbians in private does not harm the fundamental rights and freedoms of others, nor does it intolerably harm contemporary public interest, even though it may be repugnant to Christian morality, according to the testimonies received in the case, and repugnant to some non-Christians. Accordingly, the meaning of the word sex in section 3 and 16¹¹⁵ of the Constitution which promotes fundamental rights and freedoms regardless of sex, is that the word includes sexual intercourse and sexual intercourse orientation.¹¹⁶

Discrimination on the grounds of "sex" was also read as including discrimination on the grounds of "sexual orientation" by the Supreme Court of India.¹¹⁷

¹¹⁴ *Motshidiemang v Attorney General* 2019 All Bots 46 (HC), para 169.

¹¹⁵ Similar to Articles 11 and 23 of Zambia's Constitution.

¹¹⁶ *Attorney General v Orozco and Others*, Civil Appeal No. 32 of

2016, Belize Court of Appeal (30 December 2019), para 124.

¹¹⁷ *Navtej Singh Johar v Union of India*, AIR 2018 SC 4321 (6 September 2018), see the judgments of Dr Chandrachud J and Malhotra J.

African Charter on Human and Peoples' Rights

Zambia ratified the African Charter on Human and Peoples' Rights in 1984. Article 2 of the African Charter prohibits discrimination of the individual based on distinctions of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or any status.

Article 3 of the African Charter provides that every individual shall be equal before the law and entitled to equal protection of the law.

The African Commission (ACHPR) has interpreted Article 3 of the African Charter to mean that no person or group will be denied the protection of the laws, which is enjoyed by another person or group in like circumstances. In short, under similar circumstances, people must receive similar treatment under the law. It included protection from discrimination based on sexual orientation.

In *Zimbabwe Lawyers for Human Rights & Associated Newspapers of Zimbabwe v Zimbabwe* the African Commission elaborated that Article 3 "guarantees fair and just treatment of individuals within the legal system of a given country", and clarified that:

*the aim of [article 3] is to ensure equality of treatment for individuals irrespective of nationality, sex, racial or ethnic origin, political opinion, religion or belief, disability, age or sexual orientation.*¹¹⁸

Sexual orientation can be read as an expressly prohibited ground of discrimination:

*The scope of the right to non-discrimination [in the African Charter] extends beyond the right to equal treatment before the law and also has practical dimensions in that individuals should, in fact, be able to enjoy the rights enshrined in the Charter without distinction of any kind relating to their race, colour, sex, religion, political opinion, national extraction or social origin, or any other status. The expression 'any other status' in Article 2 of the Charter encompasses those cases of discrimination, which could not have been foreseen during the adoption of the Charter.*¹¹⁹

Significantly, the African Commission, recognising that every individual is entitled to equal protection of the law under Article 3 of the Charter, passed a resolution addressing States' failure to respond to violence perpetrated against persons based on their actual or perceived sexual orientation or

gender identity.¹²⁰ The resolution called on –

State Parties to ensure that human rights defenders work in an enabling environment that is free of stigma, reprisals or criminal prosecution as a result of their human rights protection activities, including the rights of sexual minorities.

International Covenant on Civil and Political Rights

Zambia ratified the International Covenant on Civil and Political Rights (ICCPR) in 1984.¹²¹ The ICCPR affirms the equality of all people in two significant provisions. Article 2(1) states:

Each State party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 26 affirms that:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

In 1994, the UN Human Rights Committee that monitors compliance with the ICCPR, and that also adjudicates violations of the ICCPR, established that:

*The reference to 'sex' in articles 2, para. 1, and 26 is to be taken as including sexual orientation.*¹²²

The UN Human Rights Committee found that laws that criminalise consensual sex between adults of the same sex or gender, such as sections 155, 156 and 158 of the Zambian Penal Code, violate the protections against discrimination in the ICCPR, as well as Article 17 of the ICCPR, which protects the right to privacy. Consequently, in its most recent review report of Zambia in November 2020, the UN Human Rights Committee pointed out that sections 155, 156 and 158 of the Zambian Penal Code, which criminalise consensual same-sex relationships between adults, are not compliant with Zambia's obligations under Articles 2, 17 and 26 of the ICCPR.¹²³

¹¹⁸ *Zimbabwe Lawyers for Human Rights & Associated Newspapers of Zimbabwe v Republic of Zimbabwe*, Comm. No. 284/03, para 155, adopted at the 6th Extra Ordinary Session of the African Commission on Human and Peoples' Rights, 30 March–3 April 2009, Banjul, The Gambia, our emphasis.

¹¹⁹ Advisory Opinion of the African Court on Human and Peoples' Rights No. 1/2018, 4 December 2020, para 66, our emphasis.

¹²⁰ *Resolution on Protection Against Violence and Other Human Rights Violations Against Persons on the Basis of Their Real or Imputed Sexual Orientation or Gender*

Identity, Resolution 275, 55th Ordinary Meeting of the African Commission on Human and Peoples' Rights, 28 April – 12 May 2014.

¹²¹ International Covenant on Civil and Political Rights (ICCPR) (1966) G.A. Res. 2200A (XXI).

¹²² *Toonen v Australia* (1992) Human Rights Committee, 50th Session, Case no. 488/1992, UN Doc. CCPR/C/50/D/488/1992.

¹²³ United Nations Human Rights Committee (2021) *International Covenant on Civil and Political Rights: List of Issues in Relation to the 4th Periodic Report of Zambia*, United Nations: CCPR/C/ZMB/Q/4.

The 2008 and 2012 Universal Periodic Review (UPR) of Zambia recommended that the country repeal the law criminalizing same-sex sexual relations among consenting adults. Both times Zambia rejected the recommendation. In 2018, Zambia noted the recommendation that it received concerning decriminalisation of consensual same-sex activities between adults.

International Covenant on Economic, Social and Cultural Rights

Whilst the International Covenant on Economic, Social and Cultural Rights (ICESCR), which Zambia ratified in 1984, makes no mention of sexual orientation or gender identity, the ICESCR Committee defines several "other statuses" that can lead to discrimination.¹²⁴ For example, paragraph 32 of General Comment 20 on non-discrimination in economic, social and cultural rights includes sexual orientation as one such "other status", and outlines that:

*States parties should ensure that a person's sexual orientation is not a barrier to realising Covenant rights.*¹²⁵

YP 30: The right to State protection

Yogyakarta Principle 30 articulates the obligation of States to apply their constitutional protections to all people, regardless of sexual orientation and gender identity:

Everyone, regardless of sexual orientation, gender identity or gender expression, has the right to State protection from violence, discrimination and other harm, whether by government officials or by any individual or group.

Under this principle, States are obliged to, among other points:

A. Exercise due diligence to prevent, investigate, prosecute, punish and provide remedies for discrimination, violence and other harm, whether committed by State or non-State actors;

B. Take appropriate and effective measures to eradicate all forms of violence, discrimination and other harm, including any advocacy of hatred that constitutes incitement to discrimination, hostility, or violence on grounds of sexual orientation, gender identity, gender expression or sex characteristics, whether by public or private actors...

Human dignity

Human dignity is a national value and principle listed in Article 8(d) of the Constitution of Zambia.

Article 5 of the African Charter on Human and Peoples' Rights states that:

every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status.

The right to dignity thus applies to all Zambians, regardless of their sexual orientation or gender identity. This means that LGBTI+ Zambians also have the right to dignity, including their sexual orientation and gender identity and expression need to be respected.

The High Court of Botswana has, on three occasions, emphasised that LGBTI+ persons are as entitled to the right to dignity as everyone else.¹²⁶ In *Attorney General v Rammoge & Others*, the Botswana Court of Appeal clarified that:

*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 other progressive States, to the constitutional protection of their dignity.*¹²⁷

The High Court of Botswana, for example, ordered the Registrar to change the gender marker on the identity document of a transgender man from female to male, emphasising that the "State (and society) must respect and uphold the individual right to human dignity despite opposing and different views it might hold with regards to the applicant's gender identity."¹²⁸

Freedom from cruel, inhuman and degrading treatment

Article 15 of the Zambian Constitution states that:

A person shall not be subjected to torture, or to inhuman or degrading punishment or other like treatment.

This is similar to Article 7 of the ICCPR which provides that "no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." Article 5 of the African Charter on Human and Peoples' Rights also emphasises that:

¹²⁴ International Covenant on Economic, Social and Cultural Rights (ICESCR) (1966) G. A. Res. 2200A (XXI).

¹²⁵ Committee on Economic, Social and Cultural Rights (2009) General Comment 20, Non-Discrimination in Economic, Social and Cultural Rights, E/C.12/GC/20.

¹²⁶ See *Attorney General v Rammoge and Others* [2017] 1 BLR 494 (CA), *ND v Attorney General and Another* [2018] 2 BLR 223 (HC) and *Motshidiemang v Attorney General* 2019 All Bots 46 (HC).

¹²⁷ *Attorney General v Rammoge and Others* [2017] 1 BLR 494 (CA), para 51.

¹²⁸ *ND v Attorney General of Botswana* [2018] 2 BLR 223 (HC).

all forms of exploitation and degradation of man, particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.

The UN Human Rights Committee, tasked with monitoring compliance with the ICCPR, has asserted that the right to be free from inhuman and degrading treatment protects the individual's mental and physical integrity and dignity.

The African Commission emphasised in the case of *Doebbler v Sudan* that Article 5 of the African Charter on Human and Peoples' Rights –

prohibits not only cruel but also inhuman and degrading treatment. This includes not only actions which cause serious physical or psychological suffering, but which humiliate or force the individual against his will or conscience.¹²⁹

At the 2017 Universal Periodic Review of Zambia, the stakeholder submissions evidenced cases of persons being arrested on charges related to sexual orientation or gender identity. In at least some of these cases, the arrested persons were subjected to forced anal examinations, amounting to torture.¹³⁰ Similarly, the experiences of LGBTI+ Zambians that have been described during the community consultation show many examples of cruel, inhuman or degrading treatment or punishment, which LGBTI+ Zambians have suffered because of their sexual orientation or gender identity.

Privacy

In Article 17(1), the Constitution of Zambia guarantees the right to privacy:

Except with his own consent, a person shall not be subjected to the search of his person or his property or the entry by others on his premises.

Any limitation to this right must be reasonable and justifiable in a democratic society.¹³¹

Article 17 of the ICCPR, which protects the right to privacy, reads:

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
2. Everyone has the right to the protection of the law against such interference or attacks.

In the community consultation, LGBTI+ Zambians described instances when their sexual orientation or gender identity was disclosed against their will in healthcare facilities. This amounts to a violation of their privacy. The non-consensual disclosure of a

person's sexual orientation or gender identity led to discrimination, violence, or denial of healthcare or education. Thus, for LGBTI+ Zambians, the right to privacy about their sexual orientation and gender identity is crucially important to avoid harm.

In recent judgments, other courts have emphasised the importance of the right to privacy concerning legislation that criminalises consensual sexual activity between adults and has argued that the right to privacy protects consensual sexual intimacy. For example, the High Court of Botswana ruled that:

The [Penal Code provisions that criminalise same-sex sexual acts] impair the applicant's right to express his sexuality in private, with his preferred adult partner. The applicant has a right to a sphere of private intimacy and autonomy, which is not harmful to any person, particularly that it is consensual.¹³²

The Constitutional Court of South Africa established that:

Privacy recognises that we all have a right to a sphere of private intimacy and autonomy which allows us to establish and nurture human relationships without interference from outside the community. The way in which we give expression to our sexuality is at the core of this area of private intimacy. If, in expressing our sexuality, we act consensually and without harming one another, invasion of that precinct will be a breach of our privacy.¹³³

The Supreme Court of India emphasised that the purpose of elevating certain rights to the stature of guaranteed fundamental rights protection in the Constitution is to insulate their exercise from the disdain of majority groups:

That "a miniscule fraction of the country's population constitutes lesbians, gays, bisexuals or transgenders" (as observed in the judgment of this Court) is not a sustainable basis to deny the right to privacy. The purpose of elevating certain rights to the stature of guaranteed fundamental rights is to insulate their exercise from the disdain of majorities, whether legislative or popular. The guarantee of constitutional rights does not depend upon their exercise being favourably regarded by majoritarian opinion. The test of popular acceptance does not furnish a valid basis to disregard rights which are conferred with the sanctity of constitutional protection. Discrete and insular minorities face grave dangers of discrimination for the simple reason that their views, beliefs or way of life does not accord with the 'mainstream'. Yet in a democratic Constitution founded on the rule of law, their rights are as sacred as those conferred on other citizens to protect their freedoms and liberties.¹³⁴

¹²⁹ *Doebbler v Sudan*, Comm. No. 236/2000; (2003) AHRLR (ACHPR 2003).

¹³⁰ Human Rights Council (2017) *Summary of Stakeholders' Submissions on Zambia: Report of the Office of the United Nations High Commissioner for Human Rights*, A/HRC/WG.6/28/ZMB/3.

¹³¹ Article 17(2) of the Constitution.

¹³² *Motshidiemang v Attorney General* 2019 All Bots 46 (HC), para. 127.

¹³³ *National Coalition for Gay and Lesbian Equality & Another v Minister of Justice and Others* 1999(1) SA 6 (CC).

¹³⁴ *Justice Puttaswamy and Another v Union of India and Others* (2017) 10 SCC 1; AIR 2017 SC 4161, para 126.

Considering Penal Code provisions like those in Zambia, the Fiji High Court noted:

*The way in which we give expression to our sexuality is the most basic way we establish and nurture relationships. Relationships fundamentally affect our lives, our community, our culture, our place and our time. If, in expressing our sexuality, we act consensually and without harming one another, invasion of that precinct risks relationships, risks the durability of our compact with the State and will be a breach of our privacy.*¹³⁵

The Inter-American Commission on Human Rights and the Inter-American Court has pointed out that "sexual orientation is part of the private life of persons and therefore it involves a sphere that cannot be subject to arbitrary interference. The Court and Commission explained that "privacy is an ample concept that is not subject to exhaustive definitions and includes, among other protected realms, the sex life and the right to establish and develop relationships with other human beings."¹³⁶

The Supreme Court of India has also held that "sexual orientation is an essential attribute of privacy".¹³⁷ Malhotra J explains the facets of privacy:

*The right to privacy is not simply the "right to be left alone" and has travelled far beyond that initial concept. It now incorporates the ideas of spatial privacy, and decisional privacy or privacy of choice. It extends to the right to make fundamental personal choices, including those relating to intimate sexual conduct, without unwarranted State interference. Section 377 affects the private sphere of the lives of LGBT persons. It takes away the decisional autonomy of LGBT persons to make choices consistent with their sexual orientation, which would further a dignified existence and a meaningful life as a full person. Section 377 prohibits LGBT persons from expressing their sexual orientation and engaging in sexual conduct in private, a decision which inheres in the most intimate spaces of one's existence.*¹³⁸

Sections 155, 156 and 158 of Zambia's Penal Code allow police officers, prosecutors and judicial officers to scrutinise and assume control of the most intimate relationships of LGBTI+ persons, thereby intruding into a deeply personal realm of their lives.

Drawing on such case law from other countries shows that the right to privacy of LGBTI+ Zambians is incompatible with the criminalisation of consensual same-sex sex. Thus, sections 155, 156 and 158 of the Penal Code violate the right to privacy of LGBTI+ Zambians.

Freedom of movement

Article 22 of the Zambian Constitution guarantees freedom of movement to all Zambians:

Subject to the other provision of this Article and except in accordance with any other written law, no citizen shall be deprived of his freedom of movement, and for the purposes of this Article freedom of movement means—
a. *the right to move freely throughout Zambia;*
b. *the right to reside in any part of Zambia.*

The community consultation highlighted how stigma and the threat of violence linked to sexual orientation and gender identity restrict the freedom of movement of LGBTI+ Zambians.

Protection of young persons from exploitation

Article 24(2) of the Zambian Constitution specifically offers constitutional protection to people under the age of 15 and states that:

All young persons shall be protected against physical or mental ill-treatment, all forms of neglect, cruelty or exploitation.

The National Youth Policy stresses that:

*All youth development initiatives shall not discriminate against any youth on the basis of sex, age, gender, race, disability or any other form of discrimination as enshrined in the Constitution of the country. The policy seeks to promote gender equity and equality, including working to eliminate all forms of discrimination at all levels.*¹³⁹

The National Youth Policy further stresses its alignment to human rights and its implementation without discrimination:

*The policy shall be in conformity with universally recognized human rights without discrimination based on gender, race/origin, age, disability, ethnicity, religion, language, political affiliation or social status.*¹⁴⁰

The violence and discrimination experienced by young LGBTI+ Zambians amount to physical ill-treatment. SOGIE-based discrimination, violence and social exclusion violate the right of young LGBTI+ Zambians to be free from physical and mental ill-treatment.

¹³⁵ *Nadan & McCoskar v State*, High Court of Fiji [2005] FJHC 500. See also, *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1999 (1) SA 6 (CC), para 32.

¹³⁶ IACHR, Report No. 400/20. Case No. 13,637, Merits (Publication) Gareth Henry and Simone Carline Edwards. Jamaica, 31 December 2020, para 57-8.

¹³⁷ *Navtej Singh Johar v Union of India*, AIR 2018 SC 4321 (6 September 2018), per Misra CJ, 168 and 229, Dr

Chandrachud J, 54 and Malhotra J, 16.2.

¹³⁸ *Navtej Singh Johar v Union of India*, AIR 2018 SC 4321 (6 September 2018), Malhotra J, 16.2.

¹³⁹ Republic of Zambia, Ministry of Youth and Sport (2015) *National Youth Policy 2015 - Towards a Skilled, Enlightened, Economically Empowered and Patriotic Youth Impacting Positively on National Development*, Chapter 3, Article 3.3, 7.

¹⁴⁰ Ibid, Article 3.4, 7.

Freedom of expression

Article 20 of the Constitution of Zambia guarantees that:

Except with his own consent, no person shall be hindered in the enjoyment of his freedom of expression, that is to say, freedom to hold opinions without interference, freedom to receive ideas and information without interference, freedom to impart and 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 correspondence.

Article 19(2) of the International Covenant on Civil and Political Rights affirms that:

Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any media of his choice.

The UN Human Rights Committee (UN HRC) in General Comment 34 elaborates on the content of this right.¹⁴¹ The UN HRC notes that freedom of opinion and expression are indispensable conditions for a person's complete development and are essential for any society. The right constitutes the foundation stone for every free and democratic society and is –

*a necessary condition for the realisation of the principles of transparency and accountability that are, in turn, essential for the promotion and protection of human rights.*¹⁴²

Freedom of expression is integral to the enjoyment of the right to freedom of association and extends to expressions that may be regarded as “deeply offensive”.¹⁴³

Article 9(2) of the African Charter provides that “every individual shall have the right to express and disseminate his opinions within the law”.

The African Commission on Human and Peoples' Rights, in the case of *Constitutional Rights Project and Others v Nigeria*, held that –

*freedom of expression is a basic human right, vital to an individual's personal development and political consciousness, and participation in the conduct of the public affairs of his country. Under the African Charter, this right comprises the right to receive information and express opinions.*¹⁴⁴

The African Commission's Declaration of Principles

on Freedom of Expression in Africa (2019) emphasises that freedom of expression is a fundamental and inalienable human right and an indispensable component of democracy:

Principle 2. Non-interference with freedom of opinion

Freedom of opinion, including the right to form and change all forms of opinion at any time and for whatever reason, is a fundamental and inalienable human right indispensable for the exercise of freedom of expression. States shall not interfere with anyone's freedom of opinion.

Principle 3. Non-discrimination

*Everyone shall have the rights to exercise freedom of expression and access to information without distinction of any kind, on one or more grounds, including race, ethnic group, colour, sex, language, religion, political or any other opinion, political association, national and social origin, birth, age, class, level of education, occupation, disability, sexual orientation, gender identity or any other status.*¹⁴⁵

Analyses of international treaties have found that freedom of expression includes the freedom to express one's sexual orientation and/or gender identity. An analysis of human rights principles pertaining to sexual orientation and gender identity in Southern Africa finds that States violate this right when they encourage public officials or others to exercise violence against or harass people whose gender expression does not conform to social gender norms.¹⁴⁶ Thus, the violence and discrimination that LGBTI+ Zambians have described at the community consultation constitute violations of LGBTI+ Zambians' freedom of expression.

Freedom of assembly and association

Article 21 of the Zambian Constitution provides for the protection of freedom of assembly and association:

Except with his own consent, no person shall be hindered in the enjoyment of his freedom of assembly and association, that is to say, his right to assemble freely and associate with other persons and in particular to form or belong to any political party, trade union or other association for the protection of his interests.

Article 10 of the African Charter on Human and Peoples' Rights provides that every individual has the right to free association so long as they abide by the law, and Article 11 provides that:

every individual shall have the right to assemble

¹⁴¹ Human Rights Committee (2011) *General Comment 34*, CCPR/C/GC/34.

¹⁴² Ibid, para 3.

¹⁴³ Ibid, para 11.

¹⁴⁴ 2000 AHRLR 227 (ACHPR), para 26.

¹⁴⁵ Adopted by the African Commission on Human and Peoples' Rights at its 65th Ordinary Session held from

21 October to 10 November 2019 in Banjul, The Gambia.

¹⁴⁶ Human Rights Watch and IGLHRC (2003) *More than a Name: State-Sponsored Homophobia and its Consequences in Southern Africa*, New York: Human Rights Watch.

freely with others. The exercise of this right shall be subject only to necessary restrictions provided for by law in particular those enacted in the interest of national security, safety, health, ethics and rights and freedoms of others.

The Botswana Court of Appeal in 2016 noted that:

All persons, whatever their sexual orientation, enjoy an equal right to form associations with lawful objectives for the protection and advancement of their interests.¹⁴⁷

Right to health

Laws and policies regulate the professional and ethical conduct of health practitioners, nurses, and midwives to reduce stigma and discrimination and create an enabling framework to reduce human rights and gender-related barriers to the health and wellbeing of all people.¹⁴⁸

The Code of Ethics of the Health Professions Council of Zambia outlines basic principles of professional practice across the board. It applies to all health practitioners who are registered under the Health Professions Act No. 24 of 2009. The Code of Ethics specifies that:

Treatment, care and welfare of the patient or client should take into account the patient's/client's needs, preference and confidentiality. Patients/clients should not be discriminated on grounds of age, gender, marital status, education, medical condition, national or ethnic origin, physical or mental disability, political affiliation, tribe, race, religion or social status.¹⁴⁹

Patients deserve full respect in all areas of their personality (physical, psychological, spiritual, financial, and social) and the health practitioner should aim at rehabilitating them to their full state of human dignity.¹⁵⁰

For nurses and midwives, the General Nursing Council of Zambia has developed a Professional Code of Conduct.¹⁵¹ Among other things, the Code of Conduct requires that all nurses and midwives:

Recognise and respect the uniqueness and dignity of each client and respond to their need for care, irrespective of their ethnic origin, political affiliation, religious beliefs, gender, traditional beliefs, values and practices, personal attributes and the nature of their health problem or any other factors.

Regarding the confidentiality of information learned from a patient, the Health Professions Council Code

of Ethics emphasises that:

It is a health practitioner's duty to strictly observe the rule of patient/client confidentiality by refraining from disclosing voluntarily to any third-party information, which he/she has learned directly, or indirectly in his/her professional relationship with the patient or client.¹⁵²

Similarly, under the General Nursing Council's Professional Code of Conduct, based on the Nurses and Midwives Act, nurses and midwives are required to protect "all confidential information concerning clients obtained in the course of [their] professional practice".¹⁵³ A nurse or midwife may only disclose confidential information with the consent of the healthcare user, by order of court, by order of the General Nursing Council of Zambia, or if the disclosure can be justified "in the wide public interest."

Both the community consultation and existing research show that health practitioners have denied Zambians healthcare, have treated them in discriminatory ways because of their sexual orientation and gender identity, and at times have disclosed their sexual orientation or gender identity without their consent. This violates the Codes of Ethics for healthcare practitioners and nurses, which, as shown above, expressly forbid discriminatory treatment, demand full respect for patients, and oblige health practitioners and nurses always to observe confidentiality and remain professional in their manner.

Despite the protections in the legal framework, research previously conducted by SALC and TBZ revealed persistent concerns around health workers actively perpetuating stigma and discrimination.¹⁵⁴

"A friend asked me to escort him to get tested; he had makeup on. People were staring at him at the hospital. When we went into the doctor's office, the doctor asked him whether he was a girl or a boy. My friend answered that he was both. I intervened and asked whether they could just test him so we could leave. The doctor went to call another doctor and they started mocking us, by their questions and comments. They insisted that both of us should be undressed and checked, but we refused and that's how we left without testing."
(Lusaka, Zambia)

"I asked [the sister in charge], 'Do you serve the key population?' and I also asked her what she meant by key populations. She said, 'children, women and old people'. And I was like, 'Let me be more specific. Do you treat lesbians, gays, transgender or bisexual people?' And she was like, 'If a thief

¹⁴⁷ *Attorney General v Rammoge and Others* [2017] 1 BLR 494 (CA), para 78.

¹⁴⁸ UNDP, National HIV/AIDS/STI/TB Council of Zambia (2019).

¹⁴⁹ Health Professions Council of Zambia (2014) Professional Code of Ethics and Discipline: Fitness to Practice, section 5.1(a), 2

¹⁵⁰ Health Professions Council of Zambia (2014), section 5.2(b).

¹⁵¹ General Nursing Council of Zambia (2013) Professional Code of Conduct.

¹⁵² UNDP, National HIV/AIDS/STI/TB Council of Zambia (2019), 57.

¹⁵³ Nurses and Midwives Act No. 31 of 1997, Part II (10).

¹⁵⁴ SALC (2016) *Accountability and Redress for Discrimination in Healthcare in Botswana, Malawi and Zambia*, 95-103.

who came to my house to steal come here to seek a service, I would serve them. And afterwards, I would hold them by the hand and hand them over to the police. I would do the same with those people you are talking about."
(Kitwe, Zambia)

"I went to the hospital for treatment, and I was told to go home and change my clothes. I was told to put on clothes that reflect my sex."
(Lusaka, Zambia)

"[O]ne of my trans sons had ulcers. ... I found he was in very bad shape. I could not afford to take him to a private clinic as I was broke, so I took him to Chaiinda clinic. There wasn't a long queue. The issue then was how do you identify this person because he was using his chosen name and his gender? Apparently when he went for check-up, the clinical officer asked him to take off his shirt, and because he was pre-op, there were still breasts. So, because of that, the conversation in the clinic became about his gender identity and not that he was sick. The clinical officer came out of the treatment room and started sharing his details carelessly – so that the whole clinic now was wondering who this person was."
(Kitwe, Zambia)

"I went to the clinic to get some medication. Later on I met the counsellor and the nurse that attended to me at a local drinking place/bar, and they started discussing my status with their friends."
(Lusaka, Zambia)

"We don't know what healthcare providers are expected to do by law and we don't fully know our rights. Sometimes family and friends discourage us from complaining."
(Lusaka, Zambia)

Existing health policies also recognise that sections 155, 156 and 158 of the Penal Code, which criminalise same-sex sex, have a detrimental effect on the health of LGBTI+ Zambians. In 2017, the National HIV/AIDS/STI/TB Council Zambia (NAC) highlighted that the criminalisation of same-sex sex under sections 155, 156 and 158 of the Penal Code risks reversing the gains made so far in the HIV national response:

*This is because it isolates key (at-risk and risky) populations who may be vulnerable or at greater risk of infection (or infecting others) and, hence, creating epidemiological blind spots which may create the necessary critical mass for a sustenance of the epidemic."*¹⁵⁵

As a result, the National AIDS Strategic Framework for 2017–2022 recognises and prioritises members of LGBTI+ communities as a key audience to

address HIV in Zambia.¹⁵⁶ It notes the importance of:

*urgently recognising the implications of key populations on the general population. Addressing the HIV service needs of key populations—efficiently, effectively and respectfully—is not just the right thing to do, in a human rights sense, it is also the smart thing to do from a self-interest perspective. [...] This is subject to identifying these populations clearly and without implied threat to them, and then addressing the cultural, legal, and structural barriers to meeting their HIV prevention and treatment needs."*¹⁵⁷

In 2015, the National Alliance of State and Territorial AIDS Directors (NASTAD) recognised that sections 155, 156 and 158 of the Penal Code are inconsistent with international guidance on enabling legal environments to prevent HIV transmission.¹⁵⁸

An assessment of the legal, regulatory and policy environment for HIV in Zambia, published by UNDP together with the National HIV/AIDS/STI/TB Council of Zambia, echoed these findings

*Laws that criminalise same-sex sex, as well as acts of stigma and discrimination act as barriers to access to health services for key populations – they are treated with indignity within the healthcare facilities and are not able to access services appropriate to their needs. Healthcare providers are also not sensitised to their needs."*¹⁵⁹

*[L]aws, policies and practices allowing for stigma, discrimination and human rights violations are a further challenge to the HIV response in Zambia and require intensified efforts to protect all persons, including vulnerable and key populations [...]"*¹⁶⁰

The International Covenant on Economic, Social and Cultural Rights, in Article 12.1, affirms:

The right of everyone to the highest attainable standard of physical and mental health.

General Comment 14 on the highest attainable standard of health defines that access to healthcare, in fulfilment of the requirements for the highest attainable standard of health, consists of four main dimensions: availability, accessibility, acceptability and quality of care.¹⁶¹

Paragraph 12.b of General Comment 14, which operationalises the right to health, states that non-discrimination is a key dimension of accessibility to healthcare; and paragraph 18 explicitly states that states may not discriminate based on sexual orientation in the enjoyment of this right.¹⁶²

¹⁵⁵ National HIV/AIDS/STI/TB Council Zambia (2017), cited in UNDP, National HIV/AIDS/STI/TB Council of Zambia (2019), 25.

¹⁵⁶ UNDP, National HIV/AIDS/STI/TB Council of Zambia (2019).

¹⁵⁷ National HIV/AIDS/STI/TB Council Zambia (2017) *National HIV & AIDS Strategic Framework 2017–2021*, 20.

¹⁵⁸ UNDP, National HIV/AIDS/STI/TB Council of Zambia (2019), 72.

¹⁵⁹ UNDP, National HIV/AIDS/STI/TB Council of Zambia (2019), 76.

¹⁶⁰ UNDP, National HIV/AIDS/STI/TB Council of Zambia (2019).

¹⁶¹ Committee on Economic, Social and Cultural Rights (2000) General Comment No. 14. *The Right to the Highest Attainable Standard of Health*, UN Doc. No. E/C.12/2000/4, our emphasis.

By virtue of article 2.2 and article 3 (equality provisions in the treaty), the Covenant proscribes any discrimination in access to healthcare and underlying determinants of health, as well as to means and entitlements for their procurement, on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, physical or mental disability, health status (including HIV/AIDS), sexual orientation,¹⁶³ and civil, political, social or other status, which has the intention or effect of nullifying or impairing the equal enjoyment or exercise of the right to health.

With respect to the right to health, equality of access to healthcare and health services has to be emphasised. States have a special obligation to provide those who do not have sufficient means with the necessary health insurance and healthcare facilities, and to prevent any discrimination on internationally prohibited grounds in the provision of healthcare and health services, especially with respect to the core obligations of the right to health.¹⁶⁴

The Committee emphasised that the right to health includes "access to health-related education and information, including sexual health."¹⁶⁵

The Gender Equity and Equality Act No. 22 of 2015 defines "sexual reproductive rights" as "the rights relating to sexuality, reproduction, sexual integrity, privacy and safety of the person, and includes the right to make free and responsible reproductive choices, receive sexual information based on scientific inquiry and receive sexual and reproductive health care in accordance with the Constitution and other laws."

Section 21(1) of the Act entitles a woman to access sexual and reproductive health services, be protected from sexually transmitted infection, and self-protection from sexually transmitted infections. Section 32(3) provides that a health officer shall respect every person's sexual and reproductive health rights and dignity without discrimination.

Yogyakarta Principle 17 (YP-17) affirms international human rights commitments related to the highest attainable standard of health. It reiterates the commitment made by the ICESCR and further elaborated in General Comment 14,¹⁶⁶ and clarifies that everyone has the right to the highest attainable standard of health without discrimination based on sexual orientation or gender identity:

Everyone has the right to the highest attainable standard of physical and mental health, without discrimination on the basis of sexual orientation or gender identity.

Right to education

Article 17(1) of the African Charter on Human and Peoples' Rights states that –

Every individual shall have the right to education.

The right to education is re-iterated in Article 11(1) of the African Charter on the Rights and Welfare of the Child, which Zambia acceded to in 2008. The African Charter on the Rights and Welfare of the Child goes on to state that the education should be directed to, amongst other things, "fostering respect for human rights and fundamental freedoms" and –

the preparation of the child for responsible life in a free society, in the spirit of understanding tolerance, dialogue, mutual respect and friendship among all peoples ethnic, tribal and religious groups.¹⁶⁷

In Zambia's Vision 2030, the country committed to its vision of:

Diversified education curricula that are responsive to the knowledge, values, attitudes and practical skill needs of individuals and society at large.¹⁶⁸

As a participant community consultation have described, discrimination and bullying based on their sexual orientation and gender identity and expression limit their ability to partake in and receive an education. Further, education that does not include affirming sexual and gender diversity make it difficult for LGBTI+ Zambians to fully understand their sexual orientation and gender identity, which places them at a disadvantage. Thus, the right to education of LGBTI+ Zambians is violated if they are discriminated against or bullied in educational institutions because of their sexual orientation or gender identity.

Right to employment and fair labour practices

Section 36 of the Employment Amendment Act No. 15 of 2015 provides that:

[a] contract of service of an employee shall not be terminated unless there is a valid reason for the termination connected with the capacity, conduct of the employee or based on the operational requirements of the undertaking.

Section 36(4) lists several grounds that are not valid reasons for terminating a contract, including a person's race, colour, sex, marital status, family responsibilities, pregnancy, religion, political opinion or affiliation, ethnicity, tribal affiliation or social status of the employee.¹⁶⁹

¹⁶² Müller, A. (2017) "Scrambling for Access: Availability, Accessibility, Acceptability and Quality of Healthcare for Lesbian, Gay, Bisexual and Transgender People in South Africa" *BMC International Health and Human Rights*, 17(1), 16.

¹⁶³ Committee on Economic, Social and Cultural Rights (2000), 18.

¹⁶⁴ Committee on Economic, Social and Cultural Rights (2000), 19.

¹⁶⁵ Committee on Economic, Social and Cultural Rights

(2000), 11.

¹⁶⁶ Committee on Economic, Social and Cultural Rights (2000).

¹⁶⁷ African Union (1999) African Charter on the Rights and Welfare of the Child, Article 11(2)(b) and (d).

¹⁶⁸ The Republic of Zambia (2006) Vision 2030 – A Prosperous Middle-Income Nation by 2030, 2.2(b).

¹⁶⁹ SALC (2017) *Laws and Policies Affecting Transgender Persons in Southern Africa*, 47.

Right to the protection of the law

In the community consultation and existing research, access to justice and fair representation before the law arose as a frequent issue for LGBTI+ Zambians. The lived experiences of LGBTI+ Zambians showed instances where Zambians were unable to report violence or other crimes committed against them because of their sexual orientation, gender identity or gender expression; or where they experienced discriminatory treatment within the law enforcement criminal justice system. A failure to act upon reports of violence or prosecute cases of violence experienced by LGBTI+ persons amount to a violation of LGBTI+ Zambians' right to protection of the law.

Article 11 of the Constitution provides that "every person" in Zambia is entitled to the fundamental rights and freedoms of the individual, including life, liberty, security of the person and the protection of the law. Courts in the region have held that this is an autonomous section, which confers the right to equal protection of the law on the individual.¹⁷⁰

The government of Zambia must take legislative and other measures to reduce violence and human rights violations against all its citizens regardless of sexual orientation.¹⁷¹

In response to ongoing violence, extra-judicial killings and executions, forced disappearances, extortion and blackmail, human rights violations experienced by LGBTI+ persons, the African Commission has urged –

*States to end all acts of violence and abuse, whether committed by State or non-State actors, including by enacting and effectively applying appropriate laws prohibiting and punishing all forms of violence, including those targeting persons on the basis of their imputed or real sexual orientation or gender identities...*¹⁷²

In his 2016 report, the UN Special Rapporteur on Torture recommended that to address ongoing violence experienced by LGBTI+ persons, States must decriminalise consensual same-sex sexual relationships. The Rapporteur found that:¹⁷³

A clear link exists between the criminalisation of lesbian, gay, bisexual and transgender persons and homophobic and transphobic hate crimes, police abuse, community and family violence and stigmatisation... Such laws foster a climate in which violence against lesbian, gay, bisexual and transgender persons by both State and non-State actors is condoned and met with impunity.

Security of the person

Article 11(a) of the Zambian Constitution guarantees all Zambians the right to life, liberty and security of the person. Several domestic laws further legislate rights and responsibilities with regards to experiences of violence.

The Anti-Gender-Based Violence Act No. 1 of 2011 is gender-neutral in its definition of victims and perpetrators of gender-based violence, as well as in its definition of gender-based violence itself. The Act defines a "victim" as "a person against whom an act of gender-based violence has been, is being or is likely to be committed".

The Act defines "gender" to mean "female or male and the role individuals play in society because of their sex and status"; and "gender-based violence" to mean:

any physical, mental, social or economic abuse against a person because of that person's gender, and includes—

(a) violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to the person, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or private life; and

(b) actual or threatened physical, mental, social or economic abuse that occurs in a domestic relationship

The Act explicitly recognises domestic relationships beyond heterosexual marriages and includes relationships in which –

the victim cohabits with the respondent in a relationship in the nature of a marriage notwithstanding that they are not married, [..] could not or cannot be married to each other.

Per definition, this includes people in a same-sex or same-gender relationship and thus theoretically offers LGBTI+ people protection from domestic gender-based violence. A domestic relationship also relates to instances where family members, parents, or spouses are perpetrators of violence. A domestic relationship is also present where the victim and perpetrator share the same residence or are co-tenants, and where the victim is a house-help in the perpetrator's household.¹⁷⁴

Section 5 of the Act imposes duties on persons attending to victims:

A police officer, labour inspector, social worker,

¹⁷⁰ *Attorney General v Dow* 1992 BLR 119, 133.

¹⁷¹ *ND v Attorney General and Another* [2018] 2 BLR 223 (HC), para 80.

¹⁷² African Commission on Human and Peoples' Rights, 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 - ACHPR/Res.275(LV)2014.

¹⁷³ Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Juan E. Méndez, 5 January 2016, UN Doc. A/HRC/31/57, paras 10 and 15.

¹⁷⁴ SALC (2017) *Laws and Policies Affecting Transgender Persons in Southern Africa*.

counsellor, medical practitioner, legal practitioner, nurse, religious leader, traditional leader, teacher, employer or other person or institution with information concerning the commission of an act of gender-based violence shall—

- (a) inform a victim of the victim's rights and any basic support which may be available to assist the victim;*
- (b) obtain for the victim, or advise the victim how to obtain shelter, medical treatment, legal services, counselling or other service that may be required in the circumstances; and*
- (c) advise the victim of the victim's right to lodge a complaint against the respondent including remedies available to the victim under this Act*

The Gender Equity and Equality Act No. 22 of 2015 defines discrimination as –

a distinction, exclusion or restriction made on the basis of sex or any other ground which has the effect or purpose of impairing or nullifying the dignity of a person or the recognition, enjoyment or exercise by a person of that person's rights and freedoms as specified in the Constitution or any other law.

Section 4 of the Act provides principles for achieving gender equity and equality, including – (d) the prohibition of gender stereotyping; (g) public and private bodies shall work together as partners in a coordinated manner in achieving gender equity and equality; (h) the elimination of gender bias; (i) justice and fairness to survivors of gender-based violence to ensure dignity, protection and respect.

The Act classifies an act of gender-based violence as discrimination.¹⁷⁵ Section 39 of the Act provides for freedom from sexual harassment and prohibits the act of sexual harassment.¹⁷⁶ Sexual harassment can result in imprisonment of between three and fifteen years.

¹⁷⁵ "Section 38. Discrimination in relation to gender-based violence: A person who subjects a woman to gender-based violence, as provided under the Anti-Gender Based Violence Act, 2011, discriminates against the woman and such discrimination shall be an aggravated action as provided under that Act."

¹⁷⁶ "Sexual harassment" includes conduct or contact of a sexual nature, such as the following—

- a) having physical contact, making advances, comments or innuendos without the consent of a person;*

- b) being offensive, humiliating or intimidating to a person in a suggestive manner; or*

- c) threatening or imposing a condition on a person for doing or undertaking anything or creating a hostile environment for an employee."*

Recommendations

The lived experiences of LGBTI+ Zambians that are collected in this report are testament to widespread discrimination and violence based on sexual orientation and gender identity and expression. The failure of the Zambian State to protect LGBTI+ Zambians from such discrimination, and to take adequate measures to enable LGBTI+ persons to live a life free from abuse, discrimination and violence, violates its constitutional principles as well as its obligations as a State Party to regional and international human rights treaties, including the African Charter on Human and Peoples' Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social, and Cultural Rights, and the Convention on the Elimination of All Forms of Discrimination against Women.

This research brief draws on existing proposals to formulate the following recommendations.¹⁷⁷ These are meant to support the government of Zambia to comply with the Zambia Constitution and Zambia's international obligations.

Decriminalisation of consensual same-sex sexual acts

This is a well-established recommendation, which government agencies have also made. The 2019 Legal Environment Assessment by UNDP and the National HIV/AIDS/TB/STI Council of Zambia recommended:

Support legal reform, through submissions to the Zambia Law Development Commission, to amend the Penal Code and Criminal Procedure Code to decriminalise same-sex sex between consenting adults.¹⁷⁸

To ensure that all Zambians, including Zambians who identify as LGBTI+, men who have sex with men, and women who have sex with women can access the full legal protection under the Constitution of Zambia and Zambia's international human rights obligations, sections 155, 156, and 158 of the Penal Code should be repealed. This process should be combined with a broader reform of sexual offences. Currently, sections 155, 156, and 158 are overly broad.

Further recommendations related to the decriminalisation of consensual same-sex sexual acts include:

- Pending the repeal of sections 155, 156 and 158 of the Penal Code and the reform of section 132¹⁷⁹ of the Penal Code to be gender-neutral, interpret sections 155, 156 and 158 to only apply to non-consensual acts.
- Issue a directive to prosecutors and police on applying only sections 155, 156 and 158 in non-consensual cases.
- Ensure training for the judiciary, law enforcement officers and healthcare providers concerning their human rights obligations regardless of persons' sexual orientation, gender identity, gender expression and sex characteristics.
- Ensure that law enforcement officers and other individuals and groups are held accountable for any act of violence, intimidation or abuse based on the criminalisation of sexual orientation, gender identity, gender expression and sex characteristics.

Interpret Article 11 of the Constitution of Zambia to include protection from discrimination based on sexual orientation and gender identity

To comply with constitutional and international human rights obligations, Article 11 of the Constitution of Zambia should be interpreted to include protection from discrimination based on sexual orientation, under the provision for protection based on 'sex'.

Improve mechanisms for accountability and redress for rights violations

The community consultation and other studies confirm the lack of trust in and access to complaints mechanisms.¹⁸⁰ Complaints processes ought to allow for complaints at facility level (at an educational institution, workplace and healthcare service); complaints to the district head, complaints to the ombudsperson nationally or the hospital ombudsperson specifically; complaints to a police Victim Support Unit; complaints to the Human Rights Commission; and complaints to the General Nursing Council and the Health Professions Council. All these existing complaints mechanisms

¹⁷⁷ See, for example: Human Rights Council (2017) *Summary of Stakeholders' Submissions on Zambia: Report of the Office of the United Nations High Commissioner for Human Rights*, A/HRC/WG.6/28/ZMB/3; and UNDP, National HIV/AIDS/STI/TB Council of Zambia (2019).

¹⁷⁸ UNDP, National HIV/AIDS/STI/TB Council of Zambia (2019), 12

¹⁷⁹ Section 132 of the Penal Code states: "Any person who has unlawful carnal knowledge of a woman or girl,

without her consent, or with her consent if the consent is obtained by force or means of threats or intimidation of any kind, or by fear of bodily harm, or by means of false representations as to the nature of the act, or in the case of a married woman, by personating her husband, shall be guilty of the felony termed rape."

¹⁸⁰ SALC (2016) *Accountability and Redress for Discrimination in Healthcare in Botswana, Malawi and Zambia*.

ought to be sensitised to the stigma and discrimination faced by LGBTI+ persons and ought to ensure confidentiality and anonymity of complainants.

For complaints mechanisms to meet the needs of LGBTI+ persons, the mechanisms should guarantee confidentiality and immunity from prosecution for persons reporting rights violations.¹⁸¹ Since complaints mechanisms are not widely used, a concerted effort must be made to ensure that they are accessible and that the public knows where and how to access them.¹⁸² Public health laws need to include protections for complaints against secondary victimisation and service denial and to put in place clear procedures for handling complaints in the context.¹⁸³

Recommendations to specific stakeholders

To the Zambia Human Rights Commission

- Fulfil its public mandate to promote, protect and defend the human rights of all Zambians without discrimination, including LGBTI+ people.
- Include SOGIE as a ground for discrimination in analyses of human rights violations.
- Ensure the involvement of LGBTI+ populations in the law review and reform processes.
- Through submissions to the Zambia Law Development Commission, support legal reform to amend the Penal Code and Criminal Procedure Code to decriminalize same-sex sex between consenting adults.

To the Zambia Law Development Commission

- Review sections 155, 156 and 158 of the Penal Code to repeal them and to ensure that the Penal Code complies with the Constitution of Zambia.
- Review section 132 of the Penal Code to revise to ensure that the offence of rape is gender-neutral.
- Ensure the involvement of LGBTI+ populations in the law review and reform processes.

To the Ministry of Health

- Recognise and provide for sexual orientation and gender identity and expression-related vulnerabilities and healthcare needs in national health policy.
- Ensure the involvement of LGBTI+ populations in policy review and reform processes.
- Provide in law for the right to confidentiality regarding all health information and health status, including information relating to sexual orientation and gender identity and expression, and for strict conditions under which disclosures may take place.
- Provide pre-service and in-service training to all healthcare providers on the human rights and healthcare needs of LGBTI+ populations. We recommend the approach taken by the KP friendly clinic at the University Teaching Hospital.

¹⁸¹ SALC (2016), 102.

¹⁸² SALC (2016), 102.

¹⁸³ SALC (2016), 134.

- Strengthen accountability mechanisms to ensure that LGBTI+ Zambians can access acceptable, appropriate, and quality healthcare like all Zambians.
- Amend patient intake forms to recognise gender diversity.
- Ensure access to hormonal therapy for transgender persons and ensure access to rights-affirming health care services for LGBTI+ persons.
- rights of LGBTI+ persons.
- Strengthen access to justice for LGBTI+ persons, including through strategic litigation.
- Strengthen access to economic empowerment initiatives for LGBTI+ persons to overcome marginalisation.

To the National HIV/AIDS/STI/TB Council of Zambia

- In line with Programme Strategy (i.) under 4.3.3 of the National HIV/ AIDS Strategic Framework 2017-2021 ("Advocate for and promote legal reforms against laws and policies that hinder access to HIV Services"), support legal reform through submissions to the Zambia Law Development Commission, to amend the Penal Code and Criminal Procedure Code to decriminalise same-sex sex between consenting adults.
- In partnership with LGBTI+ NGOs, initiate, support and monitor pre-service and in-service training and sensitisation of healthcare providers to reduce SOGIE-related stigma and discrimination in healthcare, as provided for under Programme Strategy (iv.) under 4.3.4 of the National HIV/ AIDS Strategic Framework 2017-2021.
- Ensure the involvement of LGBTI+ populations in policy review and reform processes.

To non-governmental organisations working for the rights of LGBTI+ people

- Sensitise LGBTI+ populations about their constitutional rights and protections.
- Sensitise LGBTI+ constituents about human rights accountability mechanisms and create awareness of how and where to report rights violations.
- Provide legal advice and support for LGBTI+ people who have experienced rights violations.
- Work with the Zambia Human Rights Commission and Zambia Law Development Commission to achieve the recommendations of decriminalisation and constitutional protection from discrimination.
- Conduct community awareness-raising and sensitisation campaigns to reduce stigma and discrimination against LGBTI+ populations.
- Sensitise law enforcement officers on the

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