

**SUBMISSION TO THE UNITED NATIONS UNIVERSAL PERIODIC REVIEW
ON THE RIGHTS OF LGBTQ+ PERSONS
NAMIBIA**

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Executive Summary

1. This submission focuses on Namibia's compliance with its international human rights obligations in respect of the rights of LGBTQ+ persons. The term "LGBTQ+" is used throughout this submission although it is acknowledged that the experiences of specific individuals within LGBTQ+ groups will vary, not only because of the differences in which society interacts with specific sexual orientations, gender identities, gender expressions and/or gender characteristics, but also because of the various ways in which experiences of LGBTQ+ individuals may be qualified by other fundamental elements such as race, ethnicity, age, disability, economic status, immigration status, resulting in intersectional discrimination.¹
2. The submission draws on reports from news publications from local and foreign sources, data from research networks, and research findings from local and international human rights organisations.
3. During Namibia's second cycle of the Universal Periodic Review, it was recommended that the State eliminate legal norms criminalising consensual same-sex relations and those discriminating against people on the basis of sexual orientation and gender identity, as well as strengthen the mechanisms within its institutional structures with the goal of eradicating discriminatory cultural and customary norms which negatively affect LGBTQ+ persons and other vulnerable groups.² In the following years, there have been instances of discrimination and violence based on the actual or imputed sexual orientation or gender identity of victims, as well as multiple statements made by government officials which facilitate the perpetuation of an environment hostile to LGBTQ+ persons. All these events underscore the necessity of strengthening appeals for concrete steps to be taken for the protection of this vulnerable group.

International legal framework for human rights in Namibia

4. Namibia gained its independence from South Africa in 1990. Namibia is a State Party to seven legally binding UN human rights instruments,³ and is bound by norms of customary international law, including non-discrimination. Many of the international human rights obligations borne by Namibia are relevant to issues of sexual orientation, gender identity and expression, and sex characteristics (SOGIESC). These rights include, but not limited to, the right to equality and freedom from discrimination, the right to privacy, freedom of expression, and the freedoms of association and assembly.
5. As a direct reflection of its rejection of recommendations to repeal laws harmful to LGBTQ+ persons and to adopt or amend legal norms for their protection, Namibia has elected not to adhere by its international human rights obligations inasmuch as adhering to them would result in the respect, protection or fulfilment of the human rights of this vulnerable group. Since the last Universal Periodic Review in 2016, there have been multiple instances of discrimination, harassment, and violence against LGBTQ+ persons in Namibia, which underscore the importance of establishing concrete protections for them.

Protections against discrimination, harassment and violence

6. Under existing international human rights law, States bear five "core legal obligations" in relation to the rights of LGBTQ+ persons: protecting them from homophobic and transphobic violence, and ensuring proper investigation and prosecution of hate crimes; preventing torture, cruel, inhuman and degrading treatment of LGBTQ+ persons by State and non-State actors; repealing laws criminalising consensual same-sex activity; prohibiting discrimination on the basis of sexual orientation and gender identity; and safeguarding the freedoms of expression, assembly and association of LGBTQ+ and intersex persons.⁴
7. During the second cycle of the Universal Periodic Review, Namibia chose not to support recommendations on the rights of LGBTQ+ persons. The government stated, *"There are no records of cases of harassment or discrimination reported to the Ombudsman or the Namibian police. The reality and legal history of the Namibian people does not suggest that legalising same sex marriage is important or beneficial to our legal and cultural system."* It further stated, *"The Government considers the issue of same sex marriages in*

*Namibia as a non-issue. Nevertheless, the Government has no intention to repeal any laws including the common law crime of sodomy.*⁵ The government's views on conclusions and recommendations included a discussion of the right to equality and freedom from discrimination as enshrined in Article 10 of national Constitution and the principles of equality and non-discrimination in the context of the rights of Constitution of the Republic of Namibia, 1990.⁶ Nevertheless, or perhaps for this reason, Namibia has not adopted laws making discrimination against LGBTQ+ persons unlawful. There are no legal protections for LGBTQ+ persons in respect of employment, healthcare, housing discrimination, and domestic violence.⁷

8. Namibia bears international obligations in relation to persons who may be subjected to discrimination based on their actual or perceived sexual orientation or gender identity.⁸ There is also the obligation to ensure that laws do not criminalise LGBTQ+ identities, to repeal laws affecting the rights and freedoms of persons on SOGIESC grounds, and to establish sensitisation training for law enforcement officials, the judiciary and healthcare providers in respect of relevant SOGIESC matters.⁹
9. The absence of specific legal protections based on SOGIESC grounds maintains a lacuna in the law which State and private actors may exploit to abuse, harass or generally act prejudicially towards LGBTQ+ persons. For example, because of the explicit exclusion of same-sex relationships from the definition of “domestic relationships” under the national Combatting of Domestic Violence Act, 2003, people in same-sex relationships cannot apply for protection orders against their abusers, and they may be turned away by the police when seeking other forms of protection.¹⁰ Moreover, men who have sex with men have either been refused medical attention because of their sexual orientations or have been afraid to seek medical care because they fear being stigmatised. Such treatment is likely to have a significant and detrimental effect on their sexual and reproductive health, and hinder efforts to combat the spread of HIV in a country where 11.5% of adults were living with the virus as of 2019.¹¹
10. In the same year as the second cycle of the Universal Periodic Review, the Human Rights Committee expressed concern over the discriminatory treatment to which LGBTQ+ persons were being subjected, including harassment and violence, and “corrective rape” against lesbians.¹² Hate crimes violate the rights of LGBTQ+ people to equality before the law, equal protection of the law, freedom from discrimination, the right to liberty and security of the person, the right to be free from torture, cruel, inhuman or degrading treatment or punishment, and the right to life. In March 2020, a politician and community leader was recorded savagely whipping a young transgender woman while hurling anti-LGBTQ epithets at her. It was reported that the attack stemmed from a “discovery” the victim’s gender identity, and that her attempts at securing justice were initially rejected by the police. It was only upon the involvement of Out-Right Namibia that criminal charges of assault to cause grievous bodily harm were laid against the community leader and two others.¹³ Research suggests that it is not uncommon for law enforcement officials to be dilatory in investigating anti-LGBTQ+ offences or in making arrests in terms thereof. Moreover, complainants who seek legal recourse are likely to be met with insensitive or disparaging remarks regarding their sexual orientations, gender identities or gender expressions.¹⁴
11. Despite the Namibian government’s reluctance to engage with the rights of LGBTQ+ persons on an international forum because it is a “sensitive issue... at national level”,¹⁵ research suggests that there are higher than average levels of tolerance amongst Namibians than amongst other African States. Indeed, a 2016 survey by the research network, Afrobarometer, established that 55% of Namibians would either like or not care if their neighbours are homosexual.¹⁶ This means that there is not quite the barrier to promoting the rights of LGBTQ+ persons as the Namibian government suggests. By relying on international human rights law and the manner in which human rights in the binding legal instruments to which it is a State Party, the Namibian government is capable of interpreting the national Constitution in such a way as to give full effect to the inherent human dignity of LGBTQ+ persons, as well as their right to equality, right to privacy and right to be free from discrimination by establishing the much needed legal protections without which they have been living thus far.

Recommendations

Draft and implement laws establishing adequate protection from discrimination based on SOGIESC grounds.

Draft and implement laws specifically categorising the harassment of and perpetration of violence against LGBTQ+ persons as hate crimes. Such laws must also provide adequate punitive measures through the criminal justice system.

Amend existing laws, like the Combatting of Domestic Violence Act, 2003, to provide adequate protection for LGBTQ+ persons on the same level as heterosexual persons.

Establish training for different actors in law enforcement, the justice system and in healthcare to ensure that LGBTQ+ persons receive adequate protection, relief and services.

Consensual same-sex relations

12. Consensual sexual relations between men are criminal under the Roman-Dutch common law of “sodomy”. The crime is defined as “unlawful and intentional sexual relations *per anum* between two human males”. There is no maximum penalty specified for the offence. Under the Criminal Procedure Act, 2004, peace officers and private persons may arrest without warrant any person they reasonably suspect of having committed sodomy, judicial officers may refrain from granting accused persons bail if there is a likelihood that they will commit sodomy if released.¹⁷ Non-sexual public displays of affection between same-sex attracted persons may be considered “immoral acts in public” under the Combating of Immoral Practices Act, 1980. The provision is not gender specific and attracts a maximum penalty of three years’ imprisonment and/or a fine.¹⁸
13. As stated above, during the second cycle of the Universal Periodic Review, the Namibian government expressed that it had no intention of repealing any laws affecting LGBTQ+ persons, including the common law criminalising consensual same-sex relations.¹⁹ This is despite the fact that there have been no prosecutions in respect of the crime in the State’s 30 year history as an independent State.²⁰ However, there is no true protection from human rights violations where the only barrier between same-sex attracted men and arbitrary arrest is the mere disinclination of law enforcement officials to carry out such arrests or prosecute any arrested persons. For LGBTQ+ people, especially same-sex attracted men, the threat of arrest and prosecution remains ever-present. Same-sex attracted men continue to live in constant fear of being deprived of their liberty by State and private actors who take it upon themselves to arrest them on mere suspicion. It also cannot be ignored that the criminalisation of consensual same-sex relations facilitates harassment and violence against same-sex attracted men at the hands of State and private actors because they are viewed as “unapprehended felons” whose mere existence deserves punishment.²¹
14. Sodomy laws such as those in force in Namibia infringe the principles of equality and non-discrimination (Articles 2 and 7 UDHR; Article 2(1) ICCPR and ICESCR; Article 26 ICCPR), the right to liberty and security of the person (Article 3 UDHR; Articles 9 ICCPR), the right not to be subjected to arbitrary arrest or detention (Article 9 UDHR; Article 9 ICCPR), the right to privacy (Article 12 UDHR; Article 17 ICCPR).²² In 2016, the Committee on Economic, Social and Cultural Rights emphasized that sexual and reproductive health entails respect for sexual orientation, gender identity and intersex status, meaning that the criminalisation of consensual same-sex activity is a form of discrimination and a violation of human rights as which hinders adequate provision of sexual and reproductive healthcare services.²³

Recommendations

Decriminalise consensual sexual relations between same-sex attracted men.

Ensure that law enforcement officials refrain from arresting same-sex couples engaging non-sexual intimate contact in pursuit of the Combatting of Immoral Practices Act, 1980.

Same-sex marriage

15. While the Namibian government has made it clear that it will not draft laws permitting the people to enter into same-sex marriages, at present, there are three cases before the High Court of Namibia concerning the recognition of the application of same-sex marriages for immigration purposes.²⁴ The first of these cases was initiated in 2017 by Daniel Digashu, a South African man, who married Johann Potgieter, a Namibian, in South Africa. Digashu won a petition in 2018 which permitted him to remain in Namibia on a visitor's permit while his case was under review. The second case was filed in 2018 by a Namibian lawyer, Anita Grobler, and her South African wife, Susan Jacobs, to have their marriage recognized by the Namibian government for the purposes of Jacobs' rights of residence. The third case was filed by a German couple, one of whom was born in Namibia, who registered their marriage in Germany. The Attorney-General and Ministry of Home Affairs, who have filed notices opposing the legal claims for the recognition of same-sex marriage.
16. In June 2019, the Judge President Petrus Damaseb directed that a full bench of 3 judges hear all the pending cases.²⁵ After one of the claimants in the case was granted permanent residence by the Immigration Selection Board in October 2019, the Minister of Home Affairs and Immigration reiterated the sentiment expressed by the Namibian government during the 2016 Universal Periodic Review that the official stance on non-recognition of same-sex marriages would remain unchanged.²⁶ This stance runs contrary to the principles of equality and non-discrimination under international human rights law and Namibia's obligations to promote these principles with respect to its obligations under the ICCPR, ICESCR, other relevant international human rights instruments, and international customary law.

Recommendations

Recognise same-sex marriages registered in foreign countries for the purposes of granting partners in such marriages the appropriate rights in immigration matters.

Allow meaningful consultation with LGBTQ+ and civil society organisations to fully legalise marriage.

Gender identity

17. Section 7B of the Births, Marriages and Deaths Registration Act, 1963 permits the amendment of gender markers on national identity documents following recommendations by Secretary of Health where a person as "undergone a change of sex". The Legal Assistance Centre of Namibia reported in 2015 that ID amendment applications were conducted on a case by case and were not problematic if applicants could provide medical reports, as contemplated by section 7B of the Births, Marriages and Deaths Registration Act. As the situation stands, transgender people who have undergone any medical procedures to affirm their gender identities cannot amend the gender markers on their government IDs. Rather, they must rely on section 12(1)(a) of the Identification Act, 1996, which states "if an identity document does not reflect correctly the particulars of the person to whom it is issued, or contains a photograph which is no longer a recognizable image of that person" the Minister shall cancel it and replace it with an improved ID.²⁷

Recommendations

Amend the Births, Marriages and Deaths Registration Act, 1963, to permit transgender persons who do not wish to under surgical procedures to revise the gender markers on their government IDs to reflect their gender identity.

- ¹ CEDAW General Recommendation No. 27 on older women and protection of their human rights, 19 October 2010 (CEDAW/C/2010/47/GC.1), para. 13. Available from <https://www.helppage.org/silo/files/cedaw-general-recommendation-no-27-on-older-women-and-protection-of-their-human-rights.pdf>; CEDAW General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, 19 October 2010 (CEDAW/C/2010/47/GC.2), para. 18. Available from <https://www2.ohchr.org/english/bodies/cedaw/docs/CEDAW-C-2010-47-GC2.pdf>; CRPD General Comment No. 3 (2016) Article 6: Women and girls with disabilities, 2 September 2016 (CRPD/C/GC/3), para. 4. Available from <https://www.refworld.org/docid/57c977344.html>; CRPD General Comment No. 6 (2018) on equality and non-discrimination, 26 April 2018 (CRPD/C/GC/6), paras. 21 and 33. Available from <https://www.ohchr.org/en/hrbodies/crpd/pages/gc.aspx>.
- ² “Report of the Working Group on the Universal Periodic Review: Namibia” A/HRC/32/4 (15 April 2016), paras. 137.69, 137.70, 137.71, 137.72, 137.73 and 137.81. Available from <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/078/53/PDF/G1607853.pdf?OpenElement>.
- ³ International Convention on the Elimination of All Forms of Racial Discrimination (ICERD); International Covenant on Civil and Political Rights (ICCPR); International Covenant on Economic, Social and Cultural Rights (ICESCR); Convention on the Elimination of All Forms of Discrimination against Women (CEDAW); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT); Convention on the Rights of the Child (CRC); Convention on the Rights of Persons with Disabilities (CRPD).
- ⁴ Office of the High Commissioner of Human Rights “Born Free and Equal: Sexual Orientation and Gender identity in International Human Rights Law” HR/PUB/12/06 (September 2012). Available from https://www.ohchr.org/Documents/Publications/Born_Free_and_Equal_WEB.pdf.
- ⁵ “Report of the Working Group on the Universal Periodic Review: Namibia, Addendum: Views on conclusions and/or recommendations, voluntary commitments and replies by the State under review” A/HRC/32/4/Add.1 (14 June 2016), para. 30. Available from <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/121/10/PDF/G1612110.pdf?OpenElement>
- ⁶ Constitution of the Republic of Namibia, 1990. Available from http://www.gov.na/documents/10181/14134/Namibia_Constitution.pdf/37b70b76-c15c-45d4-9095-b25d8b8aa0fb
- ⁷ Equaldex, LGBT Rights in Namibia. Available from <https://www.equaldex.com/region/namibia>; CCPR, “Concluding observations on the second report of Namibia” CCPR/C/NAM/CO/2 (22 April 2016), para. 9(c). Available from <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPRiCAqhKb7yhsh7Ph3KVs8zxwYZKnao5FA8MpfDWy%2FQGPY29QoZxc1OtOmGEp%2BDSIHNgSdJRvjLL6S1zO99wgtffaBMjydHo9u27GY2%2FQgxb3%2FXOfU8yQm7I>.
- ⁸ Yogyakarta Principles - Principles on the Application of International Human Rights Law In Relation to Sexual Orientation and Gender Identity (March 2007). Available from <https://yogyakartaprinciples.org/principles-en/>.
- ⁹ The Yogyakarta Principles Plus 10 - Additional Principles and State Obligation on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Expression and Sex Characteristics to Complement the Yogyakarta Principles (November 2017). Available from <http://yogyakartaprinciples.org/principles-en/yp10/>.
- ¹⁰ Combatting of Domestic Violence Act, 2003, ss 3 and 4(1). Available from https://laws.parliament.na/cms_documents/combating-of-domestic-violence-9456ce0238.pdf.
- ¹¹ Fey, Umar, Baral, Lipinge et al. “Stigma, Health Care Access, and HIV Knowledge among Men Who Have Sex with Men in Malawi, Namibia, and Botswana” (December 2010) *AIDS and Behaviour* (DOI: 10.1007/s10461-010-9861-2); UNAIDS, Namibia 2019. Available from <https://www.unaids.org/en/regionscountries/countries/namibia>.
- ¹² CCPR, “Concluding observations on the second report of Namibia” CCPR/C/NAM/CO/2 (22 April 2016), para. 9(b). Available from <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPRiCAqhKb7yhsh7Ph3KVs8zxwYZKnao5FA8MpfDWy%2FQGPY29QoZxc1OtOmGEp%2BDSIHNgSdJRvjLL6S1zO99wgtffaBMjydHo9u27GY2%2FQgxb3%2FXOfU8yQm7I>.
- ¹³ Gay Express “Namibian community leader filmed performing hate crime on trans woman”, 4 May 2020. Available from <https://gayexpress.co.nz/2020/05/namibian-community-leader-filmed-performing-hate-crime-on-trans-woman/>.
- ¹⁴ The Advocates for Human Rights, Legal Assistance Centre, MPower Community Trust, Namibian Gays and Lesbians Movement, TULINAM, Wings to Transcend Namibia “Namibia’s compliance with the U.N. Convention Against Torture: LGBTI Rights” (2016), para. 20. Available at https://www.theadvocatesforhumanrights.org/uploads/namibia_cat_lgbti_shadow_report_with_sign_ons_oct_2016.pdf [Accessed 28 September 2020].

¹⁵ The Namibian “Nam abstains from UN gay rights vote”, 11 July 2016. Available from

<https://www.namibian.com.na/152990/archive-read/Nam-abstains-from-UN-gay-rights-vote>.

¹⁶ Afrobarometer “Good neighbours? Africans express high levels of tolerance for many, but not for all”, Afrobarometer Dispatch No. 74, March 2016, p. 11. Available from

https://afrobarometer.org/sites/default/files/publications/Dispatches/ab_r6_dispatchno74_tolerance_in_africa_eng1.pdf.

¹⁷ Criminal Procedure Act, 2004, ss 42(1)(b), 44(1)(a) and 63(4)(a). Available from

https://www.imolin.org/doc/amlid/Namibia_CrimProcAct.pdf.

¹⁸ Combatting Immoral Practices Act, 1980, s 8. Available from https://laws.parliament.na/cms_documents/combating-of-immoral-practices-2c85487772.pdf; ILGA State-sponsored Homophobia 2019, p. 49. Available from https://ilga.org/downloads/ILGA_World_State_Sponsored_Homophobia_report_global_legislation_overview_update_December_2019.pdf.

¹⁹ The Namibian “Let gays be – Walters”, 23 August 2016. Available at <https://www.namibian.com.na/154753/archive-read/Let-gays-be-%E2%80%93-Walters> [Accessed 29 September 2020].

²⁰ UK Home Office “Country Policy and Information Note – Namibia: Sexual orientation and gender identity and expression”, Version. 1.0 (November 2018), p. 7. Available from https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/758230/Namibia_-_SOGIE_-_CPIN_-_v1.0e__November_2018_.pdf.

²¹ Edwin Cameron “Sexual orientation and the Constitution: A Test Case for Human Rights” (1993) 110 South African Law Journal 450, 455.

²² Office of the High Commissioner of Human Rights “Born Free and Equal: Sexual Orientation and Gender identity in International Human Rights Law” HR/PUB/12/06 (September 2012), pp. 40-41. Available from https://www.ohchr.org/Documents/Publications/Born_Free_and_Equal_WEB.pdf

²³ Committee on Economic, Social and Cultural Rights “General Comment No. 22 (2016) on the right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights)”, E/C.12/GC/22 (2 May 2016), para. 23. Available from <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=4slQ6QSmIBEDzFEovLCuW1a0Szab0oXTdImnsJZZVQfQejF41Tob4CvljeTiAP6sGfQktiae1vlbbOAekmaOwDOWsUe7N8TLm%2BP3HJPzxjHySkUoHMavD%2Fpyfcp3YlZg>.

²⁴ ILGA State-sponsored Homophobia, 2019, p. 150 (https://ilga.org/downloads/ILGA_World_State_Sponsored_Homophobia_report_global_legislation_overview_update_December_2019.pdf) [Accessed 10 September 2020]; Namibian Sun “Same-sex marriages before full bench”, 15 July 2019 (<https://www.namibiansun.com/news/same-sex-marriages-before-full-bench2019-07-14>) [Accessed 10 September 2020].

²⁵ ILGA State-sponsored Homophobia, 2019, p. 150. Available from (https://ilga.org/downloads/ILGA_World_State_Sponsored_Homophobia_report_global_legislation_overview_update_December_2019.pdf); Namibian Sun “Same-sex marriages before full bench”, 15 July 2019. Available from <https://www.namibiansun.com/news/same-sex-marriages-before-full-bench2019-07-14>; All Africa “Namibia: Same-Sex Marriages Test”, 26 June 2019. Available from <https://allafrica.com/stories/201906260513.html>.

²⁶ The Namibian “Govt sticks to stance on same-sex marriage”, 03 October 2019. Available from <https://www.namibian.com.na/193786/archive-read/Govt-sticks-to-stance-on--same-sex-marriage>; ILGA State-sponsored Homophobia, 2019, p. 19, 150. Available from https://ilga.org/downloads/ILGA_World_State_Sponsored_Homophobia_report_global_legislation_overview_update_December_2019.pdf.

²⁷ Southern African Litigation Centre, Transgender Rights in Namibia, August 2017. Available from <https://www.southernafricalitigationcentre.org/wp-content/uploads/2017/08/Transgender-rights-in-Nambia.pdf>.