

Submitting Stakeholders:

Namibia Diverse Women's Association (NDWA)

Khaibasen Trust of Namibia (KTN)

Transgender Intersex Androgynous Movement of Namibia (TIAMON)

Healingwound Associations (HWA)

Equal Rights For All Movement (ERA)

Mental Medical Counselling Network (MMCN)

Trans Masculine Namibia (TMN)

Namibia Sex Workers Alliance (NAMSWA)

Young Girls and Women (LIDAR)

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Cycle Submission: 3rd Cycle

Joint Submission Background

1. This report is a joint submission by the following civil society organisations:

- a) **Khaibasen Trust of Namibia (KTN)** – KTN is a rural based organisation that works in the development of LGBT communities in the rural area by building intersectionalities within general community development programming.
- b) **Namibia Diverse Women's Association (NDWA)** – NDWA works with persons who identify within and beyond their sex, gender, sexual orientation, gender identity, gender expression and sexual characteristics as women, girls and Trans-Diverse persons. NDWA further aims to strengthen a collective women's, girls and trans diverse movement that envisions gender equality as systematically realized by the achievement of human rights for all through facilitating women's leadership, socio-economic development and social rights.
- c) **Transgender Intersex Androgynous Movement of Namibia (TIAMON)** - TIAMON is an umbrella organisation that works on building local Trans Diverse Organisations and Trans Diverse Persons in Namibia. TIAMON focuses on legislative reform and movement building.
- d) **Healing Wound Associations (HWA)** – HWA is an organisation that works with Adolescent Girls and Young Women, with a mandate of amplifying knowledge and skills development within the health, human rights and community development framework.
- e) **Equal Rights for All Movement (ERAM)** - ERAM is a local non-governmental organisation based in the coastal regions of the country. It carries a mandate of protecting human rights and creating spaces for access to services with a focus of health and justices services. ERAM works directly with Transgender persons and Sex Workers.
- f) **Mental Medical Counselling Network (MMCN)** - MMCN is a national network of diverse organisations who work specifically on issues of mental health and access to health care service for the LGBT Community.
- g) **Trans Masculine Namibia (TMN)** - TMN is a national human rights organisation that fights for the rights of Transgender Men in Namibia.
- h) **Namibia Sex Workers Alliance (NAMSWA)** - NAMSWA is a national Sex Workers network that collectively coordinates national human rights works for the sex workers by strengthening local organisations in advocating for the human rights and protection of their target communities.

- i) **LIDAR Foundation (LIDAR)** - LIDAR is a Young Girls and Women's organisation that works in human rights development training and socio-economic development.
- 2. The report was developed through a national consultation of partner organisations from diverse backgrounds, representing women, girls, sex workers, and the lesbian, gay, bisexual and transgender (LGBT) communities in Namibia.
- 3. The following analysis and recommendations address a range of human rights issues, focusing on the rights of LGBT people, sex workers, gender equality and sexual and reproductive health and rights.
- 4. The report reviews recommendations made to Namibia during the 2nd cycle review and provides an update on certain recommendations that were accepted. Additionally, it is a reiteration of key areas that were noted by Namibia which require urgent action. The report also highlights achievements of the Government of Namibia in promoting and protecting human rights of its citizens since the last review cycle.
- 5. The report includes a number of recommendations that the Government of Namibia should swiftly implement to address outstanding human rights concerns. This can be achieved through various mechanisms such as legislation, administrative, education and public awareness, funding and technical and political support for state initiatives.

Key words: sexual orientation, gender identity, criminalization, discrimination, prejudice, stigmatization, women's rights, sexual and reproductive health and rights, sex workers, human rights, equality, gender expression.

Brief Assessment on the Implementation of the 3rd Cycle of the UPR

- 6. In 2016, during Namibia's 2nd cycle review, Namibia received 7 recommendations focusing on LGBT issues, however our state supported 2 of the recommendations and 5 were noted.

Recommendations received from states in the 2nd Cycle Review;

Right or area: 5.1. Constitutional & legislative framework

- a) **137.69. 137.69** Establish legislative measures to decriminalize sexual relations among adults of the same sex (Spain)
- b) **137.71. 137.71** Bring its legislation into conformity with its international human rights obligations by repealing laws that criminalize sexual activity between consenting adults of the same sex (Iceland)

Right or area: 8. Non-discrimination

- a) **137.70. 137.70** Repeal provisions criminalizing sexual relations between consenting adults of the same sex, to respect the principles of equality and non-discrimination among all people (France)
 - b) **137.73. 137.73** Adopt the necessary measures aiming at eliminating the normative provisions which criminalize and discriminate against LGBT persons (Argentina)
 - c) **137.72. 137.72** Bring its law in conformity with its international human rights obligations by repealing all laws which result in, or are likely to result in the discrimination, prosecution and punishment of people solely for their sexual orientation or gender identity (Netherlands)
 - d) **137.81. 137.81** Strengthen existing mechanisms within its institutional infrastructure to eradicate discriminatory, cultural or based on customary laws, practices to the detriment of women, children, minorities and LGBT groups (Honduras)
 - e) **137.148. 137.148** Adopt further measures to combat violence and sexual abuse against girls and women, as well as violence and discrimination based on sexual orientation (Brazil)
7. The recommendations mentioned above requested the government to take steps to eliminate discrimination on the basis of sexual orientation and gender identity by engaging in dialogue with a view to repealing laws which criminalize consensual adult same-sex, sexual relations and violence against LGBT communities.

National Framework

8. Namibia is a constitutional democracy, meaning that the Constitution is the basic law, all laws and conduct of all persons are subject to the Constitution. These foundational values are anchored in article 1(6) of the Constitution which declares that it (the Constitution) shall be the supreme law of Namibia.

9. Furthermore, the Constitution is also based on the principles of participatory democracy. The cornerstone of the Constitution is the entrenched Bill of fundamental rights and freedoms, contained in Chapter 3. Given Namibia's long history of political and social discrimination, it is appropriate that all citizens should be subject to a uniform standard of treatment.

10. The Bill of Rights includes civil, political and cultural rights, as well as limited social and economic rights for all Namibians. Further-more the bill of rights is constitutionally protected from amendment aimed at diminishing the spirit, purpose and objectives of the Namibian Bill of Rights. In this regard, article 25 (1) of the Constitution unequivocally provides that:

"In so far as it may be authorised to do so by this Constitution, Parliament or any subordinate legislative authority shall not make any law, and the executive and the agencies of Government shall not take any action which abolishes or abridges the fundamental rights and freedoms conferred by this chapter, and any law or action in contravention thereof shall to the extent of the contravention be invalid."

11. Namibia's Constitution provides for equality for all persons before the law, prohibits discrimination on the grounds of sex, not limited to , but neither sexual orientation nor gender identity are included. The Constitution specifically permits affirmative action to remedy women's disadvantages.

12. The prohibition on discrimination, like the other fundamental rights and freedoms, applies not just to discrimination by the state, but 'where applicable to them, by all natural and legal persons in Namibia. The constitutional context makes it clear that Article 10 is aimed at the achievement of substantive equality rather than formal equality, as a means to right past wrongs.

13. The Constitution also provides for equal rights to marry for men and women; provides that, any custom, tradition, practice, or usage which is discriminatory or which detracts from or violates the rights of any person as guaranteed by the Namibian Constitution or any other statutory law, or which prejudices the national interest, shall cease to apply.

14. Despite Namibia's progressive Constitution, strides have been made to bring our laws in conformity with international best practices. Namibia as a country adopts a monist approach to international treaties and has ratified the ICCPR, ICESCR, CEDAW, the African Charter and its Protocol on the Rights of Women in Africa as

well as the SADC Protocol on Gender and Development.

15. The legal environment for certain sections of our population remain prohibitive and inhibits their social and legal protection as well as the delivery of population friendly services, such as HIV and Aids related health and education programmes. Those who otherwise identify themselves as being Lesbian, Gay, Bisexual and Transgender (LGBT) and sex workers are particularly affected by this.
16. **Employment laws:** Namibia passed its first labour law change by Parliament in 2004, of which the Labour Act 15 of 2004 was intended to replace the Labour Act 6 of 1992. It was then further amended and the Labour Act 11 of 2007 was introduced. The replacement included the removal of the explicit protection against discrimination on the basis of sexual orientation, despite protests from both inside and outside of Parliament. LGBT people experience vast realities of sexual harassment, discrimination on the basis of sexual orientation and gender identity/expression at their places of work. Within the employment sector homophobia and transphobia persist to exist as prejudice and discrimination is more directed on the basis of gender identity and gender expression, of which both are associated with ones' sexual orientation.
17. Namibia has a constitutional commitment to act in accordance with the Conventions and Recommendations of the International Labour Organisation (ILO). Sexual orientation and gender identity are prohibited on the grounds of discrimination under the ILO Discrimination (Employment and Occupation) Convention, 1958 (No. 111) In May 2014, an ILO Committee of Experts specifically requested the Namibian Government to make sure that employees have the same level of protection against discrimination on the ground of sexual orientation as any other grounds covered by the Labour Act. The Committee which monitors the International Covenant on Economic, Social and Cultural Rights has stated that the right to work in the Covenant, read together with the right to equality, prohibits any "discrimination in access to and maintenance of employment" on the grounds of sexual orientation.
18. **Domestic violence laws-** Sexual and Gender Based Violence remains a big challenge for the country and specifically for the LGBT community as there is a lack of protection of domestic relationships amongst LGBT partnerships and their domestic setting. Protection and safety of members of the LGBT community is compromised as homophobic and transphobic rape, harassment, hate speech continue to exist and goes unreported and or no justice is realised.

19. **Sexual offence laws:** The criminal offence of “sodomy” once covered a wide range of sexual acts but now applies only to anal intercourse between males. Both “active” and “passive” partners are covered by the offence. The crime of “unnatural sexual offences” covers various forms of sexual activity between men: mutual masturbation; masturbation of one party by the other; sexual gratification obtained by friction between the legs of another person; oral sex; and other unspecified sexual acts between men. None of these sexual acts are illegal if they take place consensually between a man and a woman, or between two women. Namibia’s Combating of Rape Act defines rape as including a wide range of sexual acts in circumstances that involve force or coercion, so the crimes of sodomy and unnatural sexual offences are now relevant only to sexual acts between consenting adult men. It is prudent to engage such legislative framework as direct discrimination and criminalisation is experienced in which the protection of their rights are violated.
20. **Healthcare and Health** - Namibian LGBT persons face challenges in accessing healthcare services when they openly disclose their sexual orientation to healthcare personnel or when healthcare personnel assume that the patient must be LGBT. This affects the patient and doctor confidentiality and service attainment. Furthermore, transgender persons face distinct discrimination and prejudice as the services they receive are not gender affirming and appropriate to enhance the wellbeing of the patient. Overall national health programming and service delivery is not integrating issues of sexual orientation and gender identity by ensuring competent, affirming and intersectional services reach the LGBT communities.
21. **Social services:** Members of the LGBT community have no entitlements to benefit from their partner’s pensions as the exclusion of sexual orientation and gender identity is not recognized within social services. It is thus vital to note that LGBT persons rather utilize the legal system of including their partners within their “Will” to ensure the protection of their partnership from any form of discrimination.
22. Since the last review, Namibia has passed a number of human rights related laws and policies however it is noticeable that non-direct legal/policy framework has been advanced to have specific inclusion of sexual orientation and gender identity.
- a) Below are some of the legislative changes, policy interventions and other measures undertaken since the last review.
- ✓ **The Repeal of Obsolete Laws Act, 2018 (Act No. 2 of 2018)** this Act provides for the repeal of certain obsolete laws; and incidental matters thereto. The intention of the Act is to repeal 143 proclamations, ordinances, by-laws and Acts which were

outdated or discriminatory on the grounds of sex, race, colour, ethnic origin, religion, creed and social and economic status. This process shall benefit the LGBTI community from punitive colonial laws and policies that directly violates them. Members and organisations working on LGBTI human rights had the opportunity to submit an overall review and call to action for the repeal and or decriminalization of such legal frameworks.

- ✓ **The Judiciary Act, 2015 (Act No. 11 of 2015)** Access to justice is among the most important fundamental rights covered under various international and regional human rights instruments. To make it easier for her people to access justice timeously and/or expeditiously. This process is instrumental to ensuring human rights groups working on sexual orientation and gender identity are able to access the judicial and justice system however this process shall take a long time to benefit the LGBTI community as homophobia and transphobia remains a barrier of discrimination as prejudice lives a reality hence minimal to no cases are realized.
- ✓ **National Health Act, 2015 (Act No. 2 of 2015)** recognises and affirms the right to health for all its citizens. To this effect the Government enacted the National Health Act, 2015. This Act provides a framework for a structured uniform health system within Namibia; to consolidate the laws relating to state hospitals and state health services, and to regulate the conduct of state hospitals and state health services; to provide for financial assistance for special medical treatment of State patients; and incidental matters. LGBT health discrimination is an enormous issue in the country, with LGBT individuals facing barriers to accessing healthcare in virtually every sphere of the country. Barriers to accessing health services include ridicule, prejudice and discrimination, fears that breaches of confidentiality will reveal information about sexual orientation in a hostile climate, and the criminalisation of consensual sodomy. Such realities are experienced by LGBTI people as much as the National HIV/AIDS Strategic Framework advances inclusion of Key Populations- programming and services remain a challenge as it is for gender affirm and appropriately associated to the targeted community.
- ✓ **National Gender Policy and its Plan of Action (2010-2020)** the goal of the National Gender Policy is to guide actions towards the integration and mainstreaming of gender in the broader development framework. National Human Rights Action Plan (NHRAP) (2015-2019), the Office of the Ombudsman was mandated to implement the NHRAP of which it was the only national policy framework that was inclusive of public service towards LGBT people in the country.

b) The specific objectives within the NHRAP under the theme include:

- a) Enhancing affirmation of the rights of LGBT persons
- b) Having information on the extent to which the human rights of LGBT persons have been infringed
- c) Intensifying education and raising awareness
- d) Implementing legal and regulatory reform that would give effect to non-discrimination provisions in international and regional instruments
- e) New legislation to prohibit discrimination.

c) The plan executed by public agencies has proven not to benefit the LGBT community as no direct programming was done to ensure the set targets are reached. The Office of the Ombudsman has held several consultations on reviewing and updating progress in development however it was evident that services had not reached the LGBT community.

23. **Ombudsman Bill-** the Ombudsman's Office has been a key public office which advances impartiality within its human rights protection for all. It has been the voice for the LGBT community and has demonstrated this work over the past 5 years. The Ombudsman's Bill is currently in discussion and its mandate is to strengthen the institutional framework of the Ombudsman's office, independence and to broaden the definition of fundamental rights and freedoms to include all the rights enshrined in international instruments ratified by Namibia. It provides the Ombudsman with an expressed duty to promote and protect fundamental rights and freedoms by implementing education and information measures by publications, advertisements, public lectures, workshops, community meetings, etc., and makes provision for the announced or unannounced visits to places of detention.

Non-Discrimination

24. Over the years, Namibia has maintained a firm position in upholding the human rights and fundamental freedoms of all citizens over its 30 years of independence however it is imperative to note that within such a democratic progress, the country has maintained punitive laws that violates international frameworks and constitutional provisions of specific minority groups of our community.

25. Namibia does not criminalise sexual orientation and gender identity however it is prudent to note that consensual same sex sexual practices between two males are illegal and criminalised under common law sodomy provisions inherited as part of

the Roman-Dutch law though the law is silent on consensual sex between two women.

26. The Criminal Procedure Act 51 of 1977, CHAPTER 26- Competent Verdict 269 states if the evidence on a charge of sodomy or attempted sodomy does not prove the offence of sodomy or, as the case may be, attempted sodomy, but the offence of indecent assault or common assault, the accused may be found guilty of the offence so proved this also in reference to Schedule 1 Offences (Sections 40, 42, 49).
27. The Combating of Domestic Violence Act 4 of 2003 part 1 outlined in definitions explicitly defines a domestic relationship as persons being of different sexes, live or have lived together in a relationship in the nature of marriage, although they are not, or were not, married to each other, are or were in an actual or a perceived intimate or romantic relationship. The drafting of amendment Bills to the Combating of Domestic Violence Act, Combating of Rape Act, Maintenance Act and the Criminal Procedure Act. The Government has taken forward initiatives seeking to strengthen these laws so as to provide greater protection for women and girls, however, these Bills do not explicitly recognize same-sex relationships or LGBT people, denying LGBT people equal protection before the law. In addition, these Bill remain in draft form and have not been passed by Parliament.

The Domestic Violence Act directly violates the human rights and domestic environments of LGBT persons by:

- ✓ The explicit exclusion and lack of national recognition of LGBT Persons co-habiting relationship impacts on their violent experiences within domestic relationships and lack of reporting thereof.
- ✓ The lack of recognition of diverse sexual orientations in relationships withhold equal protection in unions and marriages for persons who identify as LGBT.
- ✓ State exclusion and lack of recognition of LGBT relationships deprives them from a life of liberty, integrity and security.
- ✓ The lack of recognition and protection regarding parenting for LGBT persons infringes on their parental rights and protection from SGBV.
- ✓ The lack of legislative recognition around Domestic Violence and LGBT affects access to services
- ✓ Domestic violence within and towards LGBT people often remains completely hidden because it is masked in shame and secrecy or a private matter and is not reported to the police and other service providers.
- ✓ Degrading or humiliating your child for being LGBT affects their dignity and self-

confidence. Constant ridicule or criticism impedes on the child's safety and security resulting in their SGBV experiences going unacknowledged

- ✓ Namibia's lack of Inclusion in documenting data on LGBT Persons domestic violence cases impedes on the intersectional response to combat Sexual Gender Based Violence.

28. During 2019, under the auspices of the Ombudsman, a draft Bill on Prohibition of Discrimination, Harassment and Hate Speech was developed. Consultations on this draft legislation are currently underway. This is a welcomed development, particularly as the draft Bill prohibits discrimination against any person, which would possibly include LGBT people and sex workers within the definition. However, as currently drafted **the Bill does not explicitly state or prohibit discrimination** on the grounds of sexual orientation, gender identity and gender expression nor recognize the many forms of discrimination that LGBT people face in Namibia. This is in contrast to explicit prohibitions on the grounds of sex or gender and race. Moreover, it is also unclear to what extent this draft legislation will be amended or complement pre-existing anti-discrimination legislation, specifically the Labour Act

29. Sex Work or "Prostitution", was never an offence in terms of the common law, and the act of engaging in sexual intercourse for reward has not been made into an offence in terms of any Namibian statute. However, various other aspects of sex work are currently criminalised by several statutes and municipal regulations, notably the Combating of Immoral Practices Act (No. 21 of 1980). This Act prohibits for instance soliciting, living off the earnings of prostitution and keeping a brothel. The Act is aimed primarily at third parties (pimps and brothel owners) and at public manifestations of prostitution (such as public solicitation). There are four basic legal approaches to prostitution the Act outlines -- prohibition, abolition, regulation and decriminalization. Such thematic descriptions impacts on the human rights of Sex Workers.

30. The Namibian Labour Act 11 of 2007 Article 5(2) states that "a person must not discriminate in any employment decision directly or indirectly, or adopt any requirement or engage in any practice which has the effect of discrimination against any individual on one or more of the following grounds of their race, colour, or ethnic origin, sex, marital status or family responsibilities, religion, creed or political opinion, social or economic status, degree of physical or mental disability, AIDS or HIV status and previous, current or future pregnancy." While this Act does outline principles of non-discrimination, it is silent on discrimination on the basis of sexual orientation and gender identity, and it is prudent to note that persons who identify as LGBT continue to experience employment denial and harassment from

employment institutions.

Human Rights Education & Training

31. National Sexual and Gender Based Violence (SGBV) statistics in the country are often framed as an issue solely affecting the heterosexual (cisgender) communities whilst members of the LGBT community are left out in both legislative and service reform processes.
32. As a result of cis-normative conceptions, gender remains the rhetoric of transformation as sexual and gender diverse concepts remain mythical in understanding because many transgender women are still classified as “gay men” and transgender men as “lesbian women”. **Violence against the LGBT community** often goes unreported and unpunished. Cases are at times misreported as “rape” whilst the nature of the violence experienced is directly related to “homophobic rape” because of the person’s sexual orientation and gender identity.
33. Moreover, violence against LGBT persons continues to be reinforced by a patriarchal culture that views masculinity as dominant and femininity as subservient. Such violence is often misguided and mis-characterised as violence motivated by stigma and prejudice against the victim’s sexual orientation, rather than prejudice against their gender identity and gender expression. The Namibian society continues to understand gender along a cis-normative trajectory and follows a biological model of gender identity and gender expression. This makes it extremely hard to obtain statistical data regarding SGBV on LGBT persons.
34. In addition, the **right to access health care** has been universal in the country, yet stigma and discrimination towards LGBT persons within the health fraternity prevails. This is due to the disconnection between the legal environment and practice in service delivery. There is lack of national health guidelines and standards of care for gender affirming care which could assist health professionals in providing services for transgender people in the healthcare system. Healthcare workers continue to deny LGBT persons access to healthcare because of the general assumption that homosexuality is illegal, alongside their personal prejudice, as well as a fear that they are breaking the law or their moral values by providing health services to LGBT persons.
35. Furthermore, the **right to education** remains fundamental and progress has been made with the newly adopted Namibian curriculum on Comprehensive Sexuality Education (CSE) which includes a section on sexual orientation. However, schools

continue to have realities that subject learners who are LGBT to discrimination and bullying. Noticeably learners who are seen as different in terms of gender identity are subjected to more bullying due their gender expression and identity thereof than others. Critically, very minimal to no action is taken by the school against bullying on the basis of Sexual Orientation, Gender Identity and Gender Expression.

Recommendations

36. Legal Framework

- ❖ Repeal the crime of sodomy and unnatural sexual offences within the Criminal Procedure Act 51 of 1977 by repealing all punitive and discriminatory laws which criminalise sexual activity between consenting adults of the same sex.
- ❖ Enact specific legislation that prohibits discrimination on the basis of sexual orientation and gender identity and gender expression thereby enabling LGBT persons to enjoy their Constitutional rights.
- ❖ Amend and expand the definition of a domestic relationship in the Combating of Domestic Violence Act 4 of 2003 to include LGBT couples.
- ❖ Amend the criminal legislation Criminal Procedure Act 51 of 1977 to mandate tougher punishment for crimes motivated by hatred and prejudice towards LGBT persons.
- ❖ Expeditiously amend the Labour Act 2007 to include a prohibition of discrimination on the grounds of sexual orientation, gender identity and gender expression.
- ❖ Support the draft Prohibition of Discrimination, Harassment and Hate Speech Bill to explicitly provide for a prohibition on discrimination on the grounds of sexual orientation, gender identity and gender expression and work with civil society to ensure that LGBT people are adequately protected under that new legislation.
- ❖ Advance the speedy enactment of the Ombudsman Bill by ensuring it is passed urgently.

37. Institutions and Policies

- ❖ Support efforts made by civil society to educate the general public and change mind-sets on LGBT issues by openly condemning discrimination of LGBT people.
- ❖ Address violence on the basis of Sexual Orientation, Gender identity and Gender Expression which can be dealt with by enacting protective legislation that protects and prohibits all forms of violence towards persons of the LGBT community.

- ❖ Provide funding and resources to facilitate the collection of information, including research data, on violence against LGBT persons to enable policy formulation and implementation.
- ❖ Prohibit violent, stigmatising and discriminatory treatment of transgender and LGBT persons by public service providers
- ❖ Government needs to act on those commitments in the NHRAP, undertake those key interventions and continue to pursue those objectives as a matter of urgency as part of the new NHRAP 2020-2025.

38. Human Rights Education & Training

- ❖ Require school-governing bodies and other stakeholders (teachers, unions, education bodies) to conceptualise and implement policies and implementing structures dedicated to addressing and preventing discrimination against LGBT youth.
- ❖ Provide training and education on informed consent, bodily diversity and the right to bodily integrity for all healthcare professionals to ensure the medical information of and healthcare services provided to LGBT persons are balanced, accurate, evidence based and informed by human rights approaches.

Conclusion

39. With this collective submission we urge recommending States to seriously consider the information provided and recommendations to inform recommendations made to the Government of Namibia in the upcoming review.

40. In light of Namibia's constitutional and international human rights obligations, as well as the discrimination, abuse and stigmatisation suffered by members of the LGBT and sex workers community in practice; the recommended legislative and practical changes will create far reaching safeguards and restore the dignity of these vulnerable groups further striving to make Namibia a better place for all.

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