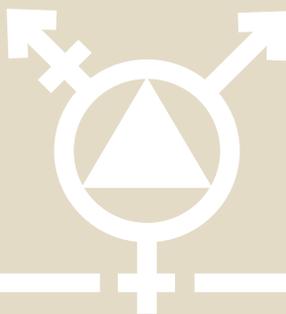


Namibian Law on LGBT Issues



Gender Research and Advocacy Project
LEGAL ASSISTANCE CENTRE

2015



ACKNOWLEDGEMENTS

The primary author of this report is **Dianne Hubbard**. Research, writing and other support was provided by **Felix Lüth, Laura Halonen, Shane Meckler, Sam Szoke-Burke, Drew Aiken, Rachel Coomer, Yolande Engelbrecht, Grace Kapere, and Markus Ihalainen**. Design and layout are by **Perri Caplan**. Thanks also to the many Namibian groups working with LGBT issues for their input and interest, and to the entire Legal Assistance Centre team. The project was funded by the **Government of the United States of America** and the **Embassy of Finland in Namibia**.



EMBASSY OF FINLAND
WINDHOEK



© Legal Assistance Centre 2015

This report may be freely copied for educational purposes,
as long as the source is acknowledged.

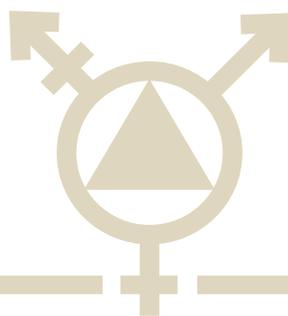
PUBLISHER'S CONTACT DETAILS

4 Marien Ngouabi Street (former name Körner Street), Windhoek
PO Box 604, Windhoek, Namibia

Telephone 264-061-223356 • Fax 264-061-234953 • Email info@lac.org.na • Website www.lac.org.na

A digital version (PDF) of this publication is available on the LAC website.

ISBN 978-99945-61-53-7



CONTENTS

Chapter 1: INTRODUCTION	1
1.1 Terminology	2
1.2 Homosexuality and bisexuality	7
1.3 Transgenderism	16
1.4 Intersexuality	21
Chapter 2: CONSTITUTION	27
2.1 Namibia's Bill of Rights	28
2.2 Protection in the Namibian Constitution for LGBT rights	29
2.3 Limiting fundamental rights	42
2.4 Enforcing fundamental rights	43
Chapter 3: INTERNATIONAL LAW	45
3.1 Introduction	46
3.2 The role of international law in Namibia	46
3.3 LGBT rights under international law	47
3.4 Conclusion	61
Chapter 4: CRIME	63
4.1 Introduction	64
4.2 Sodomy and unnatural sexual offences	65
4.3 Public indecency, indecent assault and related statutory offences	76
4.4 Sex work and brothels	77
Chapter 5: PROTECTION	81
5.1 Introduction	82
5.2 Rape and other non-consensual sexual contact	84



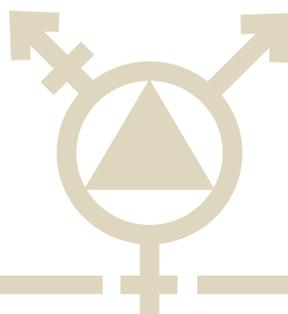
5.3	Other violent crimes	86
5.4	Domestic violence	87
5.5	Protections against exploitation in respect of sex work	88
5.6	Bullying	90
5.7	Recommendations for protecting the LGBT community	91

Chapter 6: SPEECH 93

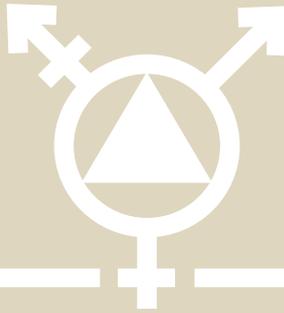
A.	PROTECTION AGAINST HATE SPEECH AND INVASION OF PRIVACY	94
6.1	Introduction	94
6.2	Legislation protecting against hate speech in Namibia	95
6.3	Criminal remedies in Namibia	97
6.4	Civil remedies in Namibia	99
6.5	Using constitutional rights to protect against hate speech	103
6.6	International law: Hate speech and crimes against humanity	104
6.7	Models for law reform	105
B.	PROTECTION FOR FREEDOM OF EXPRESSION ABOUT LGBT ISSUES	106
6.8	Restrictions on “propaganda of homosexuality”	106
6.9	Limitations on indecent, obscene and undesirable speech	107

Chapter 7: LABOUR 109

7.1	Introduction to LGBT employment discrimination	110
7.2	Employment discrimination laws in Namibia	112
7.3	International law	116
7.4	Sexual harassment	119
7.5	Family responsibilities	121
7.6	Compassionate leave	122
7.7	Severance pay and dependants on agricultural land	123
7.8	Social security benefits	124
7.9	Employees’ compensation	124
7.10	Models for law reform	125



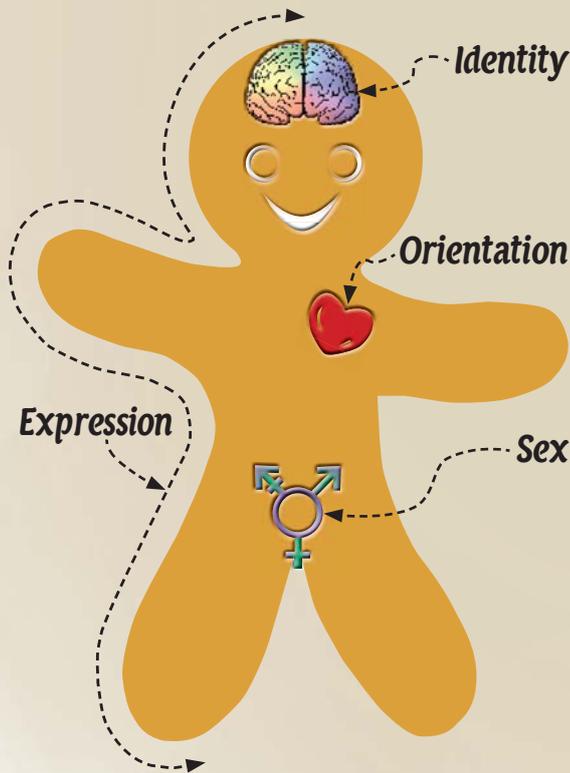
Chapter 8: FAMILY	127
8.1 Introduction	128
8.2 Marriage	128
8.3 Current legal position of same-sex partners in Namibia	136
8.4 Legal mechanisms which can be applied to same-sex partnerships	140
8.5 Adoptions	143
8.6 Assisted reproductive techniques and surrogacy	145
Chapter 9: HEALTH	147
9.1 Introduction to LGBT health discrimination	148
9.2 Non-discriminatory and confidential access to health care	151
9.3 HIV/AIDS as a health issue in the LGBT community	155
9.4 Access to condoms in prisons	157
9.5 Medical aid coverage for same-sex partners	159
9.6 International law obligations	160
9.7 Models for future law reform	163
Chapter 10: SEX CHANGE	165
10.1 Introduction	166
10.2 Sex change and birth registration	167
10.3 Legal ramifications of a sex change	169
10.4 Examples of sex change laws in other countries	172
10.5 Right to cross-dress	175
Chapter 11: REFUGEES	177
11.1 Introduction	178
11.2 Namibian domestic law	179
11.3 International refugee and human rights law	180
11.4 Conclusion	186
Chapter 12: CONCLUSION	187



LGBT =



The Gingerbread Person



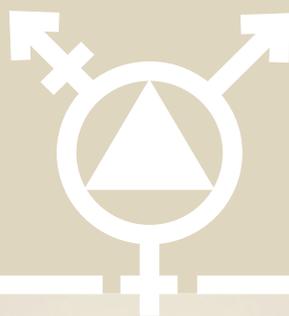
 **Gender Identity**
Woman Genderqueer Man
Gender is how you, in your head, think about yourself. It's the chemistry that composes you (e.g. hormonal levels) and how you interpret what that means.

 **Gender Expression**
Feminine Androgynous Masculine
Gender expression is how you demonstrate your gender (based on traditional gender roles) through the ways you act, dress, behave and interact.

 **Biological Sex**
Female Intersex Male
Biological sex refers to the objectively measurable organs, hormones and chromosomes. Female = vagina, ovaries, XX chromosomes; male = penis, testes, XY chromosomes; intersex = a combination of the two.

 **Sexual Orientation**
Heterosexual Bisexual Homosexual
Sexual orientation is who you are physically, spiritually and emotionally attracted to, based on their sex/gender in relation to your own.

Reproduced from [ItsPronouncedMetrosexual.com](http://itspronouncedmetrosexual.com)
(Edugraphics page: <http://itspronouncedmetrosexual.com/edugraphics-printables/>)



Chapter 1

INTRODUCTION

1.1 Terminology	2
1.1.1 LGBT	2
1.1.2 Sex, gender and sexuality	3
1.1.3 Other key terms	4
1.2 Homosexuality and bisexuality	7
1.2.1 Understanding homosexuality and bisexuality	7
1.2.2 Prevalence of homosexuality and bisexuality	11
1.2.3 Attitudes about homosexuality and bisexuality	11
1.3 Transgenderism	16
1.3.1 Understanding transgenderism	17
1.3.2 Prevalence of transgenderism	18
1.3.3 Gender transitions	18
1.4 Intersexuality	21
1.4.1 Understanding intersexuality	21
1.4.2 Sexual differentiation in fetuses	22
1.4.3 Prevalence of intersexuality	25
1.4.4 Choices for dealing with intersexuality	25

1.1 Terminology

SUMMARY

LGBT stands for **lesbian, gay, bisexual and transgender**. Some use the term LGBTI, to specifically include intersexuality. This paper uses the term **LGBT** with the understanding that it incorporates intersexuality and any other gender identities outside of the perceived societal “norm” of heterosexual males and females.

To understand LGBT issues, it is important to understand the difference between sex and gender. **Sex** is a person’s biological sex which results from factors including chromosomes, internal reproductive organs, and external genitalia. **Gender** refers to the attitudes, feelings, and behaviours that a given culture associates with a person’s biological sex.

Two other important terms are: (1) **sexual orientation**, which refers to the sex of those to whom one is sexually and romantically attracted and (2) **gender identity**, one’s sense of oneself as male, female, or transgender.

For legal purposes (such as the crime of sodomy or the ability to marry), questions of sexual orientation and identity are often irrelevant with the law being concerned only with the biological sex of the persons in question and their behaviour. For this reason, this paper will frequently refer to two people of the **same sex** in contrast to two people of the **opposite sex**.

.....
“Everyone has a sexual orientation and a gender identity. When someone’s sexual orientation or gender identity does not conform to the majority, they are often seen as a legitimate target for discrimination or abuse.”

Amnesty International, <www.amnesty.org/en/sexual-orientation-and-gender-identity>

.....

1.1.1 LGBT

LGBT stand for “lesbian, gay, bisexual, transgender”. Some people use the term LGBTI, to ensure that “intersexuality” is included.

This paper will use the term LGBT because this term is frequently used in laws, regulations, and research. This term is used with the understanding that it incorporates intersexuality and any other gender identities outside of the perceived societal “norm” of heterosexual males and females.

This paper will present some important terms and definitions used by established organisations active in the field of LGBT rights. In daily life, the best approach is to find out what terms particular individuals prefer to use to describe themselves.

.....
This paper uses the term LGBT with the understanding that it incorporates intersexuality and any other gender identities outside of the perceived societal “norm” of heterosexual males and females.

.....

.....
“Terminology is important; the words people use to describe their identity convey a sense of belonging, through connections to a shared history or community. No single term can capture the diversity of gender identity and expression around the world.”

United Nations Development Programme, “Discussion Paper: Transgender Health and Human Rights”, 2013
.....

1.1.2 Sex, gender and sexuality

To understand LGBT issues, it is important to know the difference between sex and gender:

- **Sex** refers to a person’s biological status and is typically categorised as male, female, or intersex (i.e., atypical combinations of features that usually distinguish male from female). There are a number of indicators of biological sex, including sex chromosomes, gonads, internal reproductive organs, and external genitalia.
- **Gender** refers to the attitudes, feelings, and behaviours that a given culture associates with a person’s biological sex. Behaviour that is compatible with cultural expectations is referred to as gender-normative; behaviours that are viewed as incompatible with these expectations constitute gender non-conformity.¹

It is also important to understand sexual orientation and gender identity – terms which are sometimes put together and abbreviated as “SOGI” by groups which advocate for LGBT rights:

- **Gender identity** refers to one’s sense of oneself as male, female, or transgender. When one’s gender identity and biological sex are not congruent, the individual may identify as transsexual or as another transgender category.
- **Sexual orientation** refers to the sex of those to whom one is sexually and romantically attracted. Categories of sexual orientation typically have included attraction to members of one’s own sex (gay men or lesbians), attraction to members of the other sex (heterosexuals), and attraction to members of both sexes (bisexuals). While these categories continue to be widely used, research has suggested that sexual orientation does not always appear in such definable categories and instead occurs on a continuum. In addition, some research indicates that sexual orientation is fluid for some people; this may be especially true for women.²

It is also helpful to remember that sexuality is a broad and complex concept. The LGBTI advocacy group OutRight Namibia uses this definition of sexuality:

- **Sexuality** is a central aspect of being human throughout life and encompasses sex, gender identities and roles, sexual orientation, eroticism, pleasure, intimacy and reproduction. Sexuality is experienced and expressed in thoughts, fantasies, desires, beliefs, attitudes, values, behaviours, practices, roles, and relationships. Sexualities can include all of these dimensions, not all of them are always experienced or expressed. Sexuality is influenced by the interaction of biological, psychological, social, economic, political, cultural, ethical, legal, historical, religious and spiritual factors.³

1 Excerpt from “The Guidelines for Psychological Practice with Lesbian, Gay, and Bisexual Clients”, adopted by the American Psychological Association Council of Representatives, 18-20 February 2011, <www.apa.org/pi/lgbt/resources/guidelines.aspx> (references omitted).

2 Ibid (references omitted).

3 Linda RM Baumann, “Understanding Sexuality, Sexual Orientation, Gender Identity and Expression”, OutRight Namibia, (undated), as presented to Legal Assistance Centre, 12 November 2014.

1.1.2 Other key terms

The definitions used by Johns Hopkins University, a well-respected American university with a distinguished medical school, are particularly clear and concise. These definitions therefore provide a good starting point for this discussion.

LGBT GLOSSARY

Definitions of key terms used by Johns Hopkins University

Bisexual: A person (male or female) who is emotionally, romantically, sexually, affectionately, or relationally attracted to both men and women, or who identifies as a member of the bisexual community.

Crossdresser: Individual who dresses in the “opposite” gender clothing for a variety of reasons, sometimes for sexual pleasure. Crossdressing is not indicative of sexual orientation. This term replaces the sometimes pejorative term transvestite.

FTM: An abbreviation for female-to-male transsexual. This person most likely prefers masculine pronouns.

Gay Male: A man who is emotionally, romantically, sexually, affectionately, or relationally attracted to other men, or who identifies as a member of the gay community. At times, “gay” is used to refer to all people, regardless of sex, who have their primary sexual and or romantic attractions to people of the same sex. Lesbians and bisexuals may feel excluded by the term “gay.”

Gender: A binary sociological construct defining the collection of characteristics that are culturally associated with maleness or femaleness; masculine and feminine make up gender just as male and female comprise sex.

Gender Identity: How one perceives oneself – as a man, a woman, or otherwise.

Gender Role: Norms of expected behavior for men and women assigned primarily on the basis of biological sex; a sociological construct which varies from culture to culture.

Heterosexual: A person who is emotionally, romantically, sexually, affectionately, or relationally attracted to members of the opposite sex. Often called a straight person.

Homophobia: Fear of, hatred of, or discomfort with people who love and sexually desire members of the same sex.

Homosexual: The clinical term, coined in the field of psychology, for people with a same-sex sexual attraction. The word is often associated with the idea that same-sex attractions are a mental disorder, and is therefore offensive to some people.

Intersex: Term used for a variety of medical conditions in which a person is born with chromosomes, genitalia, and/or secondary sexual characteristics that are inconsistent with the typical definition of a male or female body.

Lesbian: A woman who is emotionally, romantically, sexually, affectionately, or relationally attracted to other women, or someone who identifies as part of the lesbian community. Bisexual women may or may not feel include by this term.

MSM: An abbreviation for men who have sex with men. This term emphasises the behaviour, rather than the identities of the individuals involved.

MTF: An abbreviation for male-to-female transsexual. This person most likely prefers feminine pronouns.

Queer: Term describing people who have a non-normative gender identity, sexual orientation, or sexual anatomy – can include lesbians, gay men, bisexual people, transgender people, and a host of other identities. Since the term is sometimes used as a slur, it has a negative connotation for some LGBT people; nevertheless, others have reclaimed it and feel comfortable using it to describe themselves.

Sex: 1. A biological term dividing a species into male or female, usually on the basis of sex chromosomes (XX = female, XY = male); hormone levels, secondary sex characteristics, and internal and external genitalia may also be considered criteria. 2. Another term for sexual behaviour or gratification. Sex is a biological fact or a physical act.

Sexuality: The complex range of components which make us sexual beings; includes emotional, physical, and sexual aspects, as well as self-identification (including sexual orientation and gender), behavioural preferences and practices, fantasies, and feelings of affection and emotional affinity.

Sexual Orientation: The direction of one's sexual interest toward members of certain sexes. Can involve fantasy, behavior, and self-identification; a person's general makeup or alignment in terms of partner attraction. Includes (among others) a same-sex orientation, male-female orientation, a bisexual orientation, and a pansexual orientation.

Third Gender: A term for those who belong to a category other than masculine or feminine. For example, Native American two-spirit people, *hijira* in India, *kathoeyes* in Thailand, and *travestis* in Brazil.

Transgender: An umbrella term for those individuals whose gender identity does not match with that assigned for their physical sex... In its general sense, it refers to anyone whose behaviour or identity falls outside of stereotypical expectations for their gender. Transgender people may identify as straight, gay, bisexual, or some other sexual orientation. Sometimes shortened as trans.

Transphobia: Fear of, hatred of, or discomfort with people who are transgender or otherwise gender non-normative.

Transsexual: Term referring to a person whose gender identity consistently differs from what is culturally associated with his/her biological sex at birth. Some choose to undergo sexual reassignment surgery.

WSW: An abbreviation for women who have sex with women. This term emphasises the behaviour, rather than the identities of the individuals involved.

selected terms from "LGBT Glossary", Johns Hopkins University, undated <<http://web.jhu.edu/LGBTQ/glossary.html>>

As a point of comparison, the box on the next page presents definition of some of the key terms used by the Namibian non-governmental organisation, OutRight Namibia, which is one of the leading organisations currently advocating for LGBT rights in Namibia.



Definitions of key terms used by OutRight Namibia

Bi-sexual – a sexual orientation and identity. Bisexual people have an attraction to people of the same and opposite sex on various levels (emotionally, physically, intellectually, spiritually and sexually). Not necessarily at the same time and not necessarily an equal amount of attraction.

Gay – a male, same sex identity and orientation. Attraction between two males on various levels (emotionally, physically, intellectually, spiritually and sexually). The term can also be used to refer to both male and female homosexuals and the homosexual community at large.

Heterosexuality – a sexual orientation in which a person feels physically, emotionally, intellectually, spiritually and sexually attracted to people of the opposite sex.

Homosexuality – attraction between two people of the same sex on various levels (emotionally, physically, intellectually, spiritually and sexually) where the sex of the attracted person is the key to the attraction.

Intersex – born with ambiguous genitalia or sex organs that are not clearly distinguished as female or male.

Lesbian – a female sexual identity and orientation which is an attraction between two females on various levels (emotionally, physically, intellectually, spiritually and sexually).

Sexual orientation – refers to the sex of those to whom one is sexually and romantically attracted.

Transgender – an umbrella term which is often used to describe a wide range of identities and experiences, includes transitional FTMs [female-to-males], MTFs [male-to-females], transvestites, cross dressers, drag kings and queens, gender-queers [people with an atypical gender identity] and many more.

Transsexual – a transgender person in the process of seeking or undergoing some form of medical treatment to bring the body and gender identity into closer alignment. Not all transgender people undergo reassignment surgery.

selected terms from "Understanding Terminologies",
Looking In-Looking Out Booklet distributed by Outright Namibia, undated

In terms of the law, questions of sexual orientation and identity often do not matter. For example, the crime of sodomy is anal intercourse between two men; it does not matter whether the men in question view themselves as heterosexual, homosexual or bisexual. This is why this paper sometimes refers to two people of the same sex in contrast to two people of the opposite sex.

.....
.....
"LGBT rights ARE human rights." – United Nations
.....
.....



1.2 Homosexuality and bisexuality

SUMMARY

Sexual orientation is an enduring pattern of emotional, romantic, and/or sexual attractions to men, women, or both sexes. **Homosexuality** means a person has emotional, romantic, or sexual attractions to members of one's own sex, **bisexuality** means a person has emotional, romantic, or sexual attractions to both men and women, and **heterosexuality** means a person has emotional, romantic, or sexual attractions to members of the opposite sex.

While scientists are not sure about all the factors behind sexual orientation, they generally agree that most people experience little or no choice about their sexual orientation. Although there is no scientific consensus about the reasons for a person's sexual attractions, it is generally agreed that most people experience little or no sense of choice about their sexual orientation. Surveys in different countries have estimated that between 1 and 6% of adults identify themselves as being gay, lesbian or bisexual, while up to 11% have engaged in same-sex behaviour or experienced same-sex attraction.

Acceptance of homosexuality varies in different regions and countries. In Africa, acceptance of homosexuality is lower than in most regions in the world. Seventy-nine countries criminalise same-sex sexual activity, with 36 of these countries (45%) being in Africa (including Namibia). Some people claim that homosexuality is "un-African", but research in various African countries shows this perception is inaccurate.

A 2013 human rights survey conducted in Namibia for the Office of the Ombudsman found that *almost three-quarters of the participants acknowledged the equal rights of persons with "a different sexual orientation"*. A 2006 survey of urban and rural Namibian youth found significant levels of support for protecting gay and lesbian rights by law as well as relatively strong agreement with the idea that sexual orientation should be treated as a private matter, with urban youth being more tolerant of LGBT persons than rural youth.

.....

HOMOSEXUALITY means a person has emotional, romantic, or sexual attractions to members of one's own sex.

BISEXUALITY means a person has emotional, romantic, or sexual attractions to both men and women.

.....

1.2.1 Understanding homosexuality and bisexuality

The American Psychological Association has published explanations to some common questions about homosexuality and bisexuality. Selected portions of that pamphlet are paraphrased in simple language on the next page, as an introduction to the topic.



ANSWERS TO YOUR QUESTIONS

For a Better Understanding of Sexual Orientation and Homosexuality (paraphrased by the Legal Assistance Centre in simple language)

What is sexual orientation?

Sexual orientation is an enduring pattern of emotional, romantic, and/or sexual attraction to men, women, or both sexes. Sexual orientation is also a person's sense of identity based on those attractions, related behaviours, and membership in a community of others who share those attractions.

Sexual orientation ranges along a continuum, from attraction only to people of the opposite sex, to attraction only to people of the same sex. However, sexual orientation is usually discussed in terms of three simplified categories: (1) heterosexual (having emotional, romantic or sexual attractions to members of the other sex); (2) homosexual or gay/lesbian (having emotional, romantic, or sexual attractions to members of one's own sex), and (3) bisexual (having emotional, romantic, or sexual attractions to both men and women).

Sexual orientation is different from biological sex (the physical and genetic characteristics associated with being male or female), gender identity (the psychological sense of being male or female), and social gender role (the cultural norms that define feminine and masculine behaviour).

Sexual orientation is different from individual characteristics like biological sex or age. This is because sexual orientation is defined in terms of relationships with others. People express their sexual orientation through behaviours with others, including such simple actions as holding hands or kissing as well as nonsexual physical affection, shared goals and values, mutual support and ongoing commitment. Sexual orientation is closely tied to the intimate personal relationships that meet deeply felt needs for love, attachment and intimacy.

How do people know if they are lesbian, gay, or bisexual?

The attractions that form the basis for adult sexual orientation usually emerge between middle childhood and early adolescence. People can know their sexual orientation before they become sexually active.

Different people have very different experiences regarding their sexual orientation. Some people know that they are lesbian, gay, or bisexual for a long time before they actually enter romantic relationships with other people. Others may engage in sexual activity with same-sex and opposite-sex partners before assigning a clear label to their own sexual orientation. Prejudice and discrimination make it difficult for many people to come to terms with their sexual orientation.

What causes a person to have a particular sexual orientation?

Despite much research, scientists are not sure what factors determine sexual orientation. Many think that nature (such as genetic and hormonal factors) and nurture (such as social and cultural influences) both play complex roles. Most people experience little or no sense of choice about their sexual orientation.

• • •

Is homosexuality a mental disorder?

No, lesbian, gay, and bisexual orientations are not disorders. Both heterosexual and homosexual behaviour are normal aspects of human sexuality which have been documented in many different cultures and historical eras. Despite persistent stereotypes that portray lesbian, gay, and bisexual people as disturbed, decades of research and clinical experience have led all mainstream medical and mental health organisations in the United States to conclude that these sexual orientations are part of normal human experience.

What about therapy intended to change sexual orientation from gay to straight?

All major mental health organisations in the United States have expressed concerns about therapies aimed at changing sexual orientation. There is no scientifically-adequate research showing that such therapy is either safe or effective. Promoting change therapies also reinforces stereotypes against lesbian, gay, and bisexual persons. It is more helpful to focus on therapy which helps gay, lesbian or bisexual individuals to cope with social prejudices against homosexuality so that they can accept their own sexual orientation and lead a happy and satisfying life ...

• • •

What is “coming out” and why is it important?

The term “coming out” can refer to (1) self-awareness of same-sex attractions; (2) telling a few others about these attractions; (3) telling many others about these attractions; or (4) identification with a lesbian, gay, and bisexual community. Many people hesitate to come out because of fear of prejudice and discrimination.

Coming out is often an important psychological step for lesbian, gay, and bisexual people. This is because feeling positive about one’s sexual orientation and integrating it into one’s life results in greater well-being and mental health. Coming out also increases social support, which is important for psychological well-being. People who feel that they must conceal their sexual orientation report more mental and physical health problems than those who are able to be more open.

• • •

What is the nature of same-sex relationships?

Research indicates that many lesbians and gay men want and have committed relationships ... There are many misleading stereotypes about lesbian, gay, and bisexual people which persist even though studies have proved them false.

One stereotype is that the relationships of lesbians and gay men are dysfunctional and unhappy. However, studies have found that homosexual and heterosexual couples have equal degrees of relationship satisfaction and commitment.

A second stereotype is that homosexual and bisexual relationships are unstable. However, despite social hostility toward same-sex relationships, research shows that many lesbians and gay men form durable relationships ... It is likely that same-sex relationships would be more stable if such couples enjoyed the same levels of support and recognition for their relationships as heterosexual couples do.



A third stereotype is that the goals and values of lesbian and gay couples differ from those of heterosexual couples. In fact, research shows that the factors which influence relationship satisfaction, commitment, and stability are remarkably similar for all couples, regardless of sexual orientation

• • •

based on American Psychological Association, "Answers to Your Questions For a Better Understanding of Sexual Orientation & Homosexuality", 2008, <www.apa.org/topics/orientation.pdf>

Some other frequently asked questions and answers have been published by the South African government, a selection of which is reproduced below.

Frequently Asked Questions on Sexual Orientation and Gender Identity for Individuals, Families and Communities (excerpts)

Q. Are LGBTI persons un-African?

LGBTI persons exist in all cultures including African cultures. In fact, there is a rich history of sexual and gender diversity in a number of African traditions. In many societies, homosexual and transgender persons have been celebrated and respected.

Q. Is homosexuality unnatural or anti-religion?

No. A person's sexual orientation is a natural and normal part of that person. All religions and spiritual teachings preach love, tolerance and respect for all people. Many religious and spiritual leaders preach that all people are free and equal and must be treated with dignity

Q. Is homosexuality anti-family?

No. Like everyone else, LGBTI persons are part of families and form families. There are many different types of families in South Africa. Some children are adopted, and others are raised by only their mother or only their father, or by their grandparents or other caregivers.

LGBTI persons also raise children and there is no evidence that being raised by lesbian, gay, bisexual, transgender and intersex parents or caregivers is harmful to children. Many lesbian, gay, bisexual, transgender and intersex persons are married or live in committed, healthy relationships.

Q. Are LGBTI persons a high risk group for contracting HIV?

A person's risk for contracting HIV is determined by his or her behaviours, not sexual orientation. It is important for all people – whether homosexual or heterosexual – to always practise safe sex.

"Frequently Asked Questions on Sexual Orientation & Gender Identity for Individuals, Families and Communities",
Department: Justice and Constitutional Development, Republic of South Africa, 2014,
<www.justice.gov.za/vg/lgbti/2014-LGBTI-faq.pdf>

1.2.2 Prevalence and consequences of homosexuality and bisexuality

It is difficult to measure the prevalence of homosexuality. This is because numbers vary based on survey criteria or methods. Additionally, many people who have felt attraction for persons of the same sex, do not identify themselves as being gay, lesbian or bisexual. The presence of societal stigma and discrimination toward LGBT persons may influence survey respondents to be dishonest, particularly if there are no assurances that information collected will be kept confidential.

International estimates of the prevalence of homosexuality and bisexuality were compiled in 2011 by the Williams Institute, keeping these limitations in mind. Drawing on various surveys from different countries, the Williams Institute estimated that between 1.2% and 5.6% of adults identify themselves as being gay, lesbian or bisexual – while in some countries up to 11% of adults surveyed reported that they had engaged in same-sex behaviour or experienced same-sex attraction.⁴

.....

“Measuring sexual orientation and gender identity can be challenging since these concepts involve complex social and cultural patterns. As a group still subject to social stigma, many of those who identify as lesbian, gay, bisexual, or transgender may not be forthcoming about this identity when asked about it in a survey.”

Gary J Gates and Frank Newport, “Special Report: 3.4% of US Adults Identify as LGBT”, 18 October 2012, <www.gallup.com/poll/158066/special-report-adults-identify-lgbt.aspx>

.....

1.2.3 Attitudes about homosexuality and bisexuality

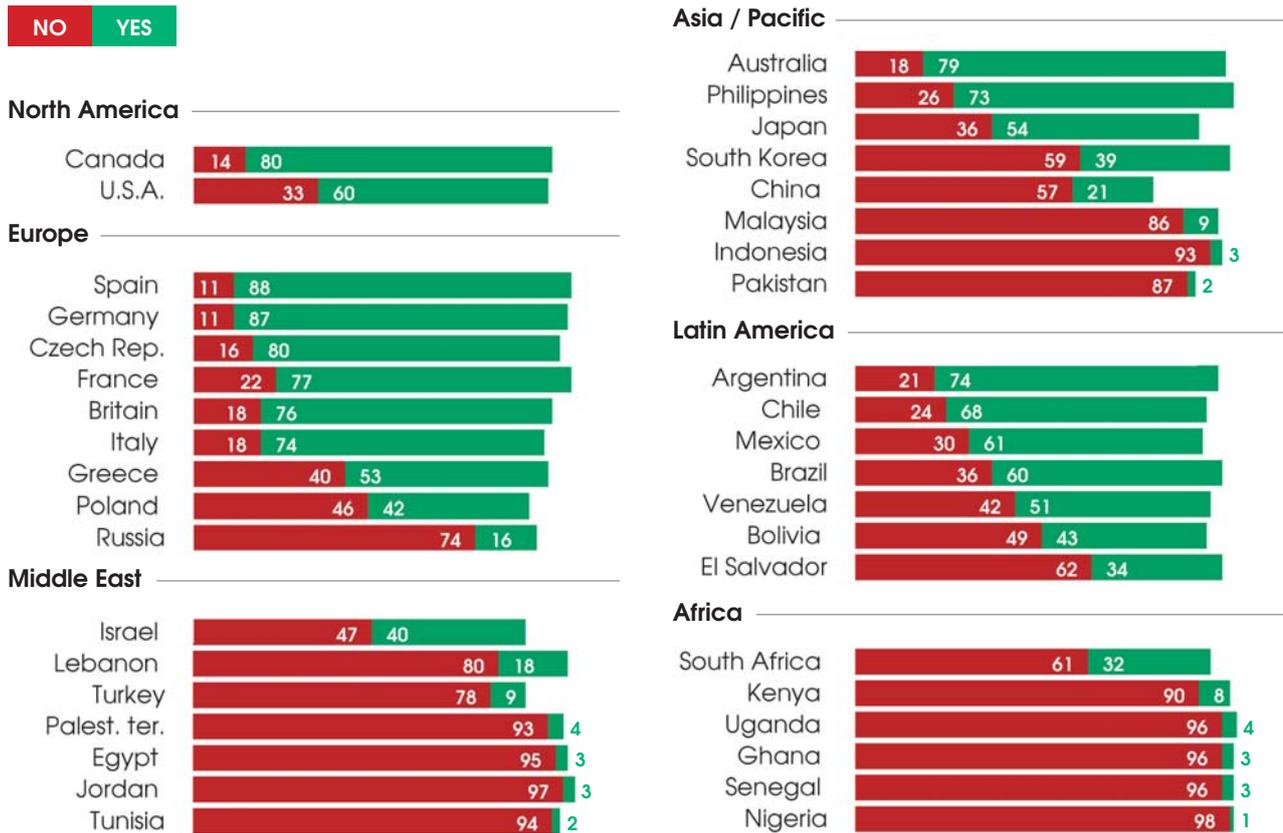
In 2013, the Pew Research Centre surveyed individuals in 39 countries about their acceptance of homosexuality and found a global divide on this question – with broad acceptance in North America, the European Union and much of Latin America, contrasted with widespread rejection in predominantly Muslim nations and in Africa, as well as in parts of Asia and in Russia. (Opinions about homosexuality were more divided in Israel, Poland and Bolivia.) Acceptance of homosexuality tended to be lower in poorer countries and in countries where religion is central to people’s lives. Men and women had similar attitudes in most of the countries surveyed, but where there was a gender difference, women were considerably more likely than men to believe that homosexuality should be accepted by society. Younger people were more tolerant of homosexuality than older people in many countries.⁵

4 Gary J Gates, “How many people are lesbian, gay, bisexual and transgender?”, The Williams Institute, April 2011, <<http://williamsinstitute.law.ucla.edu/wp-content/uploads/Gates-How-Many-People-LGBT-Apr-2011.pdf>>. The Williams Institute is based at the UCLA School of Law in the USA. It is, according to its website, “dedicated to conducting rigorous, independent research on sexual orientation and gender identity law and public policy” and producing “high-quality research with real-world relevance” for dissemination to judges, legislators, policymakers, media and the public. <<http://williamsinstitute.law.ucla.edu/mission/>>. The figures are based on surveys in the USA, Canada, UK, Australia and Norway.

5 Pew Research Centre, “The Global Divide on Homosexuality: Greater Acceptance in More Secular and Affluent Countries”, 4 June 2013, <www.pewglobal.org/2013/06/04/the-global-divide-on-homosexuality/>. The Pew Research Centre is a non-partisan American “think tank” based in Washington, DC. See <www.pewresearch.org/about/>.

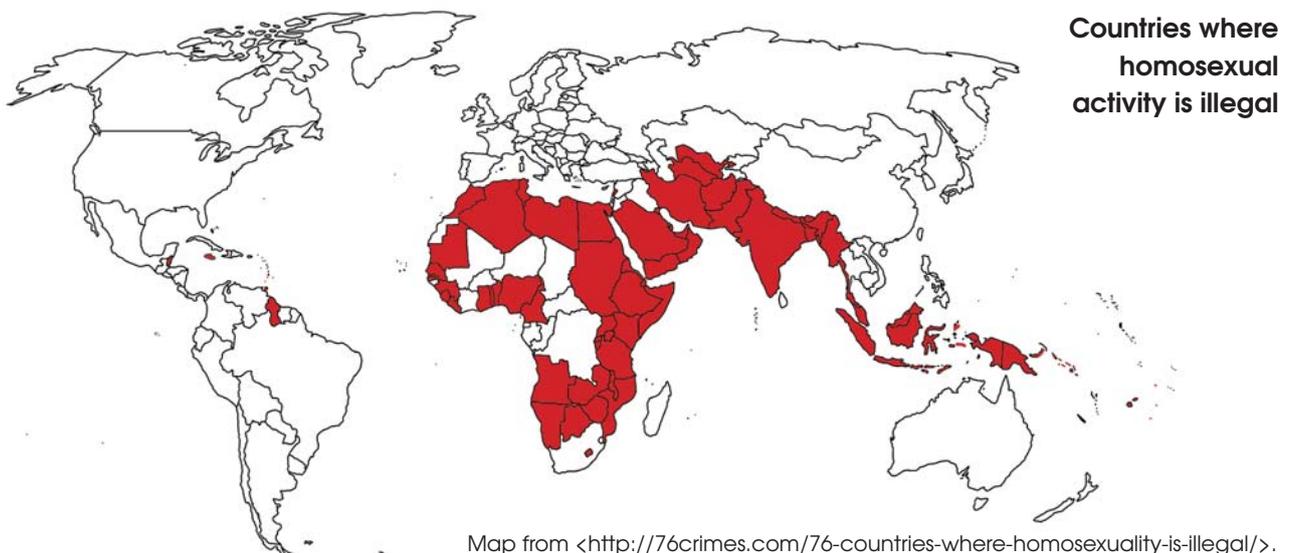


Should Society Accept Homosexuality?



PEW Research Centre, <www.pewglobal.org/2013/06/04/the-global-divide-on-homosexuality/>

As of 2014, there were either 78 or 79 countries worldwide which criminalise same-sex sexual activity, depending on how the countries are counted; 36 of these countries (45%) were in Africa, where the list includes Namibia because of its criminalisation of sodomy.⁶



⁶ Lucas Paoli Itaborahy & Jingshu Zhu, *State-sponsored Homophobia, A world survey of laws: Criminalisation, protection and recognition of same-sex love*, 9th edition, International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA), May 2014, <http://old.ilga.org/Statehomophobia/ILGA_SSHR_2014_Eng.pdf> (78 countries). Erasing 76 Crimes, “79 countries where homosexuality is illegal”, updated 14 October 2014, <<http://76crimes.com/76-countries-where-homosexuality-is-illegal/>> (79 countries).



Some observers have noted that a wave of homophobia has recently been sweeping across Africa. Some suggest that this may be a response to the increased visibility and assertiveness of LGBT lifestyles, while others point to the influence of American evangelical Christians who have actively lobbied for anti-gay legislation in various African countries.⁷

Claims that homosexuality is “un-African” have been shown to be inaccurate. For example, medical experts hired by the President of Uganda reported that homosexual behavior has existed throughout human history including in Africa, noting that homosexuality was less open in Africa in the past than it is now.⁸

Homosexuality is not un-African

... The mistaken claim that anything is un-African is based on the essentialist assumption that Africa is a homogeneous entity. In reality, however, Africa is made up of thousands of ethnic groups with rich and diverse cultures and sexualities. As appealing as the notion of African culture may be to some people, no such thing exists. Moreover, even if we wanted to imagine an authentic African culture, like all others, it would not be static.

African history is replete with examples of both erotic and nonerotic same-sex relationships. For example, the ancient cave paintings of the San people near Gurube in Zimbabwe depict two men engaged in some form of ritual sex. During precolonial times, the “mudoko dako,” or effeminate males among the Langi of northern Uganda were treated as women and could marry men. In Buganda, one of the largest traditional kingdoms in Uganda, it was an open secret that Kabaka (king) Mwanga II, who ruled in the latter half of the 19th century, was gay.

The vocabulary used to describe same-sex relations in traditional languages, predating colonialism, is further proof of the existence of such relations in precolonial Africa. To name but a few, the Shangaan of southern Africa referred to same-sex relations as “inkotshane” (male-wife); Basotho women in present-day Lesotho engage in socially sanctioned erotic relationships called “motsoalle” (special friend) and in the Wolof language, spoken in Senegal, homosexual men are known as “gor-digen” (men-women). But to be sure, the context and experiences of such relationships did not necessarily mirror homosexual relations as understood in the West, nor were they necessarily consistent with what we now describe as a gay or queer identity.

Same-sex relationships in Africa were far more complex than what the champions of the “un-African” myth would have us believe. Apart from erotic same-sex desire, in precolonial Africa, several other activities were involved in same-sex (or what the colonialists branded “unnatural”) sexuality. For example, the Ndebele and Shona in Zimbabwe, the Azande in Sudan and Congo, the Nupe in Nigeria and the Tutsi in Rwanda and Burundi all engaged in same-sex acts for spiritual rearmament – i.e., as a source of fresh power for their territories. It was also used for ritual purposes. Among various communities in South Africa, sex education among adolescent peers allowed them to experiment through acts such as “thigh sex” (“hlobonga” among the Zulu, “ukumetsha” among the Xhosa and “gangisa” among the Shangaan).

continues next page ►

7 See, for example, David Smith, “Chad becomes 37th African state to seek ban on homosexuality”, *The Guardian*, 22 September 2014 and “Why Africa is the most homophobic continent”, *The Guardian*, 23 February 2014; Max Fischer, “From colonialism to ‘kill the gays’: The surprisingly recent roots of homophobia in Africa”, *The Washington Post*, 27 June 2013; “A well-locked closet”, *The Economist*, 27 May 2010; and Jeffrey Gettleman, “Americans’ Role Seen in Uganda Anti-Gay Push”, *The New York Times*, 3 January 2010. As discussed in Chapter 3, the role of an American evangelist in Uganda has led to a court case which is currently underway in America: *Sexual Minorities Uganda v Scott Lively*, C.A. No. 12-cv-30051-MAP, Memorandum and Order Regarding Defendant’s Motions to Dismiss, (Dkt. Nos. 21 & 30), <www.gpo.gov/fdsys/pkg/USCOURTS-mad-3_12-cv-30051/pdf/USCOURTS-mad-3_12-cv-30051-1.pdf>.

8 Consensus Statement of the Presidential Scientific Committee On Homosexuality (Uganda), available at <<http://cdn.mg.co.za/content/documents/2014/02/22/scientistconsensusstatementonhomosexuality.pdf>>; see also Shaun de Waal, “Uganda MPs falsified gay report”, *Mail & Guardian*, 22 February 2014 (emphasis added).



In many African societies, same-sex sexuality was also believed to be a source of magical powers to guarantee bountiful crop yields and abundant hunting, good health and to ward off evil spirits. In Angola and Namibia, for instance, a caste of male diviners – known as “zvibanda,” “chibados,” “quimbanda,” gangas” and “kibambaa” – were believed to carry powerful female spirits that they would pass on to fellow men through anal sex.

Even today, marriages between women for reproductive, economic and diplomatic reasons still exist among the Nandi and Kisii of Kenya, the Igbo of Nigeria, the Nuer of Sudan and the Kuria of Tanzania. Like elsewhere around the world, anal intercourse between married opposite-sex partners to avoid pregnancy was historically practiced by many Africans before the invention of modern contraceptive methods.

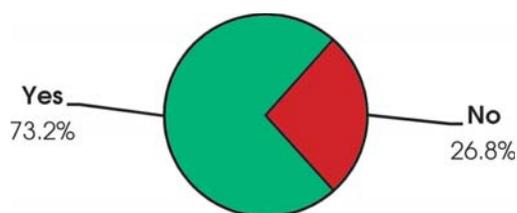
Clearly, it is not homosexuality that is un-African but the laws that criminalized such relations. In other words, what is alien to the continent is legalized homophobia, exported to Africa by the imperialists where there had been indifference to and even tolerance of same-sex relations. In Uganda such laws were introduced by the British and have been part of our penal law since the late 19th century. The current wave of anti-homosexuality laws sweeping across the continent is therefore part of a thinly veiled and wider political attempt to entrench repressive and undemocratic regimes ...

Sylvia Tamale (Professor of Law, Makerere University, Uganda),
 “It is legalized homophobia, not same-sex relations, that is alien to Africa”, *Aljazeera America*, 26 April 2014,
<http://america.aljazeera.com/opinions/2014/4/homosexuality-africamuseveniugandanigeriaethiopia.html>

It has been stated that “Namibia has become notorious in its intransigence in accepting homosexuals as equal partners in a just society”.⁹ However, official attitudes do not seem to match public opinion on this issue. In 2013, the Office of the Ombudsman published the results of a national survey of 1280 households about human right issues. One of the topics covered in this survey was attitudes about LGBT rights. When asked if people with “a different sexual orientation” have equal rights in Namibia, 73,2% of the respondent said yes – although members of the public were more hesitant about allowing gays and lesbians the right to marry.¹⁰

“Do people with a different sexual orientation have equal rights in Namibia?”

(number = 1100)



Based on Office of the Ombudsman,
 2013 Baseline Study Report on
 Human Rights in Namibia,
 2013 at 98.

Another survey conducted in Namibia in 2007 and 2008, involving 395 participants in rural and urban areas between the ages of 15 and 20, showed strong support for (1) legal protections for LGBT rights and (2) the idea that sexual orientation should be treated as a private matter.¹¹

9 Office of the Ombudsman, *2013 Baseline Study Report on Human Rights in Namibia*, 2013 <www.ombudsman.org.na/reports/special-reports/finish/4-special-reports/22-2013-baseline-study-report-on-human-rights-in-namibia> at 96.

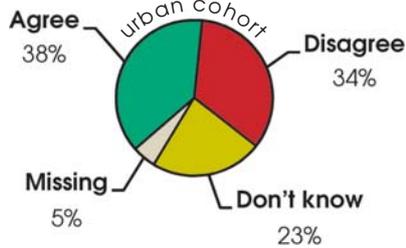
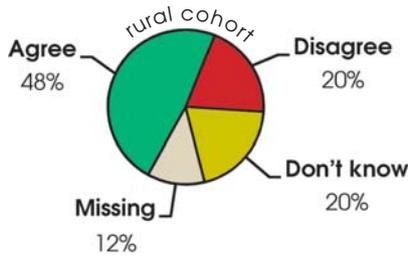
10 Id at 3, 26 and 98. The source for the information on attitudes about same-sex marriage is not clear, as the survey (reproduced in Annexure A of the report) did not ask about this issue. There would seem to be some methodological flaws with the formulation of the question; some may have understood it as a descriptive question about the Namibian Constitution or the factual situation on the ground, whereas others may have understood it as a normative question about what *should* be the case in Namibia.

11 Dr Suzanne LaFont, *Monograph 5: Beliefs and Attitudes toward Gender, Sexuality and Traditions amongst Namibian Youth*, Legal Assistance Centre, 2011, <www.lac.org.na/projects/grap/Pdf/mono5beliefs.pdf> at 46-56. This study was published by the Legal Assistance Centre which advised on the questionnaire and gave input into the analysis of the responses, but was not involved with the actual research. What is referred to as the “rural cohort” in the charts on the next page was labelled the “OYO cohort” in the study; it consisted of 318 young Namibian people aged 16-20 who lived outside of Windhoek and were either attending local public schools or OYO youth group meetings. What is referred to as the “urban cohort” in the charts on the next page was labelled the “PS cohort” in the study; it consisted of 77 young people in grade 11, aged 15-18, who were attending a private school in Windhoek. Id at 5.

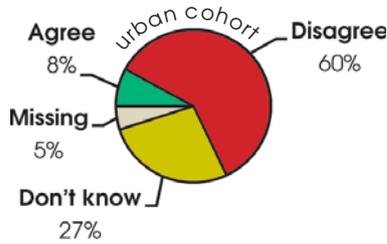
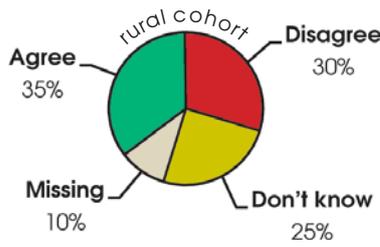


IF A FEMALE HAS SEX WITH ANOTHER FEMALE ... (number = 395)

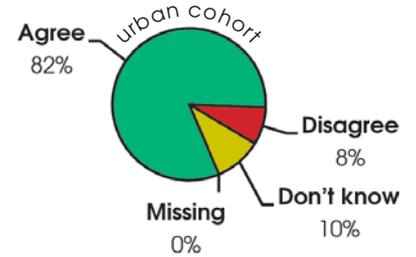
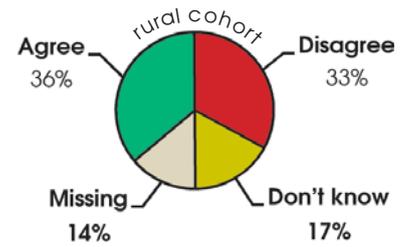
a. It is a sin.



b. It is against the law.

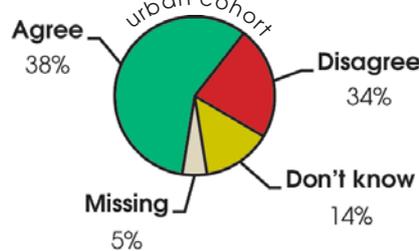
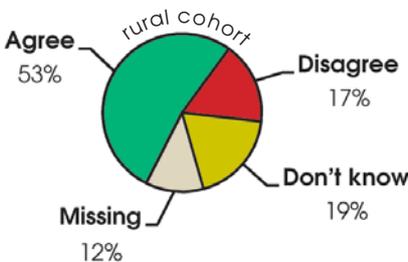


c. It is no one's business.

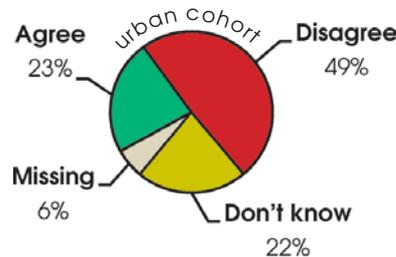
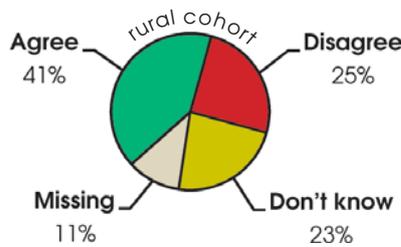


IF A MALE HAS SEX WITH ANOTHER MALE ... (number = 395)

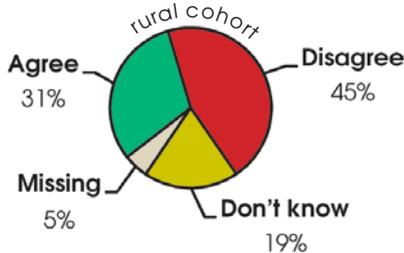
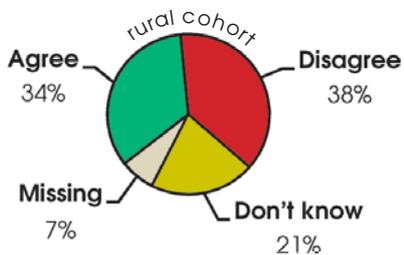
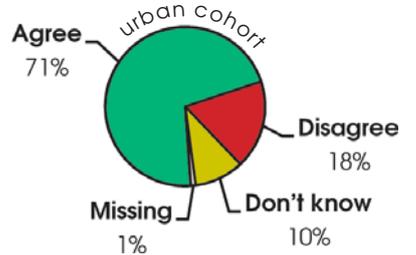
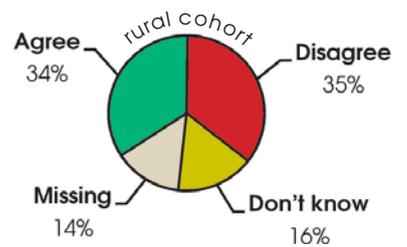
a. It is a sin.



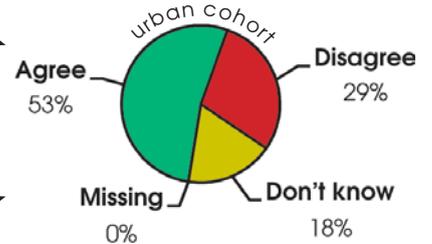
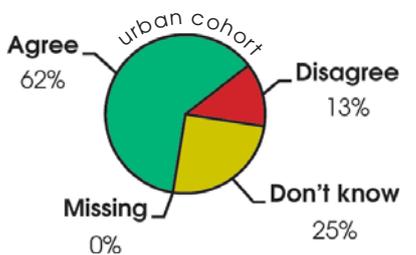
b. It is against the law.



c. It is no one's business.



Lesbian rights should be protected by the law.
(number = 395)



Gay rights should be protected by the law.
(number = 395)



In general, the number of both rural and urban respondents who supported lesbian and gay rights – along with the significant numbers of “Don’t know” answers, suggests that increased public support for legal reform on homosexual rights in the future is a possibility, and that political measures against homosexuality are not supported by all Namibians.¹²

.....

“If someone is gay and is searching for the Lord and has good will, then who am I to judge him? The Catechism of the Catholic Church explains this in a beautiful way, saying ... ‘no one should marginalize these people for this, they must be integrated into society’.”

Pope Francis, 28 July 2013¹³

.....

1.3 Transgenderism

SUMMARY

People who identify as transgender are usually born with male or female anatomies but feel as though they have been born into the “wrong body”. “Transgenderism” is often understood to mean living as a member of the opposite biological sex in some way. The most extreme expression of this is “transsexualism”, where a person wants to undergo physical transition to the opposite biological sex by means of hormonal and/or surgical treatment.

There is no single explanation for what causes transgenderism. Transgenderism manifests itself differently in different people, and many people hide their gender identity due to stigma. This makes it difficult to know how many people are transgender. One estimate is that about 0.3% of the world population is transgender – about one out of every 300 people. There is a lack of recent research on transgender populations in Africa, although historical and anthropological research reveals that cultures across Africa have often recognised and accepted gender-nonconforming individuals as part of their communities.

Some, but not all, transgender persons seek some form of transition to the gender with which they most identify. Some may simply change their name, appearance or behaviour. Others may seek hormone treatment to alter secondary sex characteristics such as body shape and body hair. Others may wish to have some form of surgery, such as a mastectomy or breast augmentation, or genital reconstruction. Most transgender people do not have access to such treatments because the costs are seldom covered by public health services or medical aid schemes.

.....

There is no single explanation for what causes transgenderism.

.....

¹² Id at 46-56.

¹³ Apostolic Journey to Rio De Janeiro on the Occasion of the XXVIII World Youth Day, Press Conference of Pope Francis During the Return Flight, 28 July 2013 (full transcript of official translation by Libreria Editrice Vaticana), <http://w2.vatican.va/content/francesco/en/speeches/2013/july/documents/papa-francesco_20130728_gmg-conferenza-stampa.html>.



1.3.1 Understanding transgenderism

People who identify themselves as transgender are usually born with male or female anatomies, but feel as though they've been born into the “wrong body”. “Transgenderism” is often understood to mean living as a member of the opposite biological sex in some way. The most extreme expression of this is “transsexualism”, where an individual wants to undergo physical transition to the opposite biological sex by means of hormonal and/or surgical treatment.¹⁴ The American Psychology Association provides some helpful explanations, summarised here in simple language:

- **Transgender is a general term for persons whose gender identity, gender expression or behaviour does not conform to that typically associated with their biological sex.**
 - *Gender identity* is a person's internal sense of being male, female or something else.
 - *Gender expression* is the way a person communicates gender identity to others through behaviour, clothing, hairstyles, voice or body characteristics.
 - Not everyone whose appearance or behaviour is gender-nonconforming will identify as a transgender person.
- **The term *transsexual* refers to people whose gender identity is different from their biological, or assigned sex.**
 - Often, transsexual people change or wish to change their bodies through hormones, surgery and other means so that their bodies match their gender identity. This is called sex reassignment, gender reassignment or gender affirmation.
 - People who were born biologically female, but identify and live as male and wish to change their bodies to match their gender identity are called transsexual men or transmen (also known as female-to-male or FTM).
 - People who were born biologically male, but identify and live as female and wish to change their bodies to match their gender identity are called transsexual women or transwomen (also known as male-to-female or MTF).
 - Some individuals who have transitioned from one gender to another prefer to be referred to as a man or woman (instead of as transgender).
- **People who *cross-dress* wear clothing that is traditionally worn by another gender in their culture.**
 - Individuals who cross-dress usually do not want to change their biological sex.
 - Cross-dressing is a form of gender expression and is not necessarily related to sexual activity.
 - Cross-dressing does not mean that an individual has a particular sexual orientation.
- **Some transgender people define their gender as being somewhere on a spectrum between male and female.** Others may view their gender identity as something different from either male or female (such as a “third gender”).
- **Transgenderism is different from sexual orientation.** Transgender people may be heterosexual, lesbian, gay, bisexual, or asexual, just like anyone else.¹⁵

14 See LJG Gooren & V Tangpricha, “Transsexualism: Epidemiology, pathophysiology, and diagnosis”, <www.uptodate.com/contents/transsexualism-epidemiology-pathophysiology-and-diagnosis> and <<http://firedrops.centelia.net/uptodate/contents/mobipreview.htm?2/36/2630/abstract/9>>, 2013.

15 Based on American Psychological Association, “Answers to Your Questions About Transgender People, Gender Identity, and Gender Expression”, 2011, <www.apa.org/topics/lgbt/transgender.pdf>.



.....

TRANSGENDER

“Transgender refers to an individual whose gender expression and identity do not conform to society’s expectation. Their expression or identity often times is different from the norm of the sex registered for them at birth. Transgender people’s gender may vary (non-conforming to either male or female gender roles or identities). Being transgender is as much about a person’s experience internally as it is about their social perception. For that reason, transgender people are those who identify as such.”

OutRight Namibia, <http://out-rightnamibia.hpage.co.in/gender_64662071.html>

.....

1.3.2 Prevalence of transgenderism

There is no single explanation for what causes someone to be transgender. It is difficult to estimate how many people are transgender because transgenderism manifests itself differently for different people, and because transgender people sometimes hide their identities because of fear of non-acceptance. Because of this, researchers have focused on transgender people who go to gender clinics to seek gender transition counselling and healthcare. However, these statistics underestimate the real size of the transgender population because other transgender people might choose not to go to clinics (because they fear stigma or discrimination, because they choose not to change their bodies, or for other reasons).

The authors of a 2011 review of various studies estimate that approximately 0.3% of the world population – about one out of every 300 people – is transgender.¹⁶

There is a lack of recent research on transgender populations in Africa. However, research shows that cultures across Africa have often recognised and accepted gender-nonconforming individuals. In recent times, gender nonconformity in Africa is more likely to be hidden because of fear of stigma and violence, making it difficult to get information about transgender persons.

1.3.3 Gender transitions

Some transgender persons seek gender transition, while some do not. Some may transition into a gender that is neither traditionally male nor female. The process of transition is different for different people and can be very complicated. There is no “right” way to transition between genders, but some common changes include –

- changing clothing and grooming
- adopting a new name
- changing sex designation on identity documents
- using hormone treatment
- undergoing medical procedures to modify the body.¹⁷

Hormone treatment can alter some sexual characteristics. For example, female-to-male transexuals may use testosterone to stimulate hair growth, and to produce a deeper voice. Male-

16 Sam Winter and Lynn Conway, “How Many Trans People are There? A 2011 update incorporating new data”, <<http://web.hku.hk/~sjwinter/TransgenderASIA/paper-how-many-trans-people-are-there.htm>>.

17 American Psychological Association, “Answers to Your Questions About Transgender People, Gender Identity, and Gender Expression”, 2011, <www.apa.org/topics/lgbt/transgender.pdf>.



to-female transsexuals may take female hormones to soften the skin and round the body shape, but body hair removal may require expensive and painful laser treatment or electrolysis.¹⁸

Some transgender people prefer to undergo surgery. For example, some transgender men may seek a mastectomy to give their chest a male appearance and some transgender women may seek breast augmentation or contouring of the hips and buttocks. Some may seek genital reconstruction, while others do not.¹⁹

While hormone treatment and gender-affirming surgery have been shown to greatly improve the well-being of transgender people, most do not have access to these treatments because they are not usually covered by public health services or medical aid. Because of this, many cannot afford to pay for the treatment at private hospitals.²⁰

Transgender persons in Namibia, like well-known transsexual activist, Mercedes Von Cloete, face significant discrimination and misunderstanding. She describes her experience in the 2013 newspaper article reproduced below.

I wake up as Mercedes, not a transsexual

THIS month Namibia together with the world conducted campaigns to raise awareness about homophobia and transphobia and on 17 May celebrated the International Homophobia and Transphobia Day. In light of these campaigns, the Windhoek Observer spoke to one of the most well known transsexual figures in Namibia, Mercedes Von Cloete.

She is dynamic, versatile, fearless, confident, outspoken, creative, sociable and a soft person. “I prefer being called a “She” and not a “He”, and if you are not comfortable with that, then don’t be near me!” the diva said.

She is also a stylist, consultant, entrepreneur, MC as well as an activist for the Lesbian Gay Bisexual Transgender Intersex (LGBTI) community. However, a distinct element sets Mercedes apart.

Mercedes began her life in Keetmanshoop but now lives in Windhoek. She’s had feminine tendencies throughout her life as a boy, and during her teen years, her desire and excitement for feminine items reached its peak.

“I started wanting hair, nails and make-up, and of course to wear heels she says, with a beautiful smile and sparkles in her eyes. In every way, Mercedes is a self-confident, brave woman.

As far back as Mercedes can remember she always experienced conflict regarding gender. But all this was resolved when she was awarded a bursary by Goethe Centre to go study in Germany, where she was exposed to liberal thinking.

She has decided to change her sex from a man to that of a woman and this year started hormone treatment in preparation for the sex change. She has been on female hormones for the past two months now and although they move her a step closer to achieving her life’s ambition of becoming a woman physically, the hormones have had minor, but negative side effects in that at times they make her hungry, lazy and tired.

“I guess I will have to live with that for now, as my body is still getting used to the changes it is going through, oh and the changes are already visible,” she adds.

continues next page ►

18 United Nations Development Programme, “Discussion Paper: Transgender Health and Human Rights”, at 21.

19 Ibid.

20 As of 2011, there were two public transgender clinics in South Africa, one at the Steve Biko Academic Hospital in Pretoria and the other at Groote Schuur Hospital in Cape Town. Both perform a small number of gender reassignment surgeries each year, with fees on a sliding scale based on income. Such surgeries are also available in the private sector in South Africa, but can be very expensive.



She will have surgery done, to complete the whole process, but wants to take it one step at a time, seeing that sex change surgeries are not performed in Namibia.

“There is so much more to being transsexual. I don’t want to make that my main focus. Above and beyond all else, **I have ambitions, goals and things that I would like to achieve like anyone else, and in light of that, I don’t make being transsexual my focus**, I have other priorities that need to be taken care of as well.”

Her make-up is all in place. “With a bit of a hassle at times (sighs), but you know me, I do my best in everything, facial hair is still a drag, but I am using laser surgery to remove them, but it’s an annoying process yet temporary though,” she says.

Her first experience walking out of the house as a ‘woman’ was super scary yet liberating at the same time. She said that it was nerve-racking.

“In Germany I saw Goth women sitting comfortably in an office without funny remarks or comments from colleagues, or a gay couple walking down the street, holding hands and cuddling,” she adds. When she saw all this, she became more comfortable in her own skin.

“I was born a guy, but my feminine side dominates more and I do not have to come and live in a foreign state to be comfortable in my own skin, I don’t have to run away from the people I love back at home because of discrimination.

“I thought I should go home and raise awareness that this is who we are, we are here, and we will be around for as long as the human race exists.

“So we need to start having a conversation about transsexuals, and in general other LGBTI members in our societies, and their inalienable claim to their rights and the protection of their human dignity,” Mercedes said.

This was the number one thing that inspired her to gradually change into a transsexual woman.

Mercedez has had people from her past, still question her transition into a woman, but has refused to be apologetic about her transformation into a woman.

“We should all be able to live by our own truth, without fearing for our lives, or living in a constant paranoia as to what people will say when they find out who we feel we are,” she says.

Mercedez spoke about her family, saying that her parents respect her decision to live as a transsexual woman.

“It took me close to seven years and I am still coming to terms with being gay my whole life, as I think about it more each time, so I respect that my parents need time to get use to the change in their own time,” she said.

Her father accepted but still needs time to get use to the whole idea. She is not really bothered.

Mercedez has two sisters whom she loves to bits. “My sisters are super supportive and my little sis regards me as her number one role model,” she adds.

“I find the Namibian community becoming slowly but surely more accepting of the gay community. We have been around and will always be around.

“Many LGBTI members of Namibia are very successful; they have proven themselves to the society that they are educated and skilled just like any other person and work towards their success which leaves little room for the public to crucify them.

“Even though this is a welcome reaction, it must also be understood we are not lining up to wait for acceptance from others.

“Like I said before, I and other members of the LGBTI community have the inalienable right to be respected for who we are in society, not because we are gay, lesbian or transsexual, but because we are human beings, like anyone else in our society.”

She wants at least two of her own kids, and also wants to adopt. “I love kids so much therefore I have been involved with different orphanages as well,” she said.

She advises the homosexual community that they have some space to express themselves although not completely, they shouldn’t take it for granted and abuse it.

“During apartheid we had to fight to be recognised as a people and be independent. How can someone who went through such pain in the past, pass judgement on people who are going through a similar battle of fighting to be accepted by society just like any other human being,” Mercedes said in closing.

Innocentia Gaoes, *Windhoek Observer*, 30 May 2013 (emphasis added)

1.4 Intersexuality

SUMMARY

Biological “sex” is a product of chromosomes, reproductive organs and external genitalia. Intersex persons are born with a mixture of traditionally male and female features, or with features which are atypical for either “male” or “female”. Some intersex people may have an inconsistency between their internal and external sexual features, or unusual combinations of sex chromosomes. The external genitalia are not always affected, with the result that intersexuality may not be evident until the child reaches puberty, or when an adult discovers that he or she is infertile.

Approximately 1.7% of births worldwide result in intersexuality. There are different opinions on what to do if a child is intersex. Many believe that irreversible surgeries on infants should be avoided so that intersex children will have the widest possible range of choices available to them when they are older. There is growing international support for the principle that operations which are not urgent on medical grounds should only take place at an age when intersex persons can give informed consent and participate actively in medical decisions.

1.4.1 Understanding intersexuality

“Sex” is determined by biology – chromosomes, internal reproductive organs and external genitalia. Intersex persons are born with a mixture of traditionally “male” and traditionally “female” features, or with features which are atypical for either “male” or “female”.

A foetus begins development with sex chromosomes from both parents. Typically, a combination of two X chromosomes produces a girl, while one X chromosome and one Y chromosome produce a boy. Sometimes there are chromosome abnormalities, such as a single sex chromosome or three sex chromosomes in various combinations of X and Y.

Some intersex people may have an inconsistency between their internal and external sexual features – such as external genitalia which appear female, but with no internal female organs and undescended testes. Some intersex people may have external genitalia which are not clearly male or female, but rather appear ambiguous (such as an unusually large clitoris or an unusually small penis).

Intersexuality may not be apparent at the time of birth. Some forms of intersexuality are not evident until the child reaches puberty – for example, the variation may be discovered only when a girl reaches puberty and fails to menstruate, or when an adult discovers that he or she is infertile. It can even happen that a person with intersex internal anatomy will never know this, with the intersexuality coming to light only in an autopsy.

Intersex persons may be heterosexual, homosexual or bisexual – just like anyone else. Most intersex persons consider themselves to be either male or female, although some prefer to identify themselves as being of a third, or different, gender.



Intersexuality should not be viewed as a disorder, but as a variation in sexual development.²¹ The word “hermaphrodite” was previously used to describe intersex persons,²² but this term is in modern times considered stigmatising by some.

Intersex

“Intersex people are human beings whose biological sex cannot be classified as either male or female. The intersex population is a group whose matters pertaining to gender, experience conditions where there is a discrepancy between the external genitals and the internal genitals (testes and ovaries). Intersex or intersexuality in humans refers to intermediate or atypical combinations of physical features that usually distinguish males from females. An intersex organism may have biological characteristics of both the male and female sexes.”

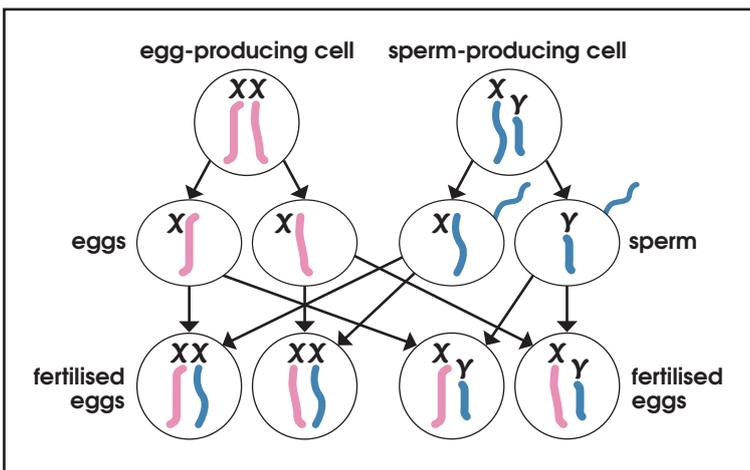
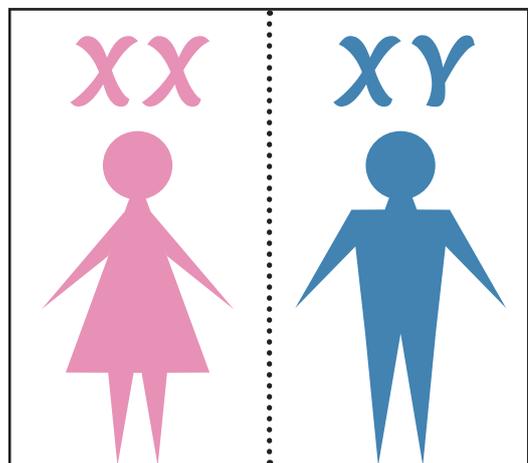
OutRight Namibia, <http://out-rightnamibia.hpage.co.in/gender_64662071.html>

1.4.2 Sexual differentiation in foetuses

There are four main steps in the sexual differentiation of a human foetus. This is a simplified explanation.

1) Fertilisation and chromosomes

Humans are usually born with 46 chromosomes in 23 pairs. The X and Y chromosomes determine a person’s sex. An egg from the mother, which contains 23 chromosomes (including an X chromosome) combines with a sperm from the father, which also contains 23 chromosomes (including either an X or a Y chromosome). The fertilised egg will typically be either XX (a genetic female) or XY (a genetic male).

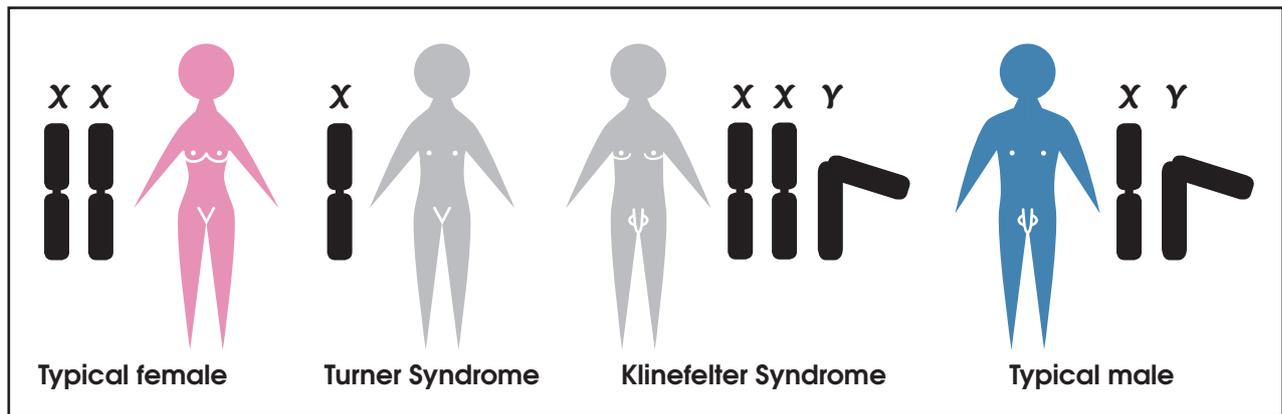


However, sometimes there are chromosome abnormalities, such as a single sex chromosome or three sex chromosomes in various combinations of X and Y.

For example, men with Klinefelter Syndrome have an extra X chromosome. This can result in small genital size, minimal body hair and breast development in males. It also causes infertility. As another example, a female with Turner Syndrome has

21 Transgender and Intersex Africa, <http://transgenderintersexafrica.org.za/?page_id=5>; Intersex Society of North America, <www.isna.org/faq/what_is_intersex>.
 22 The word is an amalgamation of the words Hermes (the Greek god of male sexuality) and Aphrodite (the Greek goddess of female sexuality, love and beauty). “Intersex”, Medline Plus, updated 2013.

only a single X chromosome, which results in underdeveloped female sex characteristics and infertility.²³

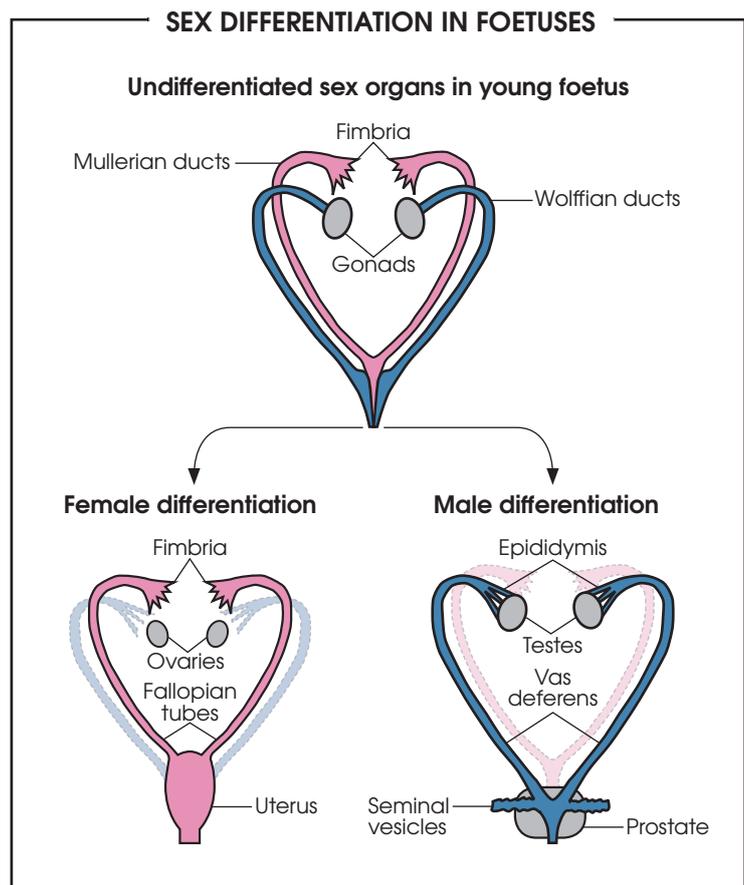


2) Formation of organs common to both sexes

The fertilised egg multiplies to form a large number of similar cells. Then, as the embryo grows, the cells differentiate to form the various organs of the body. At the earliest stages of development, all foetuses have similar sex organs:

- **Gonadal ridges:** These are structures that later develop into either testes or ovaries.
- **Internal ducts:** At 6-7 weeks, all foetuses have two sets of internal ducts – one female (Mullerian ducts) and one male (Wolffian ducts).
- **External genitalia:** At 6-7 weeks, external genitalia appear female in all foetuses.

Atypical development can occur at this stage, leading to forms on intersexuality. An example is Swyer Syndrome, where a person has minimally-developed gonadal tissue which will not develop into testes or ovaries. A child with this syndrome will look like a typical female at birth, but will not develop most of the typically-female secondary sex characteristics at puberty without hormone replacement.²⁴



²³ Intersex Society of North America, "Turner Syndrome", <www.isna.org/faq/conditions/turner>.

²⁴ Intersex Society of North America, "Swyer Syndrome", <www.isna.org/faq/conditions/swyer>.



3) Gonadal differentiation

The gonadal ridges normally develop to become either ovaries or testes. In males, testes form because of a gene in the Y chromosome that produces triggering substances. In female fetuses, the absence of this gene allows other genes to trigger the gonadal ridge to develop into ovaries.

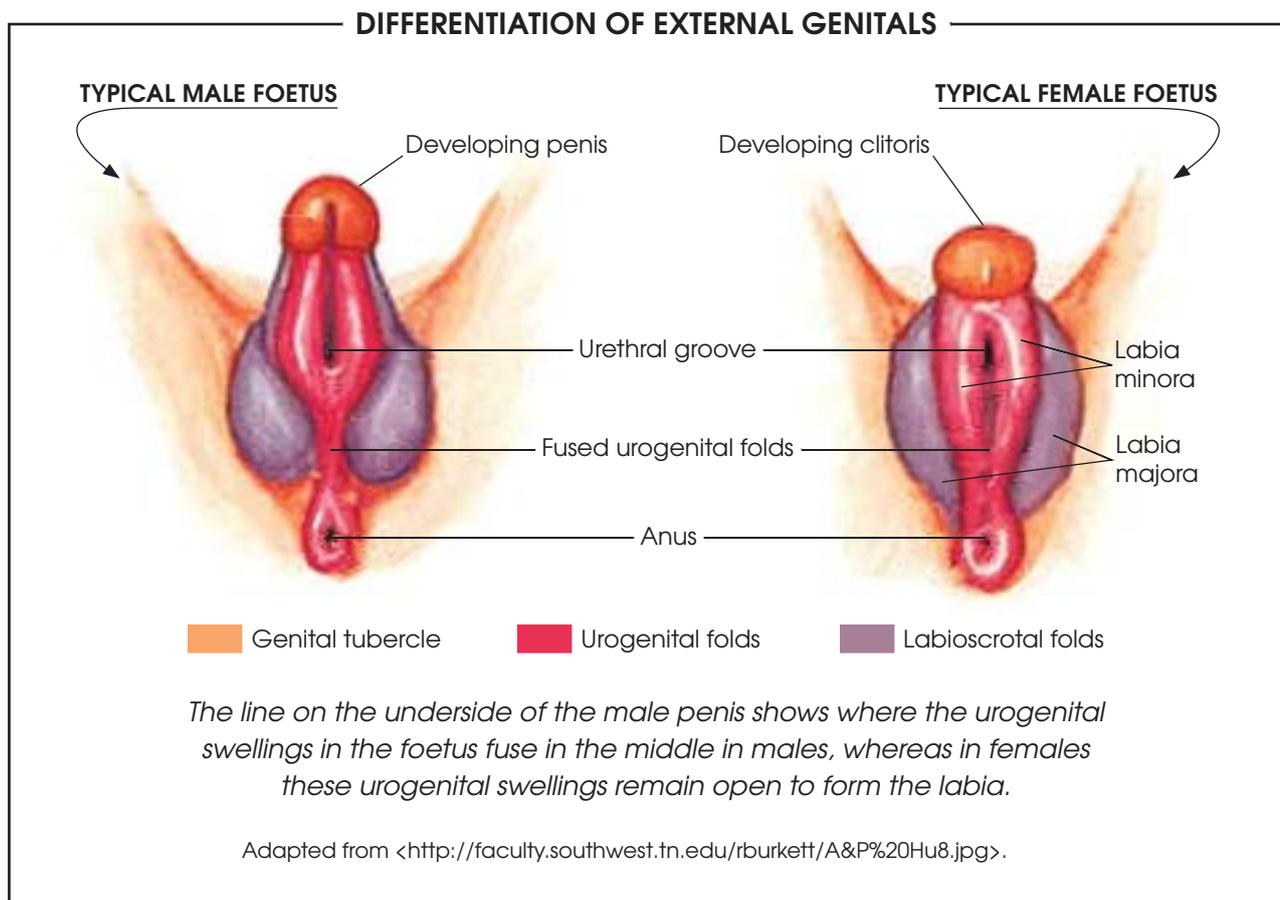
Development can also depart from the norm at this stage. For example, a foetus which is genetically male may fail to develop testes if the necessary triggering gene is absent or deficient. As another example, some people are born with gonads containing both ovarian and testicular tissue.

4) Differentiation of the internal ducts and external genitalia

The next step in sex differentiation depends on hormones. Remember that all foetuses initially have both female Mullerian ducts (which in females develop into the uterus and fallopian tubes) and male Wolffian ducts (which in males develop into the vas deferens and the seminal vesicles).

In a male foetus, hormones from the developing testes normally inhibit the growth of the female Mullerian ducts and cause the male Wolffian ducts to grow and develop. These hormones also cause the external genitalia to develop into masculine genitalia.

In a female foetus, these particular hormones are absent. As a result, the female Mullerian ducts develop and the male Wolffian ducts eventually disappear. This also causes the external genitals to remain feminine.



Various forms of intersexuality can result from atypical development at this stage. For example, the result could be a baby with male chromosomes and female external genitals, or a baby with ambiguous external genitals.

There are additional hormonal conditions that can affect sex differentiation in the foetus or in the sex characteristics which appear at puberty.

1.4.3 Prevalence of intersexuality

It is difficult to count the number of babies who are born intersex, because intersex characteristics are not always visible and because there is no universal definition of intersexuality. Also, stigma and discrimination prevent some people from telling anyone they are intersex.²⁵ According to a study in 2000 which surveyed a range of medical literature, about one out of every 600 live births (1.7%) worldwide results in some form of intersexuality.²⁶

1.4.4 Choices for dealing with intersexuality

There are different opinions on what to do if a child is intersex. There is no medical test that can determine which sex to assign to an intersex child. Many believe that permanent surgeries on infants should be avoided to allow intersex children to have more choices when they are older.

The Commissioner for Human Rights of the Council of Europe has expressed concern about performing “corrective” surgery and treatment on infants and toddlers. Such surgeries tend to be cosmetic rather than being medically necessary. They are often irreversible and can result in sterilisation. Furthermore, the sex assigned to children at an early age may not correspond with their identity and feelings later on. Since babies and young children cannot give consent to medical intervention, there are concerns that permitting surgeries at this stage which are not medically urgent violates their right to self-determination.²⁷

.....

Misconceptions about being intersex

- *If someone is intersex it does not mean that they are born with both complete sets of female and male genitalia.*
- *Intersex people are not hermaphrodite the word “hermaphrodite” is misleading as it creates the impression that an intersex person is born with both complete sets of female and male genitalia.*
- *Intersex is not a disorder, it is a variation in sexual development.*

Transgender and Intersex Africa, <http://transgenderintersexafrika.org.za/?page_id=5>

.....

25 Intersex Initiative, “Intersex FAQ” [Frequently Asked Questions], <www.intersexinitiative.org/articles/intersex-faq.html>.

26 Melanie Blackless et al, “How Sexually Dimorphic Are We? Review and Synthesis”, 12 *American Journal of Human Biology* 151 (2000), <<file:///H:/Word%20Docs/LGBT%20research/intersex%20article.pdf>>.

27 Commissioner for Human Rights of the Council of Europe, “A boy or a girl or a person – intersex people lack recognition in Europe”, Human Rights Comment, 9 May 2014.



PROHIBITING DISCRIMINATION COMPREHENSIVELY

Few countries have legislation which comprehensively prohibits discrimination against people who fall into all of the categories discussed in this chapter, with intersexuality being one of the most often neglected.

South Africa has specifically legislated against discrimination against persons in all of these categories, including intersex persons. The Prohibition of Equality and Prevention of Unfair Discrimination Act 4 of 2000, as amended in 2005, supplements the South African Constitution by providing for measures to address unfair discrimination on a number of prohibited grounds, including *gender*, *sex* and *sexual orientation*. In 2005, the definition of “sex” in this law was amended to state explicitly that “*sex includes intersex*”, with intersex being defined in the law as “a congenital sexual differentiation which is atypical, to whatever degree”.²⁸

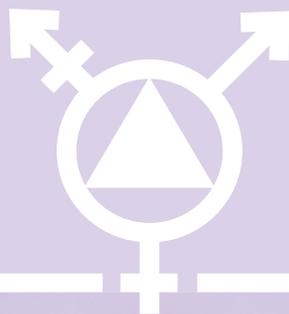
Australia is another example of comprehensive protection. Its Sex Discrimination Act 1984 was originally aimed only at discrimination between men and women. It was amended in 2013 to expand its coverage to discrimination on the basis of *sexual orientation* (defined to cover heterosexuality, homosexuality and bisexuality), *gender identity* (the gender-related characteristics of a person, regardless of their sex at birth), *intersex status* (the status of having physical, hormonal or genetic features that are neither wholly female nor wholly male, a combination of female and male or neither female nor male) and *marital or relationship status*.²⁹

Germany uses the term “*sexual identity*” in its equality legislation, with this term being interpreted broadly to cover the whole LGBTI spectrum.³⁰

28 Prohibition of Equality and Prevention of Unfair Discrimination Act 4 of 2000, section 1, as amended by the Judicial Matters Amendment Act 22 of 2005.

29 “Sex Discrimination Act amended to cover sexual orientation, gender identity, intersex status and relationship status”, Australian Government Solicitor, 3 July 2012, <www.agps.gov.au/publications/express-law/el193.pdf>.

30 Silvan Agius & Christa Tobler, *Trans and Intersex People: Discrimination on the grounds of sex, gender identity and gender expression*, European Commission, 2011, <http://ec.europa.eu/justice/discrimination/files/trans_and_intersex_people_web3_en.pdf> at 82.



Chapter 2

CONSTITUTION

2.1	Namibia's Bill of Rights	28
2.1.1	Strong, modern protection of fundamental rights	28
2.1.2	Interpretation of the Bill of Rights	28
2.1.3	Use of comparative law materials as aids to interpretation	29
2.2	Protection in the Namibian Constitution for LGBT rights	29
2.2.1	Right to liberty	30
2.2.2	Right to dignity and freedom from cruel, inhuman and degrading treatment	30
2.2.3	Right to equality and freedom from discrimination	32
2.2.4	Right to privacy	36
2.2.5	Right to family	37
2.2.6	Fundamental freedoms of speech and expression, assembly and association	39
2.3	Limiting fundamental rights	42
2.4	Enforcing fundamental rights	43

2.1 Namibia's Bill of Rights

SUMMARY

The Namibian “Bill of Rights” is the part of the Constitution that protects the fundamental rights and freedoms of citizens, such as the right to life and freedom of expression. The Namibian Supreme Court has stated that the Bill of Rights is to be interpreted broadly, but not so broadly as to stretch the ordinary meaning of the text. The interpretation of Namibia's Constitution can be guided by court judgments from other countries with similar constitutions, and by interpretations of similar international human rights standards.

2.1.1 Strong, modern protection of fundamental rights

The Namibian Constitution provides for a robust protection of basic rights. Chapter III of the Constitution, entitled “Fundamental Human Rights and Freedoms” is based on the Universal Declaration of Human Rights. Hon Hage Geingob, who chaired the Constitutional Assembly that drafted Namibia's Constitution, has noted that human rights were “the very principles Namibians had fought for.”¹

The significance of the Bill of Rights is emphasised by Articles 131 and 132 of the Constitution, which provide that while other parts of the Constitution can be amended by a two-thirds majority of the National Assembly and the National Council, Chapter III cannot be amended in any way that “diminishes or detracts from the fundamental rights and freedoms contained and defined” in it.

The importance of constitutional protections for fundamental human rights in respect of LGBT rights is becoming more widely acknowledged. For example, on 8 September 2011, shortly after the new Kenyan Constitution came into force, Kenya's Chief Justice stated: “Gay rights are human rights. ... As far as I know, human rights principles that we work on, do not allow us to implement human rights selectively.”² This example of an acknowledgement of the rights of sexual minorities as fundamental human rights by a high-ranking member of the judiciary is very important; while constitutional texts often protect fundamental rights, they are general texts which require judicial interpretation and implementation to give them practical meaning for the lives of individual citizens.

2.1.2 Interpretation of the Bill of Rights

Shortly after independence, the Namibian High Court set the tone for future constitutional interpretation by stating that the Constitution “must be interpreted in a specially purposive way, particularly so where the constitution contains a declaration of human rights and freedoms, so as to give recognition and protection to such rights”.³ Elaborating on this concept, the High Court stated in a 1991 case that the Constitution is a “mirror reflecting the national soul” which

1 Hage Geingob, “Drafting of Namibia's Constitution” in Anton Bösl et al, eds, *Constitutional Democracy in Namibia: A Critical Analysis After Two Decades*, Windhoek: Macmillan Education, 2010 at 83, 97.

2 J Kariuki, “Gay rights are human rights, says Chief Justice Mutunga”, *The Star*, 9 September 2011.

3 *Mwandingi v Minister of Defence* 1990 NR 363 (HC) at 369H-J (*per Strydom AJP*) (emphasis added).

identifies the ideals and aspirations of a nation, articulates the values bonding its people and disciplines its government.⁴

In 1994, the Namibian Supreme Court similarly said that the Bill of Rights must be “... broadly, liberally and purposively interpreted”.⁵ However, in 2001 the Supreme Court also cautioned that constitutional interpretation must be anchored in “the language of its provisions, the reality of its legal history, and the traditions, usages, norms, values and ideals of the Namibian people”.⁶

In considering possible interpretations of the Namibian Constitution on LGBT issues, it is useful to look at decisions on the rights of LGBT people by the European Court of Human Rights – the Court that interprets the European Convention on Human Rights in the 47 countries bound by this Convention. The European Convention on Human Rights is one of the most influential human rights instruments in the world, and the European Court of Human Rights has led the way in protecting the fundamental rights of LGBT persons. This Court has taken an incremental approach to the recognition of LGBT rights, following on the gradual emergence of a broader societal consensus on such rights.

2.1.3 Use of comparative law materials as aids to interpretation

This analysis of the Namibian Constitution will draw parallels with decisions of the European Court of Human Rights and jurisprudence in other countries – in particular in Namibia’s African neighbours – in examining what the fundamental rights mean in the context of the rights of LGBT persons. This is appropriate because the Namibian Constitution has intentionally, “wherever possible, tried to follow forms which have an international basis, so that, by the use of comparative jurisprudence, the courts will be assisted in giving meaning to it”.⁷ As the Supreme Court confirmed in 2010, comparative examples from other countries are useful because of “the international character of human rights”.⁸

2.2 Protection in the Namibian Constitution for LGBT rights

SUMMARY

The rights in the Bill of Rights protect all people, including LGBT persons. This section focuses on rights that are particularly relevant in the context of LGBT rights:

- the right to liberty;
- the right to dignity and freedom from cruel, inhuman and degrading treatment;
- the right to equality and freedom from discrimination;
- the right to privacy;
- the right to family; and
- the fundamental freedoms of speech and expression, assembly and association.

4 *S v Acheson* 1991 NR 1 (HC) at 10A-B (per Mahomed AJ) (emphasis added).

5 *Government of the Republic of Namibia v Cultura 2000* 1993 NR 328 (SC) at 340B-D (per Mahomed CJ) (citation omitted, emphasis added).

6 *Chairperson of the Immigration Selection Board v Frank and another* 2001 NR 107 (SC) at 135F-I (per O’Linn AJA).

7 J Diescho, *The Namibian Constitution in Perspective*, Windhoek: Gamsberg MacMillan, 1994 at 61.

8 *Alexander v Minister of Justice and Others* 2010 (1) NR 328 (SC) at para 81 (per Strydom AJA).

2.2.1 Right to liberty

**Namibian Constitution, Article 7:
PROTECTION OF LIBERTY**

No person shall be deprived of personal liberty except according to procedures established by law.

While the prominent protection of liberty in the Constitution is the result of the traumatic experience of widespread detention without trial during the apartheid era, the protection is “far wider” in its scope.⁹ It has been confirmed by the Namibian Supreme Court that the right to liberty is a substantive, and not merely a procedural right.¹⁰ In other words, it is not enough merely to prove that the deprivation of liberty is carried out according to a legal procedure; it must also be considered whether the law in question is “just and fair, proportionate to the mischief it wishes to address and is not arbitrary”.¹¹

It may well be questioned whether the criminalisation of consensual sexual acts between adults meets this test. In the 2012 *Alexander* case, the Supreme Court emphasised that liberty – and indeed “most, if not all, of the fundamental rights and freedoms” – are inspired by and pervaded with “the dignity of the individual as a human being”.¹² Significantly, the Court stated: “The criminalisation of ordinary day-to-day activities, which activities we today accept as natural, carried with it the seeds of humiliation and affront to a person’s dignity, as it deprived that person of many of his or her personal rights and further carried with it the possibility of arrest and detention.”¹³

However, the Namibian courts have generally considered the right to liberty in connection with other fundamental constitutional rights and so have not yet carved out the specific content of “liberty” on its own. This makes it important to consider other fundamental rights.

2.2.2 Right to dignity and freedom from cruel, inhuman and degrading treatment

Namibian Constitution, Article 8: RESPECT FOR HUMAN DIGNITY

- (1) The dignity of all persons shall be inviolable.
- (2) (a) In any judicial proceedings or in other proceedings before any organ of the State, and during the enforcement of a penalty, respect for human dignity shall be guaranteed.
(b) No persons shall be subject to torture or to cruel, inhuman or degrading treatment or punishment.

Article 8 contains two separate rights: (1) the right to dignity and (2) the right to freedom from torture and cruel, inhuman and degrading treatment or punishment. However, the courts have often considered these two rights together.

9 *Gawanas v Government of the Republic of Namibia*, [2012] NASC 1 at para 19 (per Strydom AJA).

10 *Julius v Commanding Officer, Windhoek Prison and Others; Nel v Commanding Officer, Windhoek Prison and Others* 1996 NR 390 (HC) at 395C-D (per Strydom JP); *Alexander v Minister of Justice and Others* 2010 (1) NR 328 (SC) at paras 98-99 (per Strydom AJA).

11 *Alexander v Minister of Justice and Others* 2010 (1) NR 328 (SC) at para 103.

12 *Id* at para 99.

13 *Id* at para 100.

It is useful to look first at some of the more straightforward examples. Cruel, inhuman or degrading treatment and treatment that infringes personal dignity are sometimes meted out to LGBT persons at the hands of law enforcement officials. For instance, the Ugandan High Court made a finding of cruel and inhuman treatment in a case where a police officer had forced a lesbian woman to strip in order to prove her sex and then proceeded to fondle her breasts.¹⁴ In Kenya, the Nairobi High Court similarly found cruel and inhuman treatment where an intersex person had been strip searched in public in order to determine his sex,¹⁵ finding that searches had to be done “with utmost decorum and respect for human dignity”.¹⁶ The State was ordered to pay damages to the applicants in both of these cases.¹⁷ Forced medical procedures, such as anal examinations undertaken in some countries that criminalise sodomy, to determine whether anal intercourse has taken place, would also be likely to constitute cruel and inhuman treatment.¹⁸

However, dignity can also be violated in more abstract ways. The Namibian Supreme Court has expressed the opinion that a sentence of life imprisonment without any possibility of parole would amount to violation of Article 8, because the right to dignity includes also a “right not to live in despair and helplessness”.¹⁹ The Canadian Supreme Court has stated:

Human dignity means that an individual or group feels self-respect and self-worth ... Human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities, or merits ... Human dignity is harmed when individuals and groups are marginalized, ignored, or devalued...²⁰

In South Africa, in the landmark *National Coalition for Gay and Lesbian Equality* case, the Constitutional Court found that the criminalisation of sodomy violated the dignity of homosexual men. The Court held that such a law was not only concerned with the sexual acts of gay men, but in essence meant that a big part of their identity was considered unacceptable by the law.²¹

It is not just state actors that can infringe a person’s right to dignity. In 2010, the Ugandan High Court ruled on a case where the respondents had published a newspaper article giving addresses and photographs of the applicants, labelled as “Uganda’s top homosexuals and lesbians”, under the headline “Hang Them; They are After Our Kids!!!!”. The Court found that the article violated the dignity of the applicants and ordered them to pay damages.²²

14 *Mukasa and Another v Attorney-General* (2008) AHRLR 248 (High Court of Uganda) at para 41.

15 *RM v Attorney General & 4 others* 2010 eKLR (High Court of Kenya) at paras 167-168.

16 *Id* at para 168.

17 *Mukasa and Another v Attorney-General* (2008) AHRLR 248 (High Court of Uganda) at para 43; *RM v Attorney General & 4 others* 2010 eKLR (High Court of Kenya) at para 169.

18 Amnesty International, *Making Love a Crime: Criminalization of Same-Sex Conduct in Sub-Saharan Africa*, London: Amnesty International, 2013 at 24.

19 *S v Tcoeb* 1999 NR 24 (SC) at 33E-F (*per* Mahomed CJ).

20 *Law v Canada (Ministry of Employment and Immigration)* [1999] 1 SCR 497 (Supreme Court of Canada) at para 53.

21 *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1999 (1) SA 6 (CC) at para 28 (*per* Ackermann J).

22 *Kasha and others v Rolling Stone and others*, HC Miscellaneous Cause No. 163 of 2010, Ruling of 30 December 2010 (High Court of Uganda).



2.2.3 Right to equality and freedom from discrimination

Namibian Constitution, Article 10: EQUALITY AND FREEDOM FROM DISCRIMINATION

- (1) All persons shall be equal before the law.
- (2) No persons may be discriminated against on the grounds of sex, race, colour, ethnic origin, religion, creed or social or economic status.

The wording of Article 10 of the Namibian Constitution is fairly broad. As noted by the High Court, "... although the Namibian experience was mainly derived from the oppressive and discriminatory system and ideology of apartheid", the final content of the Namibian Constitution was based on a broader awareness "of the evil of discrimination all over the world".²³

There are different tests for compliance with Articles 10(1) and 10(2). Article 10(1) is violated by any law that allows for differentiation between categories of people where such differentiation does not have a rational connection to a legitimate state purpose. A higher standard is applied where the differentiation is based on one of the grounds listed in Article 10(2). If the differentiation constitutes discrimination, then it is automatically unconstitutional unless it constitutes affirmative action for previously disadvantaged groups authorised by Article 23 of the Constitution. No other legitimate state purpose can save it.²⁴

The only case to date in Namibia where the constitutional rights of sexual minorities were directly at issue is the 2001 *Frank* case. Ms Frank was a German citizen who had lived and worked in Namibia for a number of years. She was co-habiting with her Namibian partner, Ms Khaxas, and the two were raising Ms Khaxas' son together. When Ms Frank applied for a permanent residency permit, the Immigration Selection Board rejected her application, without giving reasons. The High Court found that the Board had no reason to reject Ms Frank's application, and ordered it to issue her a permit, but the State appealed to the Supreme Court and the constitutional rights of Ms Frank (and Ms Khaxas) were raised on appeal.

The Supreme Court found no violation of Article 10 of the Constitution, after considering it in connection with other provisions of the Constitution. The Court found that the respondents' relationship could not serve as a basis for the foreign partner's acquisition of Namibian citizenship, since marriage in terms of Art 4(3) of the Constitution "is clearly a marriage between a man and woman, that is a heterosexual marriage, not a homosexual marriage or relationship".²⁵ The Court also found that the relationship was not a protected "family" under Article 14 of the Namibian Constitution.²⁶ Thus, it held that there was no basis for finding that the treatment of Ms Frank constituted unconstitutional discrimination.

The logic of the Court's reasoning has attracted criticism since it seemed to draw on elements of the test which applies to Article 10(2) while applying Article 10(1), failing to discuss the Article 10(1) test of whether the differentiation in question had a rational relation to a legitimate government purpose.²⁷

²³ *Kauesa v Minister of Home Affairs and Others* 1994 NR 102 (HC) at 143E (per O'Linn J).

²⁴ *Müller v President of the Republic of Namibia and Another* 1999 NR 190 (SC) at 199J-200D.

²⁵ *Id* at 143F.

²⁶ *Id* at 146.

²⁷ See Dianne Hubbard, "The paradigm of equality in the Namibian Constitution: Concept, contours and concerns" in Anton Bösl et al, eds, *Constitutional Democracy in Namibia: A Critical Analysis After Two Decades*, Windhoek: Macmillan Education, 2010 at 231-232.

The Court also ruled that a “value judgment” was required in order to arrive at the appropriate interpretation of the relevant provisions of the Constitution – in particular whether a homosexual relationship was worthy of constitutional protection. While citing a range of possible sources of Namibian values,²⁸ the Court actually based its conclusion that non-heterosexual relationships were not accepted in Namibia on the grounds that “the President of Namibia as well as the Minister of Home Affairs, have expressed themselves repeatedly in public against the recognition and encouragement of homosexual relationships”, while no member of the ruling party expressly opposed these views when the matter was brought before Parliament.²⁹

This sensitivity to national values is understandable against a pre-independence background where the will of a minority was imposed on a majority and the “rule of law” was invoked to deny basic human rights.³⁰ However, this does not mean that the values that the Court considered, and the method it used to discover what they were, are necessarily the most appropriate.³¹ The Court cited male-dominated institutions as being the key sources of national values, and focused on mainstream, majority values to the neglect of minority views. This is highly problematic in a country as diverse as Namibia.³²

The finding in *Frank* has been used out of context to argue, for example, that it is acceptable to discriminate against LGBT persons in Namibia. This is incorrect. In fact, the Court specifically recognised that nothing in its holding “justifies discrimination against homosexuals as individuals, or deprives them of the protection of other provisions of the Namibian Constitution”.³³

It should also be noted that the Namibian judiciary has recognised that the Namibian Constitution is a “dynamic” document, and what was acceptable yesterday may no longer be so tomorrow, as the views of society evolve.³⁴

The South African Constitutional Court has produced a long line of jurisprudence that upholds the rights of sexual minorities in many areas of life, striking down a range of discriminatory and exclusionary provisions in South African laws. In contrast to the Namibian Supreme Court’s reliance on majority views, the South African Constitutional Court has pointed out that –

28 *Chairperson of the Immigration Selection Board v Frank and another* 2001 NR 107 (SC) at 210B-D: “Namibian parliament, courts, tribal authorities, common law, statute law and tribal law, political parties, news media, trade unions, established Namibian churches and other relevant community-based organizations”.

29 *Id* at 150D-G.

30 Manfred O Hinz, “Justice: Beyond the limits of law and the Namibian Constitution” in Anton Bösl et al, eds, *Constitutional Democracy in Namibia: A Critical Analysis After Two Decades*, Windhoek: Macmillan Education, 2010 at 159: “The call for value judgments is in response to judgments that, in applying oppressive and discriminatory legislation under apartheid, claimed to follow the rule of law in the very formal sense, i.e. law as it was enacted by the legislator at the time.”

31 Dianne Hubbard, “The paradigm of equality in the Namibian Constitution: Concept, contours and concerns” in Anton Bösl et al, eds, *Constitutional Democracy in Namibia: A Critical Analysis After Two Decades*, Windhoek: Macmillan Education, 2010, at 215, 240-1. See also Sam Amoo, “The Constitutional jurisprudential development in Namibia since 1985” in Nico Horn and Anton Bösl, eds, *Human Rights and the Rule of Law in Namibia*, Windhoek: Macmillan, 2008, at 39, 52-55; Elizabeth Cassidy, “Article 10 of the Namibian Constitution: A look at the first ten years of the interpretation of the rights to equality and non-discrimination and predictions of the future” in Manfred Hinz et al, eds. *The Constitution at work: 10 years of Namibian nationhood*, Pretoria: University of South Africa, 2002, at 168, 186.

32 Dianne Hubbard, “The paradigm of equality in the Namibian Constitution: Concept, contours and concerns” in Anton Bösl et al, eds, *Constitutional Democracy in Namibia: A Critical Analysis After Two Decades*, Windhoek: Macmillan Education, 2010 at 240-241. See also Sam Amoo, “The Constitutional jurisprudential development in Namibia since 1985” in Nico Horn and Anton Bösl, eds, *Human Rights and the Rule of Law in Namibia*, Windhoek: Macmillan, [2008] at 52-55; Elizabeth Cassidy, “Article 10 of the Namibian Constitution: A look at the first ten years of the interpretation of the rights to equality and non-discrimination and predictions of the future” in Manfred Hinz et al, eds. *The Constitution at work: 10 years of Namibian nationhood*, Pretoria: University of South Africa, 2002 at 186.

33 *Chairperson of the Immigration Selection Board v Frank and another* 2001 NR 107 (SC) at 156G-H.

34 *Ex parte Attorney General in Re Corporal Punishment* 1991(3) SA 76 (SC) 91E-F (per Mahomed CJ) at 186I-J.



[t]he impact of discrimination on gays and lesbians is rendered more serious and their vulnerability increased by the fact that they are a political minority not able on their own to use political power to secure favourable legislation for themselves. They are accordingly almost exclusively reliant on the Bill of Rights for their protection.³⁵

After finding it unconstitutional to criminalise consensual homosexual acts, the South African Constitutional Court similarly relied on the rights to dignity and equality to uphold the rights of sexual minorities in relation to inheritance,³⁶ adoption,³⁷ immigration,³⁸ and, ultimately, marriage.³⁹ It is important to note that this development was incremental. The Constitutional Court was approached with one request at a time, slowly over ten years, moving from the decriminalisation of sodomy to gay marriage, and thus giving society time to get used to the idea of equal rights for all.

In Canada, the Supreme Court has found that sexual orientation is a prohibited ground of discrimination under the Canadian Charter of Rights and Freedoms, even though it is not specifically mentioned.⁴⁰

In India, where Article 15 of the Indian Constitution forbids discrimination based on sex, the Delhi High Court has held that this includes not only biological sex but also sexual orientation, and that discrimination on the basis of sexual orientation is therefore not constitutionally permissible.⁴¹

In a similar vein on the other side of the globe, the Inter-American Court of Human Rights found that sexual orientation is a protected ground under the Inter-American Convention on Human Rights, even though it is not specifically mentioned. The Court held that Chile had discriminated against Ms Atala Riffo when it awarded custody of her children to their father because she was in a relationship with another woman.⁴² In the United States, the 2013 case of *United States v Windsor* found that restricting federal interpretations of marriage to those between heterosexuals was unconstitutional on equality grounds.⁴³

Closer to Namibia, the Court of Appeal of Botswana has held that grounds of discrimination not specifically named in the discrimination provision of the Botswana Constitution could be covered by the provision in question,⁴⁴ concluding that “the words included in the definition are more by way of example than as an exclusive itemisation”.⁴⁵ However, in a subsequent case where a law criminalising sodomy was challenged on constitutional grounds, the Court of Appeal – relying on the prevailing public mood and the attitude of the legislature – found that “gay men and women

35 *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1999 (1) SA 6 (CC) at para 25.

36 *Gory v Kolver NO and Others* 2007 (4) SA 97 (CC).

37 *Du Toit and Another v Minister of Welfare and Population Development and Others* 2003 (2) SA 198 (CC).

38 *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 (2) SA 1 (CC).

39 *Minister of Home Affairs and Another v Fourie and Another* 2006 (1) SA 524 (CC).

40 *Egan v Canada* [1995] 2 SCR 513 (Supreme Court of Canada) at 528.

41 *Naz Foundation v Government of LCD of Delhi and others*, WP(C) No.7455/2001, Decision of 2 July 2009 (The High Court of Delhi, India) at paras 103-104. This finding was not affected by the Supreme Court ruling in *Suresh Kumar Koushal and another v Naz Foundation and others*, Civil Appeal No.10972 of 2013, Judgment of 11 December 2013 (Supreme Court of India).

42 *Atala Riffo and Daughters v Chile*, Merits, Reparations, and Costs, Judgment, IACHR (ser. C) No. 239 (24 February 2012).

43 *United States v Windsor* 570 US 12, 133 S Ct 2675 (2013). Four of the 9 justices dissented, in three different dissenting opinions.

44 Article 15(3) of the Botswana Constitution states: “In this section, the expression “discriminatory” means affording different treatment to different persons, attributable wholly or mainly to their respective descriptions by *race, tribe, place of origin, political opinions, colour 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.” (emphasis added).

45 *Attorney General v Unity Dow* 1994 (6) BCLR 1, 3 July 1992 (Court of Appeal, Botswana) at 19.

do not represent a group or class which at this stage has been shown to require protection under the Constitution”.⁴⁶

Discrimination does not need to be express to be unconstitutional; constitutional protection can also applied to “disguised discrimination”. For example, the Court of Appeal of Hong Kong struck down an ostensibly gender-neutral “buggery law” as being contrary to the principle of equality, adopting the reasoning that “[d]enying persons of a minority class the right to sexual expression in the only way available to them, even if that way is denied to all, remains discriminatory” as a form of disguised discrimination on the basis of sexual orientation.⁴⁷

Looking at equality law in a variety of jurisdictions, courts have most often found that an equality provision in a constitution or other human rights instrument protects sexual minorities from discrimination where the constitution in question includes a list of prohibited grounds of discrimination that *expressly includes sexual orientation*, or where the underlying equality clause contains an “open list” of enumerated grounds prefaced by words like “such as” or “in particular”.

Article 10(2) of the Namibian Constitution falls into neither of these two categories. It constitutes a “closed list” of impermissible grounds of discrimination which does not include sexual orientation or gender identity. (It also excludes some other rather obvious categories such as age or disability.) But this does not mean that sexual minorities are not protected.

First, the equality provision in Article 10(1) is absolute. Everyone is equal before Namibian law, including LGBT persons. Secondly, the word “sex” in Article 10(2) can be interpreted to include sexual orientation – as it has been in other countries and under international law.⁴⁸ Thirdly, in countries like Botswana, constitutions with a “closed list” of protected grounds have at times been interpreted as constituting examples rather than being exhaustive. In Nepal such a closed list was applied to protect sexual and gender minorities against discrimination, even though these were not specifically-named grounds.⁴⁹

Future developments in Namibia may perhaps draw inspiration from jurisdictions where the concept of equality is tightly linked to other protected rights. For example, the Canadian Supreme Court draws a parallel between dignity and equality and has often held that treatment that discriminates unfairly also violates dignity. The South African Constitutional Court has also repeatedly emphasised this link between equality and dignity in its adjudication of questions of LGBT rights.⁵⁰ The European Convention on Human Rights does not even recognise a self-standing right to equality, but only a right to equality in the protection of the other Convention rights.⁵¹ In many cases, the European Court of Human Rights has specifically emphasised the

46 *Kanane v The State* BLR 2003, 30 July 2003 (Court of Appeal, Lobatse, Botswana), as quoted in EK Quansah, “Same-sex relationships in Botswana: Current perspectives and future prospects”, 2 *African Human Rights Law Journal* 201 (2004), <www.ahrj.up.ac.za/quansah-e-k#_ftnref28>.

47 *Leung v Secretary for Justice* [2006] 4 HKLRD 211 (Hong Kong Special Administrative Region, Court of Appeal) at para 48.

48 See Chapter 3 of this report on International Law.

49 *Sunil Babu Pant, Executive Director of Blue Diamond Society and others v Nepal Government and others* Writ No. 917 of the year 2064 BS (2007 AD), Supreme Court Division Bench Order, 21 December 2007 (Supreme Court, Nepal), unofficial translation, <www.gaylawnet.com/laws/cases/PantvNepal.pdf>.

50 See, for example, *Minister of Home Affairs and Another v Fourie and Another* 2006 (1) SA 524 (CC) at para 15, summarising and quoting *Fourie and Another v Minister of Home Affairs and Others* 2005 (3) SA 429 (SCA) at para 13.

51 Article 14 of the Convention on “Prohibition of discrimination” states: “The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

principle of equality in finding that other rights – such as rights to privacy, family or assembly – have been infringed.⁵²

The best way forward in Namibia may be to focus, not on Article 10 in isolation, but rather on ensuring that LGBT Namibians are granted equal protection of their other constitutional rights.

2.2.4 Right to privacy

Namibian Constitution, Article 13(1): PRIVACY

No person shall be subject to interference with the privacy of their homes, correspondence or communications save as in accordance with law and as is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the protection of health and morals, for the prevention of disorder or crime or for the protection of the rights or freedoms of others.

It must first be noted that the concept of “privacy” is formulated more narrowly in the Namibian Constitution than in many other constitutional texts. We have not located any cases where Article 13(1) was successfully invoked in a challenge to state action.⁵³

Even a narrowly worded provision on privacy can be relevant in the context of LGBT rights. In Uganda, for example, a privacy provision with wording similar to the one in the Namibian Constitution was found to have been violated when the police mishandled LGBT materials confiscated from a human rights activist,⁵⁴ as well as when a newspaper published photos and addresses of LGBT persons and called for them to be hanged.⁵⁵

The right to privacy has even been recognised in countries where the constitution does not explicitly mention a right to privacy at all, such as the United States and India. This is because privacy has been seen as a necessary element in other fundamental rights (e.g. life, liberty and equality).

In India the concept of right to privacy, read into the right to life, was critical to the case of *Naz Foundation*, where the criminalisation of homosexuality was found unconstitutional. The Delhi High Court stated 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 the outside community. The way in which one gives expression to one’s sexuality is at the core of this area of private intimacy. If, in expressing one’s sexuality, one acts consensually and without harming the other, invasion of that precinct will be a breach of privacy.”⁵⁶ The Delhi High

52 For example, *Salgueiro da Silva Mouta v Portugal* (Application no. 33290/96), Judgment of 21 December 1999; *Kozak v Poland* (Application no. 13102/02), Judgment of 2 March 2010; *Alekseyev v Russia* (Applications nos. 4916/07, 25924/08 and 14599/09), Judgment of 21 October 2010 (European Court of Human Rights).

53 In the *Frank* case, an appeal to Article 13 of the Constitution was dismissed by the Supreme Court without any reasoning, as the Court found that a breach of Article 13 in the circumstances of the dismissal of Ms Frank’s application for a residency permit was “difficult to imagine”. *Chairperson of the Immigration Selection Board v Frank and another* 2001 NR 107 (SC) at 147A-B. A few other attempts to invoke Article 13 in unrelated contexts have also been unsuccessful.

54 *Mukasa and Another v Attorney-General* (2008) AHRLR 248 (High Court of Uganda) at para 44.

55 *Kasha and others v Rolling Stone and others*, HC Miscellaneous Cause No. 163 of 2010, Ruling of 30 December 2010 (High Court of Uganda) at 9.

56 *Naz Foundation v. Government of LCD of Delhi and others* WP(C) No.7455/2001, Decision of 2 July 2009 (The High Court of Delhi, India) at para 40, citing Ackermann J in *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1999 (1) SA 6 (CC), 1998 (12) BCLR 1517 (South African Constitutional Court) at para 32.

Court also drew a clear link between privacy and dignity – on the theory that respect for privacy is necessary for the protection of dignity when questions of sexual autonomy are at issue.⁵⁷ (The Indian Supreme Court overturned the decision of the Delhi High Court, but did not question the lower court’s finding that sexuality was at the core of the concept of privacy.⁵⁸)

The South African Constitutional Court similarly emphasised the fact that sexual expression is at the core of the concept of privacy, in striking down the law criminalising sodomy. The Court stated that the right to privacy protects “a sphere of private intimacy and autonomy which allows us to establish and nurture human relationships without interference from the outside community.”⁵⁹

In the United States, a majority of justices of the Supreme Court relied on the right to privacy for their finding that the criminalisation of homosexual acts was unconstitutional, with privacy being an interest that is protected as part of the “liberty” guaranteed by the US Constitution.⁶⁰

The right to privacy has also been important in European Court of Human Rights jurisprudence on the rights of sexual and gender minorities – such as in a 2002 case on the right of a transgender person to full legal recognition of a gender re-assignment.⁶¹

The concept of privacy has also guided law reform on LGBT issues in some jurisdictions. For example, in The Bahamas, homosexual acts were decriminalised by the Sexual Offences Act 1991, apparently in large part because of the recognised need to respect people’s privacy.⁶² Similarly in Rwanda, Parliament rejected a proposed provision in the draft Penal Code that would have criminalised same-sex sexual relations and LGBT activism, citing the need to respect privacy.⁶³

2.2.5 Right to family

Namibian Constitution, Article 14: FAMILY
(1) Men and women of full age, without any limitation due to race, colour, ethnic origin, nationality, religion, creed or social or economic status shall have the right to marry and to found a family. They shall be entitled to equal rights as to marriage, during marriage and at its dissolution.
(2) Marriage shall be entered into only with the free and full consent of the intending spouses.
(3) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

57 *Naz Foundation v. Government of LCD of Delhi and others* WP(C) No.7455/2001, Decision of 2 July 2009 (The High Court of Delhi, India) at paras 40-41.

58 *Suresh Kumar Koushal and another v Naz Foundation and others*, Civil Appeal No.10972 of 2013, Judgment of 11 December 2013 (Supreme Court of India) at para 51. The Supreme Court held that privacy was not violated even where the law was “used to perpetrate harassment, blackmail and torture on certain persons, especially those belonging to the LGBT community”, as these actions were neither mandated nor condoned by the law.

59 *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1999 (1) SA 6 (CC) at para 32.

60 *Lawrence et al v Texas*, 539 US 558 (2003) (United States Supreme Court).

61 See *Goodwin v United Kingdom*, (Application no. 28957/95), Judgment of 11 July 2002 (European Court of Human Rights), which found that the failure to give full legal recognition to a gender re-assignment was not within a State’s “margin of appreciation”, but was in breach of Article 8 of the European Convention on Human Rights which protects privacy.

62 Statement by Rt Hon Hubert A Ingraham Prime Minister, 8 March 1998, <www.bahamas-mon.com/pressrelease.html>.

63 Edwin Musoni, “Gov’t cannot criminalise homosexuality - Minister”, *The New Times*, 19 December 2009, discussing proposed Article 217 of the draft Penal Code.



Article 14 does not expressly guarantee anyone’s right to family. Instead, it appears to protect (i) the right of adults to marry; and (ii) the family as a unit.

It should be noted that there is no indication in the references to marriage that marriage must be a union between a man and a woman. The Namibian Constitution merely provides that men and women may marry, and that the “spouses” must enter into the union of their own free will. As one of the first academic commentaries on the Namibian Constitution noted in 1994, Article 14 “puts Namibia in the forefront of the modern world by constitutionally protecting, arguably, the rights of homosexual marriage”.⁶⁴ A contrast can be drawn with other constitutional texts, such as the recently revised Kenyan constitution, which specifies that “[e]very adult has the right to marry a person of the opposite sex, based on the free consent of the parties.”⁶⁵

However, in the *Frank* case, the Supreme Court found that the “family” intended in Article 14 was “a formal relationship between male and female, where sexual intercourse between them in the family context is the method to procreate offspring”.⁶⁶ This focus on procreation as a defining feature of the concept of “family” is problematic since many family units are not defined by procreative potential. As the Canadian Supreme Court has stated, a focus on procreation as a necessary component of “family” would exclude childless couples, single-parent families and adoptive families – creating an impoverished version of the concept.⁶⁷ The South African Constitutional Court has similarly said that procreative potential cannot be a defining legal requirement of marriage as this would be “deeply demeaning” to couples who are for some reason unable to procreate, couples who marry when they are already past child-bearing age, adoptive parents and couples who voluntarily decide not to have children or sexual relations with one another – since this is within “their protected sphere of freedom and privacy.”⁶⁸

In considering the meaning of “family” in the Namibian Constitution, the *Frank* case also interpreted the wording of Article 14(1) in the Namibian Constitution to mean that “marriage is between men and women – not men and men and women and women”,⁶⁹ it stated that homosexual relationships, “whether between men and men and women and women, clearly fall outside the scope and intent of Article 14”.⁷⁰ There is some support for this interpretation in international law, with similar wording in Article 23(2) of the International Covenant on Civil and Political Rights⁷¹ having been interpreted in 2002 by the Human Rights Council which monitors compliance with the Convention to apply only to marriages between a man and a woman.⁷² On the other hand, in 2010, the European Court of Human Rights ruled that similar language in the European Union Convention for the Protection of Human Rights and Fundamental Freedoms⁷³ did not mean that “the right to marry ... must in all circumstances be limited to marriage between two persons of the opposite sex”.⁷⁴

64 J Diescho, *The Namibian Constitution in Perspective*, Windhoek: Gamsberg MacMillan, 1994 at 64.

65 Constitution of Kenya (2010), Article 45(2) (emphasis added).

66 *Chairperson of the Immigration Selection Board v Frank and another* 2001 NR 107 (SC) at 146F-G.

67 *Canada (Attorney-General) v Mossop* [1993] 1 SCR 554 at 710C-E (per LHeureux-Dubé J), quoted in *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others*, 2000 (2) SA 1 (CC) at paragraph 52.

68 *Minister of Home Affairs and Another v Fourie and Another (Doctors for Life International and Others, Amici Curiae); Lesbian and Gay Equality Project and Others v Minister of Home Affairs and Others* 2006 (1) SA 524 (CC) at paras 85-87

69 *Chairperson of the Immigration Selection Board v Frank and Another* 2001 NR 107 (SC) at 144F.

70 *Id* at 144H-I.

71 “The right of men and women of marriageable age to marry and to found a family shall be recognized.”

72 *Joslin and Others v New Zealand*, Merits, Communication No 902/1999, UN Doc CCPR/C/75/D/902/1999, (2002) 10 IHRR 40, IHR 1719 (UNHRC 2002), 17th July 2002.

73 “Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.”

74 *Schalk and Kopf v Austria* [2010] ECHR 30141/04 at para 61.

Thus, it is possible that a Namibian court might find grounds to contradict the *Frank* case and find that Article 14 of the Namibian Constitution can be interpreted to protect the right to homosexual marriage. For example, the South African Constitutional Court has noted that “South Africa has a multitude of family formations that are evolving rapidly as our society develops, so that it is inappropriate to entrench any particular form as the only socially and legally acceptable one.”⁷⁵

It should also be kept in mind that the right to family is not restricted only to the right to marry, but also concerns rights to children (“to found a family”). For example, the European Court of Human Rights and the Inter-American Court of Human Rights have both found that the right to a family includes the right to have access to, and in appropriate circumstances custody of, one’s children – and that this right cannot be taken away simply because the parent is homosexual.⁷⁶

As discussed in more detail in Chapter 8 of this report, there have been already been Namibian cases which have applied the concept of “family” to adoptive parents and children (the 2004 *Detmold* case⁷⁷), to unmarried partners and their children (the 2007 *Frans* case⁷⁸) and to stepfamilies (the 2012 case of *JT v AE*⁷⁹). Thus, this is an area of law which is still developing.

2.2.6 Fundamental freedoms of speech and expression, assembly and association

Namibian Constitution, Article 21: FUNDAMENTAL FREEDOMS	
(1)	All persons shall have the right to: <ul style="list-style-type: none"> (a) freedom of speech and expression, which shall include freedom of the press and other media; ... (d) assemble peaceably and without arms; (e) freedom of association, which shall include freedom to form and join associations or unions, including trade unions and political parties ...
(2)	The fundamental freedoms referred to in Sub-Article (1) hereof shall be exercised subject to the law of Namibia, in so far as such law imposes reasonable restrictions on the exercise of the rights and freedoms conferred by the said Sub-Article, which are necessary in a democratic society and are required in the interests of the sovereignty and integrity of Namibia, national security, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence.

⁷⁵ *Minister of Home Affairs and Another v Fourie and Another* 2006 (1) SA 524 (CC) at para 59.

⁷⁶ *Salgueiro da Silva Mouta v Portugal* (Application no. 33290/96), Judgment of 21 December 1999 (European Court of Human Rights); *Atala Riffo and Daughters v Chile*, Merits, Reparations, and Costs, Judgment, IACHR (ser. C) No. 239 (24 February 2012).

⁷⁷ *Detmold and another v Minister of Health and Social Services et al* 2004 NR 174 (HC) at 181C (*per* Damaseb AJ), which struck down a blanket prohibition on the adoption of children born to Namibian citizens by non-Namibian citizens as being a violation of Article 10(1) on equality and Article 14(3) on the family.

⁷⁸ *Frans v Paschke and Others* 2007 (2) NR 520 (HC) (*per* Heathcote AJ), which struck down the common law rule prohibiting ‘illegitimate’ children from inheriting intestate from their fathers as being unconstitutional discrimination on the basis of “social status”, and – without mentioning Article 14 of the Constitution – stated that “loving partners and parents have the right to live together as a family with their children without being married”.

⁷⁹ *JT v AE* 2013 (1) NR 1 (SC) (*per* Shivute, CJ), where the Court considered the question of access to a minor child by the child’s biological father, who was never married to the child’s mother; in light of the fact that the child had a stepfather by this time, and thus would have two father figures in her life; the Court cited the constitutional protection of the “family” as its starting point (at para 17), and apparently considered both the unmarried biological parents and the child’s “new family” of mother and stepfather as relevant family units (at paras 22-24).



Freedom of speech and expression

What is covered by “freedom of speech and expression” has not been the subject of extensive judicial scrutiny in Namibia – with the key cases focusing on the limitation of the right under Article 21(2) as opposed to the extent of the right itself under Article 21(1).

In the *Kauesa* case, the Supreme Court held that limitations on some constitutional rights are imposed so that these rights do not “interfere with the rights and freedoms of others and with Namibia”⁸⁰. However, it found that the limitation on freedom of speech under consideration (a regulation forbidding members of the police force from making unfavourable public comments about the administration of the police force) was unconstitutional because it was arbitrary, unfair and disproportionate to the object it was trying to achieve.⁸¹

The Supreme Court confirmed the importance of freedom of speech and expression in the case of *Trustco v Shikongo*, where it found aspects of the common law on defamation contrary to the Namibian Constitution,⁸² noting the importance of balancing the freedom of the press with the dignity of those who may be the subject of media articles.⁸³

Freedom of expression can be important in the context of LGBT rights where attempts are made to restrict the rights of LGBT persons and organisations to receive or disseminate information, or to express their identity by their dress or behaviour. Discrimination in freedom of expression on LGBT grounds can take place even where the underlying laws appear to be neutral.

An example can be found in Uganda, where a British theatre producer was detained and later deported for staging a play that explored the difficulties of being homosexual in Uganda.⁸⁴ Similarly, in Canada, materials sent to a gay and lesbian bookstore were targeted for censorship by customs as “obscene”, where similar heterosexual materials were permitted to be imported; the Supreme Court found that while the customs law in general constituted a reasonable restriction on freedom of expression,⁸⁵ the *implementation* of the law – which specifically targeted gay and lesbian materials – was a breach of the right to equality with respect to freedom of expression.⁸⁶

Freedom of assembly and association

No Namibian case law has yet delineated the meaning and extent of the rights to freedom of assembly and association.

In Botswana the group Lesbians, Gay and Bisexuals of Botswana (LEGABIBO) challenged the government’s decision not to register it as a breach of the members’ right to freedom of

⁸⁰ Id at 185I-J.

⁸¹ Id at 190G-I, and 198H-I.

⁸² *Trustco Group International Ltd and Others v Shikongo* 2010 (2) NR 377 (SC) (per O’Regan AJA) at paras 30-31.

⁸³ Id at para 53.

⁸⁴ Pete Jones & Mark Schenkel, “British producer arrested in Uganda over play exploring gay issues”, *The Guardian*, 7 September 2012; Pete Jones, and Mark Schenkel, “Uganda deports British Theatre Producer over play exploring gay issues”, *The Guardian*, 12 February 2013.

⁸⁵ *Little Sisters Book and Art Emporium v Canada (Minister of Justice)* [2000] 2 SCR 1120 (Supreme Court of Canada) at paras 140-153.

⁸⁶ Id at paras 123-125.

assembly and association as well as freedom of expression.⁸⁷ The government refused to register the group as a “society” under the legislation governing such registration in Botswana, on the grounds that Botswana’s Constitution does not recognise homosexuals and also on the basis of a statutory provision which authorises refusal to register any society which includes in its objects anything that “is, or is likely to be used for any unlawful purpose or any purpose prejudicial to, or incompatible with peace, welfare or good order in Botswana”.⁸⁸ The Court found nothing in the organisation’s objectives which could sustain an objection to it on statutory grounds – and, indeed, noted that it had laudable aims such as promoting the human rights of all without discrimination.⁸⁹ Assuming that the government may have been bothered by the group’s stated intention to lobby for the decriminalisation of same-sex relationships, the Court found that such lobbying is completely lawful.⁹⁰ In light of this analysis, the Court also found that denying people the right to register a group for the purposes of lawful advocacy constitutes “a clear violation” of their constitutional rights to freedom of express, assembly and association.⁹¹

The European Court of Human Rights recently ruled against Russia in respect of state authorities’ repeated ban of a gay pride march in Moscow, on the grounds that this violated the organisers’ right of assembly. The Court rejected the State’s argument that the majority of Russian society was not accepting of homosexuality, and might therefore have attacked the protesters, holding that it was the State’s duty to ensure the safety of participants.⁹² The State’s defence of public morality was also rejected, since it could not be accepted that the rights of the minority could be determined by the views of the majority.⁹³

Similarly, in Turkey, where the Civil Code contains a provision prohibiting the establishment of associations for “immoral” purposes, the authorities tried to shut down an LGBT support organisation. The Court of Appeals held, however, that since there was nothing in the by-laws of the organisation referring to the promotion of homosexual acts, it could not be shut down.⁹⁴

In Namibia, government has been reasonably tolerant of the rights of speech, expression, association and assembly of LGBT persons – at least at the official level. However, the Namibian courts could be called upon to protect these fundamental rights if persons identifying as LGBT were prevented from expressing their sexual orientation or gender identity, educating themselves or others on LGBT-related issues, or advocating for legal or social reforms through organisations or peaceful protest actions.

87 *Thuto Rammoge and 19 others v The Attorney General*, MAHGB-000175-13, High Court of Botswana, 14 November 2014. See also LEGABIBO, “Challenges to refusal to register organisation”, 9 April 2013, <<http://legabibo.wordpress.com/2013/04/09/challenges-to-refusal-to-register-organisation/>>.

88 Societies Act (CAP 18:01) (Botswana), section 7(2)(a).

89 *Thuto Rammoge and 19 others v The Attorney General*, MAHGB-000175-13, High Court of Botswana, 14 November 2014 at para 19.

90 Id at paras 20-22.

91 Id at para 33.

92 *Alekseyev v Russia* (Applications nos. 4916/07, 25924/08 and 14599/09), Judgment of 21 October 2010 (European Court of Human Rights) at para 73.

93 Id at para 77.

94 Court of Appeals 7th Civil Chamber, Case No 2008/4109, Decision No 2008/5196, 25 November 2008. See also Amnesty International, “Turkish LGBT organization wins appeal against closure”, 21 January 2009, <www.amnesty.org/en/news-and-updates/good-news/turkish-lgbt-organization-wins-appeal-against-closure-20090121>.

2.3 Limiting fundamental rights

SUMMARY

The Namibian Constitution is rare in that it does not provide any general authority to limit fundamental rights. Some rights are absolute, while others may only be limited where a strict test set out in the Constitution itself is met. This is the reason why in Namibia, unlike in many other countries, the extent of the right is often more important than whether the State is justified in limiting it.

Namibian Constitution, Article 22: LIMITATION UPON FUNDAMENTAL RIGHTS AND FREEDOMS

Whenever or wherever in terms of this Constitution the limitation of any fundamental rights or freedoms contemplated by this Chapter is authorised, any law providing for such limitation shall:

- (a) be of general application, shall not negate the essential content thereof, and shall not be aimed at a particular individual;
- (b) specify the ascertainable extent of such limitation and identify the Article or Articles hereof on which authority to enact such limitation is claimed to rest.

Some rights under the Namibian Constitution are specifically subject to limitation, such as the fundamental freedoms listed in Article 21. However, it is significant that there is no general authority to limit or restrict the fundamental rights contained in the Bill of Rights. Where a limitation is expressly provided for in the text of the Namibian Constitution, it must pass the test of Article 22.⁹⁵

In other words there are two questions that one must ask when considering the limitation of a fundamental right. The first question is: does the right itself provide for limitation? If it does not, then the right is absolute and no limitation is permitted.⁹⁶

The second question is: If the right itself provides for limitation, then is that limitation permissible in terms of Article 22? The provision in Article 22(a) that a limitation should not “negate the essential content” of the right means that “it should not go further than what is necessary to achieve the object for which the limitation was enacted”, and the test to be applied is one of proportionality.⁹⁷ In *Kauesa* the Supreme Court held that limitations to fundamental rights must be both “reasonable and necessary” and that courts “should be strict in interpreting limitations to rights so that individuals are not unnecessarily deprived of the enjoyment of their rights”.⁹⁸

Culture, religion and tradition – and their impact on the rights of others – are particularly important in the context of LGBT rights. In this regard the Namibian Constitution specifically

⁹⁵ *Alexander v Minister of Justice and Others* 2010 (1) NR 328 (SC) (per Strydom AJA) at para 119. See also *Namunjepo and Others v Commanding Officer, Windhoek Prison and Another* 1999 NR 271 (SC) (per Strydom CJ) at 280I-281J.

⁹⁶ In *Attorney-General of Namibia v Minister of Justice and Others*, the Supreme Court confirmed that the absolute prohibition at issue applied also in case of national emergency declared under Article 26. 2013 (3) NR 806 (SC) at paras 21-25 (per Shivute CJ). See also Article 24(3) of the Namibian Constitution.

⁹⁷ *Alexander v Minister of Justice and Others* [2010] NASC 2 (Strydom AJA), paras. 121-2.

⁹⁸ *Kauesa v Minister of Home Affairs and Others* 1994 NR 102 (HC) (per Dumbutshena AJA) at 190F-G.

protects the right to culture, religion and tradition in Article 19, but “subject to the condition that the rights protected by this Article do not impinge upon the rights of others”. In other words, the moral views of those who oppose homosexuality cannot trump the basic rights of sexual minorities. However, the approach to determining the content of these basic rights in much Namibian jurisprudence defines such rights in light of the values and traditions of the majority of Namibians – creating a circular conundrum in Namibian constitutional jurisprudence which is yet to be fully explored.

2.4 Enforcing fundamental rights

SUMMARY

Anyone whose fundamental rights have been breached or threatened can bring a court case to enforce his or her rights, to stop the violation of his or her rights and to seek monetary compensation. However, Namibia does not allow public interest litigation, whereby a general complaint is brought by, for example, a human rights organisation on behalf of a group or even the general public. Another, less formal, avenue for enforcing fundamental rights is through a complaint to the Ombudsman.

Namibian Constitution, Article 25: ENFORCEMENT OF FUNDAMENTAL RIGHTS AND FREEDOMS

- (1) ...
- (2) Aggrieved persons who claim that a fundamental right or freedom guaranteed by this Constitution has been infringed or threatened shall be entitled to approach a competent Court to enforce or protect such a right or freedom, and may approach the Ombudsman to provide them with such legal assistance or advice as they require, and the Ombudsman shall have the discretion in response thereto to provide such legal or other assistance as he or she may consider expedient.
- (3) Subject to the provisions of this Constitution, the Court referred to in Sub Article (2) hereof shall have the power to make all such orders as shall be necessary and appropriate to secure such applicants the enjoyment of the rights and freedoms conferred on them under the provisions of this Constitution, should the Court come to the conclusion that such rights or freedoms have been unlawfully denied or violated, or that grounds exist for the protection of such rights or freedoms by interdict.
- (4) The power of the Court shall include the power to award monetary compensation in respect of any damage suffered by the aggrieved persons in consequence of such unlawful denial or violation of their fundamental rights and freedoms, where it considers such an award to be appropriate in the circumstances of particular cases.

The Namibian Constitution is the supreme law of the land and Article 25 gives courts wide powers to ensure that its provisions, in particular the Bill of Rights, are respected. A court can strike down legislation or executive acts that breach fundamental rights as well as order monetary compensation for past breaches. Because the courts themselves must be impartial, they cannot be influenced in their decisions by issues such as the sexual orientation or gender of the parties.

The Bill of Rights is binding not only on state organs, but also on private individuals and legal entities – such as a company, an organisation, a newspaper or an individual (including a politician).⁹⁹ If any such body or person infringes the constitutional rights of an LGBT person, the victim can seek the enforcement of his or her rights from the courts, as well as damages for the harm suffered.

The rules of standing (ie, who can bring a case before a court) are generally strict in Namibia. For constitutional complaints, Article 25(2) specifies that “aggrieved persons” may approach the courts alleging a violation of a fundamental right or freedom. The Constitution does not define the term “aggrieved person”. Common law standing requires the complainant to have a “direct and substantial interest” in the case, but the 2009 *Uffindell* case and several subsequent cases seem to point in the direction of a more liberal approach to standing in respect of constitutional issues.¹⁰⁰ However, public interest standing, whereby an individual or organisation brings a case on behalf of third parties who are unable to access the courts, is not permitted in Namibia.¹⁰¹ This is a real drawback in the context of LGBT rights, as many of the cases from other jurisdictions discussed above were brought by way of public interest litigation, or by a litigant whose interest might not satisfy the Namibian rules of standing.¹⁰² However, it is possible that Namibia’s standing requirements will be further liberalised, either by continued jurisprudential development or law reform on this issue.¹⁰³

A second avenue for enforcing constitutional rights is via a complaint to the Ombudsman. There are no formal requirements, as the process is intended to be informal. Complaints to the Ombudsman can relate to human rights violations by government institutions, parastatals or local authorities, or by private institutions or persons. The dispute will normally be investigated and resolved by conciliation if possible, although many options for action are available, including bringing the matter to the attention of relevant authorities or referring the matter to the courts.¹⁰⁴

99 Article 5 provides that the fundamental rights and freedoms “shall be respected and upheld ... where applicable to them, by all natural and legal persons in Namibia”.

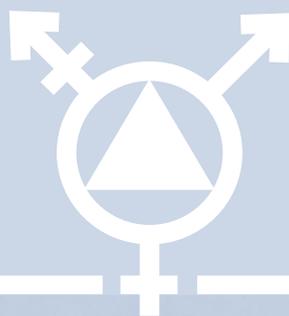
100 *Uffindell v Government of Namibia* 2009 (2) NR 670 (HC).

101 See Zoila Hinson & Dianne Hubbard, “Locus Standi: Standing to Bring a Legal Action”, Access to Justice in Namibia: Proposals for Improving Public Access to Courts, Paper No. 2, Legal Assistance Centre, 2012.

102 Examples would include Mr Leung in Hong Kong, who was over the age of 21 (the age of consent for homosexuals) at the time the judgment in his case was issued (*Leung v Secretary for Justice*, [2006] 4 HKLRD 211 (Hong Kong Special Administrative Region, Court of Appeal)), or “M” in Canada, who had settled her dispute over joint property and maintenance with “H”, her former partner, by the time of the appeal (*M v H* [1999] 2 SCR 3 (Supreme Court of Canada)).

103 Namibia’s Law Reform and Development Commission has published a paper on this topic: *Locus Standi Discussion Paper*, LRDC 27, March 2014.

104 Ombudsman Act 7 of 1990, section 5. See also Katharina Ruppel-Schlichting, “Independence of the Ombudsman in Namibia” in Nico Horn and Anton Bösl (eds), *The Independence of the Judiciary in Namibia*, Windhoek: Macmillan Education, 2008 at 273. Although the Ombudsman has the power under Article 25(2) of the Namibian Constitution and section 5 of the Ombudsman Act 7 of 1990 to bring a case directly to court where the Bill of Rights has been violated, this power has not yet been utilised in practise.



Chapter 3

INTERNATIONAL LAW

3.1	Introduction	46
3.2	The role of international law in Namibia	46
3.3	LGBT rights under international law	47
3.3.1	International agreements and their interpretation	48
3.3.2	Global agreements	48
3.3.3	African regional agreements	55
3.3.4	Customary international law and general principles of international law	58
3.3.5	Other important international documents	59
3.4	Conclusion	61

3.1 Introduction

SUMMARY

International law is an important source of protection for the rights of LGBT persons in Namibia. Non-discrimination and equality are the key international rights for LGBT persons, though other rights may also apply in some contexts.

International law can be an important source of protection for LGBT rights, particularly in countries where minority sexual orientations and gender identities have not yet achieved widespread acceptance in society. The international legal framework consists of international agreements binding on Namibia, interpreted with reference to decisions, recommendations and guidance issued by the relevant treaty bodies and human rights mechanisms. The most important international rights in the context of sexual orientation and gender identity are those general guarantees of non-discrimination and equality. Other rights which may be relevant to the protection of LGBT individuals include the right to privacy and respect for private life, the right to freedom of expression and information, the right to freely assemble and to form associations, the right to life and the right not to be treated in a cruel, inhuman, or degrading manner. International law with particular relevance to more specific topics – such as hate speech, labour, health, family law issues and LGBT-related asylum issues – will be discussed in more detail in the chapters of this report dealing with those topics.

3.2 The role of international law in Namibia

SUMMARY

Under the Namibian Constitution, international law that is binding on Namibia is automatically part of Namibian law and enforceable by Namibian courts. International law binding on Namibia should also be a guide to the interpretation of the Namibian Constitution.

Namibian Constitution, Article 144: INTERNATIONAL LAW

Unless otherwise provided by this Constitution or Act of Parliament, the general rules of public international law and international agreements binding upon Namibia under this Constitution shall form part of the law of Namibia.

Namibia is one of the few countries where international law is automatically part of the domestic law and can be enforced in the courts.¹ International law in this context means (a) international agreements that Namibia has entered into in accordance with the Namibian Constitution; (b) customary international law; and (c) general principles of law as recognised by the majority of domestic legal systems and international judicial bodies.

¹ The Namibian Supreme Court has affirmed that international agreements form “part of the law of Namibia” and must “be given effect to”. *Government of the Republic of Namibia and Others v Mwilima and all other accused in the Caprivi Treason Trial* 2002 NR 235 (SC) (*per* Strydom CJ) at 260H. Other Namibian cases have made similar statements.

Most important in the context of LGBT rights are the many human rights agreements that Namibia has entered into, such as the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the Convention on the Rights of the Child and the African Charter on Human and Peoples' Rights.

One example of how international law has been used to protect rights in Namibia is the *Mwilima* case, where the Supreme Court found that the Caprivi treason trial defendants must be given legal aid, even though Namibia's Legal Aid Act did not require this. This is because the ICCPR required Namibia to give free legal assistance to persons accused of crimes in cases where the interests of justice require legal representation and the accused do not have the means to pay for it.²

International law is also relevant to the interpretation of the Namibian Constitution. The Namibian Supreme Court has stated that the Fundamental Rights and Freedoms in the Namibian Constitution "are international in character" and that their interpretation calls for "the application of international human rights norms".³ Another Supreme Court case stated that value judgements used to interpret the Namibian Constitution must have reference to "the emerging consensus of values in the civilised international community (of which Namibia is a part) which Namibians share".⁴

3.3 LGBT rights under international law

SUMMARY

Many international agreements which are binding on Namibia – including the African Charter on Human and People's Rights – have been interpreted to protect LGBT rights, even though they do not specifically mention sexual orientation or gender identity.

The "general rules of public international law" automatically become part of the law of Namibia under Article 144 of the Namibian Constitution. This includes customary international law and general principles of law recognised by the majority of national legal systems and international judicial bodies. In the United States, customary international law is the basis for an ongoing case aimed at protecting the rights of LGBT people in Uganda against interference by a US citizen.

Non-binding international statements –such as the resolutions or reports of UN bodies and the conclusions of international conferences – can provide supporting evidence of international law on specific topics. One such document is the 2007 Yogyakarta Principles on the application of international human rights law to sexual orientation and gender identity, which was developed by a distinguished group of human rights experts.

² *Government of the Republic of Namibia and Others v Mwilima and Others* 2002 NR 235 (SC). See in particular 259-260 (per Strydom CJ) and 269-274 (per O'Linn AJA).

³ *Minister of Defence v Mwandighi*, 1993 NR 63 (HC) (per Mahomed AJA) at 70B.

⁴ *Ex parte: Attorney General: in re Corporal Punishment by Organs of State* 1991 (3) SA 76 (SC) at 86H-J (per Mahomed AJA). See also *Namunjepe and Others v Commanding Officer, Windhoek Prison and Another* 1999 NR 271 (SC) at 283H-I and *Government of the Republic of Namibia and Another v Cultura* 2000 and *Another* 1993 NR 328 (SC) at 333H.

3.3.1 International agreements and their interpretation

An “international agreement” is an agreement concluded between two or more nations (usually referred to in international contexts as “States” or “States parties”). The term can also include agreements concluded between States and international organisations. International agreements are referred to by various names – such as “treaties”, “conventions”, “covenants”, “accords”, “pacts” or “protocols” – but the different names do not give them any different status.

While there are no international agreements that deal specifically with sexual orientation or gender identity, LGBT persons are protected under many other international human rights agreements. These protections are based on the rights to non-discrimination, equality, and other general rights. This is clear from the interpretation of these human rights by human rights bodies that are responsible for monitoring compliance with the various treaties. (Such bodies interpret international treaties in a way that is similar to how judges interpret national laws in order to apply them to specific cases.)

3.3.2 Global agreements

United Nations Charter (1945) / Universal Declaration of Human Rights (1948)⁵

The Charter of the United Nations is the treaty that founded the international organisation called the United Nations (UN). It states the purposes of the UN and sets out rules on membership and on UN bodies and their powers. All UN members are required to follow its Articles. Most States are members of the UN Charter, including Namibia.⁶

The Charter focuses on how the UN should function as an organisation. While it does not focus on substantive human rights, the Charter makes it clear that human rights protection is a main part of the UN’s mission. For example, the Charter states that the UN aims to promote and encourage “respect for human rights and fundamental freedoms for all without distinction as to race, sex, language or religion”.⁷

The 1948 Universal Declaration of Human Rights was adopted to define the “fundamental freedoms” and “human rights” in the Charter. While the Universal Declaration is not directly binding, it is considered to be part of the essential documents of UN membership because of its relationship to the UN Charter. It is also considered by many to be part of customary international law (legal principles which are generally accepted all over the world).⁸ The Declaration is certainly a powerful tool in applying diplomatic and moral pressure to governments that violate any of its Articles.⁹

5 Charter of the United Nations and Statute of the International Court of Justice, <<https://treaties.un.org/doc/publication/ctc/uncharter.pdf>>; Universal Declaration of Human Rights, G.A. Res. 217A, U.N. Doc. A/810 (1948), text available at <<http://www.un.org/Overview/rights.html>>.

6 Namibia’s declaration of acceptance was admitted by the UN General Assembly on 23 April 1993 and the Charter became binding for Namibia on 23 April 1993, according to the UN Treaty Collection (UNTC).

7 Article 1(3) of the Charter.

8 See for example, John Humphrey, “The Universal Declaration of Human Rights: Its History, Impact and Judicial Character”, in BG Ramcharan (ed), *Human Rights. Thirty Years after the Universal Declaration* (1979) at 21-37; Jochen von Bernstorff, “The Changing Fortunes of the Universal Declaration of Human Rights: Genesis and Symbolic Dimensions of the Turn to Rights in International Law”, 19 *European Journal of International Law* 903 (2008) at 913.

9 The 1968 United Nations International Conference on Human Rights advised that the Universal Declaration “constitutes an obligation for the members of the international community” to all persons. Final Act of the 1968 United Nations International Conference Human Rights, 22 April-13 May, A/CONF.32/41, Proclamation of Teheran at 4.

The Universal Declaration is also the foundation for two binding (legally-enforceable) UN human rights agreements: the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).

Article 1 of the Universal Declaration states:

All human beings are born free and equal in dignity and rights.

According to Article 2:

Everyone is entitled to all the rights and freedoms set forth in this Declaration 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.

Importantly, the listed types of discrimination (race, colour, sex, etc) are not exhaustive, but are rather offered as *examples* of prohibited types of discrimination. This is reinforced by Article 7, which prohibits discrimination more generally:

*All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.*¹⁰

In 2011, the Human Rights Council passed Resolution 17/19, which identified gender and sexual identity as priorities under the Universal Declaration and recognised violence and discrimination based on their sexual orientation or gender identity as human rights violations. (See section 3.3.5 for more details.)

International Covenant on Civil and Political Rights (1966)¹¹

Many States, including Namibia,¹² have adopted the International Covenant on Civil and Political Rights (ICCPR). The ICCPR protects the civil and political rights of individuals, and is thus very important for LGBT people. It also established the Human Rights Committee to monitor and enforce the ICCPR.¹³ All States that are parties to the ICCPR must submit regular reports to the Committee, outlining the measures they have taken to implement it. The Committee examines the reports and addresses its concerns and recommendations to the State party in documents called “concluding observations”.

Under the First Optional Protocol (to the ICCPR), the Human Rights Committee can also issue “views” interpreting the ICCPR in response to specific cases – if the State in question has agreed to the complaints procedure in the Protocol, as Namibia has done.¹⁴ Individuals who believe

¹⁰ Emphasis added. Such a reading of the wording also recognises the changing nature of intolerance and discrimination. See, for example, UN Committee on Economic, Social and Cultural Rights, “General comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)”, 2 July 2009, E/C.12/GC/20, <www.unhcr.org/refworld/docid/4a60961f2.html> at para 27.

¹¹ International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16), U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171.

¹² Namibia acceded to the Covenant on 28 November 1994 and it became binding on Namibia on 28 February 1995 (source: UNTC).

¹³ See Part IV of the ICCPR.

¹⁴ Namibia acceded to the 1966 First Optional Protocol on 28 November 1994 and it became binding on Namibia on 28 February 1995 (source: UNTC).

that a State has violated their rights under the ICCPR or refused to protect their rights against violation by a private actor can submit a written complaint, called a “communication”, to the Committee. However, the individual must first pursue and exhaust all “domestic remedies”¹⁵ – such as taking the case to court within the State or taking advantage of other bodies such as a State Ombudsman. The Human Rights Committee will review the communication and the State’s response, and give a decision to the individual and to the State party. This decision may include a remedy for the situation.

Sexual orientation is not mentioned explicitly in any provisions of the ICCPR. The main non-discrimination clauses in the ICCPR are Article 2 and Article 26. While neither explicitly mentions sexual orientation, they both make reference to “sex” and a generally inclusive “other status” clause, which has been interpreted by the Human Rights Committee as including sexual orientation.

International Covenant on Civil and Political Rights

Article 2(1)

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 recognized 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

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.

The ICCPR contains additional provisions that may be helpful for the protection of LGBT rights¹⁶ including protection for privacy and family,¹⁷ the right to marry and to found a family¹⁸ and the right to liberty and security.¹⁹ Some examples of cases decided by the Human Rights Committee which are pertinent to LGBT rights are summarised below.

● *Right to life*

Article 6(1) of the ICCPR protects the right to life, while Article 6(2) specifies that the death penalty (where not completely abolished) may only be imposed for very serious crimes,

¹⁵ Articles 2 and 5(2)(b) of the Covenant.

¹⁶ INTERIGHTS, “Non-Discrimination in International Law: A Handbook for Practitioners”, 2011 edition at 139-140.

¹⁷ Article 17:

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.

¹⁸ Article 23(2):

The right of men and women of marriageable age to marry and to found a family shall be recognized.

¹⁹ Article 9(1):

Everyone has the right to liberty and security of person ...

which is understood to mean crimes involving intentional killing.²⁰ Human rights bodies have found that crimes involving sexual orientation do not fall under the “most serious crimes” definition.²¹ Thus, death penalty sentences for matters involving sexual orientation violate Article 6 of the ICCPR. LGBT individuals do not face the death penalty in Namibia, but male homosexual acts are punishable by death in some other countries. Under the ICCPR, Namibia cannot deport LGBT individuals confronted with the death penalty for homosexual acts in their home countries.²²

- **Criminalisation of homosexuality**

In the landmark case *Toonen v Australia*, the Human Rights Committee found that Tasmanian laws criminalising homosexual acts between consenting adults constituted an unlawful and arbitrary interference with the privacy of the applicant, contrary to Article 17(1) of the ICCPR.²³ The Committee did not go on to consider whether there had been a violation of Article 26, but at the request of the State, it clarified that the meaning of “sex” in the listed grounds of non-discrimination under Article 2 of ICCPR includes “sexual orientation”.²⁴ Since the *Toonen* judgment, the Human Rights Committee has expressed concern over sodomy laws in other States through the Convention’s reporting mechanism.²⁵

- **Rights of same-sex partners**

In two cases – *Young v Australia*²⁶ and *X v Colombia*²⁷ – the Human Rights Committee has ruled that pensions which provide benefits for cohabiting opposite-sex partners but not same-sex partners are discriminatory and therefore a violation of Article 26 of the ICCPR.²⁸ The Committee found that “sexual orientation” is covered by the “other status” ground of Article 26.

-
- 20 Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions to the UN General Assembly, 9 August 2012, UN Doc. A/67/275, <<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N12/457/80/PDF/N1245780.pdf?OpenElement>> at para 67.
- 21 Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions to the Commission on Human Rights (CHR), UN Doc. E/CN.4/1999/39, 6 January 1999, <<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G99/100/19/PDF/G9910019.pdf?OpenElement>> at para 63; Concluding observations of the Human Rights Committee: Sudan, UN Doc CCPR/C/79/Add.85, 19 November 1997, <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f79%2fAdd.85&Lang=en>; UN Commission on Human Rights, Human Rights Resolution 2005/59: The Question of the Death Penalty, 20 April 2005, E/CN.4/RES/2005/59 at para.7(f).
- 22 See *X v Sweden*, Merits, UN Doc CCPR/C/103/D/1833/2008, IHRL 1833 (UNHRC 2011), 1 November 2011.
- 23 *Toonen v Australia*, Merits, Communication No 488/1992, UN Doc CCPR/C/50/D/488/1992, (1994) 1-3 IHRR 97, IHRL 2290 (UNHRC 1994), 31 March 1994.
- 24 Id at paras 8.7 and 8.11.
- 25 Concluding observations of the Human Rights Committee: Togo (CCPR/C/TGO/CO/4) at para 14; Uzbekistan (CCPR/C/UZB/CO/3) at para 22; Grenada (CCPR/C/GRC/CO/1) at para 21; United Republic of Tanzania (CCPR/C/TZA/CO/4) at para 22; Botswana (CCPR/C/BWA/CO/1) at para 22; St. Vincent and the Grenadines (CCPR/C/VCT/CO/2); Algeria (CCPR/C/DZA/CO/3) at para 26; Chile (CCPR/C/CHL/CO/5) at para 16; Barbados (CCPR/C/BRB/CO/3) at para 13; United States of America (CCPR/C/USA/CO/3) at para 9; Kenya (CCPR/C/CO/83/KEN) at para 27; Egypt (CCPR/CO/76/ EGY) at para 19; Romania (CCPR/C/79/Add.111) at para 16; Lesotho (CCPR/C/79/Add.106) at para. 13; Ecuador (CCPR/C/79/Add.92) at para 8; Cyprus, (CCPR/C/79 Add.88) at para 11; United States of America (A/50/40) at para 287.
- 26 *Young v Australia*, Merits, Communication No 941/2000, UN Doc CCPR/C/78/D/941/2000, (2003) 5 IHRR 747, IHRL 1921 (UNHRC 2003), 6 August 2003.
- 27 *X v Colombia*, Merits, Communication No 1361/2005, UN Doc CCPR/C/89/D/1361/2005, (2007) 13 IHRR 933, IHRL 2615 (UNHRC 2007), 30 March 2007.
- 28 *Young v Australia*, Merits, Communication No 941/2000, UN Doc CCPR/C/78/D/941/2000, (2003) 5 IHRR 747, IHRL 1921 (UNHRC 2003), 6 August 2003; *X v Colombia*, Merits, Communication No 1361/2005, UN Doc CCPR/C/89/D/1361/2005, (2007) 13 IHRR 933, IHRL 2615 (UNHRC 2007), 30 March 2007.



- **Right to marry**

In *Joslin v New Zealand*,²⁹ the Committee found that the ICCPR does *not* require States to allow same-sex marriage. Since marriage is addressed specifically by Article 23(2) of the ICCPR, the Committee found that the right to marriage must be considered in terms of that provision. This is the only provision in the Covenant which defines a right by referring to “men and women” rather than using general expressions such as “every human being” or “all persons”. The Committee interpreted this to mean that Article 23 applies only to a marriage between a man and a woman.³⁰

- **Right to freedom of expression**

The right to freedom of expression under Article 19 of the ICCPR includes the right to express thoughts and ideas, to dress however one wants, and “to seek, receive and impart information and ideas of all kinds”.³¹ International human rights law allows very few restrictions on the right to freedom of expression and only where necessary to protect the rights or reputations of others, national security, public order, public health or morals. Such limitations are only valid if they fall within the narrow three-part test set forth in Article 19(3) of the ICCPR, which provides that restrictions on the right must be necessary, provided by law, and have a legitimate aim.

Some States have used the “morals” restriction to justify restrictions on the freedom of expression of LGBT individuals. However, the Human Rights Committee has emphasised that limitations on rights based on morals cannot be based on a single social, philosophical or religious tradition because of the universality of human rights and the principle of non-discrimination.³²

In 2010, in *Fedotova v Russia*,³³ the Committee considered a case where an openly-lesbian LGBT activist was jailed and convicted for “propaganda of homosexuality among minors” after demonstrating outside a secondary school holding signs saying “Homosexuality is normal” and “I am proud of my homosexuality”. The Committee concluded that this conviction amounted to a violation of Article 19(2) of the Covenant read in conjunction with Article 26.³⁴

- **Concluding Observations on Namibia**

In the only Concluding Observations on Namibia to date, the Human Rights Committee in 2004 noted the absence of anti-discrimination measures for sexual minorities such as homosexuals in the context of Articles 26 and 17 of the ICCPR. It stated:

The State party should consider, in enacting anti-discrimination legislation, introducing the prohibition of discrimination on the ground of sexual orientation.³⁵

29 *Joslin and ors v New Zealand*, Merits, Communication No 902/1999, UN Doc CCPR/C/75/D/902/1999, (2002) 10 IHRR 40, IHRL 1719 (UNHRC 2002), 17th July 2002.

30 *Id* at paras 8.2-8.3.

31 ICCPR, Article 19(2).

32 UN Human Rights Committee, CCPR General Comment No. 34 on Article 19: Freedom of opinion and expression, 12 September 2011, CCPR/C/GC/34 at para 32. See also Amnesty International, *Making love a crime: Criminalization of same-sex conduct in Sub-Saharan Africa*, 2013 at 66.

33 *Fedotova v Russia*, Communication No. 1932/2010, CCPR/C/106/D/1932/2010, 31 October 2012.

34 *Id* at para 10.8.

35 Human Rights Committee, Concluding observations: Namibia, UN Doc. CCPR/CO/81/NAM, 26 July 2004 at para 22.

International Covenant on Economic, Social and Cultural Rights (1966)³⁶

The International Covenant on Economic, Social and Cultural Rights (ICESCR) protects the economic, social, and cultural rights of individuals, including some rights which are very relevant in the LGBT context –such as labour rights and the right to family life, health, education.³⁷ The ICESCR is monitored by the Committee on Economic, Social and Cultural Rights. All States parties are required to submit regular reports to the Committee outlining the measures they have taken to implement the Covenant. The Committee examines each report and addresses its concerns and recommendations to the State party in the form of “concluding observations”. The First Optional Protocol to the ICESCR allows State parties to authorise the monitoring Committee to consider complaints from individuals. However, Namibia has not yet agreed to this Protocol, which entered into force internationally on 5 May 2013.³⁸

The ICESCR contains a non-discrimination provision in Article 2(2) which is similar to Article 2(1) of the ICCPR.

International Covenant on Economic, Social and Cultural Rights

Article 2(2)

The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

The Committee has expressed concern over discrimination due to sexual orientation in general comments³⁹ and concluding observations.⁴⁰ The Committee has also specified that discrimination based on sexual orientation and gender identity is covered by the “other status” clause in Article 2(2).⁴¹

Convention on the Elimination on All Forms of Racial Discrimination (1966)⁴²

The Convention on the Elimination on All Forms of Racial Discrimination (CERD) does not specifically address sexual orientation or gender identity discrimination. However, the Committee has addressed discrimination based on sexual orientation when it overlaps with racial, colour, descent, national or ethnic discrimination covered by CERD.⁴³

³⁶ International Covenant on Economic, Social and Cultural Rights, GA res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 49, UN Doc. A/6316 (1966); 993 UNTS 3; 6 ILM 368 (1967).

³⁷ Namibia acceded to the Covenant on 28 November 1994 and it became binding on Namibia on 28 February 1995 (source: UNTC).

³⁸ Source: UNTC. Unlike other human rights monitoring bodies, the Committee was not established by the treaty it oversees. Rather, it was established by the Economic and Social Council.

³⁹ See, for example, UN Committee on Economic, Social and Cultural Rights, General Comment No. 14 (2000): The right to the highest attainable standard of health (Art. 12), 11 August 2000, UN Doc. E/C.12/2000/4, <[www.unhcr.ch/tbs/doc.nsf/\(symbol\)/E.C.12.2000.4.En](http://www.unhcr.ch/tbs/doc.nsf/(symbol)/E.C.12.2000.4.En)> at para 18.

⁴⁰ See, for example, concern about sodomy laws in Concluding observations of the Committee on Economic, Social and Cultural Rights on Kyrgyzstan (E/C.12/Add.49) at paras 17, 30 and on Cyprus (E/C.12/1/Add.28) at para 7.

⁴¹ Committee on Economic, Social and Cultural Rights, General Comment No. 20: Non-Discrimination in Economic, Social and Cultural Rights, UN Doc E/C.12/GC/20, 2 July 2009, <www.unhcr.org/refworld/docid/4a60961f2.html> para. 32.

⁴² International Convention on the Elimination on All Forms of Racial Discrimination, G.A. Res. 2106 (XX), 7 March 1966, 660 UNTS 195.

⁴³ Concluding observations of the Committee on the Elimination of Racial Discrimination on Czech Republic, CERD/C/CZE/CO/7, 11 April 2007, <www.refworld.org/publisher/CERD,,CZE,46484d2d2,0.html>. See also INTERIGHTS, *Non-Discrimination in International Law: A Handbook for Practitioners*, 2011 edition at 142.

Convention on the Elimination of All Forms of Discrimination against Women (1979)⁴⁴

The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) requires that States parties take steps to eliminate all forms of discrimination against women, including the repeal of discriminatory laws and the enactment of new laws as necessary.⁴⁵ The 1999 Optional Protocol to the Convention, to which Namibia has agreed, allows the Committee on the Elimination of Discrimination against Women to consider complaints against States parties from individuals.⁴⁶

As in the case of CERD, sexual orientation and gender identity discrimination concern CEDAW where there is an overlap with sex discrimination. For example, the Committee has noted in one of its general recommendations that sex discrimination is often linked with other factors such as sexual orientation and gender identity and that “states parties must legally recognize and prohibit such intersecting forms of discrimination and their compounded negative impact on the women concerned”.⁴⁷ As another example, in its concluding observations on South Africa, the Committee expressed “grave concern about reported sexual offences and murder committed against women based on their sexual orientation” and “the practice of so-called ‘corrective rape’ of lesbians”.⁴⁸

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984)⁴⁹

The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment requires States to prevent torture and forbids States from deporting people to countries where they may be tortured.⁵⁰ The Committee may consider individual complaints alleging violations of the rights set out in the Convention by States parties who have made the necessary declaration under Article 22 of the Convention – which Namibia has not yet done.⁵¹

Both the Committee and the UN Special Rapporteur on torture have found there is significant abuse and mistreatment of LGBT persons by police, prison guards and other law enforcement officers.⁵² The Committee has specifically stated in one of its general comments that the rights in the Convention apply to all persons regardless of sexual orientation or gender identity. It has

44 International Convention on the Elimination of All Forms of Discrimination against Women, G.A. Res. 34/180, 18 December 1979, 1249 UNTS 13.

45 Namibia acceded to the Convention on 23 November 1992 and it became binding on it on 23 December 1992 (source: UNTC).

46 Namibia ratified the Protocol on 26 May 2000 and it became binding on it on 22 December 2000 (source: UNTC).

47 Committee on the Elimination of Discrimination Against Women, General Recommendation No. 28 on the Core Obligations of State Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, 19 October 2010, UN Doc CEDAW/C/2010/47/GC.2, para. 18.

48 Concluding Observations of the Committee on the Elimination of Discrimination against Women on South Africa, CEDAW/C/ZAF/CO/4 at paras 39-40.

49 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN G.A. Res. 39/46, 10 December 1984, 1465 UNTS 85.

50 Namibia acceded to the Convention on 28 November 1994 and it became binding on Namibia from 28 December 1994 (source: UNTC).

51 Source: UNTC.

52 See, for example, Concluding Observations of the Human Rights Committee on the United States of America, CCPR/C/USA/CO/3 at para 25; Concluding Observations of the Committee against Torture on the United States of America, CAT/C/USA/CO/2 at paras 32, 37; Ecuador, CAT/C/ECU/CO/3 at para 17; Argentina, CAT/C/C/CR/33/1 at para 6(g); Egypt, CAT/C/CR/29/4 at para 5(e); Brazil, A/56/44 at para 119; Committee Against Torture, General Comment No. 2: Implementation of Article 2 by State parties, CAT/C/GC/2 at para 21; Report of the Special Rapporteur on the question of torture and other cruel, inhuman or degrading treatment or punishment, A/56/156, 3 July 2001 at paras 17-25.

also stated in concluding observations that forcible anal exams performed on men in efforts to prove that illegal homosexual conduct has taken place amounts to torture.⁵³

Convention on the Rights of the Child (1989)⁵⁴

The Convention on the Rights of the Child protects the civil, political, economic, social, health and cultural rights of individuals under the age of eighteen. The UN Committee on the Rights of the Child monitors State compliance with the treaty and considers individual complaints on rights violations where States parties have agreed to the 2011 Optional Protocol on a Communications Procedure. Namibia has not adopted this Protocol, which entered into force internationally on 14 April 2014.⁵⁵

While the Convention does not specifically mention sexual orientation or gender identity, the Committee has recognised that the Convention's right to non-discrimination covers sexual orientation – referencing sexual orientation is its general comments pertaining to HIV/AIDS, adolescent health and freedom from violence.⁵⁶ The Committee has specifically expressed concerns about the rights of LGBT youth, voicing concerns about their access to appropriate information, support and protection.⁵⁷ It has also expressed concern over the existence of “sodomy laws”.⁵⁸

3.3.3 African regional agreements

African Charter on Human and Peoples' Rights (1986)⁵⁹

The African Charter on Human and Peoples' Rights has been ratified by more than fifty countries, including Namibia.⁶⁰ The African Commission on Human and Peoples' Rights monitors and interprets the Charter,⁶¹ and considers individual complaints alleging Charter violations.⁶²

There is also an African Court on Human and Peoples' Rights, which can receive complaints from the African Commission, State parties to the Protocol on the African Court on Human and Peoples' Rights or African Intergovernmental Organizations.⁶³ Non-Governmental Organisations with observer status before the African Commission and individuals from States which have made declarations accepting the jurisdiction of the Court can also institute cases directly before the Court. However, Namibia has not completed the process of accepting the relevant Protocol, nor has it made a declaration accepting the jurisdiction of the African Court.⁶⁴

53 Committee Against Torture, Concluding Observations: Egypt, CAT/C/XXIX/Misc.4 at para 6(k).

54 Convention on the Rights of the Child, UN G.A. Res. 44/25, 20 November 1989, 1577 UNTS 3.

55 Source: UNTC.

56 Committee on the Rights of the Child, General Comment No. 3: HIV/AIDS and the rights of the child, CRC/GC/2003/3, 17 March 2003 at para 8; General Comment No. 4: Adolescent Health, CRC/GC/2003/4, 1 July 2003 at para 6; General Comment No. 13: The right of the child to freedom from all forms of violence, CRC/C/GC/13, 18 April 2011 at para 72(g).

57 Concluding Observations of the Committee on the Rights of the Child: United Kingdom, CRC/C/15/Add.188, 9 October 2002 at 11.

58 Committee on the Rights of the Child, Concluding Observations of the Committee: Chile, CRC/C/CHL/CO/3, 23 April 2007 at para 29.

59 African Charter on Human and Peoples' Rights, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58, 27 June 1981.

60 Namibia acceded to the Charter on 16 September 1992 and it became binding on Namibia on 16 December 1992 in accordance with Article 65 of the Charter (source: AU). Namibia ratified the 2003 Protocol to the African Charter for Human and Peoples' Rights on the Rights of Women in Africa on 26 August 2004 and it became binding on Namibia on 25 November 2005 (source: AU).

61 See Article 30 of the Charter.

62 See Articles 55-58 of the Charter for the procedure to receive communications from individuals.

63 See Article 5 of the Protocol and Rule 33 of the Rules of the Court.

64 Namibia signed the Protocol on 9 June 1998 but never deposited the instrument of ratification according to the AU as the depository.

The African Charter protects the human rights of “every individual”. Amongst the many rights which may have particular relevance to LGBT issues are the rights to non-discrimination; equality before the law; life and integrity of the person; dignity and freedom from torture; liberty and security; work; education; cultural life; and the best attainable standard of physical and mental health, as well as the right to receive information and to express and disseminate opinions.⁶⁵

African Charter on Human and Peoples’ Rights

Article 2

Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction 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

1. Every individual shall be equal before the law.
2. Every individual shall be entitled to equal protection of the law.

Although “sexual orientation” and “gender identity” are not mentioned specifically as grounds of prohibited distinction, the references to “other status” and “sex” in the right to non-discrimination in Article 2 are analogous to protections in the ICCPR and the ICESCR which have been found to prohibit discrimination on the basis of sexual orientation and gender identity.⁶⁶ Articles 60 and 61 of the Charter say that the African Commission will “draw inspiration from” and “take into consideration” international law in its jurisprudence,⁶⁷ and the Commission has in fact held in *Zimbabwe Human Rights NGO Forum v Zimbabwe* that discrimination on the basis of sexual orientation violates the African Charter.⁶⁸

In May 2014, the African Commission adopted a “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”.⁶⁹ The full text of the resolution is reproduced in the box below. Although the resolution is not legally binding, it notes that the Commission is “alarmed” and “deeply disturbed” by the increasing instances of anti-LGBT violence and State-sanctioned homophobia, and it reflects the African Commission’s perspective on the necessity of protecting LGBT people in the member States.

⁶⁵ See Amnesty International, *Making love a crime: Criminalization of same-sex conduct in Sub-Saharan Africa*, 2013 at 70.

⁶⁶ See the discussion in section 3.3.2 above.

⁶⁷ See also Amnesty International, *Making love a crime: Criminalization of same-sex conduct in Sub-Saharan Africa*, 2013 at 70-71.

⁶⁸ *Zimbabwe Human Rights NGO Forum v Zimbabwe*, ACHPR 245/02, 15 May 2006 at para 169: “Together with equality before the law and equal protection of the law, the principle of non-discrimination provided under Article 2 of the Charter provides the foundation for the enjoyment of all human rights ... The aim of this principle 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*. The African Commission has held in Communication 211/9858 that the right protected in Article 2 is an important entitlement as the availability or lack thereof affects the capacity of one to enjoy many other rights.” (emphasis added).

⁶⁹ 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, ACHPR/Res/275, <www.achpr.org/sessions/55th/resolutions/275/>.

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

African Commission on Human and Peoples' Rights, 2014

Recalling that Article 2 of the African Charter on Human and Peoples' Rights (the African Charter) prohibits discrimination of the individual on the basis of 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;

Further recalling that Article 3 of the African Charter entitles every individual to equal protection of the law;

Noting that Articles 4 and 5 of the African Charter entitle every individual to respect of their life and the integrity of their person, and prohibit torture and other cruel, inhuman and degrading treatment or punishment;

Alarmed that acts of violence, discrimination and other human rights violations continue to be committed on individuals in many parts of Africa because of their actual or imputed sexual orientation or gender identity;

Noting that such violence includes 'corrective' rape, physical assaults, torture, murder, arbitrary arrests, detentions, extra-judicial killings and executions, forced disappearances, extortion and blackmail;

Further alarmed at the incidence of violence and human rights violations and abuses by State and non-State actors targeting human rights defenders and civil society organisations working on issues of sexual orientation or gender identity in Africa;

Deeply disturbed by the failure of law enforcement agencies to diligently investigate and prosecute perpetrators of violence and other human rights violations targeting persons on the basis of their imputed or real sexual orientation or gender identity;

1. Condemns the increasing incidence of violence and other human rights violations, including murder, rape, assault, arbitrary imprisonment and other forms of persecution of persons on the basis of their imputed or real sexual orientation or gender identity;
2. Specifically condemns the situation of systematic attacks by State and non-state actors against persons on the basis of their imputed or real sexual orientation or gender identity;
3. Calls 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; and
4. Strongly urges 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, ensuring proper investigation and diligent prosecution of perpetrators, and establishing judicial procedures responsive to the needs of victims.

African Charter on the Rights and Welfare of the Child (1990)⁷⁰

The African Charter on the Rights and Welfare of the Child (ACRWC) sets out the rights of children in Africa.⁷¹ It established the African Committee of Experts on the Rights and Welfare of the Child to promote and protect the rights contained in the ACRWC. The Committee reviews reports submitted by the member States and communications submitted by any person, group or non-governmental organisation recognised by the African Union, by a member State, or the United Nations relating to any matter covered by the Charter.⁷²

The ACRWC contains a general prohibition on discrimination which covers the “sex” or “other status” of the child or the child’s parents or legal guardians.⁷³ It also obligates States parties to take “all appropriate measures to eliminate harmful social and cultural practices affecting the welfare, dignity, normal growth and development of the child and in particular ... those customs and practices discriminatory to the child on the grounds of sex or other status”.⁷⁴ The language on non-discrimination in the ACRWC is similar to that in the United Nations Convention on the Rights of the Child, although the African Committee of Experts on the Rights and Welfare of the Child has so far not expressly addressed the issue of protecting the rights of LGBT children or their parents.

3.3.4 Customary international law and general principles of international law

Customary international law may provide additional protections for LGBT persons. Article 144 of the Namibian Constitution provides that the general rules of public international law form part of the law of Namibia. This includes (a) customary international law and (b) general principles of law recognised by the majority of domestic and international bodies. Unlike treaty obligations, customary law does not require specific acceptance by a State. Rather, the only way for a State to exempt itself from a new customary law, is to clearly and consistently object to it.⁷⁵

In Namibia, customary international law could be an important source of protection for LGBT rights in the courts. One example of how it could be relevant can be found in the case of *SMUG v Lively* in the United States. In this case, an American NGO filed a federal lawsuit on behalf of an Ugandan LGBT advocacy group, Sexual Minorities Uganda (SMUG), against American evangelist Scott Lively. The lawsuit argues that Lively’s anti-gay efforts in Uganda encouraged the persecution of homosexuals there. In preliminary proceedings, a US federal court allowed the case to proceed on the grounds that aiding and abetting a crime against humanity violates customary international law and so falls within the scope of the issues which can be decided in a US court.⁷⁶ The Court stated that, “widespread, systematic persecution

70 African Charter on the Rights and Welfare of the Child, OAU Doc. CAB/LEG/24.9/49, 11 July 1990.

71 Namibia ratified the Charter on 26 August 2004, and it became binding on Namibia on the same date (source: AU).

72 Article 44 of the Charter.

73 Article 3 of the Charter.

74 Article 21(1) of the Charter.

75 See for more details, J Crawford, *Brownlie’s Principles of Public International Law*, Oxford: Oxford University Press, 8th edition, 2012 at 23-30.

76 *SMUG v Lively*, Memorandum and Order regarding Defendant’s Motion to Dismiss, 3 C.A. No. 12-cv-30051-MAP N, 14 August 2013 at 4, 20 and 31. The case was filed under the Alien Tort Statute (28 USC §1350), which provides federal jurisdiction for “any civil action by an alien, for a tort only, committed in violation of the law of nations or a treaty of the United States”. The United States Supreme Court has affirmed the use of the Alien Tort Statute as a remedy for serious violations of international law norms that are widely accepted and clearly defined. See, for example, *Sosa v Alvarez-Machain*, 542 US 692 (2004) at 729.

of LGBTI people constitutes a crime against humanity that unquestionably violates international norms”.⁷⁷

3.3.5 Other important international documents

Non-binding international documents, such as resolutions and reports from UN bodies, can provide important evidence of developing international norms. When all or most UN members have accepted them, they can serve as evidence of customary international law.

Yogyakarta Principles

An important example in this regard is the 2007 Yogyakarta Principles on the application of international human rights law in relation to sexual orientation and gender identity.⁷⁸ These principles were developed and unanimously adopted by a distinguished group of human rights experts from diverse regions and backgrounds. The Yogyakarta Principles are not legally binding in themselves, but they are persuasive in shaping an international understanding of how human rights obligations apply to LGBT issues.

The Yogyakarta Principles reaffirm the rights of all people to equality before the law and the equal protection of the law without discrimination.⁷⁹ The Preamble observes that international human rights law affirms that all persons, regardless of sexual orientation or gender identity, are entitled to the full enjoyment of all human rights. It also affirms that the international community has recognised the right of all persons to decide freely and responsibly on matters related to their sexuality free from coercion, discrimination, and violence.

United Nations resolutions and reports

Many United Nations statements confirm that international human rights standards apply to persons of all sexual orientations and gender identities.⁸⁰ However, some States, particularly in Africa, disagree, arguing that sexual orientation and gender identity are not clear-cut grounds of prohibited discrimination.

Two important events took place in the UN Human Rights Council in 2011. First the Council issued a Joint Statement on “Ending Acts of Violence and Related Human Rights Violations Based on Sexual Orientation and Gender Identity” which was supported by 85 countries.⁸¹ In another landmark event, the Council adopted the first United Nations resolution on sexual orientation and gender identity.⁸² The resolution expresses “grave concern” about violence and discrimination based on sexual orientation and gender identity. However, no African country

⁷⁷ *SMUG v Lively*, Memorandum and Order regarding Defendant’s Motion to Dismiss, 3 C.A. No. 12-cv-30051-MAP N, 14 August 2013 at 20.

⁷⁸ See <www.yogyakartaprinciples.org>.

⁷⁹ Yogyakarta Principles, Principle 2.

⁸⁰ As discussed in previous sections of this chapter.

⁸¹ Human Rights Council, Joint Statement on Ending Acts of Violence Related Human Rights Violations Based on Sexual Orientation and Gender Identity, 22 March 2011, <www.unhcr.org/refworld/docid/4eb8f32e.html>.

⁸² Resolution 17/19, A/HRC/17/L.9/Rev.1. The text of the resolution can be found at <<http://ilga.org/ilga/static/uploads/files/2011/6/17/RESOLUTION%20L9rev1.pdf>>. There is a narrative account at <www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=11167&LangID=E>.



besides South Africa voted in favour of the resolution and about half the states which voted against it were African. (Namibia was not represented on Council at that stage.)⁸³ The main concern of the States voting against the resolution was the resolution imposed values that were not universally shared, along with the false assertion that there was no basis in international law for human rights protection for LGBT persons.⁸⁴

The adoption of this resolution paved the way for the first official United Nations report on LGBT issues, prepared by the Office of the High Commissioner for Human Rights.⁸⁵ The findings were discussed at a panel discussion in March 2012, the first time a UN body has held a formal debate on LGBT issues.⁸⁶

A 2013 global conference in Oslo, Norway, brought together over 200 delegates from 84 countries to discuss the protection of LGBT people. The conference reaffirmed the responsibility of the UN to address human rights violations on the basis of sexual orientation and gender identity, and its conclusions are expected to form the basis for a new resolution at the Human Rights Council.⁸⁷

These statements demonstrate the growing international support for and recognition of the rights of all people regardless of their sexual orientation or gender identity.

.....

“We must reject persecution of people because of their sexual orientation or gender identity ... They may not have popular or political support, but they deserve our support in safeguarding their fundamental human rights. I understand that sexual orientation and gender identity raise sensitive cultural issues. But cultural practice cannot justify any violation of human rights When our fellow human beings are persecuted because of their sexual orientation or gender identity, we must speak out. That is what I am doing here. That is my consistent position. Human rights are human rights everywhere, for everyone.”

UN Secretary-General Ban Ki-moon, Geneva, Switzerland, 25 January 2011,
Secretary-General’s remarks to the Human Rights Council,
<www.un.org/sg/statements/?nid=5051>

.....

83 It was jointly presented by South Africa and Brazil, and passed by 23 votes in favour and 19 against, along with three countries abstaining.

Countries in favour: Argentina, Belgium, Brazil, Chile, Cuba, Ecuador, France, Guatemala, Hungary, Japan, Mauritius, Mexico, Norway, Poland, Republic of Korea, Slovakia, Spain, Switzerland, Thailand, Ukraine, United Kingdom of Great Britain and Northern Ireland, United States of America, Uruguay.

Countries against: Angola, Bahrain, Bangladesh, Cameroon, Djibouti, Gabon, Ghana, Jordan, Malaysia, Maldives, Mauritania, Nigeria, Pakistan, Qatar, Republic of Moldova, Russian Federation, Saudi Arabia, Senegal, Uganda.

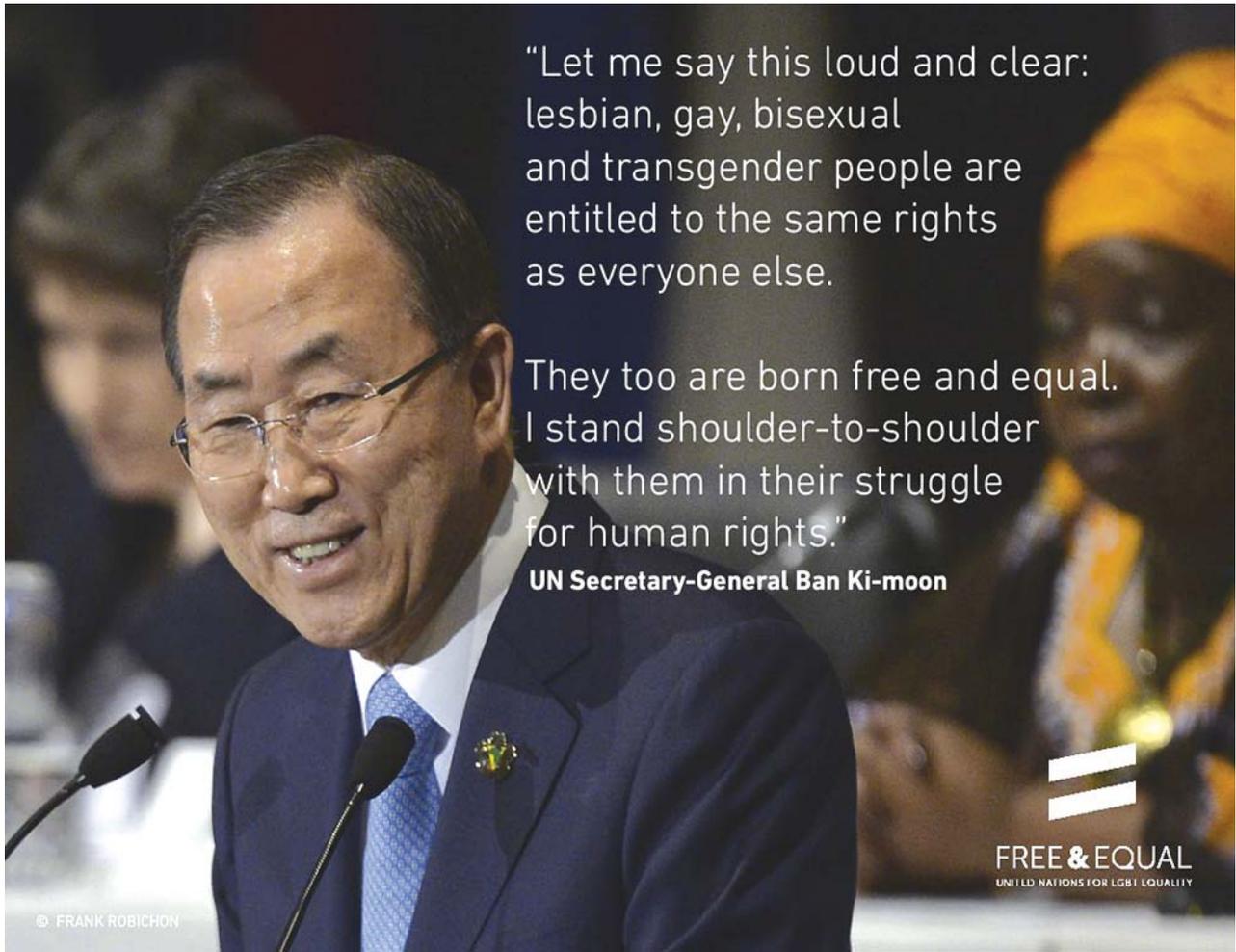
Countries abstaining: Burkina Faso, China, Zambia.

84 Amnesty International, *Making love a crime: Criminalization of same-sex conduct in Sub-Saharan Africa*, 2013 at 68.

85 Report of the United Nations High Commissioner for Human Rights, “Discriminatory Laws and Practices and Acts of Violence against Individuals Based on their Sexual Orientation and Gender Identity”, A/HRC/19/41, 17 November 2011, <www2.ohchr.org/english/bodies/hrcouncil/docs/19session/A.HRC.19.41_English.pdf>.

86 See UN Office of the High Commissioner for Human Rights, “United Nations Human Rights Council Panel on Sexual Orientation and Gender Identity”, March 2012, <www.ohchr.org/EN/Issues/Discrimination/Pages/PanelSexualOrientation.aspx>.

87 See “Co-Chairs’ Summary of Conclusions”, Human Rights, Sexual Orientation and Gender Identity, International Conference, Oslo, 15-16 April 2013, Republic of South Africa and Norwegian Ministry of Foreign Affairs, <<http://geneva.usmission.gov/wp-content/uploads/2013/06/SOGI-conference-summary-and-toolkit.pdf>>.



3.4 Conclusion

SUMMARY

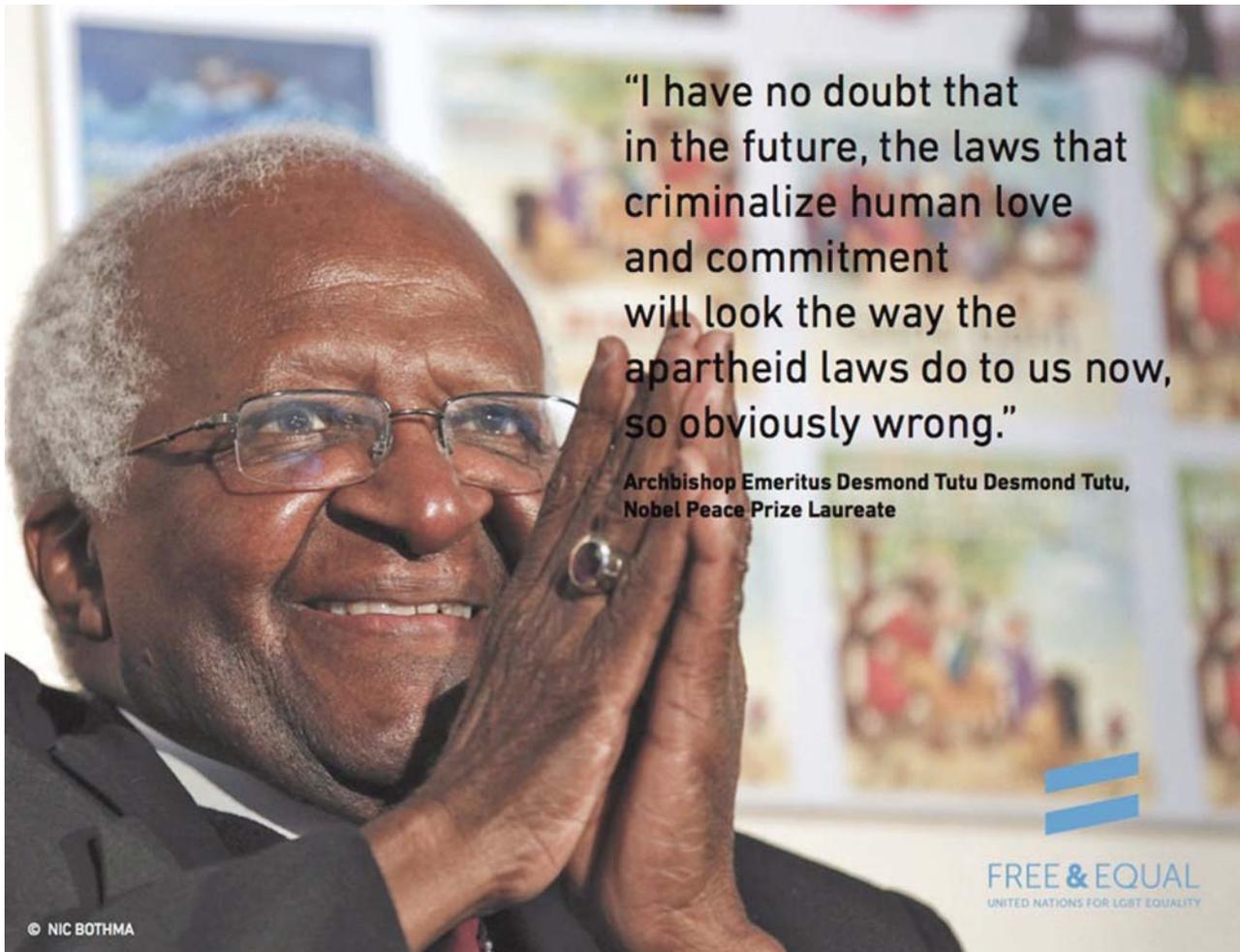
Existing international law agreements and principles, applicable to Namibia both directly and via Article 144 of the Namibian Constitution, clearly prohibit discrimination against LGBT individuals and groups in the enjoyment of their human rights.

New or special rights to protect LGBT persons are not necessary. For all the heat and complexity of the political debate about LGBT rights, from a legal perspective the issue is relatively straightforward. It requires enforcement of the universally applicable guarantee of non-discrimination and equality in the enjoyment of all rights. These principles are cross-cutting and the obligation on the part of States is immediate. Simply put, people may not be discriminated against in the enjoyment of their rights on the basis of sexual orientation or gender identity. As the High Commissioner for Human Rights has stated: “The principle of universality admits no exception. Human rights truly are the birthright of all human beings.”⁸⁸

⁸⁸ United Nations High Commissioner for Human Rights, *Born Free and Equal: Sexual Orientation and Gender Identity in International Human Rights Law*, 2012, <www.ohchr.org/Documents/Publications/BornFreeAndEqualLowRes.pdf> at 10-11.

Any State which has ratified or signed an international human rights treaty must ensure that its own legal system honours its obligation to promote, protect, and fulfil the rights in that treaty without discrimination against LGBT persons. This is the case not only with respect to laws that address sexual orientation and gender identity explicitly, but also those that apply generally to all citizens irrespective of their sexual orientation and gender identity.

In Namibia, LGBT individuals can rely on these international law agreements and principles through Article 144 of the Namibian Constitution.





Chapter 4

CRIME

4.1	Introduction	64
4.2	Sodomy and unnatural sexual offences	65
4.2.1	History and definition	65
4.2.2	Enforcement	66
4.2.3	Implications	68
4.2.4	Constitutionality of the crime of sodomy	69
4.2.5	Constitutionality of the crime of unnatural sex offences	73
4.2.6	International law	74
4.2.7	The unlikelihood of law reform	75
4.3	Public indecency, indecent assault and related statutory offences	76
4.3.1	Public indecency	76
4.3.2	Indecent assault	76
4.3.3	Related offences under the Combating of Immoral Practices Act	77
4.4	Sex work and brothels	77
4.4.1	Laws criminalising sex work	78
4.4.2	The offence of keeping a brothel	79

4.1 Introduction

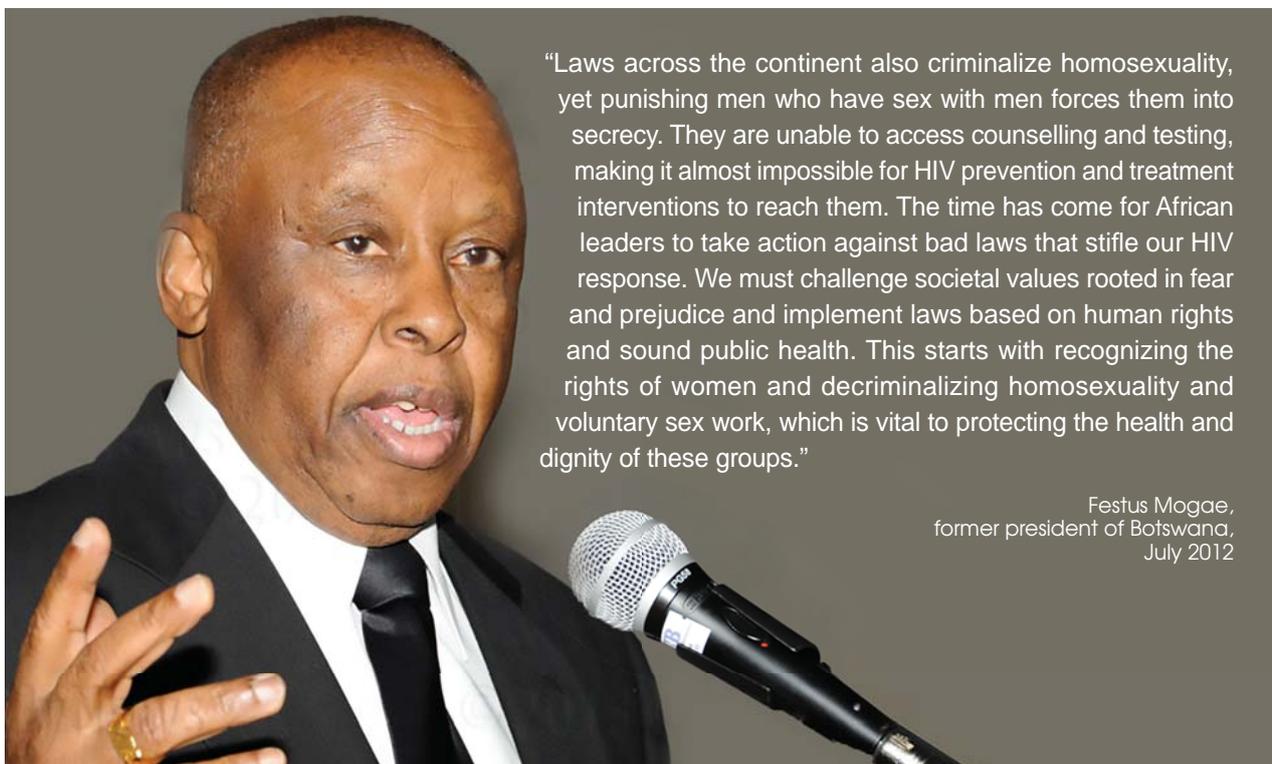
SUMMARY

Homosexuality itself is not illegal in Namibia, but sodomy and certain other sexual acts between consenting adult males are criminal offences. Even though these crimes are seldom applied in practice, their existence has a negative impact on the LGBT community.

A report on human rights commissioned by the Office of the Ombudsman recently observed that “the presence of sodomy laws on Namibian statute books makes gay men particularly susceptible to discrimination and interference with their privacy ... The continued presence of sodomy laws also mistakenly creates the impression that the practice or otherwise of homosexuality is illegal in this country and this is wrong ...”¹

The law inherited by Namibia from South Africa at independence criminalises certain sexual acts between two men. But this law does not make it illegal to be gay or lesbian, or to engage in a romantic or sexual relationship with someone of the same sex – as long as the parties do not engage in the prohibited sexual acts.

Even though the laws on sodomy and unnatural sexual offences are seldom enforced, their existence has a negative impact on the LGBT community. These laws perpetuate stigma and discrimination, create an environment of fear, encourage secrecy which undermines public health initiatives and damage the dignity of LGBT individuals.



“Laws across the continent also criminalize homosexuality, yet punishing men who have sex with men forces them into secrecy. They are unable to access counselling and testing, making it almost impossible for HIV prevention and treatment interventions to reach them. The time has come for African leaders to take action against bad laws that stifle our HIV response. We must challenge societal values rooted in fear and prejudice and implement laws based on human rights and sound public health. This starts with recognizing the rights of women and decriminalizing homosexuality and voluntary sex work, which is vital to protecting the health and dignity of these groups.”

Festus Mogae,
former president of Botswana,
July 2012

¹ Office of the Ombudsman, *2013 Baseline Study Report on Human Rights in Namibia*, 2013 <www.ombudsman.org.na/reports/special-reports/finish/4-special-reports/22-2013-baseline-study-report-on-human-rights-in-namibia> at 97.

4.2 Sodomy and unnatural sexual offences

SUMMARY

The criminal offence of “sodomy” once covered a wide range of sexual acts but now applies only to anal intercourse between males. Both the “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.

4.2.1 History and definition

The crime of “sodomy” is part of Roman-Dutch common law inherited by Namibia from South Africa at independence. Historically, the term “sodomy” included all sexual acts that were considered “unnatural” – including masturbation, oral sex and anal intercourse between persons of the same or opposite sex. The crime even extended to heterosexual intercourse between Christians and Jews.² However, today the common law crimes of “sodomy” and “unnatural sexual offences” criminalise only sexual contact between males.

In the case of sodomy, both the “active” and “passive” partners are considered equally guilty. Proof of ejaculation is not required for a conviction.³

The crime of “unnatural sexual offences”⁴ covers the following forms of sexual activity between men:

- mutual masturbation;⁵
- masturbation of one party by the other;⁶
- “sexual gratification obtained by friction between the legs of another person”;⁷
- oral sex;⁸ and
- other unspecified sexual activity.⁹

2 *S v Chikore* 1987 (2) Zimbabwe Law Reports 48 (High Court) at 50.

3 Scott Long, “Before the law: Criminalising sexual conduct in colonial and post-colonial southern African societies” in Human Rights Watch and International Gay and Lesbian Human Rights Commission, *More Than A Name: State-Sponsored Homophobia and its Consequences in Southern Africa*, 2003 at 262.

4 The leading South African case on this offence is *R v Gough and Narroway* (1926) CPD 159, which emphasises the distinction between the separate crimes of “sodomy” and “unnatural sexual offences”.

5 *S v V* 1967 (2) SA 17 (E).

6 *R v Curtis* (1926) CPD 385.

7 See, for example, *R v Gough and Narroway* (1926) CPD 159.

8 *R v K & F* (1932) EDL 71at 73-74.

9 Historically, self-masturbation was considered by some jurists to fall under the category of unnatural sexual acts. However, this is apparently no longer the case. CR Snyman, *Criminal Law*, Durban: Butterworths, 1984 at 334, citing to *R v Curtis* 1926 CPD 385 at 386.

None of these sexual acts are illegal if they take place consensually between a man and a woman, or between two women.¹⁰ It is not entirely clear why this crime does not apply to lesbian women. Perhaps sexual activity between females simply received less attention from the predominately male lawmakers of the past. According to the Namibian High Court, the reason may have been that lesbian relationships and the sexual acts typical of such relationships “never became so clearly defined and notorious as in the case of the homosexual relationship between men”.¹¹

Namibia’s Combating of Rape Act covers a wide range of intimate sexual contact in circumstances that involve force or coercion, including oral sex, anal sex and genital stimulation between people of the same or different sexes. These forms of sexual contact also constitute rape if they are committed with a child below age of 16.¹² So the common law crimes of sodomy and “unnatural sexual offences” are now relevant only to sexual acts between consenting adult men.

4.2.2 Enforcement

SUMMARY

The laws prohibiting sodomy and other unnatural sexual acts between men are seldom enforced in respect of acts between consenting adults. Statistics from the Namibian Police appear to disclose only 4 to 5 arrests for sodomy over the ten-year period from 2003 to 2012.

There is a legal doctrine whereby a crime can be “abrogated by disuse” – meaning that it loses its force if it is not applied in practice over a long period. However, it would probably be impossible to argue that the crimes of sodomy and unnatural sexual offences have been abrogated by disuse in Namibia since there are still occasional arrests for these crimes, and since government officials, Parliamentarians and members of the community still speak of the crimes as being in existence.

The laws prohibiting sodomy and other unnatural sexual acts between males are rarely if ever enforced in cases where there are consenting adults.

Statistics from the Namibian Police indicate that there were only 4 to 5 arrests for sodomy over the ten-year period between 2003-2012. The police crime statistics provided to the Legal Assistance Centre do not list sodomy separately, but include four categories of sexual offences which could involve co-operating parties:

- “illicit carnal intercourse where there is a co-operating party”;
- “illicit carnal intercourse (no co-operating party) / carnal connection with girls under age of consent and female imbeciles”;
- “other indecent, immoral and sexual offence NEM [“not elsewhere mentioned] eg soliciting for immoral purpose”;
- “other unnatural sexual offence”.

¹⁰ See, for example, the discussion of this issue in *S v M* 1979 (2) SA 406 (RA). Commentators are not in full agreement on this point. The Namibian High Court has taken the view that “the sexual act between lesbian females has never been criminalized in South African and Namibian common law”. *Chairperson of the Immigration Selection Board v Frank and Another* 2001 NR 107 (SC) at 154. See also *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1999 (1) SA 6 (CC) at 20-21.

¹¹ *Chairperson of the Immigration Selection Board v Frank and Another* 2001 NR 107 (SC) at 154.

¹² The Combating of Rape Act 8 of 2000 protects children below age of 14, with the Combating of Immoral Practices Act 21 of 1980 providing similar protection for children up to age 16 (section 14).

This structure is somewhat confusing, but it seems that only the first category involves sexual acts between consenting adults – and not all of these crimes could have been sodomy since some involved women.

ILLICIT CARNAL INTERCOURSE WHERE THERE IS A CO-OPERATING PARTY									
Year	Perpetrators					Victims			
	Total Arrests	Adults		Juveniles		Adults		Juveniles	
		M	F	M	F	M	F	M	F
2003									
2004	2	1				1			1
2005	2	1				1			
2006									
2007									
2008									
2009	3	1			1			1	1
2010									
2011	1								1
2012									
Total	8	3			1			1	3

Source: Extracted from statistics provided by the Namibian Police

As the table above indicates, there were a total of eight arrests for “illicit carnal intercourse where there is a co-operating party” during the years 2003-2012. By subtracting the three cases involving female victims, this leaves a maximum of five arrests which *might* have been for sodomy. There were only two cases which clearly involved adult males as both perpetrator and “victim”, so the number of sodomy arrests could have been as low as four arrests for two separate incidents of sodomy during the period covered (assuming that both parties who engaged in the sodomy were arrested in each case). We can conclude that the police statistics disclose a maximum of four to five arrests for sodomy between consenting adult males over the ten-year period between 2003-2012.

There are no reported court cases involving prosecutions for consensual sodomy or unnatural sexual offences between adult males since Namibian independence.¹³ However, it is clear that the crime is still occasionally applied in practice. For example, in 2005 the Legal Assistance Centre took on the case of two men who were arrested after being discovered committing a sexual act in a toilet in a private bar. They were charged with the crime of sodomy, in addition to other charges, and the Legal Assistance Centre intended to challenge the constitutionality of this crime on their behalf. However, before the case moved forward, the prosecutor withdrew the sodomy charges against the men.¹⁴

There is a legal principle called “abrogation by disuse” where a crime loses its force if it is not used for a long period of time. However, the lack of reported sodomy cases does not indicate that the crime has been abrogated by disuse in Namibia. This is because (1) the absence of

13 We could locate only one case involving the common-law crime of sodomy in post-independence Namibia, *S v Shikongo* (CA 83.98) [2000] NAHC 7 (20 March 2000). This case involved the sodomy of a 7-year-old and a 12-year-old by a 16-year-old. At the time when the crime was committed, the Combating of Rape Act had not yet been enacted, and neither the common-law crime of rape nor the provision on “statutory rape” in the Combating of Immoral Practice Act covered males. As a result, the only crime available to the prosecution was the common-law crime of sodomy.

14 This case could account for the two arrests recorded for 2005 in the police statistics discussed above.

reported prosecutions is not sufficient to show disuse since there may have been prosecutions in lower courts where decisions are not reported, and (2) the attitude of the community must be considered.¹⁵

In Namibia, there have been relatively recent arrests for sodomy, and government officials speak about this crime as being still in effect.¹⁶ This makes it unlikely that the crimes of sodomy and unnatural sexual offences have been abrogated by disuse in Namibia.

4.2.3 Implications

SUMMARY

Despite their infrequent application, the very existence of the laws on sodomy and unnatural sexual offences violates the dignity of the individuals covered by these laws and contributes to a climate of disapproval and discrimination.

The Criminal Procedure Act groups sodomy together with a list of other crimes for which police are authorised to make an arrest without a warrant or to use of deadly force in the course of the arrest. In terms of the Immigration Control Act, a non-Namibian convicted of sodomy in Namibia or of any similar offence in another country is not allowed to enter or remain in Namibia – and a permanent resident of Namibia who is convicted of sodomy may lose permanent residence status.

The prohibition on sodomy has been cited by prison officials in Namibia as a justification for refusing to provide condoms to prisoners to prevent the spread of HIV. The criminalisation of homosexual acts also opens the door to blackmail – which has been reported as a problem by 21% of men who have sex with men in Namibian survey results published in 2009. It reinforces general public prejudice and can contribute to feelings of anxiety and guilt amongst gay men.

Even though the laws on sodomy and unnatural sexual offences are rarely applied in practise, the very existence of such laws violates the dignity of the individuals covered by the laws and serves as an unspoken background threat which contributes to a climate of disapproval and discrimination.

The Criminal Procedure Act groups sodomy (but not unnatural sexual offences) together with other “Schedule 1” crimes – including treason, murder, rape and assault where a dangerous wound is inflicted. When someone is suspected of committing a Schedule 1 crime, the police are authorised to make an arrest without a warrant,¹⁷ to use deadly force¹⁸ and to take fingerprints, palm-prints or foot-prints.¹⁹ The application of these provisions to consensual sexual acts between adults is highly insulting, and so disproportionate that it is probably unconstitutional.

¹⁵ See *Hoho v The State* [2008] ZASCA 98; 2009 (1) SACR 276 (SCA), which found that criminal defamation was not abrogated by disuse despite the dearth of reported cases on it. See also *United Greyhound Racing and Breeders Society v Vrystaat Dobbel en Wedren Raad en Andere* 2003 (2) SA 269 (O) at 270H-271B, which held that the Prohibition of Dog Race-meetings Ordinance 11 of 1976 of the Orange Free State had not been abrogated by disuse.

¹⁶ See, for example, the discussion of the Namibian government’s response to the Universal Periodic Review below at section 4.2.6.

¹⁷ Criminal Procedure Act 51 of 1977, section 37(1)(a)(iv).

¹⁸ *Id.*, section 49(2).

¹⁹ *Id.*, section 37(1)(a)(iv). This applies to anyone who is served with a summons for a Schedule 1 crime.

In terms of the Immigration Control Act, non-Namibians convicted of sodomy in Namibia, or of any similar offence in other countries, are prohibited immigrants – meaning that they are not allowed to enter or remain in Namibia.²⁰ A permanent resident of Namibia may lose permanent residence status if convicted of sodomy.²¹

There may be some cold comfort in the fact that sodomy is a specified offence for the purposes of the Legal Aid Act, meaning that legal aid will likely be made available to an unrepresented accused who is charged with sodomy.²²

In prisons, the crime of sodomy is cited by prison officials as a justification for refusing to provide condoms to prisoners to prevent the spread of HIV²³ – on the unlikely theory that this could make them accessories to crime.

The sodomy law also makes gay men vulnerable to blackmail. A survey of men who have sex with men in Malawi, Namibia, and Botswana, published in 2009, found that blackmail was one of the most prevalent problems, with 18% of respondents in Malawi, 21.3% of respondents in Namibia, and 26.5% of respondents in Botswana reporting incidents of blackmail.²⁴

More broadly, the existence of laws criminalising consensual sodomy entrenches stigma and encourages discrimination against gay men.²⁵ According to the European Court of Human Rights, criminal sanctions against homosexual acts “reinforce the misapprehension and general prejudice of the public and increase the anxiety and guilt feelings of homosexuals”.²⁶

4.2.4 Constitutionality of the crime of sodomy

SUMMARY

It is possible that the laws against consensual sodomy and other sexual acts violate the rights to equality, privacy and dignity in the Namibian Constitution. Constitutional challenges to sodomy laws in other jurisdictions have had differing outcomes on these issues, with some focusing on the need to protect minority rights and others interpreting constitutional rights through the lens of their countries’ sexual conservatism.

20 Immigration Control Act 7 of 1993, sections 7-10 and Schedule 1; sections 39-50.

21 Id, section 26(5). This will be the case if the person in question has not yet acquired a domicile in Namibia in terms of the Act – which for a permanent resident requires two years of continuous residence in Namibia after being granted permanent resident status. Id, section 22.

22 Legal Aid Act 29 of 1990, section 9 read with Government Notice 106 of 1990 (Government Gazette 273 of 8 October 1991). The list of specified offences also includes bestiality.

23 See *Struggle to Survive: A Report on HIV/AIDS and Prisoners’ Rights In Namibia*, Aids Law Unit of the Legal Assistance Centre, Namibia and the University of Wyoming, 2008, <www.lac.org.na/projects/alu/Pdf/struggletosurvive.pdf> at 32-ff. This report calls for the repeal of the sodomy laws.

24 Stefan Baral, et al, “HIV Prevalence, Risks for HIV Infection, and Human Rights amongst Men Who Have Sex with Men (MSM) in Malawi, Namibia, and Botswana”, *Public Library of Science*, April 2009, <www.opensocietyfoundations.org/sites/default/files/msmresearch_20090428.pdf> and Heather Fay, et al, “Stigma, Health Care Access, and HIV Knowledge Among Men Who Have Sex With Men in Malawi, Namibia, and Botswana”, *Aids Behaviour*, August 2011, <www.jhsph.edu/research/centers-and-institutes/center-for-public-health-and-human-rights/_pdf/Beyrer_StigmaandHealth_MSMinMalawiNamibiaBotswana_AIDSBehav_Dec2010.pdf>.

See also International Gay and Lesbian Human Rights Commission, “Nowhere to Turn: Blackmail and Extortion of LGBT People in Sub-Saharan Africa”, 2011, <www.iglhrc.org/binary-data/ATTACHMENT/file/000/000/484-1.pdf>.

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

26 *Norris v Republic of Ireland* [1988] ECHR 22; (1991) 13 EHRR 186 at para 21, quoting with approval the finding of an Irish judge.

The laws against consensual sodomy and other consensual sexual acts may be unconstitutional. These laws may violate the right to equality in the Namibian Constitution because they treat heterosexual persons differently from homosexual persons, and men differently from women by criminalising homosexual acts between men but not homosexual acts between women. They may violate the right to privacy, since it would be difficult for police to enforce such laws without interfering with privacy rights. They may violate the right to dignity because they treat all gay men as criminals, thereby subjecting them to stigma and prejudice because of their very identity.

While Namibia has not yet considered the constitutionality of the crime of sodomy, constitutional challenges to sodomy laws in other African jurisdictions have had differing outcomes.

.....

“In Namibia, this Court had to date not considered the constitutionality of the crime of sodomy and there is consequently no decision decriminalizing the crime. The reason for the Courts not having considered the issue in Namibia is because unlike South Africa, the issue has not been pertinently and properly raised by litigants before Namibian Courts.”

Chairperson of the Immigration Selection Board v Frank and Another 2001 NR 107 (SC) at 150H-I

.....

South Africa

In 1998, the South African Constitutional Court ruled that a law criminalising sodomy violated the rights to equality, dignity and privacy under the South African Constitution.²⁷ The Court found that the law’s purpose was “to criminalise private conduct of consenting adults which causes no harm to anyone else” simply because such conduct “fails to conform with the moral or religious views of a section of society”.²⁸ In the Court’s view, criminalising sodomy has a grave effect on the rights and interests of gay men and deeply impairs their fundamental dignity.

The South African Constitution, unlike the Namibian Constitution, specifically prohibits unfair discrimination based on sexual orientation. On the issue of equality, the Court found that the discriminatory law on sodomy reinforces social prejudices against gay men and increases “the negative effects of such prejudices on their lives”.²⁹ As one justice elaborated in a concurring opinion, equality at the very least “affirms that difference should not be the basis for exclusion, marginalisation, stigma and punishment” and at best “it celebrates the vitality that difference brings to any society”.³⁰

Even more pertinently for Namibia, the South African Court also found that the sodomy law violated the constitutional rights to dignity and privacy – rights which are similarly protected by the Namibian Constitution. On the issue of dignity, the Court noted that at the very least “the constitutional protection of dignity requires us to acknowledge the value and worth of all individuals as members of our society”.³¹ The law infringes dignity by treating all gay men as criminals, placing them “at risk of arrest, prosecution and conviction of the offence of sodomy simply because they seek to engage in sexual conduct which is part of their experience of being

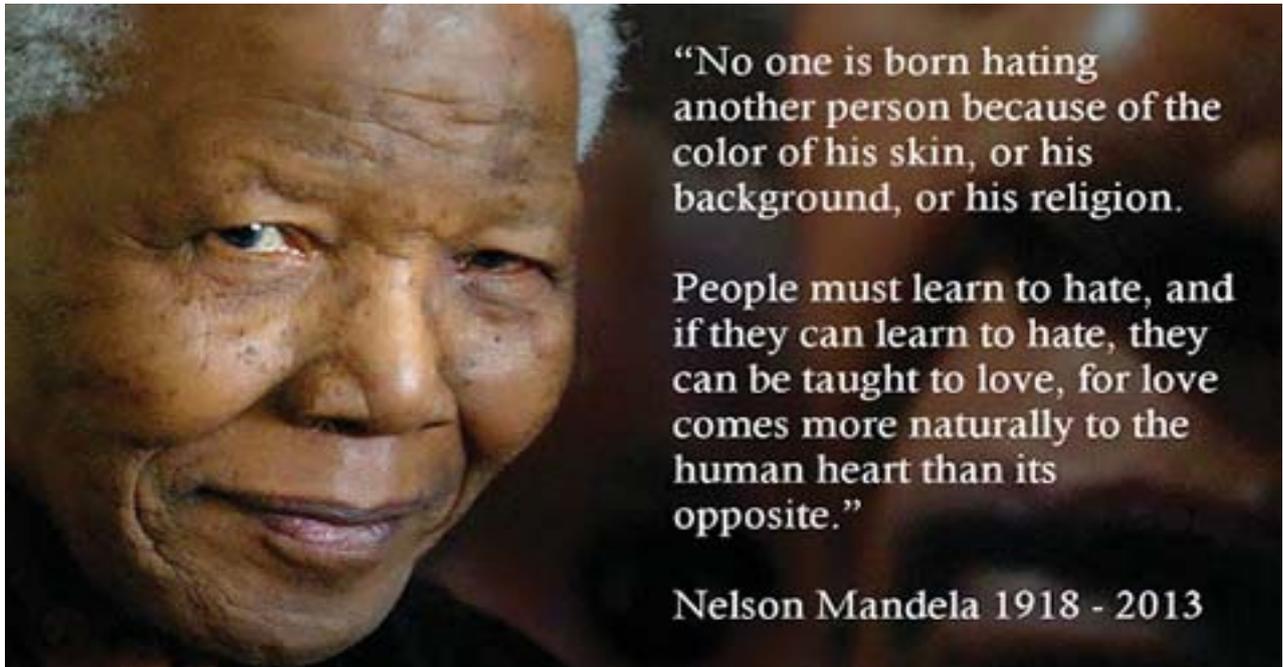
27 *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1999 (1) SA 6 (CC).

28 *Id* at para 26.

29 *Id* at para 23.

30 *Id* at para 132.

31 *Id* at para 28.



human”.³² With respect to privacy, the Court stated that the way in which people express their sexuality, provided that they act consensually and without harming others, is at the core of the concept of privacy.³³

The Court also noted that the impact of the sodomy law was similar to that of apartheid laws which criminalised sexual intercourse between persons of different races:

Just as apartheid legislation rendered the lives of couples of different racial groups perpetually at risk, the sodomy offence builds insecurity and vulnerability into the daily lives of gay men. There can be no doubt that the existence of a law which punishes a form of sexual expression for gay men degrades and devalues gay men in our broader society.³⁴

Much of the reasoning in this case could be equally applicable in Namibia.

In some ways, the argument of unconstitutionality might be easier to make in Namibia than in South Africa. The South African Constitution makes the rights to dignity and equality subject to limitations which are “reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom”.³⁵ But the Namibian Constitution does not make provision for any limitations on these rights. This means that a Namibian court which found that the criminalisation of sodomy infringes the rights to equality or dignity would have to conclude that the law is unconstitutional.³⁶

³² Ibid.

³³ Id at para 32.

³⁴ Ibid.

³⁵ South Africa Constitution, Article 36(1). The Constitutional Court found that there was no valid purpose for the sodomy law, which was aimed only at enforcing “the private moral views of a section of the community”. Because there was no legitimate purpose to weigh against the significant limitation of constitutional rights, the Court concluded that the law’s infringement of constitutional rights could not be justified. *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1999 (1) SA 6 (CC) at 57.

³⁶ The constitutions of both countries provide for certain limitations on the right to privacy.

Zimbabwe

In 2000, the Zimbabwe Supreme Court considered a challenge to the constitutionality of the crime of sodomy in the case of *S v Banana*.³⁷

As a starting point, a majority of the Court found that constitutional interpretation on this issue must be “guided by Zimbabwe’s conservatism in sexual matters”.³⁸

The majority found that Zimbabwe’s constitutional provision on privacy is limited by its wording to protection against arbitrary search or entry and was therefore not relevant to the crime of sodomy.³⁹

On the issue of gender discrimination, the majority found that the crime does not really distinguish between men and women so much as between heterosexual men and homosexual men – which does not violate the Zimbabwean Constitution since there is no specific prohibition on sexual orientation discrimination. However, the majority compared sodomy with anal intercourse between men and women, rather than with lesbian sexual acts between two women which would have been more apt.⁴⁰

In any event, the majority went on to consider whether, if the crime did discriminate on the basis of gender, this discrimination could be shown to be reasonably justifiable in a democratic society. They found that it was justifiable, noting that consensual sodomy is still a crime in other countries in the world and asserting that it was not the Court’s role “to modernise the social mores” of society.⁴¹ The majority’s main argument was that the law was an expression of the conservative values of a majority of Zimbabwean society.⁴² This approach is worrying since the majority of society is represented in a democratically-elected legislature, while minority groups – such as the LGBT community – must rely on the Constitution to protect rights that they are unlikely to be able to assert through the political process.

Two dissenting justices in the *Banana* case took the view that Zimbabwe’s crime of sodomy was unconstitutional. They found that the criminalisation of sexual activities between gay men, but not lesbian women, discriminated on the basis of gender. They found this discrimination unjustifiable, because it was doubtful that the law had a valid objective – and, even if it did, this is far outweighed by “the harmful and prejudicial impact it has on gay men”.

Moreover, depriving such persons of the right to choose for themselves how to conduct their intimate relationships poses a greater threat to the fabric of society as a whole than tolerance and understanding of non-conformity could ever do.⁴³

37 *S v Banana* 2000 (3) SA 885 (ZS).

38 *Id* at 933 (*per* McNally JA)

39 *Id* at 933-934. Unlike the Namibian Constitution, the Zimbabwean Constitution as it stood at the time of the judgment did not use the word “privacy” at all, but provided in Article 17 for “protection against arbitrary search or entry”.

40 *Id* at 934-935.

41 *Id* at 935.

42 *Id* at 933: “From the point of view of law reform, it cannot be said that public opinion has so changed and developed in Zimbabwe that the Courts must yield to that new perception and declare the old law obsolete.”

43 *Id* at 910 (*per* Gubbay, CJ, dissenting); obvious spelling error corrected.

Botswana

The Botswana Court of Appeal considered the constitutionality of similar criminal laws in Botswana in the 2003 case of *Kanane v the State*.⁴⁴ The Court ruled that the criminal statute penalising acts of “gross indecency” between men was unconstitutional (at least prior to its amendment to make it gender-neutral), but upheld the law penalising “carnal knowledge of any person against the order of nature”. The complainant argued that both laws interfered with the constitutional rights to non-discrimination, freedom of conscience, expression privacy, assembly or association.

The Court concluded that “there is no evidence that the approach and attitude of society in Botswana to the question of homosexuality and to homosexual practices by gay men and women requires a decriminalisation of those practices, even to the extent of consensual acts by adult males in private”.⁴⁵ It found that gay men and lesbian women are not groups which require protection under the Constitution.⁴⁶ The Court also noted that “while the courts can perhaps not be dictated to by public opinion”, they would be “loath to fly in the face” of it.⁴⁷

4.2.5 Constitutionality of the crime of unnatural sex offences

SUMMARY

In 1998, the High Court of Namibia found the phrase “unnatural sexual acts” unconstitutional as used in a statute forbidding the manufacture and sale of articles intended to be used “to perform an unnatural sexual act”. The Court found the reference too vague to be a reasonable restriction on the constitutional right to carry on a trade or business. In light of this holding, it is probable that a constitutional challenge to the crime of “unnatural sexual offences” would be successful.

In the 1998 *Fantasy Enterprises* case, the High Court of Namibia considered the meaning of “unnatural sexual acts”.⁴⁸ The Combating of Immoral Practice Act made it a criminal offence to manufacture, sell or supply “any article which is intended to be used to perform an unnatural sexual act”.⁴⁹ This provision was challenged by the owners of a number of sex shops that had been raided by the police. The sex shops argued, amongst other things, that this statutory provision was unconstitutional because it interfered with their freedom to carry on any trade or business under the Namibian Constitution.⁵⁰ After considering the uncertain meaning of “an unnatural sexual act”, the Court found that the offence was unconstitutionally vague because it did not indicate precisely what was prohibited. It was therefore an unreasonable restriction of the constitutional right in question.⁵¹

In light of this case, it is probable that the crime of “unnatural sexual offences” would similarly be found unconstitutional if challenged on the basis of its vagueness. It could be shown that the

44 *Kanane v the State* 2003 (2) BCLR 67 (BA) (per Tebbutt JP).

45 *Id* at 8.

46 *Id* at 9.

47 *Id* at 8.

48 *Fantasy Enterprises CC t/a Hustler the Shop v Minister of Home Affairs and Another; Nasilowski & Another v Minister of Justice & Others* 1998 NR 96 (HC) (per Maritz AJ).

49 Combating of Immoral Practice Act 21 of 1980, section 17(1).

50 Namibian Constitution, Article 21(1)(j).

51 *Fantasy Enterprises* at 107-109 (citations omitted and emphasis added).

crime in question unreasonably infringes a constitutional right which is subject to limitation (such as the right to privacy) because it is too imprecise to constitute a justifiable limitation. Alternatively, it might be possible to argue that the crime is unconstitutionally vague because it is insufficiently precise to be the basis for criminal sanctions.

4.2.6 International law

SUMMARY

Laws criminalising sodomy in various countries have been ruled to be violations of the right to privacy in the International Covenant on Civil and Political Rights (to which Namibia is a party) and the European Convention on Human Rights.

International law recognises that laws criminalising homosexuality may violate the right to non-discrimination, the right to privacy, the right to be free from arbitrary detention and – in countries where the death penalty is imposed for sexual conduct – the right to life.⁵² These rights are protected by the Universal Declaration on Human Rights, the International Covenant on Civil and Political Rights (ICCPR) and the African Charter on Human and Peoples’ Rights.

International treaty monitoring bodies have consistently ruled that criminalising homosexuality interferes with protected rights. For example, in the 1992 case of *Toonen v Australia*,⁵³ the Human Rights Committee which oversees implementation of the ICCPR found that a Tasmanian law criminalising homosexual activity violated the right to privacy protected by the ICCPR. The Court found, contrary to the argument asserted by the State, that statutes criminalising homosexuality do not help prevent the spread of HIV/AIDS but rather “tend to impede public health programs by driving underground many of the people at the risk of infection”.⁵⁴

In several cases, the European Court of Human Rights has also required States to repeal criminal laws which cover consensual sodomy. For example, in the 1981 case *Dudgeon v The United Kingdom*,⁵⁵ the European Court of Human Rights held that a similar law constituted a “continuing interference with the applicant’s right to respect for his private life (which includes his sexual life)” and thus violated the European Convention on Human Rights.⁵⁶

.....

“To deny people their human rights is to challenge their very humanity.”

Nelson Mandela

.....

52 United Nations High Commissioner for Human Rights, *Born Free and Equal: Sexual Orientation and Gender Identity in International Human Rights Law*, 2012, <www.ohchr.org/Documents/Publications/BornFreeAndEqualLowRes.pdf> at 29.

53 *Toonen v Australia*, Merits, Communication No 488/1992, UN Doc CCPR/C/50/D/488/1992, (1994) 1-3 IHRR 97, IHR 2290 (UNHRC 1994), 31 March 1994.

54 The *Toonen* ruling is of particular relevance to Namibia given that Namibia became a party to the International Covenant on Civil and Political Rights after this judgment had been handed down. Namibia acceded to the Covenant on 28 November 1994 and it became binding on Namibia on 28 February 1995 (United Nations Treaty Collection). The *Toonen* judgment is dated 31 March 1994.

55 *Dudgeon v The United Kingdom*, 45 Eur. Ct. H.R. (ser. A) (1981).

56 See also *Norris v Republic of Ireland*, 142 Eur. Ct. H.R. (ser. A) (1988); *Modinos v Cyprus*, 259 Eur. Ct. H.R. (ser. A) (1993).

.....
“Although members of the public who regard homosexuality as immoral may be shocked, offended or disturbed by the commission by others of private homosexual acts, this cannot on its own warrant the application of penal sanctions when it is consenting adults alone who are involved.”

Dudgeon v The United Kingdom, 45 Eur. Ct. H.R. (ser. A) (1981)

.....

4.2.7 The unlikelihood of law reform

SUMMARY

Most countries in the world do not criminalise sodomy. However, legislative repeal of the Namibian laws criminalising consensual sexual acts between men appears unlikely.

Most countries do not criminalise sodomy. As of May 2013, less than half of the United Nations Member States criminalised consensual same-sex sexual acts between adults: such acts were crimes in 76 nations, but *not* criminalised in 114 nations.⁵⁷

However, it appears unlikely that the Namibian Parliament will repeal the laws criminalising consensual sexual acts between men. This issue was raised in 2011 in Namibia’s Universal Periodic Review. This is a United Nations process where a State’s human rights record is reviewed by other UN Member States. In the recommendations arising from this review, there were calls for the Namibian government to de-criminalise consensual homosexual activities. However, these recommendations were the only ones that “did not enjoy the support of Namibia”.⁵⁸

This means that a challenge to the constitutionality of the crimes of sodomy and unnatural sexual offences is probably the most promising avenue for change.

In contrast to the official government position, a recent report on human rights commissioned by the Office of the Ombudsman recommended the repeal of the crime of sodomy.⁵⁹

.....

“The continued existence of the common law crime of sodomy is by its very nature and content discriminatory.”

Office of the Ombudsman, *2013 Baseline Study Report on Human Rights in Namibia*, 2013 at 96

.....

57 International Lesbian Gay Bisexual Trans and Intersex Association, *State Sponsored Homophobia*, <http://old.ilga.org/Statehomophobia/ILGA_State_Sponsored_Homophobia_2013.pdf> at 5.

58 *Report of the Working Group on the Universal Periodic Review: Namibia*, Human Rights Council, Seventeenth Session, 24 March 2011, A/HRC/17/14, <www.upr-info.org/IMG/pdf/a_hrc_17_14_namibia_e.pdf> at para 99.

59 Office of the Ombudsman, *2013 Baseline Study Report on Human Rights in Namibia*, 2013 at 107.

4.3 Public indecency, indecent assault and related statutory offences

4.3.1 Public indecency

SUMMARY

The crime of public indecency is unlawfully, intentionally and publicly committing an act which tends to deprave the morals of others or which outrages the public's sense of decency and propriety – such as by indecent exposure of the body or by publicly engaging in sexual acts. It applies equally to homosexual and heterosexual sexual acts.

The common-law crime of public indecency applies to unlawfully, intentionally and publicly committing an act which tends to deprave the morals of other or which outrages the public's sense of decency and propriety.⁶⁰ This crime typically involves improper exposure of the body, or publicly engaging in sexual acts.⁶¹ Obscene literature or performances can also be prosecuted under this crime, and even the public use of obscene or indecent language could fit under this umbrella.⁶²

“Publicly” does not mean the same thing as “in a public place”, but includes any situation where the person in question has been (or may have been) visible to members of the public (even if they only saw that person concerned from the windows of their homes or offices).⁶³

This crime does not have any particular bias against either heterosexual or homosexual forms of indecency. However, any crimes which are based on the protection of “morality” could be misused against the LGBT community. There could be attempts to treat manifestations of homosexuality as being inherently “indecent”, even in the absence of nudity or sexual acts in public. However, fortunately, we have not located any cases of this kind.

4.3.2 Indecent assault

SUMMARY

Indecent assault is an assault of an indecent character, such as physically touching the genitals or other private parts of another person's body, or attempting to touch someone in this way, even though clothes. This crime has been applied similarly in both heterosexual and homosexual contexts.

Indecent assault is an assault of an indecent character, which is understood to mean physically touching the genitals or other private parts of another person's body, or attempting to touch

⁶⁰ See, for example, Milton, *South African Criminal Law and Procedure, 2nd ed*, Cape Town: Juta, 1982 at 284.

⁶¹ CR Snyman, *Criminal Law*, Durban: Butterworths, 1984 at 331.

⁶² Milton, *South African Criminal Law and Procedure, 2nd ed*, Cape Town: Juta, 1982 at 289.

⁶³ *R v B* 1955 (3) SA 494 (D).

someone in this way, even though clothes. Because this offence interprets indecency in a physical sense, it does not seem to have given rise to any bias in its application; it has been applied similarly in both heterosexual and homosexual contexts.⁶⁴

4.3.3 Offences under the Combating of Immoral Practices Act

SUMMARY

The Combating of Immoral Practices Act is aimed primarily at prostitution, but it contains several broader criminal offences: making proposals to any other person for “immoral purposes” in a public place; being in public view in an indecent dress or manner; or committing any “immoral act” with another person in public. There is no evidence that these offences are being applied any differently to heterosexual and homosexual situations.

The Combating of Immoral Practices Act is aimed primarily at prostitution, but it contains several criminal offences which could be applied more broadly. It is a crime where a person –

- “entices, solicits or importunes or makes any proposals to any other person for immoral purposes” in any public street or other public place;⁶⁵
- “wilfully and openly exhibits himself in an indecent dress or manner at any door or window within view of any public street or place or in any place to which the public have access” (a crime which overlaps with public indecency);⁶⁶
- commits any “immoral act” with another person in public.⁶⁷

These crimes appear to apply equally to males and females in any combination. However, there is a danger in an environment which is intolerant of homosexuality that concepts like “indecency”, “immoral purposes” and “immoral acts” could be selectively applied to LGBT individuals. Fortunately, we have not to date encountered any evidence of biased enforcement of these provisions in practice, nor any cases which applied these offences in relation to homosexual activity between consenting adults.

4.4 Sex work and brothels

SUMMARY

The criminalisation of sex work has a negative impact on sex workers regardless of their sexual orientation or gender identity. This paper does not address that topic, but rather examines the current laws on sex work for any bias against LGBT sex workers and clients.

64 See, for example, *Rex v S* 1950 (2) SA 350 (SR), where one male juvenile touched the private parts of another male juvenile through his clothing. The accused was convicted of an unnatural offence, but the appeal court found that the correct charge should have been indecent assault.

65 Combating of Immoral Practice Act 21 of 1980, section 7(a).

66 Id, section 7(b).

67 Id, section 8.

The problems inherent in the criminalisation of sex work have ramifications for heterosexual, homosexual and transgender sex workers. This issue is a large topic in its own right and is not discussed here.⁶⁸ This section instead examines how the current criminal laws relating to sex work and brothels could have a disproportionate or unfair impact on the LGBT population.

4.4.1 Laws criminalising sex work

SUMMARY

Namibian law does not criminalise the exchange of sexual acts for reward, but a number of the activities surrounding sex work are criminalised by the Combating of Immoral Practices Act. The provisions of the Act aimed at sex workers are gender-neutral, with the sex of the sex worker and the client being legally irrelevant.

However, the criminalisation of sodomy and “unnatural sexual offences” means that the sexual acts committed by a male client with a male sex worker are often illegal in themselves, whereas this would not be the case for a male client and a female sex worker – giving police an additional justification for abuse and harassment of male and transgender sex workers.

Namibian law does not criminalise the actual act of engaging in sexual acts for reward, but a number of the activities surrounding sex work are criminalised by the Combating of Immoral Practices Act.⁶⁹ The Act is aimed primarily at third parties (“pimps” and brothel-owners) and at public manifestations of prostitution (such as public solicitation).

Some terms used in this Act could cover homosexual sexual acts (“sexual act”, “immoral act” and “proposals ... for immoral purposes”). Other provisions use the term “unlawful carnal intercourse”, which seems to refer primarily to heterosexual intercourse which takes place outside marriage but could also include “all such sexual interaction as may take place between persons who are not partners in a civil or customary union”.⁷⁰

There are a number of offences which can be committed by sex workers, but few which could possibly be applied to clients – and clients are never charged under the law in practice.

The provisions of the Act aimed at sex workers are gender-neutral, with the sex of the sex worker and the client being irrelevant to the application of the law. However, because sodomy and “unnatural sexual offences” are illegal, the sexual acts committed by a male client with a male sex worker are often illegal in themselves, whereas this would not be the case for a male client and a female sex worker. As one regional study has pointed out, “Laws in ... Namibia that prohibit homosexual acts affect gay and trans sex workers and provide the police with additional rationale to abuse, harass, and arrest them.”⁷¹

68 This topic is addressed, for example, in Legal Assistance Centre, “*Whose Body Is It?: Commercial Sex Work and the Law in Namibia*”, 2002.

69 Combating of Immoral Practice Act 21 of 1980.

70 *Hendricks & Others v Attorney General, Namibia & Others* 2002 NR 353 (HC) at 363. The Court did not need to decide on the meaning of this term in every provision in the Act in which it is used.

71 Jayne Arnott and Anna-Louise Crago, *Rights Not Rescue: A Report on Female, Male, and Trans Sex Workers' Human Rights in Botswana, Namibia, and South Africa*, Open Society Initiative for Southern Africa, Sexual Health and Rights Project, June 2009 at 22.

Another aspect of gender and heterosexual bias is that where interventions targeted at sex workers exist, these are often confined to female sex workers who have sex with male clients with none targeting male or transgender sex workers.⁷²

Particular problems faced by transgender sex workers

Trans sex workers reported that they often faced significant police violence for being trans. Police also devised methods to humiliate trans people such as forcing them to strip naked in public. Martin, a trans woman sex worker in Windhoek, Namibia, shared her recollections of finding a friend, Carolyn, another trans sex worker, badly beaten by the police. “They had ripped her clothes off,” she said. “It aggravates them more that you are a man so they give you a heavier beating.”

In general, trans sex workers, because they are perceived as having nonconformist gender identities, can sometimes be more visible to police than male or female sex workers. Police are known to harass trans people as they go about their daily lives. Jeannette, a trans woman from Windhoek, reported that, “Even if I just walked to town, I would get picked up by the police and had to pay 450 Namibian dollars or do four and a half months in jail.”

If detained, trans sex workers are systemically submitted to violence by being locked in jail with men. “The men in prison beat you,” recounted Catherine, a trans sex worker in Windhoek. “You are locked up in a cell with 20 or 30 men. They take you into the shower and rape you”

In Windhoek, Namibia, Davidean, a trans sex worker, reported that police routinely confiscate trans and female sex workers’ condoms more than once a week ...

Jayne Arnott and Anna-Louise Crago, *Rights Not Rescue: A Report on Female, Male, and Trans Sex Workers’ Human Rights in Botswana, Namibia, and South Africa*, Open Society Initiative for Southern Africa, Sexual Health and Rights Project, June 2009 at 40, 59

4.4.2 The offence of keeping a brothel

SUMMARY

Keeping a brothel is a criminal offence in terms of the Combating of Immoral Practice Act. The Namibian High Court ruled that portions of the original definition of a brothel were unconstitutionally overbroad, with the result that a “brothel” is now defined in the law as “any house or place kept or used for purposes of prostitution”. This definition applies regardless of the sex of the sex worker or the client, or the nature of the sexual activity they engage in.

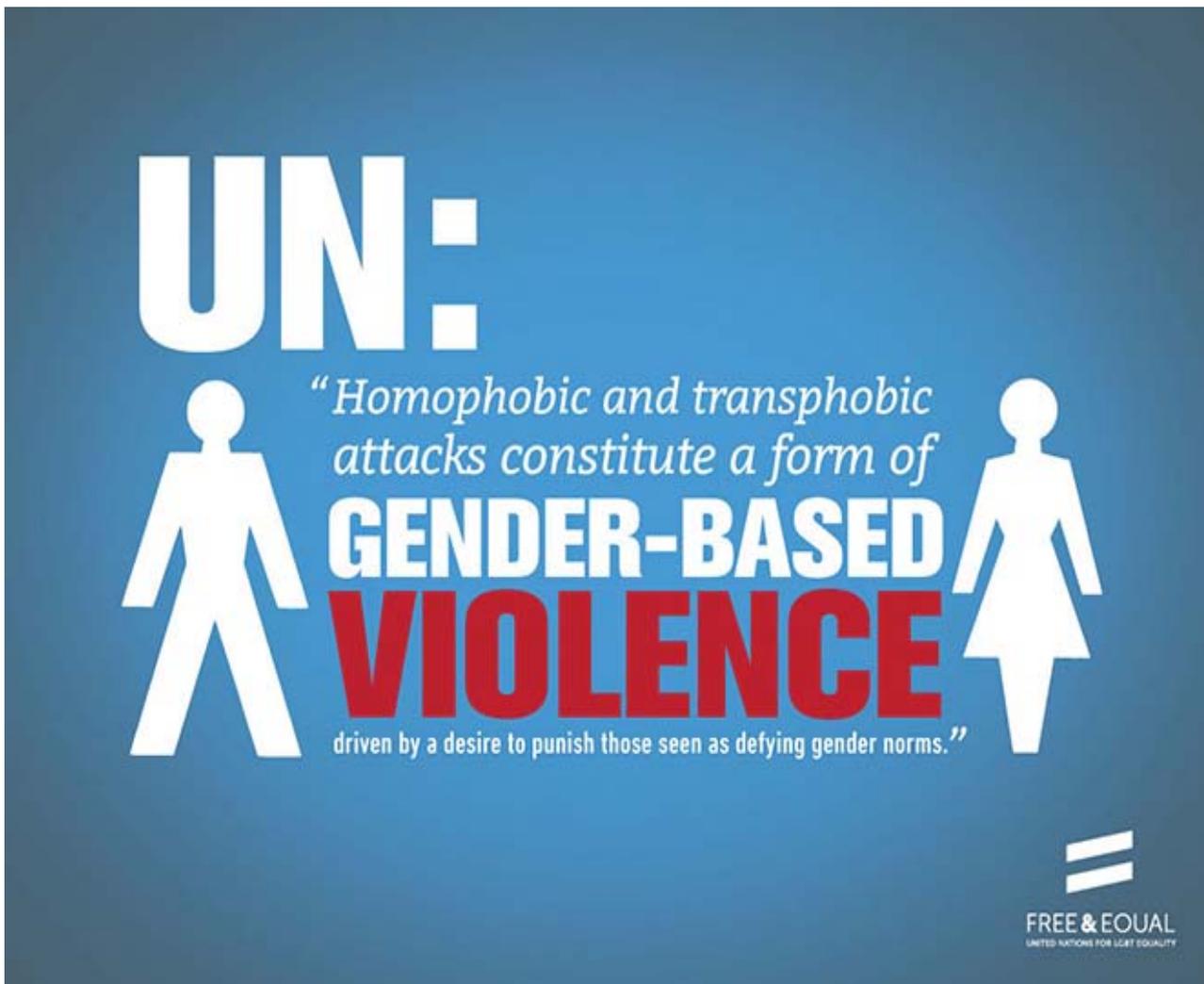
Keeping a brothel is a crime under the Combating of Immoral Practice Act. A brothel was originally defined in the Act as including “any house or place kept or used for purposes of prostitution or for persons to visit for the purpose of having unlawful carnal intercourse or for any other

⁷² “Silenced and Forgotten: HIV and AIDS agenda setting paper for women living with HIV, sex workers and LGBT individuals in southern African and Indian Ocean states”, United Nations Entity for Gender Equality and the Empowerment of Women (UN Women) and Open Society Initiative for Southern Africa (OSISA), undated (based on results of 2011 and 2012 meetings) at 6.

lewd or immoral purpose”.⁷³ The reference to “other lewd or indecent purposes” could have been understood to apply to the use of a place for homosexual conduct outside the sphere of sex work.⁷⁴

However, in 2002 the Namibian High Court ruled that portions of this definition were unconstitutional because they were overbroad.⁷⁵ As a result, a “brothel” is now defined in the law as “any house or place kept or used for purposes of prostitution”. This definition applies regardless of the sex of the sex worker or the client, or the nature of the sexual activity they engage in.

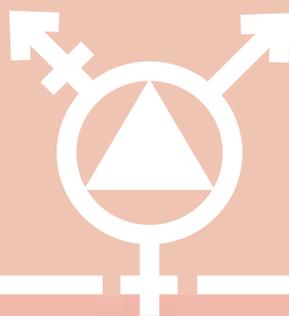
There are also some *protective* provisions in the Combating of Immoral Practices Act, which are designed to prevent coercion of persons into sex work or the exploitation of sex workers by third parties – but they protect only females. These are discussed in the following chapter.



⁷³ Combating of Immoral Practices Act 21 of 1980, section 1(i).

⁷⁴ *S v M* 1977 (3) SA 379 (C), quoting Milton, *South African Criminal Law and Procedure*, vol. 3 [edition and year not given] at 357-378.

⁷⁵ *Hendricks & Others v Attorney General, Namibia & Others* 2002 NR 353 (HC) at 362A-364C.



Chapter 5

PROTECTION

5.1	Introduction	82
5.1.1	Violence against LGBT persons internationally and in Namibia	82
5.1.2	Increasing global and regional commitment to combat violence against LGBT persons	83
5.2	Rape and other non-consensual sexual contact	84
5.2.1	Rape	85
5.2.2	Protections against sexual abuse in the Combating of Immoral Practices Act	86
5.2.3	Indecent assault	86
5.3	Other violent crimes	86
5.4	Domestic violence	87
5.5	Protections against exploitation in respect of sex work	88
5.6	Bullying	90
5.7	Recommendations for protecting the LGBT community	91



5.1 Introduction

SUMMARY

People all over the world – including in Namibia – suffer violence because of their sexual orientation or gender identity.

The United National Human rights Council recently passed two resolutions expressing grave concern at acts of violence and discrimination committed against individuals because of their sexual orientation and gender identity in all regions of the world.

The African Commission on Human and Peoples’ Rights also recently passed a resolution condemning violence and other human rights violations against persons on the basis of their sexual orientation or gender identity, calling all states in Africa to end this kind of violence and abuse.

5.1.1 Violence against LGBT persons internationally and in Namibia

According to a 2011 report by the United Nations High Commissioner for Human Rights, people in all regions of the world “experience violence and discrimination because of their sexual orientation or gender identity. In many cases, even the perception of homosexuality or transgender identity puts people at risk.”¹

Reports from all over the world have documented instances where persons have been killed because of their LGBT identity. One report listed the following examples:

a gay man sprayed with gasoline and set on fire in Belgium, the murder of a transgender human rights defender in Argentina, a nail bomb explosion in a gay bar in the United Kingdom, killing three people and injuring dozens of others, the murder of a gay rights activist by multiple knife wounds in Jamaica, prompting a crowd to gather outside his home, laughing and calling out ‘let’s get them one at a time’, and the recent execution-style murder of two lesbian human rights defenders in South Africa.²

“In many places, non-state actors continue to act out the mandates given by state leaders: to ‘eliminate’ gays and lesbians, to treat them like ‘animals’, to ‘fight against the enemy’, to ‘condemn’ and ‘reject’ homosexuals. Those who hide their difference still find the fear of violence haunts them.”

Human Rights Watch and International Gay and Lesbian Human Rights Commission, *More Than A Name: State-Sponsored Homophobia and its Consequences in Southern Africa*, 2003 at 124

1 UN Human Rights Council, “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, A/HR/C/19/41, Nov 2011 at para 1.
2 Michael O’Flaherty and John Fisher, “Sexual Orientation, Gender Identity, and International Human Rights Law: Contextualizing the Yogyakarta Principles”, 8 (2) *Human Rights Law Review* 207 (2008) at 208.

Namibia is no exception to violence against LGBT persons. OutRight Namibia, an NGO which addresses LGBT rights, reports that “high levels of sexual and other violence targeting people because of their sexual orientation and gender identity are endemic in some areas of our country”.³

For example, a 2008 study of 220 adult Namibian men who have sex with men found that 40% had experienced a human rights abuse related to their sexuality – including violence or rape. In fact, violence was most commonly identified by the participants in this study as their main health threat.⁴ According to the Namibian NGO Sister Namibia, participants in a 2009 workshop indicated that it is very difficult for lesbians and gays in the north to reveal their sexual orientation to their families and communities because of responses of “hatred, extreme acts of violence or threats of violence and ostracism from their family and community members”. Younger participants reported fears of being expelled from their homes or losing financial support for their education if they revealed their sexual orientation.⁵

The Director of OutRight Namibia has reported that lesbians in Namibia often face threats of rape from men seeking to “cure” them, adding: “If lesbians try to go to the police, they say ‘you asked for it’ and dockets go missing.”⁶ According to news reports, a man was beaten to death in Gobabis in 2014 because he was suspected of being gay.⁷

Transgender persons also face significant violence – such as in an incident described a 2013 report compiled by the US State Department, where seven men severely beat a transgender woman in an Oshivambo community in the north, but police refused to prosecute the case.⁸

A recent report by the Office of the Ombudsman found that LGBT individuals in Namibia face many types of discrimination and violence, giving as examples lesbian women being subjected to corrective rape, LGBT people being beaten and demeaned, and families disowning their children and chasing them out of their homes. The same document states that the Namibian police are reportedly not sensitive to abuse and violence against LGBT persons; they reportedly often ridicule LGBT persons who report cases of abuse, which dissuades reporting.⁹

5.1.2 Increasing global and regional commitment to combat violence against LGBT persons

The United Nations has expressed concern about the increasing violence and human rights violations against LGBT persons. The United Nations Human Rights Council has passed two

3 OutRight Namibia, “Human Rights Report on Lesbian, Gay, Bisexual, Transgender and Intersex People in Namibia”, 2013, “Foreward”.

4 Scholastika N Ipinge, *HIV prevalence among men who have sex with men in Windhoek, Namibia*, Windhoek: University of Namibia, HIV and AIDS Unit, 2008 at iv, 14.

5 Sister Namibia, *Building the Feminist Movement in Namibia*, Annual Report: January to December 2009, 2010, as reported in Research Directorate, Immigration and Refugee Board of Canada, Ottawa, “Namibia: Treatment of sexual minorities by society and government authorities; recourse and protection available to sexual minorities who have been subject to ill-treatment”, NAM104147.E, Immigration and Refugee Board of Canada, <<http://irb-cisr.gc.ca/Eng/ResRec/RirRdi/Pages/index.aspx?doc=454117>>.

6 Agence France-Presse, “Gay pageant spark breakthrough, backlash in Namibia”, *The Raw Story*, 7 February 2012.

7 “Gay killer remains in custody”, *New Era*, 24 October 2014.

8 US Department of State, *Namibia 2013 Human Rights Report*, “Societal Abuses, Discrimination, and Acts of Violence Based on Sexual Orientation and Gender Identity”, <www.state.gov/documents/organization/220354.pdf>.

9 Office of the Ombudsman, *2013 Baseline Study Report on Human Rights in Namibia*, 2013 <www.ombudsman.org.na/reports/special-reports/finish/4-special-reports/22-2013-baseline-study-report-on-human-rights-in-namibia> at 100, citing an interview with Ms Gina Tibinyane, Programme Manager, Out Right Namibia.

resolutions expressing concern over violence and discrimination against LGBT persons in all regions of the world.¹⁰ In 2011, the UN also commissioned a study to document discrimination and acts of violence against LGBT persons – and called for an update of that study in 2014.

Even more significantly for Namibia, in 2014 the African Commission on Human and Peoples' Rights passed a resolution condemning “the increasing incidence of violence and other human rights violations against persons “on the basis of their imputed or real sexual orientation or gender identity”, and calling on all states in Africa “to end all acts of violence and abuse, whether committed by State or non-state actors”.¹¹

This Chapter looks at some specific forms of protection against violence which are of special relevance to the LGBT community in Namibia.

5.2 Rape and other non-consensual sexual contact

SUMMARY

Namibia's **Combating of Rape Act** is gender-neutral and covers a wide range of sexual acts, including oral sex, anal sex and genital stimulation between people of the same or different sexes. This means that it is suitable to protect against heterosexual or homosexual abuse of men, women, girls or boys.

An amendment to the **Combating of Immoral Practices Act** has bolstered the law on rape by giving additional protection to boys and girls under the age of 16, where there is sexual contact with someone more than three years older. This crime covers any “indecent or immoral act” as well as “sexual acts” – terms which are sufficiently broad to cover a range of sexual contact between persons of the same or opposite sexes.

The Combating of Immoral Practices Act also contains some protective measures which are aimed only at females. It is an offence to engage in any “immoral or indecent act” with a mentally disabled female, or to give any intoxicating substance to a female with the intent of stupefying or overpowering her so as to have “unlawful carnal intercourse” with her. These offences should be re-formulated to cover all kinds of sexual contact with mentally disabled or intoxicated males or females.

Indecent assault is a gender-neutral crime which can be applied to acts that take place between the same or opposite sexes. It applies when one person physically touches the genitals or other private parts of another person's body, or attempting to do so – even though clothes. In practice, this crime has been applied to both heterosexual and homosexual contact.

10 Human Rights Council, *Resolution 17/19: Human Rights, sexual orientation and gender identity*, A/HRC/RES/17/19, 14 July 2011; Human Rights Council, *Resolution 27/...: Human Rights, sexual orientation and gender identity*, A/HRC/27/L.27/Rev.1, 24 September 2014.

Namibia was not a member of the Human Rights Council when the 2011 was passed. At the time of the 2014 resolution, Namibia was a member of the Human Rights Council but abstained from voting on this issue.

11 Resolution 275 of the African Commission on Human and Peoples' Rights, 55th session, 28 April to 12 May 2014, <www.achpr.org/sessions/55th/resolutions/275/>. This resolution is reproduced in full in Chapter 3 of this report.

5.2.1 Rape

Before 2000, only women and girls could lay a charge of rape, and rape covered only the insertion of a penis into a vagina. Namibia’s Combating of Rape Act, which came into force in 2000, is gender-neutral – meaning that its protection extends to men and boys. It defines rape as intentional commission of a sexual act under coercive circumstances.¹²

The definition of sexual act covers a range of forms of intimate sexual contact and so could be applied to both same-sex and opposite-sex situations:

- the insertion of the penis into the vagina of another person, to even the slightest degree;
- the insertion of a penis into the mouth or anus of another person;
- the insertion of any other part of the body into the vagina or anus;
- the insertion of any part of the body of an animal into the vagina or anus;
- the insertion of any object into the vagina or anus;
- oral stimulation of the female genitals;
- any other form of genital stimulation.¹³

The definition of “coercive circumstances” includes force, threats of force, and other situations which enable one person to take unfair advantage of another.¹⁴

The Combating of Rape Act set the age of consent for the crime of rape at 14, for both boys and girls. Namibia has the same age of consent for all sexual acts covered by the criminal law, as opposed to some other countries which have different ages of consent for typically heterosexual acts as opposed to typically homosexual acts.¹⁵

An LAC study published in 2006 found that the types of sexual acts covered by the law have been applied in practise.¹⁶ Men and boys are laying charges of rape, although only in small numbers; police statistics indicate that, since 2003, men and boys account for some 6%-8% of all victims of reported rape and attempted rape.¹⁷

Types of sexual acts (police docket sample) <small>A single case may involve more than one type of sexual act.</small>	Number and percentage of responses	
Sexual intercourse (insertion of the penis into the vagina)	368	87.4%
Insertion of the penis into anus (sodomy)	26	6.2%
Insertion of any other part of the body (usually a finger) into the vagina or anus (excluding cunnilingus)	15	3.6%
Insertion of the penis into the mouth (oral stimulation of male genitals)	3	0.7%
Cunnilingus (oral stimulation of female genitals)	3	0.7%
Insertion of any object into the vagina or anus	2	0.5%
Any other form of genital stimulation	4	1.0%
Total	421	100.0

12 Combating of Rape Act 8 of 2000, section 2(1).

13 Id, section 1.

14 Id, section 2(2).

15 For example, South Africa had differing ages of consent until this was found unconstitutional in *Geldenhuys v National Director of Public Prosecutions and Others* 2009 (2) SA 310 (CC). This case struck down provisions in the Sexual Offences Act 23 of 1957 which set the age of consent at 16 for heterosexual activities and at 19 for same-sex sexual activities.

16 Legal Assistance Centre, *Rape in Namibia: An Assessment of the Operation of the Combating of Rape Act 8 of 2000*, 2006 at 190.

17 Id at 7.

5.2.2 Protections against sexual abuse in the Combating of Immoral Practices Act

An amendment to the Combating of Immoral Practices Act, enacted in 2000, gives additional protection to boys and girls under the age of 16 where there is sexual contact with someone more than three years older. The crime which falls under this amended law is less serious than rape, but it covers any “indecent or immoral act” as well as “sexual acts”. There is no definition of an “indecent or immoral act”, but “sexual acts” refer to all the forms of sexual contact that are covered by the Combating of Rape Act.

The terms used are broad enough to cover a wide range of sexual contact between persons of the same or opposite sexes. As for the Combating of Rape Act, the age of consent is the same regardless of the type of sexual act involved.

The Combating of Immoral Practices Act also contains some protective measures which are aimed only at females. It (1) protects mentally-disabled females from being sexually exploited¹⁸ and (2) makes it a crime to give intoxicating substances to a female with the intent of stupefying or overpowering her for the purpose of unlawful carnal intercourse.¹⁹ These provisions should be revised to give similar protection to males.

5.2.3 Indecent assault

Indecent assault is physically touching the genitals or other private parts of another person’s body, or attempting to touch someone in this way, even through clothes. It has been applied similarly in both heterosexual and homosexual contexts.²⁰

Forced sexual contact which is not covered by the definition of “sexual act” in the Combating of Rape Act would be treated as indecent assault. For example, it would not be rape for a person to touch a woman’s breasts against her will, or to force his or her tongue into another person’s mouth. But these forms of forced sexual contact would be indecent assault.

5.3 Other violent crimes

SUMMARY

Most Namibian crimes aimed at violence are gender-neutral and would apply equally to heterosexual or homosexual victims. For example, assault – which is a common crime of violence – means unlawfully and intentionally applying force to another person, or inspiring a belief in another person that force is immediately going to be applied.

¹⁸ Combating of Immoral Practices Act 21 of 1980, section 15.

¹⁹ *Id.*, section 16.

²⁰ See, for example, *Rex v S* 1950 (2) SA 350 (SR), where one male juvenile touched the private parts of another male juvenile through his clothing. The accused was convicted of an unnatural offence, but the appeal court found that the correct charge should have been indecent assault. Compare *Rex v M* 1947 (4) SA 489 (N) where a man’s conviction for indecent assault for attempting to lift a woman’s dress was overturned, but only because of unsatisfactory evidence, and *S v Mwachiki* 1985 (4) SA 317 (ZH) where a man’s conviction on indecent assault was upheld for lifting a woman’s leg in a way that exposed her private parts. The crime of indecent assault has also been applied to forcible anal intercourse by a man with a woman (which is not covered by the crime of sodomy), in *S v M* 1979 (2) SA 406 (RA).

Most Namibian crimes aimed at violence are gender-neutral and would apply equally to heterosexual or homosexual victims.

Assault is a very common crime of violence. The definition of assault is unlawfully and intentionally applying force to another person, or inspiring a belief in another person that force is immediately going to be applied.²¹

In a homophobic environment, it may be particularly important to remember that the crime of assault can be committed by means of a credible threat – even if there is no physical act. A threat of harm is assault if it inspires a genuine fear of assault in the person who is threatened. The threat could take the form of words or gestures (such as pointing a firearm), or a combination of the two.²²

5.4 Domestic violence

SUMMARY

The **Combating of Domestic Violence Act** provides for protection orders in domestic relationships. These are court orders which direct the abuser to stop the violence and provide other protective measures as necessary. Protection orders are not available in the case of violence between same-sex partners. However, they are available to **LGBT** individuals who are being threatened or abused by a family member.

A person who is experiencing domestic violence from a same-sex partner could try the following remedies: (1) lay an appropriate **criminal charge**; (2) seek a **peace order** in a magistrate's court, which requires someone who committed or threatened violence to deposit money with the court which will be forfeited if the order is disobeyed; (3) seek an **interdict from the High Court**; or (4) bring a **civil action** against the abuser seeking compensation for the damages resulting from the violence.

The Combating of Domestic Violence Act provides for protection orders in domestic relationships. Protection orders are court orders directing the abuser to stop the violence. Protection orders can also provide other protective measures, such as forbidding all contact with the victim, requiring the surrender of weapons or giving the complainant an exclusive right to occupation of a joint residence for a temporary period.

Protection orders are not available in the case of violence between same-sex partners, who are specifically excluded from the law's coverage. However, they are available to LGBT individuals who are being threatened or abused by a parent, child or other family member. This could be particularly relevant where family abuse is based on the LGBT status of the person in question.²³

The exclusion of same-sex couples from the law's coverage fortunately does not leave them entirely without remedies. A person who is experiencing domestic violence from a same-sex partner could:

21 Milton, *South African Criminal Law and Procedure*, 2nd ed, Cape Town: Juta, 1982 at 467. The force in question can be indirect – such as administering poison or setting a trap for the other person to fall into.

22 Id at 479-483.

23 For more information on the Combating of Domestic Violence Act, see Legal Assistance Centre, *Guide to the Combating of Domestic Violence Act 4 of 2003*, 2007.



- (1) lay an appropriate **criminal charge**;
- (2) seek a **peace order** in a magistrate’s court, which requires someone who has committed or threatened violence to deposit money with the court which they will lose if the order is disobeyed;
- (3) seek an **interdict from the High Court**; or
- (4) bring a **civil action** against the abuser seeking compensation for the damages resulting from the violence.

5.5 Protections against exploitation in respect of sex work

SUMMARY

Although the statutory offences which can be committed by sex workers apply equally to male and female sex workers, the statutory provisions designed to *protect* sex workers from exploitation and coercion are not all gender-neutral. In terms of the Combating of Immoral Practices Act, there are several offences regarding “pimping” and coercion which protect only females. These offences should be overhauled to protect both males and females. Even if sex work is decriminalised, as the Legal Assistance Centre has recommended, it should still be a crime to force a male or a female into sex work or to coerce a male or a female into working in a brothel or committing a particular sex act.

As discussed in Chapter 4, the offences which can be committed by sex workers are gender-neutral and apply equally to male and female sex workers regardless of their sexual orientation – although male sex workers with male clients could face the additional risk of being charged with sodomy.

However, the provisions designed to *protect* sex workers from exploitation and coercion are not all gender-neutral. Under the Combating of Immoral Practices Act, there are several offences regarding coercion which protect only females.

Many of these offences are aimed at what is known as “pimping”. It is an offence –

- to “procure” any female to have sex with another person;²⁴
- to try and persuade a female to become a prostitute or to work in a brothel;²⁵
- to entice a female to a brothel for the purpose of prostitution;²⁶
- to give a female any drug, drink or other substance with the intent of stupefying or overpowering her so that someone else can have sex with her;²⁷
- to do anything which assists a male to have sex with a female;²⁸ and
- to detain a female against her will in a brothel, or to detain her in any way for the purposes of sex with a male.²⁹

²⁴ Combating of Immoral Practices Act 21 of 1980, section 5(a).

²⁵ Id, section 5(c)-(d).

²⁶ Id, section 5(b).

²⁷ Id, section 5(e)

²⁸ Id, section 6.

²⁹ Id, section 13.

These offences should be changed to protect both males and females. Even if sex work is decriminalised, as the Legal Assistance Centre has recommended, it should still be a crime to force anyone to engage in sex work or to work in a brothel or to commit a particular sex act.

There are a few gender-neutral protections – it is illegal to knowingly live wholly or in part on the earnings of another person’s prostitution,³⁰ or to profit from arranging sexual acts between others.³¹ These provisions are designed to prevent the exploitation of sex workers,³² but they could also operate to prevent sex workers from organising themselves under the protection of a benevolent brothel-keeper or supervisor.

Trans houses in Namibia

Young trans sex workers in the research area almost always lived in the homes of older trans sex workers or “mamas.” Young female sex workers, many of whom were lesbian or bisexual may also live in these communal environments. Jeannette, a mama in Windhoek, houses 20 trans sex workers and five female sex workers. Mamas’ homes offer a place where young trans people can live freely as themselves and avoid persecution at home or in the community.

“You feel safe and happy with a mama,” explained Martin, who had lived in one of the houses. “You can dress up and make jokes. It gives you a family and an older nurturing person. It’s based on lessons, to teach you to take care of yourself. What to do when a man gets violent with you. How to convince a customer to use a condom. Mamas teach you all about safer sex.”

If trans people choose to live in these situations, they are expected to make financial contributions to the operating of the home. Most obtain money to cover their costs through sex work.

The security of communal living makes it easier for some sex workers to refuse unsafe sex. “Mama always showed us condoms and would demonstrate on a bottle,” said Davidean in Windhoek. “She would say, ‘If there is ever a man who doesn’t want to use a condom, don’t have sex, just come back home.’”

Mamas in the communal home in Windhoek host weekly dinners where workers share a variety of skills. “Saturday, we work till sunrise and go to bed at 8:00 or 9:00 a.m.,” said Martin. “Then, on Sundays, we all go to the shopping centre and buy food and have a big family lunch. We talk about the week. We talk about our times with the clients and sex. We teach each other skills. I learned how to cut hair and do nail extensions. We don’t keep what we know just to ourselves.” The houses also participate in fashion/talent/beauty pageants for trans women that are held from time to time and are attended by lesbians, trans men, other queer groups, and some heterosexuals.

Jayne Arnett and Anna-Louise Crago,
Rights Not Rescue: A Report on Female, Male, and Trans Sex Workers’ Human Rights in Botswana, Namibia, and South Africa,
Open Society Initiative for Southern Africa, Sexual Health and Rights Project, June 2009 at 65-66

30 Combating of Immoral Practices Act 21 of 1980, section 10(a), as interpreted by *Hendricks & Others v Attorney General, Namibia & Others* 2002 NR 353 (HC) at 357B and 367H-368G.

31 *Id.*, section 10(b).

32 *Hendricks & Others v Attorney General, Namibia & Others* 2002 NR 353 (HC) at 368A-F.

5.6 Bullying

SUMMARY

LGBT youth in Namibia, as in other countries, experience bullying at school from both classmates and teachers because of their sexual orientation or gender identity.

The **General Rules of Conduct for Learners** obligate all learners to respect the dignity, person and property of others and order learners not to behave “in a disgraceful, improper or indecent manner”. Learners who violate this code can be disciplined by the school after a disciplinary hearing.

The **Code of Conduct for the Teaching Service** forbids teachers from engaging in romantic or sexual relations with learners, or from sexually harassing or abusing learners. Teachers are also prohibited from humiliating or abusing learners, or from using language or behaviour that will undermine the confidence and respect of any learner. Failure to comply with the Code of Conduct constitutes misconduct, and can result in sanctions ranging from a reprimand to dismissal.

However, these codes of conduct are apparently not being enforced very effectively in practice.

Like domestic violence, violent bullying can be addressed through criminal charges, peace orders, High Court interdicts or civil actions for damages. Possible remedies for bullying which takes the form of hate speech are described in Chapter 6 of this report. However, there are in addition some specific rules which apply to bullying at schools, which appears to be a common problem for LGBT individuals.

School bullying has been described as follows:

Bullying occurs when a student or group of students say or do bad and unpleasant things to another student. It is also bullying when a student is teased a lot in an unpleasant way or when a student is left out of things on purpose. It is not bullying when two students of about the same strength or power argue or fight or when teasing is done in a friendly and fun way.³³

Bullying and physical violence are common in Namibian schools. Approximately half of learners surveyed in the 2004 and 2013 Namibia School-based Student Health Surveys reported being bullied in the previous month.³⁴ Although the links between sexual orientation, gender identity and school bullying have not been researched in Namibia, international findings show that LGBT youth are often bullied by classmates and teachers. In Namibia, the Office of the Ombudsman made the following observations:

³³ *Report on the Namibia School-Based Student Health Survey 2004*, Windhoek: Ministry of Health and Social Services, 2008 at 53 (questionnaire).

³⁴ *Report on the Namibia School-Based Student Health Survey 2004*, Windhoek: Ministry of Health and Social Services, 2008 at 15, Table 3.3.4 at 14, and Table C.3.12 at 77. This survey collected information from 6367 Namibian learners in grades 7-9. Note that the discussion of these statistics in the narrative of the report is misleading. The figures reported here have been re-calculated from Table 3.3.4.

In the 2013 survey, 46% of the 4531 students aged 13-17 years who participated in the survey reported being bullied in the 30 days preceding the survey. Global School-based Student Health Survey, *Namibia 2013 Fact Sheet*.

LGBTI children ... face a high level of homophobia and transphobia at the hands of their teachers and fellow learners. This form of bullying leads to LGBTI people in schools to drop out by the end of their educational careers and this at times leads to suicides.³⁵

The government has issued codes of conduct for both learners and teachers under Namibia's Education Act.³⁶

The **General Rules of Conduct for Learners**³⁷ require all learners to respect the dignity, person and property of others and order learners not to behave "in a disgraceful, improper or indecent manner". Learners who violate this code can be disciplined by the school after a disciplinary hearing. Possible punishment can be a reprimand, additional tasks relating to the contravention, a consultation with the learner's parents, written warnings, suspension or expulsion.

The **Code of Conduct for the Teaching Service**³⁸ forbids teachers from engaging in romantic or sexual relations with learners, or from sexually harassing or abusing learners. Teachers cannot humiliate or abuse learners physically, emotionally or psychologically, or use language or behaviour that will undermine the confidence and respect of any learner. Failure to comply with the Code of Conduct can result in sanctions ranging from a reprimand to dismissal.

These codes of conduct are not being enforced very effectively. A 2010 Namibian report indicates that the researchers observed situations where learners were bullied by other learners and teachers, with little being done by schools and/or teacher counsellors.³⁹ They were told during discussions at secondary schools that bullying is pervasive and that the problem "is not being effectively addressed and is not prioritised by school counsellors or school management".⁴⁰

The Legal Assistance Centre has produced a comic on safety in schools which is available on the LAC website in various languages.⁴¹



5.7 Recommendations for protecting the LGBT community

SUMMARY

National, regional and international recommendations all emphasise the need to sensitise law enforcement personnel on how to respond to reports of crimes against LGBT individuals, to ensure a sensitive reception, thorough investigation and diligent prosecution. This could be a useful advocacy point.

35 Office of the Ombudsman, *2013 Baseline Study Report on Human Rights in Namibia*, 2013 at 101.

36 These form part of the regulations issued under the Education Act No 16 of 2001.

37 General Rules of Conduct for Learners, Government Notice No 189 of 28 October 2002 (Government Gazette 2841).

38 Code of Conduct for Teaching Service, Government Notice No 15 of 6 February 2004 (Government Gazette 3144).

39 *Evaluation of School Counselling Services in Namibia*, Windhoek: UNICEF, 2010 at 56.

40 Id at 36.

41 The LAC website is <www.lac.org.na>.

The 2013 *Baseline Study Report on Human Rights in Namibia* report recommends training programmes for law enforcement personnel to sensitise them to violence against LGBT persons and help them recognise and respond to reports of such crimes, as well as public information campaigns aimed at reducing homophobia and transphobia.⁴²

The African Commission on Human and People’s Rights recommends “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, ensuring proper investigation and diligent prosecution of perpetrators, and establishing judicial procedures responsive to the needs of victims”.⁴³

The UN High Commissioner for Human Rights suggests a number of actions by governments including:

- (a) Prompt investigation of all killings and violence against individuals because of actual or perceived sexual orientation or gender identity, hold perpetrators accountable, and establish systems for recording and reporting incidents.
- (b) Take measures to prevent torture and cruel, inhuman or degrading treatment based on sexual orientation and gender identity, to investigate all reported incidents, to prosecute and hold accountable those responsible.
- (c) Ensure that immigration and asylum laws account for sexual orientation and gender identity and protect sexual minorities – including that LGBT persons are not returned to a territory where his or her life or freedom is threatened.
- (d) Ensure that criminal laws do not discriminate against or target LGBT persons, including by repealing laws criminalising same-sex sexual conduct and abolishing the death penalty for offenses involving consensual sexual relations.
- (e) Enact comprehensive anti-discrimination legislation that includes discrimination on grounds of sexual orientation and gender identity.
- (f) Ensure that LGBT individuals can exercise their rights to freedom of expression, association and peaceful assembly in safety without discrimination.
- (g) Implement sensitisation and training programmes for police, prison officers, border guards, immigration officers and other law enforcement personnel, and support public information campaigns to counter homophobia and transphobia among the general public and targeted anti-homophobia campaigns in schools.

These recommendations could be the basis for advocacy to better combat violence against LGBT persons in Namibia.

.....

“Secondary victimization by the police is a serious issue... We want the police to understand sexuality issues, and be sensitive and responsive to them.”

Forum for the Empowerment of Women,
Kathlehong, South Africa,
quoted in Amnesty International,
*Making Love A Crime:
Criminalization of same-sex conduct in sub-
Saharan Africa*, 2013 at 30.

.....

COMPLAINTS ABOUT NAMPOL

If you believe that police have not responded appropriately to your complaint, speak to the Station Commander. If this does not produce satisfactory results, contact:

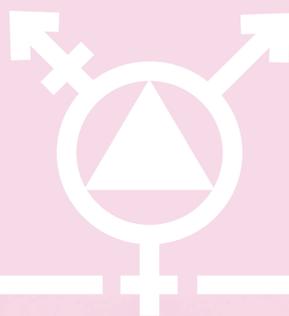
Nampol Complaints and Discipline Division

Attention: The Commanding Officer

3rd Floor, National Police Headquarters, Windhoek
Private Bag 12024, Ausspannplatz, Windhoek
Telephone: 061-2093111 (main switchboard) or
061-2093266 (direct line) / Fax: 061-2093358

42 Office of the Ombudsman, *2013 Baseline Study Report on Human Rights in Namibia*, 2013 at 101.

43 Resolution 275 of the African Commission on Human and Peoples’ Rights, 55th session, 28 April to 12 May 2014 at para 4.



Chapter 6

SPEECH

A.	PROTECTION AGAINST HATE SPEECH AND INVASION OF PRIVACY	94
6.1	Introduction	94
6.2	Legislation protecting against hate speech in Namibia	95
6.2.1	Hate speech based on race: a model	96
6.2.2	Combating hate speech by political parties	96
6.3	Criminal remedies in Namibia	97
6.3.1	<i>Crimen injuria</i>	97
6.3.2	Criminal defamation	98
6.3.3	Incitement	99
6.4	Civil remedies in Namibia	99
6.4.1	Defamation	100
6.4.2	Infringement of dignity	101
6.4.3	Invasion of privacy	102
6.5	Using constitutional rights to protect against hate speech	103
6.6	International law: Hate speech and crimes against humanity	104
6.7	Models for law reform	105
6.7.1	Legislation on hate speech	105
6.7.2	Legislation on privacy	106
B.	PROTECTION FOR FREEDOM OF EXPRESSION ABOUT LGBT ISSUES	106
6.8	Restrictions on “propaganda of homosexuality”	106
6.9	Limitations on indecent, obscene and undesirable speech	107
6.9.1	Indecent or Obscene Photographic Matter Act 37 of 1967	108
6.9.2	Publications Act 42 of 1974	108

A. PROTECTION AGAINST HATE SPEECH AND INVASION OF PRIVACY

6.1 Introduction

SUMMARY

“Hate speech” aimed at members of the LGBT community is a persistent problem in Namibia, as in many other African countries, with derogatory statements and labelling coming from both public and private figures.

Namibia has no legislation specifically prohibiting hate speech related to LGBT status, but various legal rules of a more general nature can be applied to protect against hate speech. It is possible to respond to hate speech by laying criminal charges or by bringing a civil action for damages.

Any law limiting hate speech necessarily limits freedom of speech and expression, which is constitutionally protected in Namibia. But this freedom must be balanced against other constitutional rights – including the rights to dignity, non-discrimination and privacy – and it is constitutionally permissible to subject this freedom to reasonable legal limitations to protect the public interest.

“Hate speech” is written or verbal communication that incites hatred of an individual or a group on the basis of a specific attribute – such as race, religion, disability, ethnicity, gender, sex, sexual orientation or marital status.

Hate speech against the LGBT community by public and private figures is a significant problem in Namibia, as in many other African countries. For example, in a 2013 publication, Amnesty International explains how political leaders sometimes attack LGBT rights for political gain:

Political leaders often use statements characterising same-sex sexuality as ‘un-African’ and attacking lesbian, gay, bisexual and transgender people and groups to drum up support amongst conservative constituencies, to attack their opponents and to distract from issues facing the country. The Presidents of Zimbabwe and Namibia, for example, have made statements linking homosexuality to corruption, paedophilia, child murder, pornography and other social ills. For political leaders who feel vulnerable, attacking an already marginalised group such as LGBTI people can be a prelude to attacking other groups like opposition parties and the press. Political leaders sometimes express hostility towards LGBTI people in attempts to divide civil society....

Namibia has no legislation specifically prohibiting such hate speech, but various laws of a more general nature can be applied against hate speech, by laying criminal charges or by bringing a civil action for damages.

Any law limiting hate speech limits the freedom of speech and expression which is protected by the Namibian Constitution.¹ But the Constitution says that these rights may be limited by

¹ Namibian Constitution, Articles 21(1)(a).

“reasonable restrictions” imposed by law, where these are “necessary in a democratic society” and serve one of several important objectives, such as preserving decency or morality or protecting against defamation or incitement to an offence.² The rights to freedom of speech and expression must be balanced against other constitutional rights – including the rights to dignity, non-discrimination and privacy.

.....

“Words are powerful weapons which if they are allowed to be used indiscriminately can lead to extreme and unacceptable action.”

Afri-Forum and Another v Malema and Others 2011 (6) SA 240 (EqC) at para 94

.....

6.2 Legislation protecting against hate speech in Namibia

SUMMARY

Namibia’s Racial Discrimination Prohibition Act prohibits hate speech on the basis of race. There is no equivalent protection against hate speech based on gender, sex, sexual orientation or marital status. Litigation around this statute shows how Namibian courts draw the boundary between prohibiting hate speech and protecting free speech.

The requirements for registration as a political party in Namibia’s electoral legislation could possibly be applied to prevent registration of a political party which uses hate speech about homosexuality or gender identity, or to motivate for cancellation of such a party’s registration.

WHY PROHIBIT HATE SPEECH?

“Hate speech at a social level is prohibited for four reasons:

1. *To prevent disruption to public order and social peace stemming from retaliation by victims.*
2. *To prevent psychological harm to targeted groups that would effectively impair their ability to positively participate in the community and contribute to society.*
3. *To prevent both visible exclusion of minority groups that would deny them equal opportunities and benefits of ... society and invisibly exclude their acceptance as equals.*
4. *To prevent social conflagration and political disintegration.”*

*Afri-Forum and Another v Malema and Others
2011 (6) SA 240 (EqC) at paras 29-30
(citation omitted; ellipsis in original)*

² Id, Article 21(2).



6.2.1 Hate speech based on race: a model

Namibia's Racial Discrimination Prohibition Act prohibits hate speech on the basis of race. This law makes it a crime to threaten or insult a person or group of persons on the basis of race; to encourage hatred towards persons of a specific racial group; or to spread ideas based on racial superiority.³ The punishment can be a fine of up to N\$100 000, imprisonment for up to 15 years, or both.⁴ Where there is a conviction, the complainants can apply for compensation for any damage suffered as a result of the hate speech.⁵

There is no similar protection against hate speech based on gender, sex, sexual orientation or marital status. However, the law on race-based hate speech provides a model which could be expanded to protect other persons and groups.

Litigation around this statute shows how Namibian courts balance prohibiting hate speech against protecting free speech. For example, as a result of a 1996 High Court ruling, the hate speech statute was narrowed to minimise its restrictions on free speech.⁶

6.2.2 Combating hate speech by political parties

In 2014, a group seeking registration as a political party in Namibia had a party platform which officially opposed homosexuality.⁷ This raises the question as to whether or not it is permissible to register such a party to contest elections in Namibia.

Under the Electoral Act 24 of 1992, which was in force at the relevant time, political parties cannot have any object prejudicial to “the public welfare or the peace and good order”.⁸ Despite these rules, registration of the avowedly anti-gay party proceeded without problems.⁹

The “Guidelines for the Conduct of Political Activities by Political Parties, Associations, Organisations and Independent Candidates during Election Campaign” issued under that

3 Racial Discrimination Prohibition Act 26 of 1991, section 11, as amended by Act 26 of 1998, after *S v Smith NO & Others* 1996 NR 367 (HC) declared the original version of section 11(1) unconstitutional.

4 *Id.*, section 14(1)(b). Some exceptions to the crime of hate speech were added in response to the ruling in *S v Smith NO & Others* to ensure that the law does not inhibit good faith discussion of matters of public interest. See section 14(2).

5 *Id.*, section 16.

6 *S v Smith NO & Others* 1996 NR 367 (HC). The High Court ruled that the original formulation of section 11(1) was in conflict with Article 21(1) and (2) of the Constitution on several grounds:

- truth was not a defence under any circumstances, even where the statement was not made with an intention to provoke hatred;
- the statute did not clearly require that the sole purpose of the person making the statement was to provoke racial hatred or disharmony; and
- there were no exceptions for matters of public interest or even for legitimate criticism of government policy which may cause disharmony even though it is stated with the purpose of securing the *removal* of racist practices.

The Court referred the statute back to Parliament to correct the defects which unnecessarily infringed freedom of speech and expression. Parliament accordingly amended the statute to address the constitutional concerns.

7 According to one press report, the head of this party, Namibia Economic Freedom Fighters (NEFF), stated at the party's launch that “the imperialists are influencing our nation through homosexual practices” and that the NEFF “is committed to uniting all Namibians to root out this evil practice”. Rebecca Davis, “Homophobic Namibian fighters: What the EFF?”, *Daily Maverick*, 26 June 2014. See also Immanuel Shinovene, “Malema's EFF fever hits Namibia”, *The Namibian*, 25 June 2014 and Placido Hilukilwa “NEFF to target Swapo's two-thirds”, *Namibian Sun*, 21 July 2014; and Elvis Muraranganda, “ECN gives NEFF the nod”, *Namibian Sun*, 17 August 2014, which noted: “The NEFF... has a strong anti-homosexuality stance and promised that no gays, lesbians, bi-sexual or transgender people would be part of its leadership.”

8 Electoral Act 24 of 1992, section 39(1)(a)(ii) and (iii).

9 See, for example, Nomhle Kangootui, “NEFF registered as a political party”, *The Namibian*, 18 August 2014.

legislation prohibit intimidation and incitement to violence.¹⁰ A violation of these principles could be invoked to oppose the registration of any political party which opposes homosexuality,¹¹ or to motivate for cancellation of such a party's registration.¹²

The Electoral Act 5 of 2014, which replaced the Electoral Act 24 of 1992 shortly before the 2014 national elections, has similar provisions.¹³

POLITICAL HATE SPEECH IN ECUADOR

As a point of comparison, in 2013 Ecuadorian presidential candidate Nelson Zavala was fined US\$3000 and banned from any political affiliation for one year, after he publically stated that gay people were "immoral" and could be "cured". The Court which made the ruling found that Mr Zavala had breached electoral ethics, which forbids public expression by political candidates of thoughts that discriminate or affect other people's dignity.

BBC News, "Ecuador preacher sentenced for homophobic comments", 12 March 2013; Impunity Watch, "Ecuadorian Preacher And Presidential Candidate Charged With Hate Speech", 14 March 2013.

6.3 Criminal remedies in Namibia

SUMMARY

Hate speech could give rise to a criminal charge of *crimen injuria* where it involves a serious violation of another person's dignity. A charge of **criminal defamation** could be used where the speech has injured another person's reputation. A criminal charge of **incitement** could be used if the speech encouraged the commission of a crime.

6.3.1 *Crimen injuria*

The crime of *crimen injuria* is the unlawful, intentional and serious violation of the dignity or privacy of another person.¹⁴ It is difficult to determine precisely what actions will constitute *crimen injuria*, as this can differ depending on the particular circumstances of each case.

Dignity includes the right to self-respect, privacy and mental tranquillity and the right to be free from insulting, offensive, humiliating and degrading treatment.¹⁵ A Court will determine whether the invasion of dignity is serious by considering factors such as age, sex, social standing, sexual

10 General Notice 143/1992, published in *Government Gazette* 503, dated 17 October 1992. The title of the guidelines is reproduced as it appears in the *Government Gazette*. These Guidelines are still in force even though the Electoral Act 24 of 1992 has been replaced by the Electoral Act 5 of 2014.

11 Electoral Act 24 of 1992, section 39(1)(a).

12 Electoral Act 24 of 1992, section 41(b)(i).

13 Electoral Act 5 of 2014, section 152.

14 CR Snyman, *Criminal Law*, Durban: Butterworths, 1984 at 404.

15 Milton, *South African Criminal Law and Procedure*, 2nd ed, Cape Town: Juta, 1982 at 536.

impropriety, the parties' previous relationship, the complainant's personal reaction, the public interest and the nature of the act in question.¹⁶

While no cases concerning sexual orientation or gender identity have been brought in Namibia, Namibian courts have found that derogatory comments about race or sex can be *crimen injuria*.¹⁷ The High Court of Namibia has also commented that protections of freedom of speech in Namibia do not allow persons to violate the dignity of another person, meaning that the doctrine of *crimen injuria* is regarded as a legitimate and proportionate restriction on freedom of expression.¹⁸ The High Court has also noted that the prohibition of *crimen injuria* is strengthened by Article 8(1) of the Constitution of Namibia, which provides that "the dignity of all persons shall be inviolable".¹⁹

Cases from South Africa and Lesotho show that *crimen injuria* could apply to LGBT hate speech. For example, in the 2008 case of *S v Coetzee*,²⁰ the Kwazulu Natal High Court applied *crimen injuria* to language regarding a complainant's sexual behaviour and preferences, in a case where the accused asked two of his employees about their sexual relationships with their respective partners and questioned one complainant on her preferences in regard to sexual acts. In Lesotho, in the 1984 case of *S v Molapo*,²¹ the High Court confirmed a conviction of *crimen injuria* where the accused had written a letter referring to the complainant's homosexuality in foul and derogatory language.²²

6.3.2 Criminal defamation

Criminal defamation is the unlawful and intentional publication of matter concerning another which tends to injure his or her reputation.²³ Many countries no longer have this crime, but it still exists in Namibia and South Africa.²⁴

Commentators disagree on whether or not the injury must be serious in order to constitute a crime, but the Supreme Court of Appeal in South Africa has held that while it is usual practice to prosecute only serious instances of damage to reputation, seriousness is not an actual element of the crime.²⁵

It is open to the accused to prove that the defamatory publication was justified – such as by proving that it was substantially true and published for the public benefit, or that it constituted fair comment regardless of its truth.²⁶

16 CR Snyman, *Criminal Law*, Durban: Butterworths, 1984 at 410.

17 See *S v Vries* 1992 NR 5 (HC) and *S v Visage* 2010 (1) NR 271 (HC).

18 *Kauesa v Minister of Home Affairs and Others* 1994 NR 102 (HC) overruled in *Kauesa v Minister of Home Affairs* 1995 NR 175 (SC). This *dicta* of the High Court was not discussed in the Supreme Court case.

19 Id at 150.

20 *S v Coetzee* [2008] ZAKZHC 40.

21 *S v Molapo* [1984] LSHC 38.

22 Id at 2. The judge stated, "I find this Injuria very borderline but will not substitute my own Opinion to that of the trial magistrate because seriousness depends to a great extent upon the modes of thought prevalent amongst any particular community or at any period of time". Ibid.

23 CR Snyman, *Criminal Law*, Durban: Butterworths, 1984 at 411; *Hoho v The State* [2008] ZASCA 98, 2009 (1) SACR 276 (SCA) at para 23.

24 In the 1995 *Kauesa* case, the High Court of Namibia considered a televised statement by a police officer which criticised the white-dominated command structure of the police. Although the case concerned the constitutionality of a police regulation under which this officer was charged with misconduct, the Court noted in passing that the statements made were of such gravity as to constitute criminal defamation (or *crimen injuria*). *Kauesa v Ministry for Home Affairs* 1994 NR 102 (HC) at 110. In South Africa, see *Hoho v The State* [2008] ZASCA 98; 2009 (1) SACR 276 (SCA).

25 *Hoho v The State* [2008] ZASCA 98; 2009 (1) SACR 276 (SCA) at para 21-23.

26 Id at para 24; PMA Hunt & JRL Milton, *South African Criminal Law and Procedure, Vol II, Common-Law Crimes*, 2nd ed, Cape Town: Juta, 1982 at 557-559.

In the 2008 case of *Hoho v The State*²⁷ the South Africa Supreme Court of Appeal upheld a conviction for criminal defamation where a legislative researcher published leaflets making accusations of “corruption, bribery, financial embezzlement, sexual impropriety, illegal abortion and fraud” regarding various politicians.²⁸ The Court found that the criminal defamation law is constitutional because it strikes an appropriate balance between the protection of freedom of expression, and the value of human dignity.²⁹ Some have argued that a criminal sanction for defamatory words is “too drastic a means of regulating free speech”, especially when there is a well-developed civil action whereby a person can claim damages resulting from a defamatory statement.³⁰ However, after considering the higher standard of proof required for a conviction of criminal defamation, the Court concluded that it is an acceptable method for protecting people’s reputations in a democratic society.³¹

6.3.3 Incitement

It is a crime to encourage someone else to commit a crime.³² This could apply to situations where someone calls for violence against individuals because of their LGBT status.

Prior to independence, the apartheid government used charges of incitement to public violence to silence opposition to racist policies, such as in instances where statements made at public gatherings urged violent opposition to “Europeans” or police spies.³³ In the post-apartheid era, it is possible to imagine a situation where aggressive anti-gay sentiments expressed at a public meeting could constitute incitement to public violence.

Speech calling for assault, murder or other harmful action against a specific individual or LGBT persons in general could constitute incitement to criminal activity, which is punishable with the same penalties as the criminal act which was encouraged.³⁴

The criminal charge of incitement is normally utilised when the crime which was encouraged did not actually take place. If the criminal activity which was urged did occur, then the person who encouraged it can be charged as an accomplice or a conspirator.³⁵

6.4 Civil remedies in Namibia

SUMMARY

There are several possible civil actions which could be applied to hate speech. **Defamation** would apply if the speech injured a person’s reputation or status. One question of debate in defamation claims in other jurisdictions is whether it can be considered defamatory simply to identify someone as being homosexual, transsexual or intersex – or whether defamation requires some additional inference that such attributes are negative in some way.

27 *Hoho v The State* [2008] ZASCA 98; 2009 (1) SACR 276 (SCA).

28 *Id* at para. 2.

29 *Id* at paras 27-36.

30 *Id* at para 32.

31 *Id* at paras 36-37.

32 Riotous Assemblies Act 17 of 1956, section 18(2).

33 *R v Radu* 1953 (2) SA 245 (E); *R v Maxaulana* 1953 (2) SA 252 (E).

34 CR Snyman, *Criminal Law*, Durban: Butterworths, 1984 at 245.

35 *Id* at 245-246.

Infringement of dignity would apply where the speech caused the person in question to feel insulted or humiliated, as long as any reasonable person would have reacted in this way. In contrast to defamation claims, it is not necessary to show damage to reputation to succeed in a case of infringement of dignity, as the emphasis here is on the impact of the speech on the person who was insulted rather than on the reactions of others.

If the speech involved the unlawful publication of private facts about a person, then it would be possible to bring a civil action for **infringement of the right to privacy**. This might apply, for example, where a person's sexual orientation or gender identity was revealed to others without consent.

6.4.1 Defamation

Defamation is the intentional publication, regarding another person, of words or behaviour which injures that person's good name, reputation or status.³⁶

In Namibia, once it is proved that the defendant published a defamatory statement, the defendant can avoid liability by proving that statement was true and that its publication was in the public benefit; that the published statement constituted fair comment; or that the statement was made in a context of privilege (where the person making the statement has some legal, moral or social duty to do so, and where the person to whom the statement has some similar duty to receive it).³⁷

The Namibian courts have not yet decided a defamation case concerning LGBT status, but cases from other countries provide some guidance. One question in defamation cases in other countries has been whether simply identifying someone as being gay, lesbian, bisexual, transsexual or intersex can be considered defamation.

Some courts have expressed concern that if they were to agree that simply calling someone homosexual is defamatory; this would legitimise the perception that homosexuality is a negative attribute.³⁸ In contrast, in countries where consensual homosexual acts are criminalised, courts have found that simply calling someone homosexual can be defamatory in itself.³⁹

This question has not yet been decided in South Africa, but two Constitutional Court justices have suggested that it would be illogical to find an imputation based on a constitutionally-protected ground of non-discrimination defamatory, since this would "open a back door to the enforcement by the law of categories of differentiation that the Constitution has ruled irrelevant".⁴⁰

³⁶ J Neethling et al, *Law of Delict*, (5th ed), Durban: LexisNexis, 2006 at 307, citing *Tap Wine Trading CC v Cape Classic Wines (Western Cape) CC and Another* 1999 (4) SA 194 (C).

³⁷ *Trustco Group International Ltd and Others v Shikongo* 2010 (2) NR 377 (SC) at para 24. On what constitutes a privileged occasion, see, for example, *Botha and Another v Mthiyane and Another* 2002 (1) SA 289 (W).

³⁸ See, for example, the Scottish case *Quilty v Windsor* [1999] SLT 346 and the following US cases: *Albright v Morton*, NO. C.A.02-11458-NG. 321 F.Supp.2d 130 (2004) and *Yonaty v Mincolla* 2012 NY Slip Op 04248, decided on May 31, 2012 Appellate Division, Third Department (*per* Mercure JP), <<http://law.justia.com/cases/new-york/appellate-division-third-department/2012/512996.html>>.

³⁹ See, for example, the Zambian case of *Sata v Simwaka* [2011] ZMHC 84 and the Seychelles case of *Talma v Henriette* [1999] SCSC 12.

⁴⁰ *Le Roux and Others v Dey* 2011 (3) SA 274 (CC) at paras 185-188 (minority opinion); the majority decided the case on a different basis.

In Namibia, referring to someone as homosexual might be considered defamatory in itself, in a context where the Constitution provides no protection against discrimination on the basis of sexual orientation and gender identity and some homosexual conduct is criminalised. However, defamation claims would have a greater chance of success where the statement in question coupled the reference to sexual orientation or gender identity with a suggestion that this was a negative attribute. For example, it would probably be defamatory to state that a person's homosexuality would interfere with his or her job performance, or to associate homosexuality with abuse of power or infidelity.⁴¹

In the 2010 case of *Trustco Group International Ltd v Shikongo*, the Namibian Supreme Court considered whether the law of defamation interferes with the constitutional right to freedom of speech and free expression. The Court weighed the rights at stake, explaining that while free speech and free press are “central to a vibrant and stable democracy”, the press must exercise these rights “responsibly and with integrity”.⁴² The Court developed the law on defamation to ensure consistency with the Namibian Constitution by holding that “reasonable or responsible publication of facts that are in the public interest” should be a defence to a claim of defamation, at least for media defendants.⁴³

6.4.2 Infringement of dignity

A claim for infringement of dignity might be an alternative to a claim for defamation. The three essential requirements for such a claim are (a) an intention on the part of the offender to produce the effect of his or her act; (b) a wrongful act; and (c) a resulting impairment of the dignity of another.⁴⁴ A wrongful act would include making an offensive or insulting communication.⁴⁵

In contrast to defamation cases, infringement of dignity claims do not require proof that a person's reputation was affected. But the plaintiff must show that he or she did in fact feel insulted by the act, and that any reasonable person would feel insulted by the same conduct.

In an action for infringement of dignity, in contrast to defamation, the fact that the insulting statement was true is not a defence.⁴⁶

While it may or may not qualify as an infringement of dignity simply to refer to someone's sexual orientation, the use of a derogatory term such as “*moffie*”⁴⁷ could support such a claim, just as calling a black person a “*kaffir*” has been found by the courts to be a verbal infringement of dignity.⁴⁸

Because many LGBT individuals have reported insults from police officers or other officials, it is useful to consider the South African case of *Mblini v Minister of Police*.⁴⁹ Here, damages were

41 See *Quilty v Windsor* [1999] SLT 346.

42 *Trustco Group International Ltd and Others v Shikongo* 2010 (2) NR 377 (SC) at para 28.

43 *Id* at paras 53-56.

44 See *R v Umfaan* 1908 TS 62 at 66; *Delange v Costa* 1989 (2) SA 857 (A).

45 *Delange v Costa* 1989 (2) SA 857 (A) at 861.

46 *Fayd'herbe v Zammit* 1977 (3) SA 711 (D).

47 “*Moffie*” is a derogatory term for gay or effeminate men and a common insult in Southern Africa.

48 *Ciliza v Minister of Police and Another* 1976 (4) SA 243 (N); *Mbatha v Van Staden* 1982 (2) SA 260 (N).

49 *Mblini v Minister of Police* 1981 (3) SA 493 (E). Only headnote available in English.

awarded in respect of insulting and threatening words said by a policeman on duty to the wife of a detainee. The Court found that the State could be held liable for the policemen's act unless it could show that the statement was of a purely personal nature and wholly outside the scope of the policeman's employment.⁵⁰

6.4.3 Invasion of privacy

If speech involves the unlawful publication of private facts about a person, then it is possible to bring a civil action for infringement of the right to privacy.⁵¹ This might apply, for example, where a person's sexual orientation or gender identity was revealed to others without consent.

The invasion of privacy may take two forms:

- (i) an unlawful intrusion upon the personal privacy of another (such as by recording or filming them without their consent); and
- (ii) the unlawful publication of private facts about a person.

In drawing the boundary between lawfulness and unlawfulness, courts must consider the context. For example, if the case involves the publication of private facts in the press, the aggrieved person's interest in preventing the public disclosure of those facts must be weighed against the interest of the public in being informed of those facts.⁵²

In 2007 in South Africa, three plaintiffs successfully sued for damages for violation of their dignity and privacy after their HIV-positive status was published in a biography of a political figure without their consent.⁵³ The Constitutional Court found that the disclosure could not be justified in the public interest, and that disclosure of someone's HIV-status deserves protection for many reasons – including the intolerance and discrimination that may result from such a disclosure in the South African context.⁵⁴ Such reasoning could apply to sexual orientation and gender identity in Namibia given the societal intolerance faced by LGBT persons.

In assessing the amount of damages, the Court found the following factors relevant: the nature and extent of the publication and the invasion of privacy; whether or not there was malice involved; the social standing of the parties; and whether or not there was an apology.⁵⁵

It is also possible that posting information about a person's sexual orientation on social media sites could constitute an invasion of privacy.⁵⁶

50 See also *Ciliza v Minister of Police and Another* 1976 (4) SA 243 (N).

51 See *NM and Others v Smith and Others (Freedom of Expression Institute as Amicus Curiae)* 2007 (5) SA 250 (CC) at para 55.

52 *Financial Mail (Pty) Ltd and Others v Sage Holdings Ltd and Another* 1993 (2) SA 451 (A) at 462-463.

53 They also claimed infringement of their psychological integrity, but this was not discussed other than in summary terms and not mentioned in respect of the award of damages. See paras 54 and 81.

54 At para 42.

55 At para 77.

56 In England, a defendant was ordered to pay damages after setting up a false Facebook profile which contained incorrect personal information about the plaintiff, including a statement that he was homosexual. *Applause Store Productions Limited v Raphael* [2008] EWHC 1781 (QB). See also *Dutch Reformed Church Vergesig and Another v Sooknunan* 2012 (6) SA 201 (GSJ), where a South African court ordered the removal of personal details (in this case, contact information) which had been posted on a Facebook wall without consent.

Pros and Cons of Civil versus Criminal Remedies

There are two matching sets of remedies available under the common law to challenge hate speech in court:

Civil remedies

Infringement of dignity
Defamation

Criminal remedies

Crimen injuria
Criminal defamation

Criminal remedies are a useful alternative to civil cases because they are prosecuted by the state prosecutor and so would not require the engagement of a private legal practitioner as a civil case would. Therefore, criminal cases provide a less expensive option for redress. A criminal sanction may also constitute a more drastic remedy than an award of damages.

On the other hand, it is not possible under current Namibian law to claim compensation in a criminal case other than for property damage, so monetary damages in respect of hate speech could be claimed only through a civil case. Furthermore, the standard of proof in a criminal case is “beyond reasonable doubt” – a higher standard than that required in a civil case, which is “on a balance of probabilities”.

Also, because of differing approaches to what must be proved by whom, it is substantially more difficult to secure a conviction on a charge of criminal defamation than to succeed in a civil claim for defamation – particularly where the offending party is a member of the media.

In both kinds of cases, the court would have to weigh up the damage done against the right to freedom of expression, to ensure that a correct constitutional balance has been drawn.

Civil cases

Private lawyer
Damages
Lower burden of proof

Criminal cases

State prosecutor
Criminal sanction but no compensation
Higher burden of proof

See *Hoho v The State* (2008) ZASCA 98, 2009 (1) SACR 276 (SCA) at para 33

6.5 Using constitutional rights to protect against hate speech

SUMMARY

In other countries, constitutional rights to dignity, privacy, equal treatment and non-discrimination have been utilised to protect members of the LGBT community from hate speech in the absence of special hate speech legislation. Since the constitutional provisions which have been relied upon are similar to those in the Namibian Constitution, these cases provide useful inspiration for possible test cases in Namibia.

In Uganda, in the 2010 case of *Kasha and Others v Rolling Stone*, the Uganda High Court ruled on a newspaper article which published the names and photographs of 100 individuals it referred to

as “leading gays in this nation”, alongside in highly derogatory statements about homosexuals.⁵⁷ The Court held that the article threatened the applicants’ constitutional rights to respect for human dignity, protection from inhumane treatment and privacy of the person and the home.⁵⁸ This case is particularly relevant for Namibia, given that the Namibian Constitution’s protected rights and freedoms similarly include respect for human dignity (Article 8), privacy (Article 13) and family (Article 14) – rights which Namibia’s High Court has suggested should be elevated above the right to free speech.⁵⁹

The permissibility of hate speech has also been restricted on constitutional grounds in the Netherlands, where the Constitution prohibits discrimination on any grounds whatsoever and guarantees the right to equal treatment. In the 1990 case of *Van Zijl v Goeree*,⁶⁰ the Dutch Supreme Court held that the publication of a pamphlet describing AIDS as a “consequence of homosexuality” and describing the government as “leading the country into ruin” by legalising homosexuality had violated the plaintiff’s right to equal treatment.⁶¹ In the circumstances, the right to equal treatment was held to outweigh the defendant’s right to free expression.

6.6 International law: hate speech and crimes against humanity

SUMMARY

In extreme circumstances, hate speech could amount to persecution, which is an international crime against humanity under the Rome Statute of the International Criminal Court. However, this would apply only where the persecution was part of a widespread or systematic attack against a civilian population alongside some another crime against humanity from the list in the Rome Statute.

A US case which is still underway has made a preliminary finding that persecution against sexual minorities is a crime against humanity, and that campaigning for the denial of basic human rights to the LGBT community in Uganda constitutes aiding and abetting such persecution.

International law may also prohibit specific types of speech. This is important in Namibia because the Namibian Constitution provides that rules of international law form part of Namibian law, or can be applied directly in Namibian courts.⁶²

⁵⁷ *Kasha, Kato and Onziema v Rolling Stone*, Uganda High Court, Miscellaneous Cause No 163 of 2010, <<http://iglhrc.org/sites/default/files/2010%20Kasha%20Jacqueline%20v%20Rolling%20Stone.pdf>> at 2-3. One of the applicants in this case, David Kato, was murdered at his home less than a month after the issue of the judgment regarding the newspaper article identifying him as homosexual – illustrating the potential link between hate speech and hate crimes. Xan Rice, “Ugandan gay rights activist David Kato found murdered”, *The Guardian*, 27 January 2011.

⁵⁸ *Kasha, Kato and Onziema v Rolling Stone*, Uganda High Court, at 9.

⁵⁹ *Kauesa v Minister of Home Affairs and Others* 1994 NR 102 (HC) at 122, overruled in *Kauesa v Minister of Home Affairs* 1995 NR 175 (SC) which explicitly refused to endorse the High Court’s extraneous discussion of constitutional issues (at 183).

⁶⁰ *Van Zijl v Goeree*, 1990 RvdW Nr. 41 (HR Neth).

⁶¹ Submission of Interrights (the International Centre for the Legal Protection of Human Rights) and the International Commission of Jurists pursuant to leave granted by the President of the Chamber of the European Court of Human Rights in *the Case of Vejdeland and Others v Sweden*, (Application no. 1813/07), <www.interrights.org/files/137/Vejdeland.pdf>, citing A Mattijssen and L Smith, “Dutch Treats: The Lessons the U.S. Can Learn from How the Netherlands Protects Lesbians and Gays”, 4 *American University Journal of Gender & Law* 303 (1995-1996).

⁶² Namibian Constitution, Article 144.

Hate speech may be prohibited by international law where it amounts to persecution, which is a crime against humanity. Crimes against humanity are defined in the Rome Statute of the International Criminal Court, ratified by Namibia on 25 June 2002, as certain acts which are “committed as part of a widespread or systematic attack directed against any civilian population”. One of these crimes against humanity is persecution against “any identifiable group or collectivity”, which is defined by the Rome Statute as the “intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity”. However, this applies only where the persecution occurred in conjunction with another crime against humanity listed in the Rome Statute, such as murder, extermination, enslavement, imprisonment or other inhumane acts.⁶³

An ongoing US case has made an initial finding that persecution against sexual minorities qualifies as a crime against humanity, in a case where a US citizen campaigned for the denial of basic human rights to the LGBT community in Uganda.⁶⁴

6.7 Models for law reform

SUMMARY

Many other countries have legislation against hate speech. Some explicitly cover hate speech based on sexual orientation or gender identity, while others which lack explicit language to this effect have been applied in this way by the courts. Many of these laws have explicitly been found compatible with constitutional protections on freedom of speech and could serve as useful models for law reform in Namibia. It is also useful to note that some privacy legislation in other countries explicitly protects against the disclosure of a person’s sexual orientation.

6.7.1 Legislation on hate speech

Namibia

Namibia’s Racial Discrimination Prohibition Act 26 of 1991, discussed on page 96, prohibits hate speech about race and is compatible with the Namibian Constitution’s protection of freedom of expression. This statute could be copied or expanded to cover hate speech on other grounds, including sexual orientation or gender identity.

South Africa

South Africa has enacted hate speech legislation which covers a broad range of protected attributes – including gender, sex, marital status and sexual orientation. The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 prohibits speech that would promote or propagate hatred on the basis of any protected attribute. The Act provides only for civil liability for the perpetrator but a court that hears a complaint of hate speech can refer the case for criminal proceedings where appropriate.⁶⁵

63 Rome Statute of the International Criminal Court, Articles 7 and 5.

64 *Sexual Minorities Uganda v Scott Lively*, C.A. No. 12-cv-30051-MAP; Memorandum and Order Regarding Defendant’s Motions to Dismiss, (Dkt. Nos. 21 & 30), <www.gpo.gov/fdsys/pkg/USCOURTS-mad-3_12-cv-30051/pdf/USCOURTS-mad-3_12-cv-30051-1.pdf>.

65 Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (South Africa), sections 10(2) and 21(2)(n).

Canada

In Canada, many provinces have legislation specifically prohibiting hate speech on the basis of sexual orientation.⁶⁶ For example, the province of Saskatchewan prohibits hate speech on the basis of various “prohibited grounds”, which include sexual orientation.⁶⁷ Hate speech includes publishing or displaying any document or statement “that exposes or tends to expose to hatred, ridicules, belittles or otherwise affronts the dignity of any person or class of persons”.⁶⁸

Sweden

A provision on hate speech in Sweden’s Penal Code which makes no reference to sexual orientation has been applied to statements denigrating homosexuality. The European Court of Human Rights upheld a conviction for this, finding that the speech fell within the prohibition against “agitation against a national or ethnic group”, The Court held that sexual orientation “should be treated in the same way as categories such as race, ethnicity and religion which are commonly covered by hate-speech and hate-crime laws, because sexual orientation is a characteristic that is fundamental to a person’s sense of self” as well as “a marker of group identity”.⁶⁹

6.7.2 Legislation on privacy

Some privacy legislation in other countries specifically protects against the disclosure of a person’s sexual orientation. For example, Trinidad and Tobago prohibit the disclosure of “sensitive personal information”, including information about someone’s “sexual orientation or sexual life”.⁷⁰

B. PROTECTION FOR FREEDOM OF EXPRESSION ABOUT LGBT ISSUES

6.8 Restrictions on “propaganda of homosexuality”

SUMMARY

Some countries have attempted to prevent speech which “promotes” homosexuality or LGBT rights. This has not taken place in Namibia, and probably could not, as such restrictions would be incompatible with the Namibian Constitution and with international conventions to which Namibia is a party.

66 See, eg, *Saskatchewan Human Rights Code*, Chapter S-24.1 of the Statutes of Saskatchewan, 1979, section 14; *Human Rights Act*, Chapter H of the Statutes of Prince Edward Island, section 12; *Human Rights Act*, RSNB 2011, c 171 (New Brunswick), section 7; *Alberta Human Rights Act*, Chapter A-25.5 of the Revised Statutes of Alberta 2000, section 3(1).

67 *Saskatchewan Human Rights Code*, sections 14(1)(b) and 2(1)(iv).

68 *Id.*, section 2(1)(iv). See also *Saskatchewan (Human Rights Commission) v. Whatcott* [2013] 1 S.C.R. 467, which held that the prohibition on hate speech about a person’s sexuality is a permissible limitation on Canada’s constitutional protection of freedom of expression.

69 *Case of Vejdeland and Others v Sweden*, majority judgment at para 45.

70 Data Protection Act, 2011, sections 2 and 40

Some countries including the Republic of Moldova, the Russian Federation and Ukraine, have tried to use legislation to prevent speech which “promotes” homosexuality or LGBT rights.⁷¹ Namibia does not currently have any such laws, but the issue could arise more indirectly if LGBT events were obstructed based on their content in terms of the Public Gatherings Proclamation, 1989, which allows police to place conditions on certain gatherings, or in terms of local authority regulations on public events.⁷² Such restrictions would interfere with constitutional rights as well as international commitments.

For example, the Human Rights Committee has found that restricting peaceful LGBT assemblies seeking to promote tolerance towards gays and lesbians violates the freedom of speech under the International Covenant on Civil and Political Rights.⁷³ This case involved a Russian activist who was banned from holding peaceful assemblies aimed at promoting tolerance towards gays and lesbians after she displayed posters near a school, showing statements such as “Homosexuality is normal” and “I am proud of my homosexuality”.⁷⁴ In finding that the restriction violated the ICCPR, the Committee noted that “freedom of opinion and freedom of expression are indispensable conditions ... constitute the foundation stone for every free and democratic society”.⁷⁵ Thus, when freedom of speech and expression is restricted, the standard for finding such restrictions acceptable under the ICCPR is particularly high.⁷⁶

Similarly, in 2010, the European Court of Human Rights held that Russia violated the protection for freedom of assembly and the prohibition against discrimination in the European Convention of Human Rights by repeatedly refusing permission for a gay pride event in Moscow. Russia argued that the purpose of the restriction was to protect public safety and morals, but the European Court found this justification unpersuasive.⁷⁷

6.9 Limitations on indecent, obscene and undesirable speech

SUMMARY

Prohibitions on sexually-explicit homosexual material are probably equally justifiable (or unjustifiable) as prohibitions on sexually-explicit heterosexual material, but there is a danger that homosexuality may be deemed “immoral” or “obscene” by virtue of its nature rather than its explicitness. In Namibia and South Africa, laws aimed at protecting against pornography have been worded or applied in a way which treats homosexual issues differently to heterosexual ones. In Namibia, two statutes govern pornographic depictions: the Indecent or Obscene Photographic Matter Act and the Publications Act. The

71 European Commission for Democracy through Law (Venice Commission), “Opinion on the Issue of the Prohibition of So-Called ‘Propaganda Of Homosexuality’ in the Light of Recent Legislation in some Member States of The Council of Europe”, adopted by the Venice Commission at its 95th Plenary Session (Venice, 14-15 June 2013), Opinion 707/2012, CDL-AD(2013)022, [www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2013\)022-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2013)022-e) at paras 48 and 56.

72 Public Gatherings Proclamation, AG 23 of 1989.

73 *Fedotova v Russian Federation*, Communication no. 1932/2010, CCCPR/C/106/D/1932/2010 (30 November 2012).

74 *Id.*

75 *Id.* at para 10.3, quoting General comment No. 34 at para 2.

76 *Ibid.*, quoting General comment No. 34 at para 22.

77 *Alekseyev v Russia*, Applications nos. 4916/07, 25924/08, and 14599/09, 21 October 2010, <<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-101257>>.

Namibian High Court has declared the operative provision of the first law unconstitutional. In South Africa the second law was applied in a manner which restricted educational material aimed at men who have sex with men, but the High Court overturned this ruling.

6.9.1 Indecent or Obscene Photographic Matter Act 37 of 1967

The Indecent or Obscene Photographic Matter Act 37 of 1967 defines “indecent or obscene photographic matter” as “photographic matter” which depicts “sexual intercourse, licentiousness, lust, homosexuality, lesbianism, masturbation, sexual assault, rape, sodomy, masochism, sadism, sexual bestiality or anything of a like nature”.⁷⁸ The operative provision of this law was declared unconstitutional in the High Court of Namibia in the 1998 *Fantasy Enterprises* case. The Court found that the overly broad prohibitions in the statute violated the constitutional protection of freedom of expression as they went far beyond coverage of sexually explicit material.⁷⁹ The Court found that the remainder of the Act could not be separated from the unconstitutional section, thus this statute, although still on Namibia’s law books, has no active effect.⁸⁰

6.9.2 Publications Act 42 of 1974

The Publications Act 42 of 1974 prohibits or restricts production, importation, distribution and possession of publications, objects and films which the administrative bodies find “undesirable”. Its stated purpose is to “uphold a Christian way of life”.⁸¹ “Undesirable” is defined as being, amongst other things, “indecent or obscene”, “offensive or harmful to public morals”, “blasphemous” or “offensive to the religious convictions or feelings of any section of the inhabitants of the Republic”.⁸² No cases applying this statute in Namibia have been located. In South Africa there was an attempt to use it against two educational films on protection against HIV transmission aimed at gay men. However, the High Court overturned the finding that the films were “undesirable”.⁸³ This case shows that it may be necessary to be watchful to ensure that laws on obscene or immoral publications are not applied in ways discriminatory to LGBT rights and interests.

78 Indecent or Obscene Photographic Matter Act 37 of 1967, section 1. This statute is applicable to Namibia as amended in South Africa to November 1979, and as amended by the SWA Indecent or Obscene Photographic Matter Amendment Act 4 of 1985.

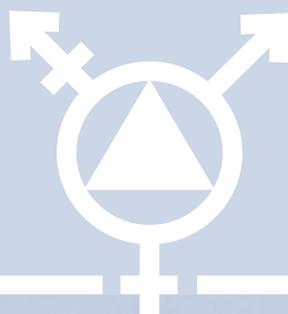
79 *Fantasy Enterprises CC T/A Hustler The Shop v Minister of Home Affairs and Another; Nasilowski and Others v Minister of Justice and Others* 1998 NR 96 (HC). See also *Case and Another v Minister of Safety and Security and Others* 1996 (3) SA 617 (CC).

80 Id at 109B-C.

81 Publications Act 42 of 1974, section 1.

82 Id, section 47.

83 *South African Connexion CC T/A Reel Communications v Chairman, Publications Appeal Board* 1996 (4) SA 108 (T). The Act is a relic from the days of South African control over South West Africa, and was for a while in force in similar versions in both South Africa and independent Namibia. The statute was subsequently repealed in South Africa by Act 65 of 1996, but remains in force in Namibia.



Chapter 7

LABOUR

7.1	Introduction to LGBT employment discrimination	110
7.1.1	The international picture	110
7.1.2	LGBT employment discrimination in Namibia	111
7.2	Employment discrimination laws in Namibia	112
7.2.1	Labour Act 6 of 1992	112
7.2.2	Labour Act 15 of 2004	112
7.2.3	Labour Act 11 of 2007	114
7.2.4	Strategies for using the current labour law to combat LGBT employment discrimination	114
7.3	International law	116
7.3.1	LGBT employment discrimination and the ILO	117
7.3.2	Other international obligations	118
7.4	Sexual harassment	119
7.5	Family responsibilities	121
7.5.1	Labour Act 11 of 2007	121
7.5.2	ILO Convention on Workers with Family Responsibilities	122
7.6	Compassionate leave	122
7.7	Severance pay and dependants on agricultural land	123
7.8	Social security benefits	124
7.9	Employees' compensation	124
7.10	Models for law reform	125

7.1 Introduction to LGBT employment discrimination

SUMMARY

General discrimination against LGBT persons in society is linked to discrimination and harassment in the workplace, worldwide and in Namibia. The problems are often related to gender stereotyping, with discrimination, harassment and exclusion from the labour market occurring whenever there is non-conformity with preconceptions of how women and men are expected to look and behave. Many LGBT employees conceal their sexual orientation or their true gender identity at work, which can be very stressful. Workplace discrimination is particularly severe for transgender persons.

7.1.1 The international picture

An International Labour Organization (ILO) report notes that general societal discrimination against LGBT individuals translates into discrimination and harassment in the employment context, particularly where same-sex activity is criminalised.¹ Some studies have also found that gay employees earn between 3 and 30% less than their non-gay counterparts.² Another problem is that same-sex couples may not be treated in the same way as heterosexual couples in terms of work-related benefits, such as medical aid coverage, compassionate leave or rights in terms of pension plans.³

Since 1 May 2012, the ILO has been sponsoring a project called **Gender Identity and Sexual Orientation: Promoting Rights, Diversity and Equality in the World of Work (PRIDE)**. The project is researching discrimination faced by members of the LGBT community in order to promote tolerance, diversity and equality in the workplace. Preliminary research findings reported in October 2013 highlighted the problems faced by LGBT employees:

7. While national contexts differ, there are nonetheless some common themes emerging from preliminary research findings in Argentina, Hungary, South Africa and Thailand, namely:
 - (a) Discrimination and harassment are commonplace for LGBT workers.
 - (b) Legislation protecting the rights of LGBT workers is often absent.
 - (c) Discrimination, harassment and exclusion from the labour market often happen on the basis of non-conformity with preconceptions of how women and men are expected to behave.
 - (d) The majority of LGBT workers choose to conceal their sexual orientation in the workplace.
 - (e) Transgender workers appear to experience the most severe forms of workplace discrimination.⁴

1 International Labour Conference, *Equality at work: The continuing challenge*, 2011, <www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_166583.pdf> at xiii.

2 Id at 51.

3 Ibid.

4 International Labour Office, *Discrimination at work on the basis of sexual orientation and gender identity: Results of pilot research*, 2013, <www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_221728.pdf> at 2 (emphasis added).

7.1.2 LGBT employment discrimination in Namibia

While there have been no studies of LGBT discrimination in Namibian workplaces, anecdotal evidence suggests that LGBT workers in Namibia experience the same problems as those elsewhere. For example, in 2013, OutRight Namibia reported that “[t]rans-diverse communities find it hard to enter the job market and find gainful employment” – with the result that they may turn to sex work out of desperation.⁵ A brief 2014 assessment from Freedom House also reports, without details, that members of the LGBT community in Namibia experience discrimination in employment.⁶

Transvestite man loses Cash Crusader job

A transvestite man says he was chased away by the manager of Cash Crusaders Wernhil Park because he worked for a gay and lesbian organisation.

Annanias “Tingy” Haufiku, a former employee of the now defunct gay and lesbian organisation The Rainbow Project, was sent to Cash Crusaders by Edu Letu, a job placement company.

“The boss looked at my CV and asked me what Rainbow Project is. When I told him we worked for gay and lesbian rights he got angry,” said Haufiku.

He further said the boss whom he identified as Nico then said they don’t employ moffies (gays). “There is no place for moffies and lipstick in my shop.”

Haufiku says he tried by all means to be as normal as possible, “I had no make-up on. I was as normal as possible. He didn’t even give me a chance to prove myself. I have experience but till now I’m job hunting.”

Haufiku said he feels hurt, “It’s not the first time this happened to me. I’m not keeping quiet anymore. I’m sick and tired. I’m claiming my space in this country.”

Veronica Gebhardt of Edu Letu confirmed, “Yes it did happen but I first have to talk to management regarding talking to the media.”

Linda Baumann of Out-right Namibia which advocates for gay and lesbian rights who was Haufiku’s reference said she was outraged by the incident

Discrimination at employment level is unacceptable. Edu-Letu should take it up with Cash Crusaders because Annanias was found qualified for the job,” exclaimed Baumann. Cash Crusaders manager denied all allegations saying Haufiku was not given the job because he lacked retail experience, “I looked at his CV and saw he did not work at any retail shop before. Then I looked at his face and noticed he had make-up on. It was not appropriate for an interview. I have a gay man working for me.

Paulina Moses, “Transvestite Man Loses Cash Crusader Job”, *Informanté*, 12 August 2010

.....

Many LGBT employees conceal their sexual orientation or their true gender identity at work, which can be very stressful.

.....

5 OutRight Namibia, *LGBTI Human Rights Report on Lesbian, Gay, Bisexual, Transgender and Intersex People in Namibia*, 2013 at 17.

6 Freedom House, “Freedom in the World 2014: Namibia”, <www.freedomhouse.org/report/freedom-world/2014/namibia-0#.VEI5f2eSzeA>.

7.2 Employment discrimination laws in Namibia

SUMMARY

The first labour law enacted in post-independence Namibia prohibited discrimination on the basis of “sexual orientation” in the employment context. This 1992 law has since been replaced by the Labour Act 11 of 2007 which prohibits discrimination in employment decisions on the basis of sex, but not sexual orientation. However, court cases from other jurisdictions show that it may be possible to apply the provision forbidding sex discrimination in employment to some instances of discrimination on the basis of sexual orientation or gender identity.

7.2.1 Labour Act 6 of 1992

The first Labour Act passed after independence included explicit protection against discrimination on the basis of sexual orientation in the employment context.⁷ This was reportedly the result of quiet lobbying by gay and lesbian activists.⁸ There are no reported court cases in which the sexual orientation protection was applied in practice. This may have resulted partly from the fact that the legal protection against discrimination on the basis of sexual orientation was not widely known, or because gay and lesbian employees feared speaking out to assert their rights under the law.⁹

7.2.2 Labour Act 15 of 2004

A new labour law was passed by Parliament in 2004: the Labour Act 15 of 2004. This Act was intended to replace the Labour Act 6 of 1992. It removed the explicit protection against discrimination on the basis of sexual orientation, despite protests from both inside and outside of Parliament.

The Bill prepared by the Ministry of Labour in 2004 prohibited employment discrimination only on the following grounds:

- (a) race, colour, or ethnic origin;
- (b) sex, marital status or family responsibilities;
- (c) religion, creed or political opinion;
- (d) social or economic status; or
- (e) degree of physical or mental disability.

The Legal Assistance Centre, amongst others, lobbied the Ministry of Labour and Parliamentarians in the National Assembly to add sexual orientation to the list of prohibited grounds. A member of one of the opposition parties proposed that the Bill should be amended to protect against discrimination on the basis of sexual orientation, but this suggestion made no headway.¹⁰

⁷ Labour Act 6 of 1992, section 107.

⁸ Ashley Currier, “Deferral of Legal Tactics: A Global LGBT Social Movement Organisation’s Perspective” in Scott Barclay, Mary Bernstein and Anna-Maria Marshal, eds, *Queer Mobilizations: LGBT Activists Confront the Law*, New York: NYU Press, 2009 at 23.

⁹ See for example, International Gay and Lesbian Human Rights Commission (IGLHRC) and the Center for Women’s Global Leadership (CWGL), *Written Out*, 2000, <<http://library.law.columbia.edu/urlmirror/CLR/101CLR1181/WrittenOut/III-D.html>> at 245.

¹⁰ See Hon Johan de Waal, National Assembly, on the Second Reading of the Labour Bill 2004, 5 May 2004; Hon Johan de Waal, Committee Stage on the Labour Bill 2004, 6 May 2004; Hon Albert Kawana, Committee Stage on the Labour Bill 2004, 6 May 2004.

The Legal Assistance Centre also lobbied for a stronger provision on sexual harassment,¹¹ and the National Council inserted an amendment to this effect which clarified the definition of sexual harassment without affecting the related grounds for discrimination.¹²

The Labour Act 15 of 2004 never came completely into force; the Labour Act 6 of 1992 continued to be the operative law.¹³

Justice Minister scorns homosexuality as ‘criminal’

HOMOSEXUALITY is “illegal and criminal” in Namibia, Justice Minister Albert Kawana said in the National Assembly yesterday, snubbing a request by the DTA to include a provision in the new Labour Bill that would prevent discrimination against employees based on their sexual orientation.

During the Committee Stage of the debate on the legislation, which is set to replace the current Labour Act of 1992, the DTA’s Johan de Waal requested that Labour Minister Marco Hausiku retain a provision in the current Act that prohibits sexual discrimination. But, instead, it was Kawana who chose to respond to his demand.

“In Namibia, sexual orientation is not really accepted in any Namibian law or in any policy. The Supreme Court has found homosexuality and such things as illegal and criminal acts in Namibia.”

The House was notably silent at this point, but Kawana did not cite the case in which this ruling was made.

De Waal then made it expressly clear that he was unhappy that this provision was being removed from the new Bill and said that “if we were the Government, we would want that it be in there”.

He said Government was likely to come into conflict with international labour legislation and human rights conventions it had acceded to if it did away with the provision.

According to clause 107 of the current Act, an employee may approach the labour court if he or she is discriminated against on a number of grounds, including sexual orientation.

However, in the new legislation’s clause 5(2), which deals with discrimination in any employment practice directly or indirectly, sexual orientation is not included as a ground for such legal redress

Lindsay Dentlinger, *The Namibian*, 7 May 2004

11 Legal Assistance Centre, *Comments on Draft Labour Bill 2004: Looking at the Bill from a Gender Perspective*, submitted in February 2004 to the Ministry of Labour, Ministry of Justice, Ministry of Women Affairs and Child Welfare (as the Ministry of Gender Equality and Child Welfare was then called), all MPs, the Chairperson of the National Assembly’s Standing Committee on Human Resources, Social and Community Development, the National Union of Namibian Workers and the NGO community. The LAC comments stated in relevant part:

Section 5, prohibition of discrimination in employment – sexual orientation: We are sorry to see that sexual orientation has been removed from the list of prohibited grounds of discrimination in employment practices, and propose that it be retained. The high level of societal discrimination on this basis makes this provision extremely important, and removing it from the law once it has already been there sends out a dangerous message that discrimination on this basis is now permissible. Prohibiting discrimination on this ground is not the same as endorsing or approving homosexuality, and private opinions on the topic would not be affected. Sexual activities of any nature which take place in private outside the workplace (including adultery, polygamy, etc) should not be a basis for any consequences in the sphere of employment.

12 “Report of the National Council Standing Committee on Constitutional and Legal Affairs on the Labour Bill submitted to the National Council on 02 August 2004”, available from the National Council; Minutes of Proceedings of the National Assembly, 21 September 2004, No 62-2004, Item 6.

13 The Labour Act 15 of 2004 was intended to repeal the Labour Act 6 1992, but it never came into force in its entirety. Sections 75, 97(a), (b), (c), (e) and (h), 94(1) and (4), 98, 99, 100 and 101 and items 1 and 11(3) of Schedule 1 came into force on 30 November 2005 (GN 162/2005, GG 3545). Section 118 and item 13(1) of Schedule 1 came into force on 27 January 2006 (GN 20/2006, GG 3582). Section 139, which would have repealed the Labour Act 6 of 1992, was never enacted.

7.2.3 Labour Act 11 of 2007

The motivation for the non-implementation of the 2004 Labour Act was to review the legislation in the wake of criticism from several quarters after its enactment.¹⁴ During this process, some technical changes were made to the provisions on discrimination in employment and sexual harassment, but there were no changes to the grounds for discrimination.¹⁵ The law was re-enacted after the revisions as the Labour Act 11 of 2007.

It should be noted that a recent report on human rights commissioned by the Office of the Ombudsman recommends that sexual orientation be reinstated as one of the grounds on which discrimination is prohibited in terms of the Labour Act 11 of 2007.¹⁶

7.2.4 Strategies for using the current labour law to combat LGBT employment discrimination

The Labour Act 11 of 2007 prohibits sex discrimination in any employment decision. Since the Act does not define “sex”, it may be possible to make an argument that sexual orientation and gender identity are encompassed in the term

United States

US case law is instructive on this issue because the relevant US law – Title VII of the Civil Rights Act of 1964 – prohibits “sex” discrimination in employment without reference to “sexual orientation”, much like Namibia’s current Labour Act.¹⁷

In a landmark 1989 case, *Price Waterhouse v Hopkins*, the US Supreme Court held that expecting an employee to conform to gender stereotypes can constitute “sex” discrimination. This case involved a senior manager at a professional accounting partnership who was not selected for a partnership position despite her impressive work accomplishments. Comments made by other partners suggested that this was because she did not conform to traditional ideas of femininity; she was described as “macho” and told that she should “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewellery”. The Court found that sex stereotyping had played a material part in the evaluation of the employee as a candidate for partnership, and that this constituted sex discrimination.¹⁸

The following are other examples of how US Courts have recognised discrimination on the basis of sexual orientation or gender identity as forms of sex discrimination:

Smith v City of Salem, Ohio (2004) – A firefighter who was undergoing a gender transition from male to female argued that he had been suspended because of his feminine appearance. The Court found that the employee had experienced discrimination for failure to conform to the employer’s idea of how males should look and act.¹⁹

14 Hon !Naruseb, National Assembly, on the Introduction of the Labour Bill 2007, 6 March 2007.

15 There is no record of any discussion within Parliament about adding “sexual orientation” to the list of prohibited forms of discrimination in the Bill when it was reconsidered.

16 Office of the Ombudsman, 2013 Baseline Study Report on Human Rights in Namibia, 2013 at 2.

17 42 USC § 2000e

18 *Price Waterhouse v Hopkins* 490 US 228 (1989).

19 *Smith v City of Salem, Ohio* 378 F.3d 566, 568 (6th Cir. 2004).

Barnes v City of Cincinnati (2005) – A transsexual police officer was denied a promotion because he did not appear sufficiently masculine, after he had been warned to stop wearing makeup to work. The court found that there was sufficient evidence to support a claim for sex discrimination on the basis of the employee’s failure to conform to gender stereotypes.²⁰

Schroer v Billington (2008) – A job offer as a Specialist in Terrorism and International Crime after the employer learned that the male colonel who had been chosen intended to undergo sex reassignment surgery to become a female. The employer argued that a feminine appearance would undermine the perception that the Colonel had appropriate military credentials. The Court found that this constituted sex discrimination because it was a form of gender stereotyping. The Court found that failure to employ a person who planned to change his or her anatomical sex was “literally” sex discrimination – just as an employer who hired Christians and Jews, but not persons who converted from one of these religions to the other, would be discriminating on the basis of religion.²¹

Prowel v Wise Business Forms, Inc (2009) – The Court held that a gay employee could bring a claim of sex discrimination even though the law did give direct protection against sexual orientation discrimination. The court’s reasoning was that it is a form of gender stereotyping where an employer discriminates against an employee because he believes an individual should engage in sexual activity only with members of the opposite sex.²²

Macy v Holder (2012) – A former police detective applied for a job with a crime lab while still presenting as a man. When he informed his prospective employer of his pending gender transition from male to female, the job offer was withdrawn. The US Equal Employment Opportunity Commission which enforces laws against workplace discrimination²³ held that “claims of discrimination based on transgender status, also referred to as claims of discrimination based on gender identity” can fall within the law’s prohibition on sex discrimination.²⁴

TerVeer v Billington (2014) – An employee claimed that he was harassed and humiliated by his supervisor, who consistently quoted biblical passages condemning homosexuality and ultimately dismissed him. The Court held that this could constitute sex discrimination because the employee is “a homosexual male whose sexual orientation is not consistent with the Defendant’s perception of acceptable gender roles”.²⁵

Some courts and commentators have objected to these interpretations of sex discrimination, arguing that gender-stereotyping claims are being used to “bootstrap” protection for sexual orientation into the law despite the fact that the legislature chose not to include sexual orientation in this legislation.²⁶ Other courts and commentators assert that discrimination based on sexual

20 *Barnes v City of Cincinnati* 401 F 3d 729 (6th Cir. 2005).

21 *Schroer v Billington* 577 F. Supp. 2d 293 (D.D.C. 2008).

22 *Prowel v Wise Business Forms, Inc* 579 F.3d 285 (3d Cir. 2009).

23 The Equal Employment Opportunity Commission (EEOC) makes administrative decisions which are not binding on the federal courts. However, its stance is significant since it is responsible for handling initial claims processing for employment discrimination complaints.

24 *Macy v Holder* EEOC Decision No. 0120120821, 2012 WL 1435995 (20 April 2012).

25 *TerVeer v Billington* 2014 WL 1280301 (D.D.C. 2014), as discussed in Rathod Mohamedbhai, “Expanding Sexual Orientation Protections for Employees?”, 7 April 2014, <www.rmlawyers.com/expanding-sexual-orientation-protections-for-employees/>

26 See the discussion in Dr Frank J Cavico, Dr Stephen C. Muffler & Dr Bahaudin G Mujtaba, “Sexual Orientation and Gender Identity Discrimination in the American Workplace: Legal and Ethical Considerations”, *International Journal of Humanities and Social Science*, Vol. 2 No. 1 (2012) at 5-6. See also *Etsitty v Utah Transit Authority* 502 F.3d 1215 (10th Cir. 2007), where the Court stated that there was no basis for a conclusion “that the plain meaning of ‘sex’ encompasses anything more than male and female” and could not apply to discrimination against someone for being transsexual. Another example is *Anderson v Napolitano, Secretary, Department of Homeland Security* Case No. 09-60744 (S.D.Fla. Feb. 8, 2010). where the Court held that references to an employee as a “fag” and as being “too flamboyant” were directed at his behaviour as a gay man, as opposed to being behaviour associated with a woman. Therefore, the Court found the problem to be one relating to sexual orientation rather than sexual stereotyping, meaning that it was not sex discrimination.

orientation is intrinsically intertwined with sex, meaning that it is not possible to separate the two concepts.²⁷

South Africa

South African labour legislation in South Africa prohibits discrimination on the basis of sex, gender and sexual orientation, amongst other grounds.²⁸ The South African Labour Courts have ruled in favour of several transgender complainants on the basis of sex and gender discrimination in the workplace. These cases may serve as models for similar challenges under the provisions prohibiting sex discrimination in Namibia.

Atkins v Datacentrix (Pty) Ltd (2009) – In this case, a male employee was dismissed after he disclosed to his employer his intention to undergo gender reassignment surgery. The employer argued that he was not dismissed because of his desire to undergo gender reassignment, but because of his failure to disclose this fact before being employed. The Court found that there was no legal duty on the employee to disclose his intentions. The Labour Court held that the discrimination which the employee experienced “fits under both sex and gender”.²⁹

Ehlers v Bohler Uddeholm Africa (Pty) (2010) – After an employee in a steel supply company underwent gender reassignment from male to female, the employer extracted an agreement from the employee that she would continue to wear male clothes and present herself as a male when consulting with clients, on the theory that the firm’s clients from the male-dominated engineering industry would be more comfortable with a man. The employee was eventually dismissed. The Labour Court stated that it found the agreement reminiscent of job reservations for whites during the apartheid era, and found the dismissal unfair because it was based on sex and gender discrimination.³⁰

Conclusion

Cases such as these suggest that there may be similar scope in Namibian law for expanding the concept of what constitutes “sex discrimination” in employment contexts, even though the law does not explicitly protect against discrimination on the basis of sexual orientation or gender identity.

7.3 International law

SUMMARY

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 grounds of discrimination under the ILO Discrimination (Employment and Occupation) Convention, 1958 (No. 111) only if a member state has voluntarily recognised such grounds after consultation with representative employers’ and employee’s organisations – a step which has not been taken in Namibia. Nevertheless, in May 2014, an ILO Committee of Experts specifically requested the Namibian Government

27 See the discussion in Dr Frank J Cavico, Dr Stephen C. Muffler & Dr Bahaudin G Mujtaba, “Sexual Orientation and Gender Identity Discrimination in the American Workplace: Legal and Ethical Considerations”, *International Journal of Humanities and Social Science*, Vol. 2 No. 1 (2012) at 5-6 and the cases summarised in this chapter.

28 See the Labour Relations Act 66 of 1995, section 187(1) and the Employment Equity Act 55 of 1998, section 6(1).

29 *Atkins v Datacentrix (Pty) Ltd* [2009] ZALC 164; [2010] 4 BLLR 351 (LC); (2010) 31 ILJ 1130 (LC) (2 December 2009).

30 *Ehlers v Bohler Uddeholm Africa (Pty) Ltd* [2010] ZALC 117; (2010) 31 ILJ 2383 (LC) (13 August 2010).

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.

7.3.1 LGBT employment discrimination and the ILO

According to Article 95(d) of the Namibian Constitution, Namibia has undertaken a duty to adopt policies aimed at compliance with “Conventions and Recommendations of the ILO”:

The broad policies of the ILO are set at the International Labour Conference, which meets once each year in Geneva, Switzerland, in June. This annual Conference brings together delegates representing governments, workers and employers from each ILO member state.³¹ The ILO Conference can adopt Conventions and Recommendations by a two-thirds majority.³² ILO Conventions are treaties that become binding on states which ratify them. ILO Recommendations are non-binding guidelines. ILO member states are required by the ILO Constitution to put Recommendations before the relevant national authority, to consider whether to enact them by legislation or otherwise. The State is not obligated to implement a Recommendation, but it does a duty to consider implementing it.³³

The primary ILO document on discrimination in employment is the **ILO Discrimination (Employment and Occupation) Convention, 1958 (No. 111)**, which prohibits discrimination on the basis of “race, colour, sex, religion, political opinion, national extraction or social origin” where this “has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation”. Additional prohibited grounds of discrimination may be determined by the member State after consultation with representative employers’ and workers’ organisations, and other appropriate bodies”. As of 2013, more than 60 member States had committed themselves to prohibit discrimination on the basis of sexual orientation,³⁴ but Namibia has not yet taken this step. The Committee of Experts on the Application of Conventions and Recommendations have proposed a new protocol to the Discrimination (Employment and Occupation) Convention, 1958 (No. 111) which would include sexual orientation as a prohibited ground of discrimination under this Convention.³⁵

There are two existing ILO Recommendations which explicitly refer to prohibiting and preventing discrimination on the basis of sexual orientation – one which prohibits discrimination on this basis by private employment agencies³⁶ and one which recommends measures at the workplace

31 “International Labour Conference”, ILO website: <www.ilo.org/global/about-the-ilo/how-the-ilo-works/international-labour-conference/lang-en/index.htm>.

32 ILO Constitution, Art 19.

33 Id, Art 19(6). See also Charlotte Bynum, *ILO Research Guide*, Cornell Law School (revised 2010 by Zachary D Wellbrock).

34 International Labour Conference, “ILO Director-General’s statement on International Day against Homophobia and Transphobia”, 17 May 2013, <www.ilo.org/global/about-the-ilo/who-we-are/ilo-director-general/statements-and-speeches/WCMS_213528/lang-en/index.htm>.

35 Interrights, *Non-discrimination in International Law: A Handbook for Practitioners*, 2011 Edition at 143.

36 Recommendation R188.

to combat HIV/AIDS which involve all workers, regardless of their sexual orientation.³⁷ Namibia has indicated to the ILO that it considered the Recommendation on private employment agencies – and the Labour Act 11 of 2007 does include provisions on private employment agencies, but without addressing discrimination by such agencies on the basis of sexual orientation.³⁸ The most recent information available from the ILO indicates that Namibia has not yet considered the Recommendation on HIV-related workplace measures for possible enactment into Namibian law or policy.³⁹

In May 2014, the Committee of Experts on the Application of Conventions and Recommendations of the International Labour Organization published the following observation on the application of the Discrimination (Employment and Occupation) Convention, 1958 (No. 111) in Namibia:

*In its previous comments, the Committee noted with regret that the Labour Act no longer prohibited discrimination based on sexual orientation. The Committee notes that the Government repeats its statement that article 10 of the Constitution prohibits discrimination based on sex, race, colour, ethnic origin, creed, and social or economic status. The Government also indicates that all workers have the same level of protection against discrimination under section 5(2) of the Labour Act. The Committee recalls however that neither section 5 nor any other section of the Labour Act prohibit[s] discrimination based on the ground of sexual orientation. **The Committee again requests the Government to ensure that workers have the same level of protection against discrimination on the ground of sexual orientation as provided under section 5 of the Labour Act with respect to other grounds, and asks the Government to provide information on specific measures taken in this regard.***⁴⁰

Thus, although none of the ILO commitments which are binding on Namibia require action to prohibit workplace discrimination on the basis of sexual orientation, ILO Conventions, Recommendations and other documents can serve as a basis for advocacy on this issue.

7.3.2 Other international obligations

Namibia is a party to the International Covenant on Economic, Social and Cultural Rights. Article 6(1) of this Covenant recognises the right to work and requires States to “take appropriate steps to safeguard this right”. The Committee on Economic, Social and Cultural Rights has stated that this right to work, read together with the right to equality in Article 2, “prohibits any discrimination in access to and maintenance of employment 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*, or civil, political, social or other status, which has the intention or effect of impairing or nullifying exercise of the right to work on a basis of equality”.⁴¹

37 Recommendation R200. These are the only ILO Recommendations to date which reference sexual orientation explicitly, and there are none which refer to gender identity.

38 Private employment agencies are covered by sections 128-128C of the Labour Act 11 of 2007.

39 See <www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_235054.pdf> at 655.

40 Observation (CEACR) – adopted 2013, published 103rd ILC session (2014), *Discrimination (Employment and Occupation) Convention, 1958 (No. 111) – Namibia (Ratification: 2001*, <www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:3149050> (emphasis in original).

41 Committee on Economic, Social and Cultural Rights, General Comment No. 18, E/C.12/GC/18, 2005 at para 12(b)(i) (emphasis added).

7.4 Sexual harassment

SUMMARY

The Labour Act 11 of 2007 defines sexual harassment without any reference to the sex or sexual orientation of the victim or perpetrator, and as a separate issue from the prohibition of discrimination in the workplace. This suggests that sexual harassment at the workplace could take place without necessarily being related to sexual orientation or sexual attraction. Case law from other jurisdictions with similar legal provisions supports this analysis. Sexual harassment in Namibia requires a showing that it constitutes “a barrier to equality in employment”, but the resulting inequalities could be presented as inequalities of sex if the courts were not receptive to claims of inequalities based on sexual orientation or gender identity.

The fact that the Labour Act fails to prohibit discrimination on the basis of sexual orientation does *not* prevent a person from bringing a claim based on sexual harassment by someone of the same sex. The rules against sexual harassment are couched in different terms from those on discrimination and could arguably be applied to *any* sexual harassment in an employment context, regardless of the sex of the victim or the perpetrator and regardless of sexual orientation or sexual attraction.

Definition of sexual harassment in the Labour Act 11 of 2007 section 5(7)(b)

“sexual harassment” means **any unwarranted conduct of a sexual nature** towards an employee **which constitutes a barrier to equality in employment** where –

- (i) the victim has made it known to the perpetrator that he or she finds the conduct offensive; or
- (ii) the perpetrator should have reasonably realised that the conduct is regarded as unacceptable, taking into account the respective positions of the parties in the place of employment, the nature of their employment relationships and the nature of the place of employment.

(emphasis added)

The definition of sexual harassment contains two basic requirements: (1) unwarranted conduct of a sexual nature; and (2) a barrier to equality in employment. There are two approaches to determining whether conduct of a sexual nature is unwarranted – one is where the victim has explicitly indicated to the perpetrator that the conduct is offensive, and the other is where a reasonable person in the perpetrator’s position would have known that the conduct is unacceptable. The law gives no guidance on how to identify a “barrier to equality in employment”.

Nothing in any of these requirements suggests that sexual harassment could not take place between persons of the same sex – regardless of their sexual orientation. Inequalities resulting from sexual harassment could probably be presented as inequalities of sex if the courts were not receptive to claims of inequality based on sexual orientation or gender identity.

There is no Namibian case law to provide guidance, but case law from other jurisdictions supports this analysis.

US case law is useful because the relevant US law requires a showing of sexual harassment, as well as a showing that the harassment constituted sex discrimination. This is similar to the Namibian two-step approach on sexual harassment, which requires “unwarranted conduct” and a finding that such conduct is “a barrier to equality in employment”.

In the 1998 *Oncale* case,⁴² the US Supreme Court recognised “heterosexual same-sex harassment”⁴³ – which suggests that sexual harassment laws can protect LGBT employees without requiring evidence of the sexual orientation of the perpetrator or the victim. Mr Oncale was employed on an oil platform as part of an eight-man crew. Two crew members physically assaulted him in a sexual manner, and one threatened him with rape. He eventually quit his job because of the sexual harassment and accompanying verbal abuse. He then filed a case against his employer alleging that he had been discriminated against because of his sex – not his sexual orientation, but his sex. The Supreme Court found that there is no basis for excluding same-sex harassment claims from the coverage of the law, which “must extend to sexual harassment of any kind that meets the statutory requirements”.⁴⁴ It also emphasised that “harassing conduct need not be motivated by sexual desire” in order to constitute sexual harassment. For example, the Court said, a female victim might be harassed in sex-specific by another woman who is motivated by general hostility to women in the workplace.⁴⁵

Here are other examples of US cases on sexual harassment involving person of the same sex:

Nichols v Azteca Restaurant Enterprises (2001) – A male restaurant employee, Sanchez, was perceived as being effeminate by his co-workers although it was unclear from the facts of the case if he was actually gay. Sanchez was repeatedly referred to as “she”, and mocked for walking and carrying his serving tray “like a woman”. He was also called a “faggot” and a “fucking female whore”. A US Court of Appeals for the Ninth Circuit found that this constituted harassment was based on sex because Sanchez was being harassed for having feminine mannerisms and thus not fitting the stereotype of masculinity.⁴⁶

EEOC v Boh Brothers Construction Co (2013) – A male construction worker complained of sexual harassment after his male supervisor called him names such as “princess” and “faggot”, walked up behind him while he was bending over and mimed anal intercourse, and exposed his penis to the employee while urinating along with a meaningful wave and smile. There was no allegation that either the employee or his supervisor was gay. The Court found that this behaviour amounted to harassment because of sex, being based on stereotypes of a particular sex. In other words, the employee here was harassed because he was perceived as not being a sufficiently “manly” man.⁴⁷

Couch v Department of Energy (2013) – The US Equal Employment Opportunity Commission (EEOC), a federal agency that enforces laws against workplace discrimination, found in favour of a federal employee who alleged he had been subjected to sex-based harassment, including homosexual slurs. The EEOC determined that the slurs and comments were a form of “sex-based epithets” that fall within the scope of the protections against sex discrimination.⁴⁸

42 *Oncale v Sundowner Offshore Servs, Inc* 523 US 75 (1998).

43 D McCann, “Sexual harassment at work: National and international responses”, *Conditions of Work and Employment Series No. 2*, Geneva: International Labour Office, 2005, <www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---travail/documents/publication/wcms_travail_pub_2.pdf> at 22.

44 *Oncale* 523 US 75 (1998) at 79.

45 *Id* at 80.

46 *Nichols v Azteca Restaurant Enterprises* 256 F.3d 864, 870 (9th Cir. 2001).

47 *EEOC v Boh Brothers Construction Co.*, No. 11-30770 (5th Cir. Sept. 27, 2013). Cases cited by the Court as supporting a similar approach include *Medina v Fairfield Med Ctr* 413 F.3d 757 (6th Cir.2006); *Vickers v Income Support Div, NM* 452 F.3d1131 (10th Cir. 2005) and *Bibby v Philadelphia Coca Cola Bottling Co* 260 F.3d 257 (3d Cir. 2001).

48 *Couch v Department of Energy*, EEOC Appeal No. 0120131136. See *EEOC v Boh Brothers* at footnote 7.

EEOC v Wells Fargo Bank (2013) – The EEOC *itself* sued a banking and financial services holding company, Wells Fargo Bank, for same-sex sexual harassment after a female branch manager subjected female employees to graphic sexual comments, gestures and images, accompanied by inappropriate touching and grabbing. She also suggested that the female employees should wear sexually provocative clothing in order to attract customers.⁴⁹

The approaches used in the United States could be attempted in Namibia. The Namibian law, unlike the US law, requires that harassment must involve “conduct of a sexual nature” – but this does not mean that the conduct must be based on sexual attraction. This route could be of assistance in situations where, for example, heterosexual women or men harass an employee who is perceived to be LGBT. For example, a harasser might utilise speech, messages or drawings with a sexual content in an effort to ridicule someone perceived as being gay or lesbian, or perceived as having gender characteristics outside the prevailing norms. If “unwarranted conduct” of this nature created such an unpleasant work environment that it created “a barrier to equality in employment”, then the situation would be actionable as sexual harassment under the Namibian Labour Act.

7.5 Family responsibilities

SUMMARY

The explicit prohibition on employment discrimination on the basis of family responsibilities in Namibia’s **Labour Act 11 of 2007** could theoretically extend to responsibilities of same-sex partners and children being cared for within that partnership, because the definition of “family responsibility” includes the responsibility of an employee to a “dependant” who “regardless of age, needs the care and support of that employee”.

It may also be useful to lobby for Namibia’s adoption of **ILO Convention No. 156: Convention concerning Equal Opportunities and Equal Treatment for Men and Women Workers: Workers with Family Responsibilities, 1981**, and for Namibia to use its discretion under this Convention to apply a broad definition of “family responsibilities” for the purposes of the Convention as well as domestic labour legislation.

7.5.1 Labour Act 11 of 2007

The Labour Act 11 of 2007 forbids discrimination on the basis of family responsibilities.⁵⁰ Discrimination on the basis of family responsibilities might include a situation where an employer, for example, punishes an employee who is unable to work overtime because of child care duties or the need to care for an elderly or sick partner, or an employee who requests some special arrangement to allow for picking up a child from school over the lunch break.

The definition of “family responsibility” covers the responsibility of an employee to a “dependant” who “regardless of age, needs the care and support of that employee”. The term “dependant” could be applied to an employee’s same-sex partner.

⁴⁹ *EEOC v Wells Fargo Bank*, NA Case No 3:13-CV-00528 in the US District Court for the District of Nevada; US Equal Employment Opportunity Commission, “EEOC Sues Wells Fargo for Same-Sex Sexual Harassment”, 25 September 2013, <www.eeoc.gov/eeoc/newsroom/release/9-25-13g.cfm>.

⁵⁰ Labour Act 11 of 2007, section 5.

There is no precedent for this interpretation yet, meaning that employers might be reluctant to acknowledge such relationships as family responsibilities. However, the possibility for pushing for recognition of LGBT family responsibilities is clearly present.

7.5.2 ILO Convention on Workers with Family Responsibilities

The primary ILO document regarding family responsibilities is **Convention No. 156: Convention concerning Equal Opportunities and Equal Treatment for Men and Women Workers: Workers with Family Responsibilities, 1981** – which has been ratified by 43 states, including several African nations (but not Namibia).⁵¹ The Convention applies to male and female workers whose responsibilities to care for dependent children and other immediate family members may restrict their ability to work. Its purpose is to create equality of opportunity and treatment for male and female workers.

The definitions in the Convention allow for flexibility, with the key terms relating to family (including the term “members of the immediate family”) being understood as they are defined in the member country.⁵² Thus, this Convention leaves room to cover family responsibilities between same-sex couples and their children.

It might be useful to advocate that Namibia should become a party to this Convention, and that it should apply a broad definition of “family responsibilities” for the purposes of the Convention as well as in domestic labour legislation.

7.6 Compassionate leave

SUMMARY

The provision on compassionate leave in the **Labour Act 11 of 2007** provides a narrow and specific definition of “family” for the purposes of such leave. The reference to “child” appears to exclude children other than biological or adopted children, and the reference to “spouse” recognises only conventional forms of marriage. Therefore, this legal provision is not of any assistance to same-sex partners if employers are not willing to recognise their family relationships in respect of compassionate leave.

In Namibia, an employee is entitled to compassionate leave if there is a death or serious illness in the family. All employees are granted five days of compassionate leave at full pay in every year of continuous employment.

The provision on compassionate leave in the Labour Act 11 of 2007 provides a narrow and specific definition of “family” for the purposes of such leave: it includes a child (including a child adopted in terms of any law, custom or tradition); a spouse; a parent, grandparent, brother or sister of the employee; or a father-in-law or mother-in-law of the employee.⁵³ The term “child” seems to include only biological or adopted children, and the term “spouse” is defined as “a partner in a

51 International Labour Organisation, “Ratifications of C156 – Workers with Family Responsibilities Convention, 1981 (No. 156)”, <http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO::P11300_INSTRUMENT_ID:312301>.

52 Id, Articles 1(1)-(3) and 9.

53 Id, section 25(5).

civil marriage or a customary law union or other union recognised as a marriage in terms of any religion or custom”.⁵⁴

It would be very difficult if not impossible to argue that a same-sex partner falls within the definition of spouse, and it a child cared for within an informal partnership would be covered if not that child were not the biological child of the employee in question.

Expanding the coverage of compassionate leave will require either a constitutional challenge to the existing law, law reform to broaden its coverage or negotiation with individual employers outside the parameters of the law.

7.7 Severance pay and dependants on agricultural land

SUMMARY

Both opposite-sex and same-sex cohabiting partners are excluded from the provisions of the **Labour Act 11 of 2007** which relate to a) the possibility of claiming severance pay due to a deceased employee; and b) the duties of employers of agricultural workers who reside on the land to provide sufficient housing, sanitation and water for the employee’s family and dependants.

Severance pay is provided to an employee who is unfairly dismissed, to an employee who resigns or retires after reaching age 65, or to an employee who dies during employment. It is available only if the employee had been employed by that employer for 12 months of continuous service. The amount must be equal to at least one week’s pay for every year of continuous service with that employer.⁵⁵

The payment of severance pay in the case of an employee who dies without leaving a will goes to (a) the employee’s surviving spouse; or (b) if there is no spouse, to the employee’s children; or (c) if there are no children, to the employee’s estate.⁵⁶ Neither opposite-sex nor same-sex cohabitants can claim severance pay if there is no will.⁵⁷

Employers who require their employees to live on agricultural land must provide sufficient housing, sanitation, water and food or land for cultivation of livestock for the employee and the employee’s dependants. For these purposes, “dependants” are defined as “the spouse and the dependant children of the employee or of the spouse”⁵⁸ – thus excluding same-sex partners.

Law reform or a court ruling would be necessary to put both opposite-sex and same-sex partners on a similar footing as married couples in respect of these labour-related entitlements.

⁵⁴ Id, section 1.

⁵⁵ Labour Act 11 of 2007, section 35(1)-(2).

⁵⁶ Id, section 35(6).

⁵⁷ There is no right to severance pay if an employee refuses to accept comparable employment with “the surviving spouse, heir or dependant of a deceased employer”. Id, section 35(1)(c)(i). See also consequential section 35(4)(a). The theory here is that there will be no severance pay owing in such circumstances because the employee has actually been provided with continuity of employment. The undefined term “dependant” probably includes at least some cohabiting partners even though the term “spouse” does not.

⁵⁸ Labour Act 11 of 2007, section 28.

7.8 Social security benefits

SUMMARY

Both opposite-sex and same-sex partners are eligible to collect the once-off death benefits payable under the **Social Security Act 34 of 1994** in respect of a deceased member – but only if the partner can show that he or she was *dependent upon the deceased for maintenance*. In practice, the Social Security Commission pays the death benefit to such a partner only if there is no surviving spouse or child.

The Social Security Act 34 of 1994 contains a definition of “dependant” to identify persons who can claim the once-off death benefits available under the Act in respect of employees who have died.⁵⁹ For this purpose, a dependant includes a person who was, in the opinion of the Commission, dependent on the deceased employee, regardless of whether or not that employee has a legal duty to maintain this dependant.⁶⁰ Some same-sex cohabitants would fall with this definition.

In practice, the Commission pays death benefits to anybody who can provide satisfactory evidence of dependence on the deceased – but only in the absence of other categories of dependants such as spouses or children.

7.9 Employees’ compensation

SUMMARY

Both opposite-sex and same-sex partners have a right under the **Employees’ Compensation Act 30 of 1941** to claim compensation in the case of the death of an employee due to an accident which took place during the course of employment – but only if the partner can show that he or she was *wholly or partially dependent on the employee for the necessities of life*. Such a partner would be eligible to receive the compensation only if there are no spouses or children, and an opposite-sex cohabiting partner would take precedence over a same-sex partner of the same employee.

The Employees’ Compensation Act 30 of 1941 provides for compensation in the case of the temporary or permanent disablement or death of an employee because of an accident which happens during the course of his or her employment. This compensation is available only to employees who earn less than a prescribed wage ceiling, which is adjusted by government from time to time.⁶¹

Same-sex partners could be eligible to claim this compensation in respect of a deceased employee because the law provides for compensation to “any other person who, in the opinion of the commissioner, was at the time of the accident wholly or partly dependent upon the workman for the necessities of life”.⁶²

⁵⁹ Social Security Act 34 of 1994, sections 28(4)(c) and 31. An amount equal to the once-off death benefit can also be claimed by an employee who retires or becomes permanently disabled. *Id.*, section 31(3).

⁶⁰ *Id.*, section 1.

⁶¹ Employees’ Compensation Act 30 of 1941, section 3(2).

⁶² *Id.*, section 4(1)(f), as amended by the Employees’ Compensation Amendment Act 5 of 1995.

However, surviving spouses and children take preference for compensation under this Act when an employee dies, with other dependants eligible for the compensation only in their absence. For this purpose the term “surviving spouse” also includes an opposite-sex cohabiting partner.⁶³

7.10 Models for law reform

SUMMARY

There are a number of SADC countries and other countries which have laws in place (or under consideration) that provide explicit protection against discrimination and harassment on the basis of sexual orientation in the workplace. These could serve as models and advocacy points for improvements to Namibian labour legislation.

Angola

In Angola, a legal provision under consideration would prohibit discrimination in the employment context on the basis of gender or sexual orientation.⁶⁴

Angola: Proposed provision for Penal Code

Article 197 (Discrimination)

1. Whoever, because of gender, race, ethnicity, colour, birthplace, religion or belief, **sexual orientation**, political or ideological convictions, social origin or condition:
 - (a) to refuse employment contract, refuse or restrict the supply of goods or services or restrict or prevent the exercise of economic activity of another person, or
 - (b) to punish or fire workers shall be punished with imprisonment up to 2 years or with fine of up to 240 days.

(emphasis added)

Botswana

The law on employment, as amended in 2010, prevents employees from being fired based on their sexual orientation.⁶⁵ This is the case even though both male and female same-sex activity are criminalised in Botswana.⁶⁶

63 Id, section 40(5): “(5) In this section ‘surviving spouse’ includes a person referred to in paragraph (b) of subsection (1) of section 4.” Section 4(1) (b) reads: “if there is no surviving spouse who, at the time of the accident, was wholly or partly dependent upon the employee for the necessities of life any person with whom the employee was in the opinion of the Commission living as man and wife at the time of the accident”.

64 This is part of a new Penal Code initiated in 2004 and the final draft of the new penal code was sent to the Council of Ministers in March 2014, though it has yet to be approved. Agência Angola Press, “Final Draft of Penal Code submitted to Cabinet Council”, 17 February 2014, <www.portalangop.co.ao/angola/en_us/noticias/politica/2014/1/8/Final-Draft-Penal-Code-submitted-Cabinet-Council,46883b5d-6da9-4898-838b-5eea21037232.html>.

65 Employment Law, as amended by Act 10 of 2010, <www.icj.org/sogi-legislative-database/botswana-sogi-legislation-country-report-2013/>.

66 Penal Code: Chapter 08.01, section 164, <<http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2013/05/Botswana-Penal-Code-1964-eng.pdf>>.

Botswana: Employment Law, as amended by Act 10 of 2010, Chapter 47:01

Section 23 – Restriction of grounds on which employers may terminate contracts of employment

Notwithstanding anything contained in a contract of employment, an employer shall not terminate the contract of employment on the ground of –

- (d) the employee's race, tribe, place of origin, social origin, marital status, gender, **sexual orientation**, colour, creed, health status or disability ...

(emphasis added)

South Africa

In line with South Africa's Constitution, which prohibits both state and private actors from unfairly discriminating against anyone on the basis of gender, sex or sexual orientation,⁶⁷ there are several pieces of legislation which address such discrimination in respect of employment.⁶⁸

South African Labour Legislation

Labour Relations Act 66 of 1995

187. Automatically unfair dismissals

- (1) A dismissal is automatically unfair if the employer, in dismissing the employee, acts contrary to section 550 or, if the reason for the dismissal is –

- (f) that the employer unfairly discriminated against an employee, directly or indirectly, on any arbitrary ground, including, but not limited to race, **gender, sex**, ethnic or social origin, colour, **sexual orientation**, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility;

Employment Equity Act 55 of 1998

5. Elimination of unfair discrimination

Every employer must take steps to promote equal opportunity in the workplace by eliminating unfair discrimination in any employment policy or practice.

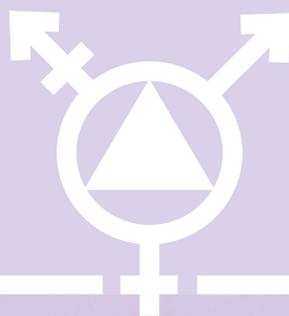
6. Prohibition of unfair discrimination

- (1) No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, **gender, sex**, pregnancy, marital status, family responsibility, ethnic or social origin, colour, **sexual orientation**, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language and birth.
- (2) It is not unfair discrimination to –
 - (a) take affirmative action measures consistent with the purpose of this Act; or
 - (b) distinguish, exclude or prefer any person on the basis of an inherent requirement of a job.
- (3) Harassment of an employee is a form of unfair discrimination and is prohibited on any one, or a combination of grounds of unfair discrimination listed in subsection (1).

(emphasis added)

⁶⁷ Constitution of the Republic of South Africa, No. 108 of 1996, Section 9: Equality.

⁶⁸ The Employment Equity Act 55 of 1998 was amended by the Employment Equity Amendment Act 47 of 2013 to additionally prohibit unfair discrimination on "any other arbitrary ground", but this amendment had not yet come into force at the time of writing.



Chapter 8

FAMILY

8.1	Introduction	128
8.2	Marriage	128
8.2.1	The law on marriage in Namibia	129
8.2.2	Constitutional analysis	130
8.2.3	International law	134
8.2.4	Prospects of success in a constitutional challenge on same-sex marriage	135
8.2.5	Recognition of same-sex marriages concluded in other countries	135
8.3	Current legal position of same-sex partners in Namibia	136
8.3.1	Maintenance	137
8.3.2	Property	137
8.3.3	Joint bank accounts	138
8.3.4	Insurance, pensions and statutory benefits	138
8.3.5	Tax	138
8.3.6	Inheritance	139
8.3.7	Immigration rights	139
8.3.8	Other statutes	139
8.3.9	Future possibilities	140
8.4	Legal mechanisms which can be applied to same-sex partnerships	140
8.4.1	Contracts	141
8.4.2	Universal partnerships	141
8.4.3	Unjust enrichment	142
8.5	Adoptions	143
8.5.1	Adoption by same-sex couples in Namibia	144
8.5.2	Recognition of same-sex adoptions concluded in other countries	144
8.6	Assisted reproductive techniques and surrogacy	145
8.6.1	Assisted reproductive techniques	145
8.6.2	Surrogacy	146

8.1 Introduction

SUMMARY

Denying legal recognition to relationships between same-sex couples has a profound impact on many practical aspects of their lives, as well as being detrimental to their sense of self-worth and dignity.

State recognition of a relationship provides legal rights and protections, as well as economic benefits. Where couples are unable to obtain such legal recognition, this profoundly impacts many areas of their lives and can impair their sense of self-worth and dignity. As Justice Sachs of the South African Constitutional Court has articulated –

The exclusion of same-sex couples from the benefits and responsibilities of marriage ... is not a small and tangential inconvenience It represents a harsh if oblique statement by the law that same-sex couples are outsiders, and that their need for affirmation and protection of their intimate relations as human beings is somehow less than that of heterosexual couples. It reinforces the wounding notion that they are to be treated as biological oddities, as failed or lapsed human beings who do not fit into normal society, and, as such, do not qualify for the full moral concern and respect that our Constitution seeks to secure for everyone.¹

Refusal to legally recognise same-sex partnerships and related family rights places individuals in vulnerable situations and sends the message that sexual minorities are lesser citizens and not worthy of the inherent human rights to equality, dignity, and family.

8.2 Marriage

SUMMARY

It is not possible for gay and lesbian couples to marry under civil or customary law in Namibia.

Namibian courts have not yet considered whether the exclusion of same-sex couples from the ability to marry might be unconstitutional, but courts in several other countries have found that this exclusion violates constitutional provisions which are similar to those found in Namibia.

In South Africa, the Constitutional Court has ruled that denying same-sex couples the right to marry infringed their constitutional rights to equality and dignity. Canadian courts have similarly found that such differential treatment violates the right to equality, while courts in different jurisdictions in the United States have reached different conclusions on this question. In the 2002 *Joslin* case, the Human Rights Council ruled that the International Covenant on Civil and Political Rights does not *require* States parties to allow marriages between same-sex couples because the wording of the provision on marriage, unlike the wording of other provisions in the Covenant, refers specifically to “men and women”.

¹ *Minister of Home Affairs and Another v Fourie and Another* 2006 (1) SA 524 (CC) at para 71.

It is difficult to predict whether a constitutional challenge to the law’s limitation of marriage to opposite-sex couples would have a chance of success in Namibia. This question is proving to be a difficult one for courts worldwide, and such a constitutional challenge might face an uphill battle in light of Namibia’s general social conservatism. It is more likely in the immediate future that Namibian jurisprudence may provide incremental protection to same-sex couples on specific issues.

Now that more and more countries around the world allow same-sex marriage, could a Namibian same-sex couple marry elsewhere and have their marriage recognised in Namibia? In general, Namibia applies a legal principle which states that a marriage which was validly entered into in the country in which it took place will be recognised as valid in Namibia. However, there are two important exceptions to this general rule. One exception is the principle that Namibia will not recognise a foreign marriage where people resident in Namibia deliberately chose to have their marriage solemnised elsewhere with the intention of escaping an essential requirement of Namibian law. The other exception allows Namibia to refuse to recognise a foreign marriage which violates Namibian public policy. These exceptions could be applied to refuse recognition to a foreign same-sex marriage.

A Marriage Bill under consideration by Namibia’s Ministry of Home Affairs at the end of 2014 would define marriage as being limited to persons of opposite sexes and would explicitly limit recognition of foreign marriages to marriages between persons of opposite sexes.

8.2.1 The law on marriage in Namibia

There are two basic types of marriage in Namibia – civil marriage and customary marriage. It is not possible for gay and lesbian couples to marry under civil or customary law in Namibia.

Civil marriage by definition can take place only between one man and one woman.² The Ministry of Home Affairs intends to affirm this requirement in forthcoming legislation.³

Customary marriage in Namibia can be polygamous, but we are aware of no circumstances where customary marriage in Namibia has involved same-sex couples.

Thus, it is not possible for gay or lesbian couples to marry in Namibia.

.....

“The harm to homosexuals ... of being denied the right to marry is considerable. Marriage confers respectability on a sexual relationship; to exclude a couple from marriage is thus to deny it a coveted status. Because homosexuality is not a voluntary condition and homosexuals are among the most stigmatized, misunderstood, and discriminated-against minorities in the history of the world, the disparagement of their sexual orientation, implicit in the denial of marriage rights to same-sex couples, is a source of continuing pain to the homosexual community...”

Baskin v Bogan 766 F.3d 648 (7th Cir. 2014)

.....

2 The common law definition of marriage is “a union of one man with one woman, to the exclusion, while it lasts, of all others”. *Mashia Ebrahim v Mahomed Essop* 1905 TS 59 at 61. This definition is currently supported by the Marriage Act 25 of 1961.

3 Draft Marriage Bill, dated December 2013 section 1.

8.2.2 Constitutional analysis

Namibian courts have not yet considered whether excluding same-sex couples from the ability to marry is unconstitutional, but courts in several other countries have found that this exclusion violates constitutional provisions which are similar to those found in Namibia.

Namibia

The issue of same-sex relationships was touched on in the 2001 *Frank* case decided by the Namibian Supreme Court, which held that the existence of a lesbian relationship between a Namibian and a non-Namibian has no relevance to an application for permanent residence by the non-Namibian partner. This case said that equality before the law “does not mean equality before the law for each person’s sexual relationships” – but it also emphasised that nothing in the judgement “justifies discrimination against homosexuals as individuals, or deprives them of the protection of other provisions of the Namibian Constitution”.

This case contained several flaws in its analysis. It took a very narrow view of the constitutional concept of “family”, identifying procreation as the defining feature – which is at odds with subsequent Namibian case law which has recognised the existence of a wider range of family groupings. The *Frank* case also used a very narrow interpretation of constitutional values, ignoring the importance of protecting the right of minorities whose interests may not be sufficiently protected by the will of the majority.

Homosexual relationships are NOT ILLEGAL in Namibia

Some people think that the *Frank* case made homosexuality illegal in Namibia. This is incorrect. The *Frank* case was decided by the Namibian Supreme Court in 2001. The only part of this case which is legally binding says that the existence of a lesbian relationship between a Namibian and a non-Namibian has no bearing on an application for permanent residence by the non-Namibian partner.

The *Frank* case said that equality before the law “does not mean equality before the law for each person’s sexual relationships” – but it also emphasised that nothing in its judgement “justifies discrimination against homosexuals as individuals, or deprives them of the protection of other provisions of the Namibian Constitution”.

We will not know how the Namibian Constitution applies to other issues involving relationships between gay and lesbian partners until there have been more court cases on this topic in Namibia.

Interpreting Article 14 of the Namibian Constitution

THE RIGHT TO MARRY

- (1) Men and women of full age, without any limitation due to race, colour, ethnic origin, nationality, religion, creed or social or economic status shall have the right to marry and to found a family ...

The *Frank* case

In the *Frank* case, the Namibian Supreme Court understood the wording of this provision to mean that “marriage is between men and women – not men and men and women and

women”,⁴ stating that homosexual relationships “clearly fall outside the scope and intent of Article 14”.⁵

The International Covenant on Civil and Political Rights

There is some support for the *Frank* case’s interpretation of Article 14(1) in international law. Article 23(2) of the International Covenant on Civil and Political Rights uses somewhat similar wording:

The right of men and women of marriageable age to marry and to found a family shall be recognized.

Because this provision refers to “men and women” rather than using a more general expression such as “all persons”, the Human Rights Council which monitors compliance with the Convention expressed the view in 2002 that this language applies only to marriages between a man and a woman.⁶

EU Convention for the Protection of Human Rights and Fundamental Freedoms

On the other hand, the European Court of Human Rights in 2010 took a broader interpretation of similar language in Article 12 of the European Union Convention for the Protection of Human Rights and Fundamental Freedoms:

Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.

The Court came to the conclusion that this wording did not necessarily limit marriage to persons of opposite sexes:

... The Court observes that, looked at in isolation, the wording of Article 12 might be interpreted so as not to exclude the marriage between two men or two women. However, in contrast, all other substantive Articles of the Convention grant rights and freedoms to “everyone” or state that “no one” is to be subjected to certain types of prohibited treatment. The choice of wording in Article 12 must thus be regarded as deliberate. Moreover, regard must be had to the historical context in which the Convention was adopted. In the 1950s marriage was clearly understood in the traditional sense of being a union between partners of different sex.

In light of subsequent developments in the European Union, however:

... the Court would no longer consider that the right to marry enshrined in Article 12 must in all circumstances be limited to marriage between two persons of the opposite sex.⁷

Since there is yet no European consensus regarding same-sex marriage, the Court concluded that the decision whether or not to allow same-sex marriage should be a matter of national discretion.⁸

4 *Chairperson of the Immigration Selection Board v Frank and Another* 2001 NR 107 (SC) at 144F.

5 *Id* at 144H-I.

6 *Joslin and Others v New Zealand*, Merits, Communication No 902/1999, UN Doc CCPR/C/75/D/902/1999, (2002) 10 IHRR 40, IHRL 1719 (UNHRC 2002), 17th July 2002.

7 *Schalk and Kopf v Austria* [2010] ECHR 30141/04 at para 55.

8 *Id* at paras 57-61.

Conclusion

It could be argued that the wording of Article 14(1) in the Namibian Constitution does not imply that only men and women are free to marry each other, but that it rather guarantees to all men and women the right to marry the person of their choice, without discrimination – and that the reference to “founding a family” means establishing a family unit rather than being able to procreate.

Interpreting Article 14 of the Namibian Constitution

THE RIGHT TO FOUND A FAMILY

- (1) Men and women of full age, without any limitation due to race, colour, ethnic origin, nationality, religion, creed or social or economic status shall have the right to marry and to found a family ...

- (3) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

The *Frank* case

In the *Frank* case, the Namibian Supreme Court found that the “family” protected by Article 14 “envisages a formal relationship between male and female, where sexual intercourse between them in the family context is the method to procreate offspring and thus ensure the perpetuation and survival of the nation and the human race”.⁹ The focus on procreation as a defining feature of the concept of “family” is problematic. Family units can and often do comprise many groupings not defined by procreative potential, such as extended family members, cousins, single parents and children, single grandparents and children, and child-headed households – to name but a few of the myriad household compositions one might find in Namibia.

The Canadian Supreme Court has criticised the use of procreation as a pre-requisite for “family”:

The argument is that procreation is somehow necessary to the concept of family and that same-sex couples cannot be families as they are incapable of procreation. Though there is undeniable value in procreation, the Tribunal could not have accepted that the capacity to procreate limits the boundaries of family. If this were so, childless couples and single parents would not constitute families. Further, this logic suggests that adoptive families are not as desirable as natural families. The flaws in this position must have been self-evident. Though procreation is an element in many families, placing the ability to procreate as the inalterable basis of family could result in an impoverished rather than an enriched version.¹⁰

There is little other Namibian jurisprudence on the meaning of “family” in the Namibian Constitution. However, comments made by the High Court in several subsequent cases suggest that there is scope for a more generous interpretation of “family” in future.

⁹ Id at 146F-G.

¹⁰ *Canada (Attorney-General) v Mossop* [1993] 1 SCR 554 at 710C-E (per LHeureux-Dubé J), quoted in *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others*, 2000 (2) SA 1 (CC) at paragraph 52.

The *Detmold* case (2004)¹¹

In this case, the High Court found that a law which prohibited non-Namibian citizens from adopting children born to Namibian citizens violated Article 10(1) on equality and Article 14(3) on the family.¹² The Court agreed with the argument that this blanket prohibition might deprive a child of the benefits of a loving and stable family life, and expressed agreement with a statement of the South African Constitutional Court that this would defeat “the very essence and social purpose of adoption which is to provide the stability, commitment, affection and support important to a child’s development, which can be offered by suitably qualified persons”¹³ – quoting from a South African case involving same-sex partners who were seeking to adopt.¹⁴

The *Frans* case (2007)¹⁵

Here, the High Court struck down the common law rule prohibiting ‘illegitimate’ children from inheriting intestate from their fathers. The Court found that the differentiation between ‘legitimate’ and ‘illegitimate’ children was based on “social status”, and that the historical basis for the rule was the punishment of “lustful” parents. However, the rule made no distinction between children born of adultery, incest or a long-term relationship between loving partners and thus gave a “social stigma” to all such children. The Court concluded that this amounted to unfair discrimination and was therefore unconstitutional.¹⁶ Although the case did not invoke Article 14, the Court noted that “loving partners and parents have the right to live together as a family with their children without being married”.¹⁷

***JT v AE* (2102)**¹⁸

More recently, the Namibian Supreme Court considered an appeal regarding access to a minor child by the child’s biological father, who was never married to the child’s mother. The child had a stepfather by this time, and one of the Court’s concerns was the effect on the child of having two father figures in her life. The Court cited the constitutional protection of the “family” as its starting point, and seemed to consider both the unmarried biological parents and the child’s “new family” of mother and stepfather as relevant family units.

Conclusion

These cases viewed together suggest that the Namibian courts may take a functional approach to the concept of family in some circumstances, rather than confining it to a specific definition.

11 *Detmold and Another v Minister of Health and Social Services and Others* 2004 NR 174 (HC) (per Damaseb AJ).

12 *Id* at 181C-183B.

13 *Id* at 181G-I.

14 *Du Toit & Another v Minister of Welfare and Population Development & Others* 2003(2) SA 198 (CC) at paragraph 21. (The Namibian High Court mistakenly cited paragraphs 18 and 19 as the source of the quotation.)

15 *Frans v Paschke and Others* 2007 (2) NR 520 (HC) (per Heathcote AJ).

16 *Id* at 528-29 (per Heathcote AJ).

17 *Id* at 529A.

18 *JT v AE* 2013 (1) NR 1 (SC) (per Shivute, CJ) at paras 17 and 22-24.

South Africa

In 2006 in South Africa, the Constitutional Court confirmed the holding of the Supreme Court of Appeal that same-sex partners have a right to marry, in the *Fourie* case.¹⁹ The Constitutional Court held that “the exclusion of same-sex couples from the status, entitlements and responsibilities accorded to heterosexual couples through marriage”, violates their right to equal protection under the law (which is similar to that in Namibia’s Constitution),²⁰ as well as violating the prohibition against discrimination on the basis of sexual orientation.²¹

The Court emphasised that equality requires the acceptance rather than the suppression of difference, and affirmed that post-apartheid South Africa must be built on the values of tolerance and mutual respect.²² The Court also stated that, in a democratic society, no one can be subordinated to the cultural or religious norms of others.²³

.....

“Same-sex unions continue in fact to be treated with the same degree of repudiation that the state until two decades ago reserved for interracial unions ...”

Minister of Home Affairs and Another v Fourie and Another 2006 (1) SA 524 (CC) at para 81

.....

In response to the *Fourie* holding, a Civil Union Bill was tabled in the South African Parliament in August 2006. The Bill proposed a “civil partnership” for same-sex couples, intended to parallel marriage in terms of its legal consequences whilst reserving the term “marriage” for heterosexual couples.²⁴ The Bill was criticised for providing a “separate but equal” approach which would make same-sex unions seem inferior to opposite-sex ones. Critics also argued that the Bill’s approach was not consistent with the holding in *Fourie*, which was premised on the constitutional principle of equality. As a result of advocacy around these points, the Bill was amended to give same-sex couples a choice between “marriage” or “civil partnership”, both of which would have the same procedures for solemnisation and the same legal consequences. The amended Bill became the Civil Union Act 17 of 2006, which came into force on 30 November 2006.²⁵

8.2.3 International law

In the 2002 *Joslin* case, the Human Rights Committee ruled that the International Covenant on Civil and Political Rights does not *require* States parties to allow marriages between same-sex couples because the wording of the provision on marriage, unlike the wording of other provisions in the Covenant, refers specifically to “men and women.”²⁶ The European Court of Human Rights,

19 *Minister of Home Affairs and Another v Fourie and Another (Doctors for Life International and Others, Amici Curiae); Lesbian and Gay Equality Project and Others v Minister of Home Affairs and Others* 2006 (1) SA 524 (CC), confirming *Fourie and Another v Minister of Home Affairs and Others* 2005 (3) SA 429 (SCA).

20 *Fourie* 2006 (1) SA 524 (CC) at para 75 (per Sachs, J).

21 *Id* at para 76, citing section 9(3) of the South African Constitution.

22 *Id* at para 60.

23 *Id* at para 61.

24 Draft Civil Union Bill, GG 29169 (31 August 2006).

25 For more detail on the Bill and its amendments, see Pierre de Vos, “The ‘Inevitability’ of Same-Sex Marriage in South Africa’s Post-Apartheid State”, 23 (3) *SAJHR* 432 (2007) at 458-63.

26 *Joslin and ors v New Zealand*, Merits, Communication No 902/1999, UN Doc CCPR/C/75/D/902/1999, (2002) 10 IHRR 40, IHRL 1719 (UNHRC 2002), 17th July 2002.

considering a similarly-worded provision, found that it does not mean that marriage must be *limited* to person of opposite sexes, but also does not *require* states to grant same-sex couples access to marriage.²⁷

However, in a 2011 report on discriminatory laws and practices relating to sexual orientation and gender identity, the United Nations High Commissioner for Human Rights made the following comment on the *Joslin* judgment:

The Human Rights Committee has held that States are not required, under international law, to allow same-sex couples to marry. Yet, the obligation to protect individuals from discrimination on the basis of sexual orientation extends to ensuring that unmarried same-sex couples are treated in the same way and entitled to the same benefits as unmarried opposite-sex couples.²⁸

8.2.4 Prospects of success in a constitutional challenge on same-sex marriage

The question of whether it is unconstitutional to limit marriage to opposite-sex couples is proving to be a difficult one for courts worldwide. Such a constitutional challenge might face an uphill battle in light of Namibia's general social conservatism combined with the *Frank* precedent in Namibia and the international *Joslin* case. It is more likely in the immediate future that Namibian jurisprudence may provide incremental protection to same-sex couples on specific issues.

8.2.5 Recognition of same-sex marriages solemnised in other countries

Now that more and more countries around the world allow same-sex marriage, could a Namibian same-sex couple marry elsewhere and have their marriage recognised in Namibia? In general, Namibia applies a legal principle which states that a marriage which was validly entered into in the country in which it took place will be recognised as valid in Namibia.

However, there are two important exceptions to this general rule. One exception is the principle that Namibia will not recognise a foreign marriage where people resident in Namibia deliberately chose to have their marriage solemnised elsewhere with the intention of escaping an essential requirement of Namibian law. The other exception allows Namibia to refuse to recognise a foreign marriage which violates Namibian public policy.

It should be remembered that public policy in the past was cited as an objection to foreign interracial marriages and polygamous marriages – which indicates how understanding of public policy can evolve in democratic environments. In the recent *Von Schauroth* case,²⁹ the Namibian High Court emphasised the need to exercise caution in rejecting a foreign rule of law on the basis of public policy. But, even if ideas about public policy are evolving in a more tolerant direction in Namibia, it is not clear that the Namibian courts would recognise a foreign same-sex marriage.

27 *Schalk and Kopf v Austria* [2010] ECHR 30141/04; *Case of Hämäläinen v Finland*.

28 UN Human Rights Council, "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, A/HR/C/19/41, Nov 2011 at para 68 (footnotes omitted).

29 *Von Schauroth v Von Schauroth* [2013] NAHCMD 257 (*per van Niekerk, J*)

As of the end of 2014, a Marriage Bill under discussion by the Ministry of Home Affairs and Immigration contained a provision specifically forbidding the recognition of foreign same-sex marriages.³⁰

This position could create confusion. For example, people who are parties to a foreign same-sex marriage could enter a heterosexual marriage in Namibia without having obtained a divorce, but in any country which recognised the same-sex marriage they would be guilty of bigamy.³¹ It could also cause great personal consternation for people who are married elsewhere, but find themselves suddenly “unmarried” when they enter Namibia – and deny such couples access to divorce if they are practically or financially unable to return to the country where they married.

The proposed rule is also problematic because it would cover two different situations without distinction: foreign same-sex couples who marry validly in their country of residence and then travel or re-locate to Namibia, and same-sex couples resident in Namibia who wish to travel to another jurisdiction to conclude a same-sex marriage and then return to Namibia. These two different situations raise different practical issues which should be taken into consideration.

8.3 Current legal position of same-sex partners in Namibia

SUMMARY

In Namibia, neither heterosexual couples nor homosexual couples acquire any automatic status or rights by virtue of cohabitation, regardless of how long the couple have been living together as partners, although there is a minimal amount of statutory protection for dependants in a few areas.

- **Maintenance:** In general, there is no legal duty of support between cohabitants either during the relationship or when it ends. In the eyes of the law, each partner is responsible for his or her own upkeep. This means that there is no possibility of a claim for loss of support when a cohabiting partner is injured or killed, unless this is specifically provided for by statute.
- **Property:** The law does not regard the property of cohabitants to be jointly owned unless they have entered into an express or implied agreement to this effect. If property is owned individually, the cohabitant who owns the property has a legal right to deal with that property as he or she wishes, without consulting his or her partner. Joint ownership is the best way for same-sex partners to secure joint rights in land and homes as the law currently stands.
- **Joint bank accounts:** No Namibian banks allow joint bank accounts for married or cohabiting couples.
- **Insurance, pensions and statutory benefits:** Married persons and single persons essentially have the same rights in respect of life insurance policies. It is also generally possible to name anyone as a beneficiary to a life insurance policy.
- **Tax:** There is no distinction between the taxation of single persons and married persons in terms of Namibian income tax law.

³⁰ Draft Marriage Bill, dated December 2013, section 21.

³¹ See “Senators told same-sex couples who marry overseas can be left in legal limbo”, *The Guardian*, 21 August 2014.

- **Inheritance:** The only way that a surviving same-sex partner can inherit from a deceased partner is by means of a will.
- **Immigration rights:** Citizenship and domicile rights are dependent on marriage and are not available to same-sex or opposite-sex cohabitants.
- **Other statutes:** The treatment of cohabiting partners differs under different statutes. Same-sex partners would fall under general definitions such as those of “dependant” in a few statutes, but cohabiting partners of the same or opposite sex are usually left out and so deprived of various benefits which would accrue to a spouse.

At the moment, the key distinction in Namibian law is between married couples and unmarried couples – regardless of the sex of the unmarried couples. If there is law reform on cohabiting couples in future, there could be scope to challenge any law reform that excluded same-sex couples from protections afforded to similarly-situated opposite-sex couples on equality grounds.

8.3.1 Maintenance

There is no legal duty of support between cohabitants either during the relationship or when it ends. Each partner is responsible for his or her own upkeep.³² There is no possibility of a claim for loss of support when a cohabiting partner is injured or killed, unless this is specifically provided for by statute. For example, one potentially serious issue for both opposite-sex and same-sex cohabiting partners is their ineligibility for payments under the Motor Vehicle Accidents Fund Act 10 of 2007 for loss of financial support when a partner is killed in a motor vehicle accident.

A few South African court cases have inferred a contractual duty of support between cohabitants or applied flexible common-law concept of a duty of support. In the case of *Du Plessis v Road Accident Fund*,³³ the applicant argued that he was entitled to claim damages for loss of support after the death of his long-term same-sex partner in a car accident, as an opposite-sex spouse would be able to do. The Supreme Court of Appeal held that the answer depended in part on whether the parties had undertaken a reciprocal duty of support – a factual question which must be decided on a case-by-case basis in respect of a same-sex partnership.

It has recently been noted again in South Africa, in *Chitima v Road Accident Fund*, that the “common law duty of support is a flexible concept which has been extended and developed over time”. Here, the Court found that an unregistered customary marriage concluded in Zimbabwe gave rise to a duty of support for purposes of a claim for loss of support after a motor vehicle accident.³⁴

There could be some scope for attempting to similarly develop the law on the duty of support in Namibia for purposes of claims for compensation for loss of support.

8.3.2 Property

The law does not regard the property of cohabitants to be jointly owned unless they have entered into an agreement to this effect. If property is owned individually, the cohabitant who owns the

³² *McDonald v Young* 2012 (3) SA 1 (SCA).

³³ *Du Plessis v Road Accident Fund* 2004 (1) SA 359 (SCA).

³⁴ *Chitima v Road Accident Fund* [2012] 2 All SA 632 (WCC) (per Bozalek, J).

property has a legal right to deal with that property as he or she wishes, without consulting his or her partner. This is true even if the property was acquired during the course of the relationship and even if the other partner made financial contributions to its purchase. But if property is jointly owned or leased by both partners, then both have equal rights to occupy it. This is currently the best way for same-sex partners to secure joint rights in land and homes.

8.3.3 Joint bank accounts

No Namibian banks allow joint bank accounts for married or cohabiting couples. At present, couples can open a bank account in one partner's name, with the other partner being a signatory on the account – but this means that the individual who is the owner of the account in the eyes of the bank can at any time unilaterally withdraw the other partner's authority over the account. This clearly places the signatory spouse in a vulnerable position.

The Law Reform and Development Commission has recommended a law reform requiring banks to offer the option of a joint banking account to married couples³⁵ – which, if enacted, could pave the way for joint accounts for informal partnerships.

8.3.4 Insurance, pensions and statutory benefits

Married persons and single persons essentially have the same rights in respect of life insurance policies.³⁶ It is also generally possible to name anyone as a beneficiary to a life insurance policy.

Private pension funds and the government pension fund (GIPF) generally cover “dependants”, broadly defined to include persons who are factual dependents regardless of whether there is legal liability to maintain.³⁷ A few statutory pension funds, such as those which apply to judges, include only spouses.³⁸

Such a fund was challenged in South Africa before same-sex marriage was possible; the Constitutional Court found that the exclusion of same-sex partners constituted unconstitutional discrimination on the grounds of sexual orientation where the parties have in fact undertaken “reciprocal duties of support”.³⁹

Private pension funds and the government pension fund (GIPF) cover “dependants”, which include persons who are factual dependents.

8.3.5 Tax

There is no distinction between the taxation of single persons and married persons in terms of Namibian income tax law, which is set forth in the Income Tax Act 24 of 1981.

35 Law Reform and Development Commission, *Report on Marital Property*, LRDC 15, March 2010.

36 Long-term Insurance Act 5 of 1998, sections 43-45.

37 Pension Funds Act 24 of 1956, sections 1 and 37C. Spouses and dependants are treated slightly differently for the purpose of certain loans under section 19(5)(a).

38 Judges' Pensions Act 28 of 1990.

39 *Satchwell v President of the Republic of South Africa* 2002 (6) SA 1 (CC).

8.3.6 Inheritance

The only way that a surviving same-sex partner can inherit from a deceased partner is by means of a will. Neither spouses nor cohabiting partners are eligible to claim maintenance from a deceased estate before its distribution to the heirs.

Although not technically “inheritance”, the Communal Land Reform Act 5 of 2002 provides for re-allocation of communal land to the surviving spouse when the holder of the communal land right dies – but makes no provision for same-sex or opposite-sex cohabiting partners.⁴⁰

8.3.7 Immigration rights

Citizenship and domicile rights are dependent on marriage and are not available to same-sex or opposite-sex cohabitants. It is unlikely that a Constitutional challenge to the current rules on immigration would succeed in light of the holding of the Namibian Supreme Court in the *Frank* case (discussed above and in several other chapters of this report), where the Namibian Supreme Court in which found that the existence of a lesbian relationship between a foreigner and a Namibian citizen was irrelevant to the application for permanent residence.⁴¹

In contrast, in South Africa, in the case of *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others*⁴² – decided before same-sex marriage was possible – the Constitutional Court found that South Africa’s immigration law was unconstitutional partners in same-sex couples the same rights that were available to spouses. The Court found that the provision in question not only discriminated against the applicants on the basis of sexual orientation and marital status, but also violated their right to dignity.⁴³

8.3.8 Other statutes

The treatment of cohabiting partners differs under different statutes. Same-sex partners would fall under general definitions such as those of “dependant” in a few statutes, but cohabiting partners of the same or opposite sexes are usually left out and so deprived of various benefits which would accrue to a spouse.

There are currently only two Namibian statutes which make reference to cohabiting partners without expressly limiting this to partners of opposite sexes: (1) The **Anti-Corruption Act 8 of 2003** defines “relative” as “a partner living with the public officer on a permanent basis as if they were married or with whom the public officer habitually cohabits” in connection with the offence of corruptly using an office or position for the benefit of a relative or associate.⁴⁴ (2) The **Criminal Procedure Act 51 of 1977** makes special arrangements for vulnerable witnesses available to any person against whom “any offence involving violence has been committed by a close family member or a spouse or a partner in any permanent relationship”.⁴⁵ These statutes

40 Communal Land Reform Act 5 of 2002, section 26.

41 *Chairperson of the Immigration Selection Board v Frank and Another* 2001 NR 107 (SC) (per O’Linn AJA) at 116.

42 *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 (2) SA 1 (CC).

43 Id at para 54.

44 Anti-Corruption Act 8 of 2003, section 43(1)-(2)) and (2).

45 Criminal Procedure Act 51 of 1977, section 158A(3)(c).

are important, even though they do not involve major aspects of same-sex relationships, because they provide a precedent for inclusivity.

Medical aid coverage for same-sex partners is discussed in Chapter 9 on health.

The position of same-sex partners under Namibia's labour laws is covered in Chapter 7 on labour.

8.3.9 Future possibilities

Currently, the key distinction in Namibian law is between married couples and unmarried couples – regardless of the sex of the unmarried couples. If there is law reform on cohabiting couples in future, it may be useful to keep in mind the Canadian case of *M v H*,⁴⁶ where the Canadian Supreme Court held that unmarried same-sex couples in Canada are entitled to the same protection as unmarried opposite-sex couples.

8.4 Legal mechanisms which can be applied to same-sex partnerships

SUMMARY

The only way that opposite-sex or same-sex cohabiting partners in Namibia can acquire mutual duties and obligations is through agreements – either a **contract** between the two partners or an implicit agreement in the form of a “**universal partnership**” which is inferred from their conduct. However, as discussed below, these avenues for establishing mutual obligations have significant limitations. There is also some possibility of using an action for **unjust enrichment** to distribute assets fairly when a same-sex relationship breaks down, but this legal concept has not yet been applied to cohabiting couples in Namibia or South Africa. However, examples from other countries point the way to possible legal developments in Namibia on this issue.

- A written contract combined with a written will is the best way for same-sex partners to regulate their relationship at present, although there are limitations to such contracts. They cannot put same-sex partners on the same footing as a married couple, but they can assist with issue such as maintenance and division of assets in the event that the relationship breaks down or one partner dies.
- Implied contracts establishing universal partnerships have been used in some cases to justify the distribution of assets between cohabiting partners. But establishing a universal partnership is very difficult, and the outcome can be unpredictable.
- The law governing unjust enrichment may be applied to cohabitation relationships to achieve fairness between the partners. This cause of action is still under development in Namibia and South Africa and has not yet been applied to cohabitants.

46 *M v H* [1999] 2 SCR 3.

8.4.1 Contracts

People who are cohabiting could make a straightforward agreement about their respective rights and duties. **A written contract combined with a written will is the best way for same-sex partners to regulate their relationship at present**, although there are limitations to such contracts. The most important limitation is that a contract between cohabitants would not be enforceable with respect to third parties.

It is rare in practice for cohabiting partners to make an express agreement about their respective obligations – which is unsurprising in a nation where few people even make wills. Furthermore, the economically-weaker parties in a relationship will not be able to negotiate from an equal bargaining position. Uneducated parties who cannot afford legal assistance would also probably struggle to craft an agreement which protected their respective interests adequately, even if their intentions were good.⁴⁷

Same-sex partners who want to conclude a contract about the rights and duties of the relationship should ideally get help from a legal practitioner, and they should combine the contract with a written will. They should also bear in mind the fact that it is not possible to entirely replicate the rights and duties of a marriage with a relationship contract. But a contract can be useful as an agreement on how income and assets will be shared, and to establish a mutual duty of support.

It might be useful for LGBT organisations to work with legal practitioners to draft a set of model templates for relationship contracts which could fit different situations.

8.4.2 Universal partnerships

Because express agreements between partners are rare, cohabitants may find themselves in the position of attempting to rely upon an implied agreement. The existence and terms of such an agreement must be proved by the person who is seeking to rely upon it, which can be very difficult in practice.

The law of contract includes a concept known as universal partnership, which has been applied to cohabiting partners. A universal partnership is an express or implied partnership agreement where the parties agree to pool their property for their joint benefit. When the partnership comes to an end, the partnership assets are divided in proportion to each party's contribution. If it is not possible to determine the respective contributions of the parties, then the assets are to be divided equally or in a manner which is fair in the circumstances.⁴⁸

There are **four basic requirements for establishing any universal partnership**: (1) Each partner must bring something into the partnership, or bind himself or herself to bring something into it – whether it is money, labour or skill. (2) The partnership in question should be carried on for the joint benefit of both parties. (3) The object of the partnership should be to make some sort of profit or gain. (4) The implied contract between the parties should be a legitimate contract.

47 See June Sinclair, *The Law of Marriage, Volume I*, Cape Town: Juta, 1996, at 283. For a more detailed discussion of some of the drawbacks to express contracts for regulating family matters, see Elsje Bonthuys, "Family contracts", 121 (4) *SALJ* 879 (2004) at 894-ff.

48 A case of the South African Supreme Court of Appeal on universal partnerships reported since the Legal Assistance Centre report on cohabitation was published, *Ponelat v Schrepfer* 2012 (1) SA 206 (SCA), confirms that such partnerships can exist between unmarried couples.

These criteria do not apply to most personal relationships, and have been most successfully applied to family businesses.

There is only one reported case in Namibia which addresses the concept of a universal partnership in a cohabitation relationship – the *Frank* case.⁴⁹ As previously discussed, this case involved the Immigration Selection Board’s refusal to grant permanent residence to a German citizen who was in a long-term lesbian relationship with a Namibian citizen. The Chairperson of the Board argued that the lesbian relationship was not recognised in Namibian law and so could not assist the application for permanent residence.⁵⁰ The High Court found that this assertion was incorrect, citing previous South African cases where universal partnerships were established between cohabiting couples involving partners of the opposite sex.⁵¹ The Court then cited the equality clause of the Namibian Constitution (Article 10), and concluded that if a man and a woman can tacitly conclude such a partnership then the equality provision mandates that same-sex partners can equally do so.⁵² The High Court concluded that “the long term relationship between applicants, in so far as it is a universal partnership, is recognised in law”, and that the Immigration Selection Board should have taken it into account when considering the application for permanent residence.

The Namibian Supreme Court overturned the High Court decision, but its discussion of universal partnership made it clear that cohabiting partners can in theory rely on this concept.⁵³

8.4.3 Unjust enrichment

The law governing unjust enrichment may be applied to cohabitation relationships to achieve fairness between the partners. For example, one cohabiting partner might be able to show that the other partner was enriched during the relationship by tangible improvements made to the property of the one partner by the other, or by some other form of contribution such as services rendered.

This cause of action is still under development in Namibia and South Africa and has not yet been applied to cohabitants.⁵⁴ But the concept of unjust enrichment has been applied to cohabitation in many other jurisdictions, including Zimbabwe, the Seychelles and Canada. The required elements of such a claim would be to show that (a) one party to the relationship was enriched; (b) the other party to the relationship was impoverished; (c) the enrichment of the one party must be at the expense of the other; and (d) the enrichment must be unjustified”.⁵⁵

49 *Frank & Another v Chairperson of the Immigration Selection Board* 1999 NR 257 (HC); *Chairperson of the Immigration Selection Board v Frank & Another* 2001 NR 107 (SC).

50 *Frank* 1999 NR 257 (HC) at 264C.

51 The judgement (*per* Levy J) cited *Isaacs v Isaacs* 1949 (1) SA 952 (C) and *Ally v Dinath* 1984 (2) SA 451 (T).

52 To support this conclusion, the Court also cited Article 16 of the Namibian Constitution on the right of all persons to “acquire, own and dispose of all forms of immovable or movable property individually or in association with others and to bequeath their property to their heirs or legatees” and Article 21(1)(e) on the right to freedom of association.

53 *Frank* 2001 NR 107 (SC). For example, the Supreme Court said that the issue of universal partnership had not been properly put before the court in this case (at 114D), and noted that “even if such a partnership was proved and relied upon by respondents”, it was still within the discretion of the Immigration Selection Board to decide whether to regard it as a factor relevant to the application (at 114E). The entire discussion by the Supreme Court in the *Frank* case is premised on the idea that a universal partnership could be found in such circumstances, but that its existence or non-existence was not dispositive in the case at hand.

In South Africa, the case of *LT v VLM* [2012] ZAGPJHC 262 found a universal partnership between two lesbian life partners which came into existence before same-sex marriages were legalised.

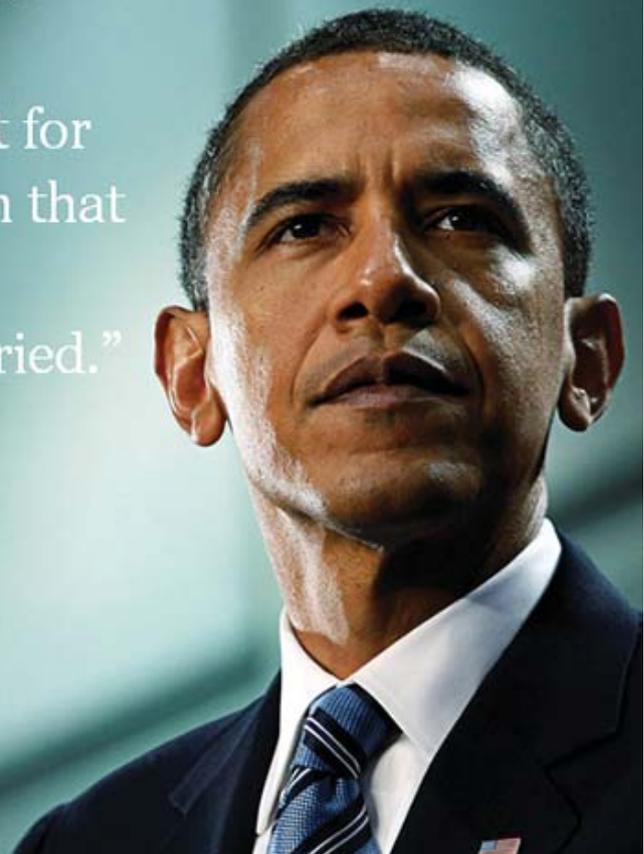
54 In Namibia, see *Ferrari v Ruch* 1994 NR 287 (SC), appeal from 1993 NR 103 (HC); *Seaflower Whitefish Corporation Ltd v Namibian Ports Authority* 2000 NR 57 (HC); *Oshakati Tower (Pty) Ltd v Executive Properties CC and Others* (2) 2009 (1) NR 232 (HC), reversed on appeal by 2013 (1) NR 157 (SC); *Muller v Schweiger* 2005 NR 98 (HC), reversed in part and confirmed in part by 2013 (1) NR 87 (SC); *Swakopmund Airfield CC v Council of the Municipality of Swakopmund* 2013 (1) NR 205 (SC).

55 *Watson NO and Another v Shaw NO and Others* 2008 (1) SA 350 (C) at 356H, on appeal *Afrisure CC and Another v Watson NO and Another* (522/2007) [2008] ZASCA 89; [2009] 1 All SA 1 (SCA); 2009 (2) SA 127 (SCA) (11 September 2008);

“At a certain point I’ve just concluded that for me personally, it is important for me to go ahead and affirm that I think same sex couples should be able to get married.”

President Obama

May 9, 2012



8.5 Adoptions

SUMMARY

Same-sex couples cannot adopt children jointly in Namibia. In practice, some social workers have facilitated adoptions for same-sex couples by allowing one partner to adopt as a single (or divorced or widowed) adoptive parent. However, this approach leaves the other partner without any legal parental rights.

Joint adoption by same-sex couples is allowed in many countries, but it is unlikely that a Namibian same-sex couple would be able to adopt a child in another country. This is because an intercountry adoption is a co-operative measure which requires compliance with the laws on adoption on both the State of origin (where the child is habitually resident) and the receiving State (where the parents are habitually resident, and will be bringing the child to live).

Furthermore, Namibia is not obliged to recognise adoptions which are contrary to Namibia’s public policy. But public policy considerations might be over-ridden by Namibia’s duty to make all decisions concerning children on the basis of the best interests of the child.

8.5.1 Adoption by same-sex couples in Namibia

Adoption in Namibia is currently governed by the Children's Act 33 of 1960. The possibility of adoption by same-sex couples is not covered by the law at all. In practice, some social workers have facilitated adoptions for same-sex couples by allowing one partner to adopt as a single (or divorced or widowed) adoptive parent.⁵⁶ However, this approach leaves the other partner without any legal parental rights. It is not possible for the parents to agree between themselves to share parental rights and powers in the absence of a court order of some specific statutory authorisation.

In South Africa, the Constitutional Court ruled that a prohibition against joint adoption by same-sex life partners (before same-sex marriage was legalised) was unconstitutional discrimination on the grounds of sexual orientation and marital status, as well as a violation of the right to dignity.⁵⁷ The Court noted that the best interests of the child should be the paramount consideration in such matters, and held that excluding suitable persons in permanent same-sex partnerships from joint adoption could deprive children “of the possibility of a loving and stable family life ...”⁵⁸

In Namibia, in the 2004 *Detmold* case, the High Court held that a law which prohibited the adoption of children born to Namibian parents by non-Namibian citizens was unconstitutional discrimination and also conflicted with the constitutional right of every child to a family. The Court found that the distinction in the law was not based on a rational connection to a legitimate purpose, and might exclude children from adoption by persons who may provide them the best hope of a secure and stable future and family life.⁵⁹ It is possible that similar arguments might be used to challenge the prohibition on joint adoption by same-sex couples.

Cases from the European Court of Human Rights (ECHR) could also be useful as guidance for future adoption cases in Namibia. For example, in the 2008 case *EB v France*, the ECHR found that refusing to allow a single person to adopt a child solely because that person was homosexual violated Article 8 (on privacy) and Article 14 (on equality) of the European Convention on Human Rights.⁶⁰

8.5.2 Recognition of same-sex adoptions concluded in other countries

Joint adoption by same-sex couples is allowed in many countries, but it is unlikely that a Namibian same-sex couple would be able to adopt a child in another country. Namibia is preparing to join the Hague Convention on Intercountry Adoption which establishes mechanisms for cooperation between countries on intercountry adoption to safeguard the best interests of the child. The Hague Convention approach to adoption depends not on the nationality of the adoptive parents or child, but on their countries of habitual residence. It applies whenever adoptive parents who are habitually resident in one state adopt a child who is habitually resident in another state.

⁵⁶ Children's Act 33 of 1960, section 70(1).

⁵⁷ *Du Toit v Minister for Welfare and Population Development* 2003 (2) SA 198 (CC).

⁵⁸ *Id* at para 21. Section 28(1)(b) of the South African Constitution states that “[e]very child has the right ... to family care or parental care, or to appropriate alternative care when removed from the family environment”.

⁵⁹ *Detmold and Another v Minister of Health and Social Services and Others* 2004 NR 174 (HC).

⁶⁰ *EB v France* (no 435466/02, 22 January 2008).

The Hague Convention would not allow a same-sex couple habitually resident in Namibia to adopt a child together in another country and then return to Namibia, nor would it allow a child habitually resident in Namibia to be adopted by a foreign same-sex couple resident elsewhere. This is because an intercountry adoption is a co-operative measure which requires compliance with the laws on adoption on both the State of origin (where the child is habitually resident) and the receiving State (where the parents are habitually resident, and will be bringing the child to live).

Additionally, Namibia is not obliged to recognise adoptions which are contrary to Namibia's public policy. This is true for both foreign national adoptions and intercountry adoptions which did not involve Namibia as a State of origin or a receiving State – such as in a case where an adoption took place while the adoptive parents and child were habitually resident elsewhere but later relocated to Namibia. But public policy considerations might be over-ridden by Namibia's duty to make all decisions concerning children on the basis of the best interests of the child.

8.6 Assisted reproductive techniques and surrogacy

SUMMARY

Current Namibian legislation on **ovum or sperm donation** contemplates only a situation where such artificial reproductive techniques are used by married couples. Thus, where such artificial reproductive techniques are utilised by single persons or same-sex partners, the donor of the ovum and sperm would be the child's parents in the eyes of the law.

Surrogacy is an arrangement whereby woman agrees to bear a child for another person or couple, with the explicit intention of transferring the child to the commissioning person or couple after birth. Surrogacy is sometimes used by same-sex couples as a method for having a child who is genetically related to one partner. Surrogacy is not covered by any law in Namibia.

8.6.1 Assisted reproductive techniques

Lesbian couples may have children by arranging for artificial insemination of an ovum of one of the partners, while gay couples may have children by donating one of the partner's sperm for insemination.

Current Namibian law on **ovum or sperm donation** contemplates only a situation where artificial reproductive techniques are used by married couples. It does not cover situations where such techniques are used by single persons or same-sex partners.⁶¹ Where such artificial reproductive techniques are used by single persons or same-sex partners, the donor of the ovum and sperm would be the child's parents under the law. If the donor identity is not known, then the child would be without one or both legal parents.

⁶¹ Children's Status Act 6 of 2006, section 24. The current law on assisted reproductive techniques is expected to be repealed and re-enacted in substantially the same terms in the forthcoming Child Care and Protection Act.

In South Africa, a similar law was ruled to be unconstitutional discrimination based on marital status and sexual orientation.⁶²

8.6.2 Surrogacy

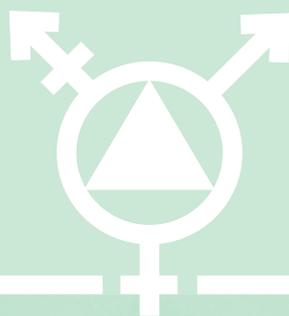
Surrogacy is where a woman agrees to bear a child for another person or a couple, with the explicit intention of transferring the child to the person or couple after birth. The surrogate mother may be the genetic mother of the child, or only the “gestational mother” of the child (meaning that the child was conceived with the ova and sperm of the commissioning couple, with donor ova and sperm, or with some combination of the two). The surrogate mother normally has no intention of exercising any parental rights or responsibilities with respect to the child. Surrogacy is sometimes used by same-sex couples as a method for having a child who is genetically related to one partner.

Surrogacy is not covered by any law in Namibia. Because of this, a private agreement about surrogacy might not be enforceable in a Namibian court if a dispute arose. As in the case of other artificial reproductive techniques, the common law rules would apply to make the persons who supplied the ovum and sperm the child’s legal parents regardless of the parties’ intentions. A married couple could use joint adoption to overcome this problem, but joint adoption would not be available to a same-sex couple.

In contrast, South Africa’s Children’s Act 38 of 2005 contains an entire chapter on surrogate motherhood which clearly contemplates surrogacy on behalf of both unmarried opposite-sex and same-sex couples (by referring to the “husband, wife or partner” of the commissioning parent).⁶³

62 *J v Director General, Department of Home Affairs* 2003 (5) SA 621 (CC).

63 South Africa’s Children’s Act 38 of 2005, sections 292-303.



Chapter 9

HEALTH

9.1	Introduction to LGBT health discrimination	148
9.1.1	The international picture	148
9.1.2	Discrimination in healthcare in Namibia	149
9.2	Non-discriminatory and confidential access to health care	151
9.2.1	Namibian Constitution	151
9.2.2	Hospitals and Health Facilities Act 36 of 1994	152
9.2.3	Duty of confidentiality	152
9.2.4	Ethical guidelines	153
9.2.5	Patient Charter	153
9.2.6	Making complaints about healthcare services	153
9.2.7	Other possible legal strategies	154
9.3	HIV/AIDS as a health issue in the LGBT community	155
9.4	Access to condoms in prisons	157
9.5	Medical aid coverage for same-sex partners	159
9.6	International law obligations	160
9.7	Models for future law reform	163
9.7.1	Namibian legislation	163
9.7.2	Examples from other countries	163

9.1 Introduction to LGBT health discrimination

SUMMARY

LGBT health discrimination is an enormous issue worldwide, with LGBT individuals facing barriers to accessing healthcare in virtually every state in the world. Barriers to accessing health services include ridicule and discrimination, fears that breaches of confidentiality will reveal information about sexual orientation in a hostile climate, and the criminalisation of consensual sodomy.

In Namibia, there have been reports of verbal abuse by medical professionals, as well as unclear and insensitive health information. A study of men having sex with men published in 2009 found that over 18% of the men interviewed in Namibia were afraid to seek healthcare because of their sexual orientation and more than 8% of the participants stated they had been denied healthcare services due to their sexuality. The exclusion of the LGBT community from health care services also means that their concerns continue to be poorly reflected in national health plans and policies.

9.1.1 The international picture

LGBT individuals face barriers to accessing healthcare based on their LGBT identity in virtually every state in the world.¹

Barriers can take the form of **outright prejudice and discrimination**, such as when people are given sub-standard care or are turned away from a hospital or local clinic because of their sexual orientation or gender identity – or **more subtle obstacles**, such as when health professionals fail to take the time to understand the health needs of their LGBT patients.² In Southern Africa, discrimination in health-care settings has been noted as both direct (refusal to see patients, derogatory labelling) and indirect (lack of sensitivity, lack of knowledge).³

Another obstacle to accessing healthcare services is **the fear that confidentiality may be violated**, meaning that the patient's sexual orientation or gender identity may be revealed to a hostile public.⁴ Breaches of confidentiality may lead to stigma and violent reprisals, so a lack of confidence in doctor-patient confidentiality may discourage LGBT individuals from attempting to access healthcare.⁵

Yet another hurdle to accessing healthcare is **the continued criminalisation of consensual sodomy in many countries, including Namibia** (discussed in Chapter 4).

1 Nils Dauilaire, "The Importance of LGBT Health on a Global Scale", 1(1) *LGBT Health* 8 (2014), <<http://online.liebertpub.com/doi/pdfplus/10.1089/lgbt.2013.0008>> at 8.

2 World Health Assembly LGBT Health Panel, "Speech of the US Secretary of Health and Human Services", 21 May 2012, <www.hhs.gov/secretary/about/speeches/sp20120521.html>.

3 Heather Fay et al, "Stigma, Health Care Access, and HIV Knowledge Among Men Who Have Sex With Men in Malawi, Namibia, and Botswana", 15(6) *AIDS and Behavior* 1088 (2011), <www.opensocietyfoundations.org/sites/default/files/msmresearch_20090428.pdf> at 9.

4 Nils Dauilaire, "The Importance of LGBT Health on a Global Scale", 1(1) *LGBT Health* 8 (2014) at 8.

5 Human Rights Council, "Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Ben Emmerson", 4 June 2012, <www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session20/A-HRC-20-14_en.pdf>.

Another health issue of concern is **the erroneous idea held by some that “corrective therapy” can “cure” individuals of their homosexuality**, or the attitude that homosexuality is a disorder that can be prevented or successfully treated.⁶ Scientifically inaccurate attitudes such as these can fuel misunderstanding, stigma and discrimination.⁷

Transgender individuals in Namibia face unique challenges with regard to health. Worldwide, transgender individuals’ access to healthcare is an issue. Some still view transsexualism as a disorder, although this attitude is changing as a result of progress in transgender rights and advocacy.⁸ Another hurdle is that **healthcare professionals often lack professional training on transgender issues**, which compromises their technical competence and sensitivity.⁹

There is a similar lack of information and competence about how to address the needs of intersex children, resulting in some children undergoing irreversible surgical procedures without proper information about their choices. Namibians interested in surgical intervention for gender reassignment or in cases of intersexuality often seek medical assistance outside the country.¹⁰

Although health data on LGBT persons is limited, the international data that does exist points to inferior health outcomes for LGBT individuals even though there are no LGBT-specific diseases.¹¹ Experts report that the LGBT community across the globe experiences “higher rates of depression, anxiety, tobacco use, alcohol abuse, suicide or suicidal ideation, as a result of chronic stress, social isolation, and disconnectedness from a range of health and support services”.¹²

9.1.2 Discrimination in healthcare in Namibia

In Namibia, 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.¹³

6 See, for example, “Campaigners in China have taken a clinic to court over its backing of gay-to-straight conversion therapy”, which discusses a lawsuit brought by LGBT activists against a clinic which offers so-called “conversion therapy” involving electroshock therapy. *Pink News*, 29 July 2014, <www.pinknews.co.uk/2014/07/29/china-gay-cure-clinic-sued-by-activists-in-landmark-move>.

7 Amnesty International, “Making Love a Crime – Criminalization of Same-Sex Conduct in Sub-Saharan Africa”, 2013 at 59-60; World Health Organization, “Improving the health and well-being of lesbian, gay, bisexual and transgender persons”, 14 May 2013, <www.ghwatch.org/sites/www.ghwatch.org/files/B133-6_LGBT.pdf>; Human Rights Council, “Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez”, 1 February 2013, <www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A.HRC.22.53_English.pdf>; Jen Kates, “The U.S. Government and Global LGBT Health: Opportunities and Challenges in the Current Era”, *The Henry J. Kaiser Family Foundation*, April 2014, <www.opensocietyfoundations.org/sites/default/files/msmresearch_20090428.pdf>.

8 The current version of the International Classification of Diseases used by the World Health Organization still considers transsexualism to be a disorder of adult personality and behaviour. International Statistical Classification of Diseases and Related Health Problems, 10th Revision. The 11th revision is scheduled for publication in 2017. For advocacy on this issue, see World Professional Association for Transgender Health, “World Consensus Process Regarding Transgender and Transsexual-Related Diagnoses in ICD-11”, 31 May 2013, <www.wpath.org/uploaded_files/140/files/ICD%20Meeting%20Packet-Report-Final-sm.pdf>; World Health Organization, “Improving the health and well-being of lesbian, gay, bisexual and transgender persons”, 14 May 2013, <www.ghwatch.org/sites/www.ghwatch.org/files/B133-6_LGBT.pdf> at para 10.

9 World Health Organization, “Improving the health and well-being of lesbian, gay, bisexual and transgender persons”, 14 May 2013 at para 10; see also, for example, Theresia Tjihenua, “Transgender individuals struggle to access health facilities”, *The Namibian*, 7 August 2014.

10 Information from LAC clients.

11 World Health Organization, “Improving the health and well-being of lesbian, gay, bisexual and transgender persons”, 14 May 2013.

12 Pan American Health Organization, “Health authorities pledge to improve access to health care for LGBT people”, 3 October 2013, <www.paho.org/hq/index.php?option=com_content&view=article&id=9056%3A-health-authorities-pledge-to-improve-access-to-healthcare-for-lgbt-people&catid=740%3Anews-press-releases&Itemid=1926&lang=en&Itemid=1926>.

13 Immigration and Refugee Board of Canada, “Namibia: Treatment of sexual minorities by society and government authorities; recourse and protection available to sexual minorities who have been subject to ill-treatment”, 11 June 2014, <<http://irb-cisr.gc.ca/Eng/ResRec/RirRdi/Pages/index.aspx?doc=454117>>.

A 2003 study on the consequences of homophobia in Southern Africa, conducted by Human Rights Watch and the International Gay and Lesbian Human Rights Commission, included several **reports of verbal abuse inflicted by medical professionals in Namibia**.¹⁴ Other sources have reported **concerns about whether doctor-patient confidentiality would be respected by doctors who treat members of the LGBT community**.¹⁵

.....
“I need a doctor I can trust, a doctor that will never take my problems outside.”

interview with gay Namibian reported in Human Rights Watch and International Gay and Lesbian Human Rights Commission, *More Than A Name: State-Sponsored Homophobia and its Consequences in Southern Africa*, 2003 at 114 at 157

Research published in 2009 assessed some of the challenges experienced by men who have sex with men (MSM) in Malawi, Namibia and Botswana. The researchers found that the criminalisation of sodomy in Namibia inhibits men who have sex with men from seeking medical treatment; **over 18% of the MSM interviewed in Namibia were afraid to seek healthcare because of their sexual orientation, and more than 8% stated they had been denied healthcare services due to their sexuality**.¹⁶ A baseline study of human rights in Namibia, published by the Office of the Ombudsman in 2013, reports that members of the LGBT community “are often denied access to health care services due to stigma and discrimination from health care officials”.¹⁷ Even more recently, in June 2014, *The Namibian* published an article at the end of a LGBT workshop in Ongwediva which indicated that health discrimination is still occurring in Namibia, with one activist reporting that lesbians and gays continue to face ridicule when they seek healthcare.¹⁸

It is not surprising that LGBT individuals can be reluctant to seek healthcare services in Namibia, given the fact that the prevailing political climate is strongly disapproving of homosexuality. However, the result is that **the needs of the LGBT community continue to be poorly reflected in national health plans and policies**, which helps to perpetuate the inadequacy of health services to serve their needs and hampers efforts to confront general public health issues such the HIV/AIDS pandemic effectively and inclusively.¹⁹

Transgender individuals struggle to access health facilities

FOR Okahandja resident Freddie ‘Celine’ Eiseb, the judgmental look on the faces of nurses when ‘she’ visits clinics or hospitals for treatment is too familiar.

In a country where being a transgender is still largely frowned upon, and where there are no laws that protect the rights of gays and lesbians or transgender people, Eiseb has had to fight off a lot of discrimination and endure insults at the hands of conservative health officials.

14 Human Rights Watch and International Gay and Lesbian Human Rights Commission, *More Than A Name: State-Sponsored Homophobia and its Consequences in Southern Africa*, 2003 at 114.

15 Id at 157.

16 Stefan Baral, et al, “HIV Prevalence, Risks for HIV Infection, and Human Rights amongst Men Who Have Sex with Men (MSM) in Malawi, Namibia, and Botswana”, *PLoS ONE*, Vol 4, Issue 3 (2009), <www.opensocietyfoundations.org/sites/default/files/msmresearch_20090428.pdf> and Heather Fay, et al, “Stigma, Health Care Access, and HIV Knowledge Among Men Who Have Sex With Men in Malawi, Namibia, and Botswana”, 15(6) *AIDS and Behavior* 1088 (2011), <www.jhsph.edu/research/centers-and-institutes/center-for-public-health-and-human-rights/research/current_projects/Global_HIV_among_MSM_in_LMIC.html>.

17 Office of the Ombudsman, *2013 Baseline Study Report on Human Rights in Namibia*, 2013 <www.ombudsman.org.na/reports/special-reports/finish/4-special-reports/22-2013-baseline-study-report-on-human-rights-in-namibia> at 12, 170.

18 Linda Baumann, Director of OutRight Namibia, as quoted in Oswald Shivute, “LGBTI workshop ends at Ongwediva”, *The Namibian*, 10 July 2014.

19 Human Rights Council, “Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Anand Grover”, 1 February 2013.

While other countries have slowly passed laws that accommodate transgender people, Namibia has not included specialised programmes for transgender people in its strategic health plans.

“Transgender people are not well received in the public health sector. There is still a lot of prejudice going on,” says Eiseb, who was diagnosed with HIV at the age of 30...

“I was born a woman trapped in a man’s body. This is not my fault and I have the right to access health services just like anyone else” Eiseb says...

excerpt from Theresia Tjihenuna, *The Namibian*, 7 August 2014

9.2 Non-discriminatory and confidential access to health care

SUMMARY

Namibian law has no explicit provision protecting LGBT individuals from discrimination in accessing healthcare, but this protection is embodied in the principles of equality, dignity before the law and the commitment to improve public health in the **Namibian Constitution**. Additionally, the **Hospitals and Health Facilities Act 36 of 1994** articulates the principle that every person in Namibia is entitled to access state healthcare; the law provides for exceptions, but these would have to be based on rational reasons in terms of administrative law.

Medical professionals have a legal duty of **confidentiality** in terms of the common law as well as under rules on misconduct which apply to doctors, dentists, nurses, clinical psychologists and other medical professionals. Patient confidentiality is probably also protected by the constitutional right to privacy.

These laws are buttressed by **Ethical Guidelines for Health Professionals** – which state that patient care may not be prejudiced by the personal beliefs of the medical professional concerned about “*lifestyle*”, “*gender*” or “*sexual orientation*” – and the **Patient Charter** – which also explicitly prohibits discrimination in access to healthcare services on the basis of gender or sexual orientation.

If any of these legal or ethical duties are breached, **patients can bring a complaint to the relevant Health Professions Council**.

Although there are no Namibian court cases on non-discriminatory access to health care, South African jurisprudence suggests that criteria for access to healthcare services must be reasonable, without excluding any segment of society.

9.2.1 Namibian Constitution

Abusive treatment of LGBT persons by medical professionals probably violates the rights of dignity and equal protection in the Namibian Constitution. Additionally, according to Article 95 of the Constitution of Namibia, the State shall adopt policies aimed at improving public health – and it is not possible to make a good faith effort to improve public health if laws and policies on health fail to ensure non-discriminatory access to healthcare services by all persons in Namibia.

9.2.2 Hospitals and Health Facilities Act 36 of 1994

According to the Hospitals and Health Facilities Act 36 of 1994, every Namibian (which would obviously include LGBT individuals) shall have access to health facilities and be entitled to receive medical treatment and benefit from health services. The Superintendent of a state hospital is granted wide powers to deny health services to persons for sufficient reasons, but it would be unlawful to refuse to provide access to a state hospital on the basis of personal prejudice or unconstitutionally discriminatory grounds.

9.2.3 Duty of confidentiality

Medical practitioners have a clear duty of confidentiality to their patients.²⁰ Confidentiality protects both the patient's privacy and the public interest; patients would be unlikely to seek medical help if their privacy was not assured, and failure to seek help for some medical conditions could endanger public health. The duty to respect doctor-patient confidentiality has long been recognised as being a legal duty as well as an ethical one.

However, this duty is not absolute. There may be circumstances where a doctor's duty to an individual patient is outweighed by the doctor's duty to society at large. For example, doctors are sometimes required by law to violate confidentiality, to report suspicions of child abuse or to report highly-contagious diseases that could endanger the public.²¹

In Namibia, legal rules issued under the laws which govern doctors and other members of the medical profession generally make it misconduct to share confidential information about a patient unless –

- the patient has given consent;
- the information is required to be divulged in court on the instructions of the presiding officer; or
- there is some law requiring that the information be disclosed.

Unauthorised disclosure of confidential details about a patient could be the basis for claims for damages for invasion of privacy. For example, in a 1993 South African case, a doctor disclosed a patient's HIV-positive status without consent to a dentist and another doctor. While there may be cases where a doctor has a duty to share such information with other health care workers who could be at risk of exposure, this was not the situation in this case. The Court awarded damages to the patient in respect of the wrongful disclosure of the information.²²

.....

“Private and confidential medical information contains highly sensitive and personal information about individuals. The personal and intimate nature of an individual's health information, unlike other forms of documentation, reflects delicate decisions and choices relating to issues pertaining to bodily and psychological integrity and personal autonomy ... As a result, it is imperative and necessary that all private and confidential medical information should receive protection against unauthorised disclosure. ...”

NM and Others v Smith and Others 2007 (5) SA 250 (CC) at para 40-43

.....

20 See *Jansen Van Vuuren and Another NNO v Kruger* 1993 (4) SA 842 (A).

21 See, for example, the Public Health Act 36 of 1919 and the provisions on mandatory reporting in the Child Care and Protection Act.

22 *Jansen Van Vuuren and Another NNO V Kruger* 1993 (4) SA 842 (A).

9.2.4 Ethical guidelines

The Health Professions Councils of Namibia have issued **Ethical Guidelines for Health Professionals**²³ which cover respect and patient confidentiality amongst other issues – and, unlike the laws discussed in the previous sections, they reference sexual orientation explicitly. These Guidelines require health professionals to treat “all individuals and groups in an impartial, fair and just manner”.²⁴ They also provide for the right of access to healthcare services without discrimination based on LGBT identity, by providing that patient care may not be prejudiced by the personal beliefs of the medical professional concerned about “lifestyle”, “gender” or “sexual orientation”.²⁵ Deviations from these Guidelines could form the basis for a complaint of unprofessional conduct. Medical personnel who do not treat LGBT patients on a basis of equality with other patients, with full respect for their dignity, should be held accountable.

9.2.5 Patient Charter

Namibia has a Patient Charter which was developed in 1998 to help protect human rights in the health sector.²⁶ The first right listed in this Patient Charter concerns access to health services and states that every patient and client has the right to receive care on the basis of need, regardless of gender or sexual orientation (amongst other grounds).²⁷ Patients also have a right to dignity and integrity, which includes amongst other things the right –

- to be treated with respect and courtesy;
- to respect for “their values, culture, religion and dignity”;
- to confidentiality; and
- to be informed, upon request, of how to lodge a complaint.²⁸

Although this Charter is not a legally-binding document, it gives added support to the legal duties to provide healthcare services without discrimination and with respect for confidentiality.

9.2.6 Making complaints about healthcare services

The medical profession in Namibia is in large part self-regulating. Complaints regarding healthcare in Namibia may be brought before one of the Health Professions Councils which are mandated to protect the public by investigating allegations of unprofessional conduct in the medical field.²⁹ All of the councils in Namibia operate under the oversight of the Health Professions Councils of Namibia (HPCNA).³⁰

23 Health Professions Councils of Namibia, *Ethical Guidelines for Health Professionals*, 2010, <www.hpcna.com/legal/Ethical%20Document%20-%20Final%20Draft%201.pdf>.

24 Id, 1. Professional Guidelines, Section One – Ethics, para 1.2 at 3-4.

25 Id, 1. Professional Guidelines, Section Two – General Ethical Duties, para 2.1, point 5 at 6.

26 Ministry of Health and Social Services, *The Patient Charter of Namibia*, June 1998. The document is specially designed to govern public healthcare institutions, but “can also be used and followed in private institutions”, as stated in the forward. As of 2014, an updated Patient Charter was being prepared but had not yet been finalised, so the 1998 Charter was still in use. Telephonic information from Ministry of Health and Social Services.

27 Id, Chapter 1: Patient/Client Rights, section 1.1 at 1.

28 Id, Chapter 1: Patient/Client Rights, section 1.2 at 1.

29 See generally Mindy Jane Roseman, Aziza Ahmed, and Jennifer Gatsi-Mallet, “At the Hospital There are No Human Rights: Reproductive and Sexual Rights Violations of Women Living with HIV in Namibia”, Northeastern University School of Law, Research Paper No. 128-2013, 26 July 2012, <http://harvardhumanrights.files.wordpress.com/2012/07/namibia_final.pdf> at 20.

30 See the website of the Health Professions Councils of Namibia, <www.hpcna.com/aboutus.php>. This council is the overarching body for the councils which operate under (1) the Social Work and Psychology Act 6 of 2004; (2) the Allied Health Professionals Act 7 of 2004; (3) the Nursing Act 8 of 2004; (4) the Pharmacy Act 9 of 2004; and (5) the Medical and Dental Act 10 of 2004.

For example, under the Medical and Dental Act 10 of 2004, the Medical and Dental Council has broad powers to investigate complaints of “*unprofessional conduct*” by any of its members, which it can exercise itself or delegate to its professional conduct committee.³¹ These bodies have the power to impose penalties ranging from a reprimand or a fine, to suspension or permanent de-registration of the medical professional in question.³²

It is possible for the Council to designate someone as a “*pro forma* complainant” to present the case to the Council in the absence of an actual complainant.³³ This could be a very useful mechanism in the LGBT context. For example, if an organisation working in the field of LGBT or human rights received reports of unprofessional conduct from persons unwilling to speak out publicly, it might be possible for the organisation to request appointment as a *pro forma* complainant to the Council.

How can an LGBT individual make a complaint about inappropriate actions by a health professional?

If you have a complaint against a health professional, you should record your complaint in writing.

You should address the complaint to the Registrar of the Health Professions Councils of Namibia (HPCNA). This Council will pass the complaint onward to the council which governs the medical profession in question.

Your statement should include specific details about the complaint – including what happened, the date of the incident and where it took place. You should say that you want the matter to be investigated and provide your contact details. You will also need to complete a consent form provided by the HPCNA which authorises the Council to have access to your medical records for purposes of investigating the complaint.

Personal communication from HPCNA,
August 2014 and February 2015

9.2.7 Other possible legal strategies

While there appears to be no case law regarding access to healthcare in Namibia, several cases decided by the South African Constitutional Court support the argument that the criteria for regulating access to healthcare services and resources must be reasonable.

For example, in the 1998 *Soobramoney* case,³⁴ the Constitutional Court found it acceptable for a state hospital to prioritise access to scarce resources on the basis of guidelines which gave preference to persons who have some hope of eventual cure as opposed to terminal cases, as long as this criteria was applied fairly and rationally.

³¹ Medical and Dental Act 10 of 2004, sections 38-39.

³² Id, section 42(1).

³³ Id, section 46.

³⁴ *Soobramoney v Minister of Health (Kwazulu-Natal)* 1998 (1) SA 765 (CC).

The 2002 *Treatment Action Campaign* case³⁵ considered access to an anti-retroviral drug aimed at the prevention of mother-to-child transmission of HIV. The Court found that the Government policy to make the drug in question available only at selected research and training sites was not reasonable, because it denied mothers and newborn children at public hospitals and clinics access to a potentially lifesaving drug which “could have been administered within the available resources of the State without any known harm to mother or child”.³⁶

A 2013 South African case, *Lee v Minister of Correctional Services*,³⁷ goes even further by finding that government’s failure to take reasonable steps to fulfil its duties in the health sphere could lead to legal liability where this failure to take positive action increases the risk of harm to an individual’s health.³⁸

These precedents could have useful applicability to cases where LGBT individuals are unfairly or unreasonably excluded from health-care services – particularly since negative societal attitudes make them a vulnerable group in respect of discrimination in this area.

9.3 HIV/AIDS as a health issue in the LGBT community

SUMMARY

Lack of relevant information and discrimination in access to health care can increase the vulnerability of LGBT individuals to HIV transmission or compromise their treatment. HIV is spread primarily through heterosexual conduct, but LGBT individuals may be unfairly assumed to be HIV-positive or unreasonably blamed for spreading HIV. At the same time, because outreach and prevention on HIV have focused on heterosexual transmission, it may be wrongly assumed that homosexual sex is safer than heterosexual sex. Furthermore, lack of sensitivity on the part of health care workers can prevent LGBT persons from obtaining the means for safer sex. However, in recent years, there has been increased attention to HIV outreach in respect of men who have sex with men, and a few signs that the importance of sensitivity to LGBT issues in HIV prevention efforts is beginning to be recognised in Namibia.

In sub-Saharan Africa, the majority of persons living with HIV are heterosexual and most new infections arise through heterosexual conduct. Nevertheless, lack of access to information and discrimination in access to basic healthcare services can put LGBT individuals in the region at particular risk of contracting HIV or of suffering disproportionately from its consequences.³⁹

In Namibia, LGBT individuals may find they are unfairly presumed to be HIV-positive and carriers of HIV. But, despite this unfair blaming, until recently HIV prevention programs have focused

35 *Minister of Health and Others v Treatment Action Campaign and Others (No 2)* 2002 (5) SA 721 (CC).

36 *Id* at para 80.

37 *Lee v Minister of Correctional Services* 2012 (3) SA 617 (SCA); 2013 (2) SA 144 (CC).

38 This case, which involved the State’s failure to implement a reasonable system for the management of tuberculosis in prisons, is discussed in more detail in section 9.4 of this Chapter .

39 Human Rights Watch and International Gay and Lesbian Human Rights Commission, *More Than A Name: State-Sponsored Homophobia and its Consequences in Southern Africa*, 2003 at 109.

almost exclusively on heterosexual transmission.⁴⁰ Furthermore, state officials who have tried to promote HIV outreach to men who have sex with men have often been harassed or silenced.⁴¹ Thus, some Namibians have grown to believe that homosexual sex is safer than heterosexual sex with respect to the risk of HIV transmission.⁴² There is also evidence of worrying linkages between sexual violence and HIV transmission amongst both lesbians and men who have sex with men in Namibia.⁴³

The fact that consensual sodomy is illegal in Namibia also has ramifications for HIV. Comparative data from Southern and Eastern African countries indicates that men who have sex with men have significantly higher levels of HIV than men in the general population where same-sex sexual conduct is illegal.⁴⁴ Laws criminalising same-sex behaviour drive LGBT people underground, making it harder to target them for HIV prevention and treatment programmes.⁴⁵ Another problem is that protection measures appropriate for lesbian sexual activities are not always readily available.⁴⁶

In Namibia, government has begun to engage in specific outreach with men who have sex with men in respect of HIV/AIDS issues, as evidenced by a 2009 workshop in Windhoek focusing on HIV prevention for this target group.⁴⁷ Namibia's *National Strategic Framework for HIV and AIDS Response in Namibia 2010/11 – 2015/16* includes some specific commitments on HIV prevention and treatment in respect of LGBT individuals. This document identifies sex workers and men who have sex with men as being amongst Namibia's "most at risk populations".⁴⁸ (However, this

40 For example, in 2007, the Legal Assistance Centre criticised the fact that the LGBT community was not recognised as a vulnerable community in the *National Policy on HIV/AIDS* that was adopted in Parliament during that year: "In the previous drafts of the Policy, the LGBT community was recognised as a vulnerable community and tangible solutions were to be undertaken to ensure that AIDS and HIV is prevented and its impact is mitigated. The removal of the LGBT community in the adopted draft now leaves a big gap in the policy framework, with the attendant negative consequences, such as the increased marginalisation and discrimination of community already facing severe legal and social obstacles ...". Brigitte Weidlich, "Gays and lesbians left out of AIDS policy: LAC", *The Namibian*, 26 March 2007.

41 Human Rights Watch and International Gay and Lesbian Human Rights Commission, *More Than A Name: State-Sponsored Homophobia and its Consequences in Southern Africa*, 2003 at 110.

42 Zethu Matebeni, et al, "I thought we are safe': Southern African lesbians' experiences of living with HIV", *Culture, Health and Sexuality*, Vol 15 (2013), <www.ncbi.nlm.nih.gov/pmc/articles/PMC3696027> at 20; Robert Lorway, "Breaking a Public Health Silence: HIV Risk and Male-Male Sexual Practices in the Windhoek Urban Area" in Suzanne LaFont, *Beliefs and Attitudes toward Gender, Sexuality and Traditions amongst Namibian Youth*, Windhoek: Legal Assistance Centre, 2007 at 292; Human Rights Watch and International Gay and Lesbian Human Rights Commission, *More Than A Name: State-Sponsored Homophobia and its Consequences in Southern Africa*, 2003 at 116.

43 For example, a study that assessed the HIV status of 591 lesbians from Botswana, Namibia, South Africa and Zimbabwe found that the only factor independently associated with self-reported HIV positive status was forced sex. Theo Sandfort, et al, "Forced Sexual Experiences as Risk Factor for Self-Reported HIV Infection among Southern African Lesbian and Bisexual Women", *Plos ONE*, Vol 8, Issue 1 (2013), <www.ncbi.nlm.nih.gov/pmc/articles/PMC3541146>.

Another study involving focus-group discussions and in-depth interviews with 52 men in five cities in Namibia found that violence, in varying forms, is commonplace in the lives of men who have sex with men and may be associated with HIV testing patterns. R Stephenson et al, "Intimate partner, familial and community violence among men who have sex with men in Namibia", 16(5) *Culture, Health and Sexuality* 473 (2014).

44 AIDS Rights Alliance for Southern Africa (ARASA), *HIV and Human Rights in Southern and East Africa: 2014 Report*, <www.arasa.info/index.php/download_file/767/> at 26.

45 Amnesty International, "Making Love a Crime – Criminalization of Same-Sex Conduct in Sub-Saharan Africa", 2013 at 58-59.

46 Zethu Matebeni, et al, "I thought we are safe': Southern African lesbians' experiences of living with HIV", *Culture, Health and Sexuality*, Vol 15 (2013) at 10.

47 Namibia was chosen to host the 2009 HIV/AIDS Implementers' Meeting which was co-sponsored by the U.S. President's Emergency Plan for AIDS Relief (PEPFAR); the Global Fund to Fight AIDS, Tuberculosis and Malaria; The Joint United Nations Program on HIV/AIDS (UNAIDS); UNICEF; the World Bank; the World Health Organization; and the Global Network of People Living with HIV. This meeting included the first workshop in Namibia focused solely on HIV prevention for MSM. PEPFAR, "Namibian President to Open 2009 HIV/AIDS Implementers' Meeting", 12 May 2009, <www.pepfar.gov/documents/organization/123511.pdf>; Sean Cahill, "A burst of progress on HIV policy", *The Gay & Lesbian Review*, 1 March 2010.

48 Ministry of Health and Social Services, *National Strategic Framework for HIV and AIDS Response in Namibia 2010/11 – 2015/16*, 2010, <www.aidstar-one.com/sites/default/files/prevention/resources/national_strategic_plans/Namibia_2011-2016.pdf> at 7.

“most at risk” identification is problematic, without careful explanation, as any increased risk levels in these target groups stem from the illegality of their activities and from not the activities in themselves; the designation on its own could carry the danger of scapegoating.)

Another positive sign is the explicit recognition by the Ministry of Health and Social Services that special youth-friendly services meant to help young people overcome barriers to accessing healthcare – including HIV/AIDS services – need to have “workers who are members of the target population and sensitive to youth culture, ethnic cultures, and issues of gender, sexual orientation, and HIV status”.⁴⁹

9.4 Access to condoms in prisons

SUMMARY

Namibia’s refusal to provide condoms in prisons is ostensibly based on the illegality of sodomy. However, the **Correctional Service Act 9 of 2012** obligates the Correctional Service “as far as is practicable and when so required” to provide “every inmate” with “access to preventative health measures”. Furthermore, a prison medical officer has a duty to prevent the spread of any disease and must for this purpose provide inmates with “necessary precautionary or prophylactic health measures”. It could be argued that these duties require the provision of condoms.

The issue of condom provision must be considered against the backdrop of sexual abuse in prisons – which, according to a 2009 study by Legal Assistance Centre, is not uncommon. A recent South African Constitutional Court case, *Lee v Minister of Correctional Services*, suggests that the failure to provide access to condoms in prisons could be legally actionable in this context. In this case, the Court found that the responsible prison authorities were aware of the appreciable risk of infection with TB in the crowded prison environment, but failed to take reasonable measures to reduce the risk of contagion and so were liable for the ensuing harm to Mr Lee’s health. It is possible that a similar theory could be used in Namibia to hold the government accountable for the failure to provide condoms in prison, on the basis that this places prisoners at an increased risk of contracting HIV.

Attempts to advocate for the distribution of condoms in Namibian prisons have so far been unsuccessful.⁵⁰ In 2001, a Namibian official stated, “Giving condoms to prisoners is the same as promoting sodomy Consenting sex between two male prisoners will be considered sodomy and it is punishable.”⁵¹ The Legal Assistance Centre has argued that the government’s refusal to distribute condoms violates Namibia’s domestic and international human rights obligations.⁵²

49 Ministry of Health and Social Services, *Namibia Health Facility Census (HFC) 2009*, 8.4.5 Youth-Friendly Services (YFS) at 196.

50 See Crispin Inambao, “Prisoners Should Not Be Condemned to AIDS Sentence”, *The Namibian*, 15 June 1998, accessed via Africa News Service, as quoted in Human Rights Watch/International Gay and Lesbian Human Rights Commission, *More than a Name: State-Sponsored Homophobia and its Consequences in Southern Africa*, New York: Human Rights Watch, 2003 at 111.

51 Deputy Commissioner of Prisons Fwafwa Mabakeng, quoted in Max Hamata, “Condoms clash on cards”, *The Namibian*, 6 September 2001, as quoted in Human Rights Watch/International Gay and Lesbian Human Rights Commission, *More than a Name: State-Sponsored Homophobia and its Consequences in Southern Africa*, New York: Human Rights Watch, 2003 at 111.

52 Legal Assistance Centre / University of Wyoming College of Law, *Struggle to Survive A Report on HIV/AIDS and Prisoners’ Rights In Namibia*, Windhoek: Legal Assistance Centre, [2008], <http://www.aidstar-one.com/sites/default/files/prevention/resources/national_strategic_plans/Namibia_2011-2016.pdf>.

But as of 2014, condoms are still not provided to inmates despite the clear health risks of the failure to do so.

The Correctional Service Act 9 of 2012 obligates the Correctional Service (which is the new name for the previous Prisons Service) “as far as is practicable and when so required” to provide “every inmate” with “access to preventative health measures”.⁵³ More specifically, each correctional facility must have a medical officer who must provide inmates with “necessary precautionary or prophylactic health measures “ for the purpose of “preventing the spread of or risk of any disease”.⁵⁴ Particularly since not all same-sex sexual activity in prisons is consensual, it could be argued that these legal provisions require medical officers to provide condoms to male prisoners.

Namibia’s *National Strategic Framework for HIV and AIDS Response in Namibia 2010/11 – 2015/16* identifies prisoners as being amongst the most-at-risk populations for HIV/AIDS.⁵⁵ While this document stops short of explicitly discussing condom provision in prisons, it does call for increased “HIV prevention interventions” in prisons.⁵⁶

The issue of condom provision must be considered against the backdrop of sexual abuse in prisons. A 2009 study by Legal Assistance Centre recorded numerous accounts of coercive sex in the prison environment, including reports of sexual activities being exchanged for necessities or protection, or simply being accomplished by force. Such sexual abuse sometimes involved gangs, and there were reports of coercive sex between prisoners and wardens.⁵⁷

A recent South African Constitutional Court case, *Lee v Minister of Correctional Services*,⁵⁸ suggests that the failure to provide access to condoms in prisons could be legally actionable. In this case, the South African Supreme Court of Appeal considered a claim for damages by a prisoner who allegedly contracted tuberculosis (TB) while in prison. Mr Lee argued that his disease was the result of negligent behaviour on the part of the prison authorities. The Supreme Court of Appeal found that the prison authorities did indeed fail to implement an adequate system for preventing the spread of tuberculosis amongst prisoners – but refused to award damages because of questions about causation. The Court believed that it would be impossible for prison authorities to eliminate all risk of infection since a prisoner might become contagious before he was diagnosed with TB. On appeal, the South African Constitutional Court, found that “the responsible authorities were aware that there was an appreciable risk of infection and contagion of TB in crowded living circumstances. Being aware of that risk they had a duty to

53 Correctional Service Act 9 of 2012, brought into force on 1 January 2014 (GN 330/2013, GG 5365), section 23 (1) (c).

54 *Id.*, sections 23(3)(c) and 24(1)(b)(v).

55 Ministry of Health and Social Services, *National Strategic Framework for HIV and AIDS Response in Namibia 2010/11 – 2015/16*, 2010 at 7.

56 **Prisoners:** By 2006, Namibia had approximately 4 123 inmates (prisoners) countrywide. Seven percent were known to be HIV positive and approximately 27.5% had been enrolled on ART [anti-retroviral treatment]. While there are limited programmes in prisons currently, scaling up interventions in the correctional services has been limited by the lack of a clear national policy on HIV and AIDS in prisons. It is necessary to scale up the provision of specific HIV prevention interventions within prisons and the establishment [sic] of a follow up programme for inmates when they are released from prisons into the general community. *Id.* at 34-35 (footnote omitted).

57 Legal Assistance Centre / University of Wyoming College of Law, *Struggle to Survive A Report on HIV/AIDS and Prisoners’ Rights In Namibia*, Windhoek: Legal Assistance Centre, [2008] at 25-32. A former inmate interviewed for this study said: “Those who cannot fight become victims of sodomy”. At 25. Another stated: “Every week, someone is raped in prison.” At 30. Another said: “Sodomy in the general prison population is a matter of power; if [you are] weak, then [you] get raped”. *Ibid.* According to a counsellor: “Groups of men gang up on a newcomer and it occurs usually through gang rape. The person is usually raped over a prolonged time, even for years.” At 32. It was also alleged that wardens are sometimes bribed to ignore a particular part of the prison to facilitate sexual assault. At 48.

58 *Lee v Minister of Correctional Services* 2012 (3) SA 617 (SCA); 2013 (2) SA 144 (CC).

take reasonable measures to reduce the risk of contagion.”⁵⁹ The Constitutional Court found that the prison authorities had a positive duty to uphold, and held that there *was* a reasonable connection between the failure to uphold that duty and the harm which ensued. Therefore, they must be held accountable for this harm.⁶⁰

It is possible that a similar theory could be used in Namibia to hold the government accountable for the failure to provide access to condoms in prison, on the grounds that this places prisoners at risk of contracting HIV when reasonable, affordable steps to prevent this are available.

9.5 Medical aid coverage for LGBT individuals

SUMMARY

The **Medical Aid Funds Act 23 of 1995** has an open-ended definition of who may be treated as a “dependant”, which does not preclude coverage of same-sex partners. However, the parameters of who will be covered as a “dependant” are left to the rules of each particular fund. At least one medical aid fund does provide coverage of same-sex partners where they have been living together for at least two years – although this was not immediately evident from the rules of the fund. This suggests that same-sex couples should enquire about such coverage, and lobby for it if it is not already provided.

Medical aid funds established and managed by the Government are exempt from the Medical Aid Funds Act 23 of 1995. The Public Service Employees Medical Aid Scheme (PSEMAS) provides coverage only for spouses – thus excluding both heterosexual and homosexual partners who are cohabiting.

There is some basis for a legal argument that failure to provide coverage for same-sex couples constitutes unfair discrimination.

One private fund consulted reported that it excludes coverage for gender re-assignment and medical interventions pertaining to an intersex condition. The same is reportedly true of PSEMAS. However, anecdotal evidence suggests that coverage may be provided in some cases.

One practical concern for gay and lesbian couples is securing coverage for each other under medical aid schemes.

Medical aid schemes in Namibia are governed generally by the **Medical Aid Funds Act 23 of 1995**. This law has an open-ended definition of who may be treated as a “dependent” for the purposes of a medical aid scheme, allowing for flexibility on the part of individual medical aid funds.⁶¹

Applications for the registration of medical aid funds under this Act must show that the establishment of the proposed fund will be in the public interest⁶² – which could be a basis for

59 Id at para 59.

60 Id at paras 64-70.

61 Medical Aid Funds Act 23 of 1995, section 1.

62 Id, section 24(2)(a).

requiring compliance with Namibia’s binding international obligations not to discriminate against persons on the basis of their sexual orientation.

Some medical aid funds do provide coverage for same-sex partners, although this may not always be evident from the fund rules. For example, the fund rules for one medical aid scheme provide for coverage of a cohabitant partner who has lived with a member for at least two years, on application and subject to any conditions that the fund may decide to impose. A telephone enquiry revealed that this fund does cover same-sex cohabitants under this provision.⁶³ This suggests that same-sex couples should enquire about such coverage, and press private funds to provide coverage if they do not do so already.

Medical aid funds “established and managed by the Government” are exempt from the Medical Aid Funds Act 23 of 1995.⁶⁴ Medical aid for government employees is provided by the Public Service Employees Medical Aid Scheme (PSEMAS), which includes only spouses and children as dependants.⁶⁵ This means that PSEMAS does not provide coverage for partners who are cohabiting without being married, regardless of whether they are heterosexual or homosexual.

In 1998, the High Court of South Africa ordered a state medical scheme to recognise the homosexual relationship of an enrolled member and to extend spousal benefits to the partner. The Court found the restrictive definition of “dependent”, which excluded a great number of persons who were *de facto* dependants of its members, to be discriminatory. This case – which pre-dated the legal recognition to same-sex couples developed over time in South Africa case law and legislation – did not rely on any rights which accrue to same-sex couples in particular, but rather on a broad understanding of the common-law duty to maintain.⁶⁶ Thus, there is some basis for pressuring medical aid funds to establish rules that provide for coverage for dependents of members, broadly defined to include same-sex partners.

Another issue of concern is whether medical aid schemes will cover the costs of gender re-assignment surgery or medical interventions relevant to intersexuality. One private medical aid fund consulted telephonically reported that it excludes coverage for gender re-assignment and for medical interventions pertaining to an intersex condition. PSEMAS also excludes these interventions from coverage. This is an area where education and advocacy will be needed to push for change.

9.6 International law obligations

SUMMARY

Namibia is a party to a number of international agreements that guarantee non-discrimination in respect of health. It can be argued that some of these commitments require State parties to incorporate equal access to health services for LGBT individuals into their domestic laws.

⁶³ Personal communication from author’s medical aid fund.

⁶⁴ Medical Aid Funds Act 23 of 1995, section 2(1).

⁶⁵ Public Service Employees Medical Aid Scheme (PSEMAS), *Member guide 2013/2014*, <www.methealth.com/na/psemas/index.htm> at 2. According to section 1.2 of the guide, the rules governing it were issued in terms of Section 35 of the Public Service Act 13 of 1995 and approved by the Prime Minister on the recommendation of the Public Service Commission, in terms of section 5(2)(j) read in conjunction with section 5(3) of Act 13 of 1995.

⁶⁶ *Langemaat v Minister of Safety and Security and Others* 1998 (3) SA 312 (T).

Some of the international agreements binding on Namibia explicitly cover the right to health and access to healthcare – and can be interpreted to require States not to discriminate in access to healthcare on the grounds of sexual orientation and gender identity.⁶⁷

Universal Declaration of Human Rights

The Universal Declaration of Human Rights guarantees adequate medical care for all.⁶⁸

International Covenant on Civil and Political Rights (ICCPR)

Although the International Covenant on Civil and Political Rights does not contain an explicit right to health, the Human Rights Committee has mentioned concerns about discrimination in access to health care on the basis of sexual orientation in its concluding observations on various country reports.⁶⁹

International Covenant on Economic, Social and Cultural Rights (ICESCR)

The International Covenant on Economic, Social and Cultural Rights requires parties to take progressive steps, utilising the maximum available resources, to support the full realisation of rights in the ICESCR – including the right to the enjoyment of the highest attainable standard of physical and mental health.⁷⁰ The Committee which monitors this Convention has clearly stated that the ICESCR prohibits discrimination on the ground of sexual orientation in access to healthcare.⁷¹

Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW)

Parties to CEDAW are obligated to ensure that women and men have equal access to healthcare. In recent years, the Committee which monitors this Convention has expressed concerns about lesbian, bisexual, transgender and intersex women as “victims of abuses and mistreatment by health service providers”.⁷²

Convention on the Rights of the Child

The Convention on the Rights of the Child requires states parties to “recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health” and to “strive to ensure that no child is deprived of his or her right of access to such healthcare services”.⁷³ The Committee on the Rights of the Child has expressed specific concerns about discrimination on the basis of sexual orientation in all of its General Comments on health issues.⁷⁴

67 Preston Mitchum and Lauren Nussbaum, “Homophobia as a Public Health Hazard: Gender Identities, Sexual Orientation, and the Human Right to Health”, 6(2) *Health Law and Policy Brief* 124 (2012) at 128.

68 Universal Declaration of Human Rights, Article 25(1).

69 See, for example, Human Rights Committee, Concluding Observations on Russia, CCPR/C/RUS/CO/6, 29 October 2009 at para 27; Japan, CCPR/C/JPN/CO/5, 18 December 2008 at para 29 and Czech Republic, CCPR/C/CZE/CO/2/Add.1, 9 September 2008.

70 International Covenant on Economic, Social and Cultural Rights, Articles 2 and 12.

71 Committee on Economic, Social and Cultural Rights, “General comment No. 14: The Right to the Highest Attainable Standard of Health”, E/C.12/2000/4, 11 August 2000, para 18. General Comments are issued by the bodies which monitor specific conventions from time to time to explain their interpretation of specific articles of the convention in question.

72 Committee on the Elimination of Discrimination against Women, “Concluding observations on Costa Rica”, 2011 at para 40.

73 Convention on the Rights of the Child, Art 24(1).

74 Committee on the Rights of the Child, General Comment No. 3: “HIV/AIDS and the rights of the child”, CRC/GC/2003/3, 17 March 2003 at para 8; Committee on the Rights of the Child, General Comment No. 4: “Adolescent health and development in the context of the Convention on the Rights of the Child”, CRC/GC/2003/4, 1 July 2003 at para 6; Committee on the Rights of the Child, “General comment No. 15 (2013) on the right of the child to the enjoyment of the highest attainable standard of health (art. 24)”, CRC/C/GC/15, 17 April 2013 at para 8.

African Charter on Human and Peoples' Rights

The African Charter on Human and Peoples' Rights guarantees the best attainable state of physical and mental health for all Africans and obligates states to take the necessary measures to protect the health of its citizens. This guarantee must be read with Article 2, which provides that the rights enshrined in the Charter are guaranteed to every individual “*without distinction of any kind*”.⁷⁵ It has been observed that this formulation “provides ample grounds for applying its provisions to eradicate the legal and physical abuse” of LGBT individuals, even if the term “sex” is not construed to include sexual orientation and identity.⁷⁶

African Charter on the Rights and Welfare of the Child

The African Charter on the Rights and Welfare of the Child has an extensive provision on health which guarantees the right of every child “to enjoy the best attainable state of physical, mental and spiritual health”. It also binds States Parties “to ensure the provision of necessary medical assistance and health care to *all children*”.⁷⁷ These rights must be read in conjunction with the provision on non-discrimination, which prohibit discrimination on the basis of sex or “other status”.⁷⁸

Yogyakarta Principles, Principle 17 (Right to the highest attainable standard of health)

“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. Sexual and reproductive health is a fundamental aspect of this right.”

<www.yogyakartaprinciples.org>

• • •

As explained in Chapter 3 of this report, the 2007 Yogyakarta Principles on the application of international human rights law in relation to sexual orientation and gender identity were developed and unanimously adopted by a distinguished group of human rights experts from diverse regions and backgrounds. Although are not legally binding themselves, these principles are persuasive in shaping world understanding of how international human rights obligations apply to people of all sexual orientations and gender identities.

.....

Every child shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in this Charter irrespective of the child's or his/her parents' or legal guardians' race, ethnic group, colour, sex, language, religion, political or other opinion, national and social origin, fortune, birth or other status.

African Charter on the Rights and Welfare of the Child, Article 3: Non-Discrimination

.....

75 African Charter on Human and Peoples' Rights, Article 2 (emphasis added).

76 “Protection for Sexual Orientation and Gender Identity under the African Charter on Human and Peoples' Rights”, written by various international groups, including the Centre for Human Rights, University of Pretoria, South Africa, at the request of the African Commission on Human & Peoples' Rights, 2008.

77 African Charter on the Rights and Welfare of the Child, Article 14 (emphasis added).

78 Id, Article 3.

9.7 Models for future law reform

SUMMARY

The provision on non-discrimination in healthcare services on the grounds of race in Namibia's Racial Discrimination Prohibition Act 26 of 1991 could serve as a useful model for future law reform forbidding similar discrimination on the basis of sexual orientation or gender identity. Other countries have legislation which generally prohibits discrimination on the basis of sexual orientation or gender identity in access to services, which covers access to healthcare without explicitly mentioning it. A particularly progressive example of legislation on health issues can be found in Argentina, where it is legally required that medical interventions for gender re-assignment must be treated like any other treatments or surgery when it comes to costs. This law also provides for a right of access to such interventions for adults and children.

9.7.1 Namibian legislation

In Namibia, the **Racial Discrimination Prohibition Act 26 of 1991** contains a provision regarding equal access to medical institutions and forbidding racial discrimination in healthcare services. It would be helpful to the LGBT community if Parliament would enact a similar provision prohibiting discrimination on the basis of sexual orientation or gender identity in access to healthcare services.

9.7.2 Examples from other countries

The principle of non-discrimination in access to health care is covered in some countries by general equality laws.

One example is **Australia's Sex Discrimination Act, 1984**, which was amended in 2013 to prohibit discrimination on the basis of "sexual orientation, gender identity, intersex status, marital or relationship status" amongst other grounds. This Act covers discrimination in many sectors, including in the provision of goods, facilities and services.⁷⁹

South Africa's Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 generally prohibits discrimination on the basis of gender, sex or sexual orientation amongst other grounds.⁸⁰ Although the Act has general applicability, it also contains an illustrative list of widespread practices which may involve unfair discrimination; one item on this list concerns access to healthcare services:

- (a) Subjecting persons to medical experiments without their informed consent.
- (b) Unfairly denying or refusing any person access to health care facilities or failing to make health care facilities accessible to any person.
- (c) Refusing to provide emergency medical treatment to persons of particular groups identified by one or more of the prohibited grounds.
- (d) Refusing to provide reasonable health services to the elderly.⁸¹

⁷⁹ Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 98 of 2013 (Australia), which amends the Sex Discrimination Act 1984 (Australia); amended version at <www.austlii.edu.au/au/legis/cth/consol_act/sda1984209/>.

⁸⁰ Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, section 1 and 5.

⁸¹ Id, section 29 and Schedule, Item 3.

The **United Kingdom**'s Equality Act 2010 provides general protection against discrimination in the provision of services on the basis of sex, sexual orientation or gender reassignment.⁸² The UK Government has prepared "Guidances" to explain how this law affects different sectors, to help people understand its application to daily life.⁸³ One particularly useful aspect of the guidance on health is its discussion of how the principles of non-discrimination apply to "transsexuals", including directions on how to treat transsexual patients sensitively and confidentially. For example, this guidance notes that sufficient privacy for transsexual patients "can usually be ensured through the use of curtains or by accommodation in a single side room adjacent to a sex-appropriate ward."⁸⁴

Argentina's Gender Identity Law, 2012 ensures that hormone treatment and surgery for the purposes of gender re-assignment are treated in the same way as other treatments and surgeries, as part of the country's "Obligatory Medical Plan" – meaning that healthcare providers will not be able to charge extra costs for these services. The law also provides for a right of access to such interventions for adults and children.⁸⁵

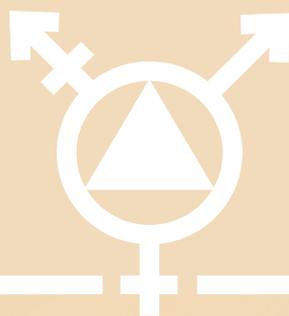
These examples could be drawn on as models for future legislation in Namibia which explicitly ensures non-discriminatory access to healthcare for all persons, regardless of their sexual orientation or gender identity.

82 Equality Act 2010 (UK), <www.legislation.gov.uk/ukpga/2010/15/contents>.

83 UK Equality and Human Rights Commission, <www.equalityhumanrights.com/publications/guidance#services>.

84 UK Equality and Human Rights Commission, "Your rights to equality from healthcare and social care services" at 18-19.

85 Gender Identity Law, 2012 (Argentina), Article 11, "English Translation of Argentina's Gender Identity Law as approved by the Senate of Argentina on May 8, 2012", <www.tgeu.org/Argentina_Gender_Identity_Law>.



Chapter 10

SEX CHANGE

10.1	Introduction	166
10.2	Sex change and birth registration	167
10.3	Legal ramifications of a sex change	169
10.4	Examples of sex change laws in other countries	172
10.4.1	Laws allowing sex changes in birth registration records	172
10.4.2	Laws allowing “third sex” or “indeterminate sex” designations	173
10.5	Right to cross-dress	175
10.5.1	Namibian law	175
10.5.2	Jurisprudence in other countries	175
10.5.3	Examples of law reform protecting the right to cross-dress	176

10.1 Introduction

SUMMARY

People may seek a sex change (also known as “gender reassignment” or “gender affirmation”) because they are **transgender** persons who strongly feel as though they’ve been born into the “wrong body” and wish to undergo a physical transition to the biological sex with which they identify. A sex change may also be desired by **intersex** persons who are born with mixed, or atypical, physical features traditionally associated with being “male” or “female” – which may include visible ambiguities in the external genitalia, or atypical sex attributes which may not immediately be evident – such as atypical sex chromosomes, internal sexual organs or hormones. These issues are separate from the question of sexual orientation; transgender and intersex persons may be heterosexual, homosexual or bisexual – just like anyone else.

This chapter refers to “sex change” because that is the term used in Namibian law. Some prefer to speak “gender reassignment” or “gender affirmation”.

To understand these concepts, it is important to remember that “sex” is a product of chromosomes, internal reproductive organs and external genitalia.

Why do some people want to change their sex? The most common reason for a person to request a sex change is a result of transgenderism or intersexuality. Chapter 1 provides more information about these terms. To re-cap the key points, transgender people are usually born with typical male or female anatomies, but feel as though they’ve been born into the “wrong body”. Some transgender people undergo physical transition to the opposite biological sex by means of hormonal and/or surgical treatment – although there is no treatment which can alter every aspect of sex differentiation. Not everyone who is transgender wants to have a sex change.¹

Intersex persons are born with a mixture of the features that are traditionally considered to be “male” or “female”, or with features which are atypical for either “male” or “female”. There may be visible ambiguities in the external genitalia at birth. However, some forms of intersexuality, which involve only sex chromosomes, internal sexual organs or hormones, are not evident until puberty and other forms may never come to light. Many people discourage parents from engaging in irreversible treatment of infants who are identified as being intersex, because it is usually difficult to identify which sex will be most appropriate for that person at such an early stage.

It is important to remember that the issue of sex change is not about sexual orientation. Transgender and intersex persons may be heterosexual, homosexual or bisexual – just like anyone else.

Sex change is not about sexual orientation. Transgender and intersex persons may be heterosexual, homosexual or bisexual – just like anyone else.

¹ Sam Winter and Lynn Conway, “How Many Trans People are There? A 2011 update incorporating new data”, <<http://web.hku.hk/~sjwinter/TransgenderASIA/paper-how-many-trans-people-are-there.htm>>.

.....

“Most societies have ordered their laws and affairs on the assumption that people can be classified into two distinct and plainly identifiable sexes. Until fairly recently, transsexualism had not become a problem that concerned the law. Medical advances and other technical developments in the fields of physiology and psychology have seriously challenged the traditional assumptions that men and women are two rigidly distinct sexes. In particular, the development of sexual reassignment surgery and hormonal treatment has made it possible to change essential physical and psychological characteristics of persons to reassign them to the opposite sex. It is not surprising that the law has approached the problems conservatively and with apprehension. The fundamental questioning of the basic assumptions of human beings relating to their sexual identity is not readily comprehended by people...”

Department of Social Security v SRA (Australia) (1993) 43 FCR 299
at para 313.7 (per Lockhart J)

.....

10.2 Sex change and birth registration

SUMMARY

Children are normally registered at birth in Namibia as being male or female – although it would arguably be possible to leave the sex blank in the case of an infant born with ambiguous genitals who could not immediately be determined to be male or female. It is possible to change the sex designation of a person in the birth register in terms of the Births, Marriages and Deaths Registration Act if appropriate medical records are provided to the Ministry. It is expected that the current law on birth registration will soon be replaced by a new law on birth registration. As of the end of 2014, the proposed new law under discussion contained a similar provision on sex change. Under both the current and proposed laws, where a designation of sex is changed, the applicant is issued with a new birth certificate reflecting the updated information.

Children are registered at birth in Namibia as being male or female. There is no other choice on the birth registration forms or on the Namibian birth certificate, but it would arguably be possible to leave the sex blank in the case of an infant born with ambiguous genitals who could not immediately be determined to be male or female.²

Births, Marriages and Deaths Registration Act 81 of 1963, section 7B

Alteration of sex description of person in his birth register

7B. The Secretary may on the recommendation of the Secretary for Health alter, in the birth register of any person who has undergone a change of sex, the description of the sex of such person and may for this purpose call for such medical reports and institute such investigations as he may deem necessary.

2 Regulation 13 deals with forms which cannot be completed because it is “impossible to obtain the prescribed particulars”, providing for the registration of a birth or a death to proceed with incomplete information and for missing information to be added at a later stage. South West African Government Notice 214 of 1987, Official Gazette 5480.



It is possible to change the sex of a person in the birth register if that person has had a sex change.³ The term “change of sex” is not defined, but is rather determined on a case by case basis. Interviews with relevant personnel at the Ministry of Home Affairs and Immigration indicate that changing sex in the birth register is not problematic in practice, provided that the person in question can supply medical records to document the sex change. As in the case of all administrative decisions, the applicant is entitled to written reasons if the request is refused, and the applicant is entitled to ask a court to review the reasonableness of the decision. Once the birth registration is changed and a new birth certificate issued, the changes to other legal documents such as IDs and passports would follow.

It is expected that the current law on birth registration will soon be replaced by a new law.⁴ As of late 2014, the provision on sex change in the draft bill is similar to the one in the current law. The proposed law would allow a person (or someone acting in that person’s interest, such the parent of a minor child) to apply to the Ministry of Home Affairs and Immigration to “change the description of a person’s sex subsequent to a medical procedure intended to alter such sex if proof to this effect is supplied by a registered medical practitioner”.⁵ As in the current law, none of the key terms (such as “medical procedure”) are defined, leaving the meaning of these terms open to application on a case-by-case basis.⁶ Under the proposed law, there is an internal appeals process which could be utilised if an application to alter the sex contained in the birth register were refused or ignored,⁷ with an ultimate right to approach the High Court to review the decision.⁸

Where the designation of sex was changed, the applicant would be issued with a new birth certificate reflecting the updated information. The information about the person’s sex would also be changed in the National Population Register, which is the authoritative administrative record of personal information. A historical record of all changes to a birth registration would be kept in the database, as a safeguard against fraud or confusion about a person’s identity, but this data would not be generally accessible to the public.⁹

Transgender faces passport photo problem

JOSPER Morris Cloete’s problem is not being born male 24 years ago because he is undergoing gender transformation. The problem, he says, is the trouble he goes through whenever he travels because his passport photo is different from the way he looks now.

Slender, stylish, with long, curly hair, an even bigger personality, and a new name Mercedes von Cloete – he cuts the figure of a beautiful young woman.

3 Births, Marriages and Deaths Registration Act 81 of 1963, section 7B.

4 This discussion is based on the draft National Population Registration Bill dated 7 December 2013.

5 Draft National Population Registration Bill, section 15(1)(f).

6 The term “medical practitioner” is defined in section 1 of the draft bill as “a medical practitioner as defined in section 1 of the Medical and Dental Act, 2004 (Act No. 10 of 2004)”. That definition is “a person registered as such in terms of this Act, or regarded to be so registered in terms of section 64”. Section 64 is a transitional provision designed to ensure continuity from previous legislation. Before the National Population Registration Bill goes forward, the Legal Assistance Centre will advocate an expansion of the definition of “medical practitioner” to cover medical practitioners registered outside Namibia, since sex change operations are in practice often performed overseas.

7 Draft National Population Registration Bill, section 41(1)(b). The list in this provision seems to have inadvertently omitted decisions on alterations of birth records and certificates pursuant to section 15. This should be added to the list before the Bill becomes final.

8 Id, Part 6: Appeals and Reviews.

9 Id, section 15(4).

Like many other transgender people, Cloete says he undergoes extensive – and time-consuming – questioning at both the Namibian and South African borders because the picture on his identification document was taken in 2008, and does not look anything like him now.

Cloete says he applied to have his passport photo changed in June 2012, but the application was turned down. He only found out about the denial a year later, after checking several times.

Apart from Home Affairs telling him there was no record of an application under his name in their system, Cloete claims they said his transition is “messing with the system” and that if he doesn’t shave his hair off, he can have problems acquiring Namibian documentation ...

... The Executive Director of OutRight Namibia, Linda Baumann, said Cloete’s case is not isolated. Many transgender people have complained about being told to either shave their hair to look more like the man they once were, or to dress like the woman they were born as. And this, Linda says, discourages other transgender people from going through the proper channels to get the most recent Namibian documentation ...

... This has left many transgender people, just like Cloete, feeling rejected by the place they call home. He laments that being denied proper documentation goes against his rights as a Namibian. “If your own country denies you your right, what do you do?”

Ministry of Home Affairs and Immigration’s Jacobus van der Westhuizen said this should not be happening. In a telephonic conversation with *The Namibian*, Van der Westhuizen said, to his knowledge, no Namibian should be denied the right to identification documents.

Van Der Westhuizen recalls there have been cases of this nature in Namibia before, where transgender people have been issued documentation without a problem.

Cindy van Wyk, *The Namibian*, 19 December 2013

10.3 Legal ramifications of a sex change

SUMMARY

The sex designation on an official birth certificate should be authoritative for all legal purposes. Outdated South African case law held that a change of sex on a birth certificate was not valid for purposes of marriage, but this line of cases followed the 1970 English decision of *Corbett v Corbett* which is now widely discredited. Law reform in countries such as South Africa and the UK has clarified that a change of sex designation in official government records should be effective for all purposes, and it is recommended that Namibia follow suit in its forthcoming new legislation on civil registration for avoidance of all doubt.

The altered description of a person’s sex on the birth certificate should be effective for all purposes. The current law states that the information contained on a birth certificate can be accepted as correct evidence of the facts it states, as long as there is no proof to the contrary.¹⁰ The draft bill which is expected to replace the current law contains a similar provision.¹¹ These provisions would indicate that a sex change is valid for all legal purposes once it has been accepted by the Ministry of Home Affairs and altered on the birth certificate.

10 Births, Marriages and Deaths Registration Act 81 of 1963, section 42(3).

11 Draft National Population Registration Bill, section 49. The reference in the current law to “courts of law and public offices” is somewhat wider than the reference to “any legal proceeding” in the draft National Population Registration Bill and should be replicated in the forthcoming law.

However, South African case law emphasises that the stated sex on the birth certificate merely creates a presumption which can be disproved, meaning that the sex of a person is a question of fact which can be determined by a court if it is disputed.¹²

The first reported case in South Africa to consider this question was the 1976 case of *W v W*.¹³ This case involved a man who had a sex change operation to become female. The operation involved the construction of an artificial vagina and the insertion of prosthetic breasts, but did not make it possible for the plaintiff to bear children. After the operation, the plaintiff regarded herself as being female and was accepted as being female in society. She had her sex changed to female on her birth certificate, and then married a man who was aware of the sex change operation. Their marriage was consummated, and the parties had normal sexual relations. The question of the validity of the marriage arose in the context of divorce proceedings brought by the plaintiff, on the grounds of her husband's adultery with another woman.

The Court reasoned that the marriage could only have been valid in the first place if the sex change did in fact change the plaintiff's sex to female. As in similar cases in many other countries, the Court used as its starting point the 1970 English case of *Corbett v Corbett*, which also addressed the validity of a marriage where a male transsexual married a man after undergoing a sex change operation to become a woman.¹⁴ The British court found that the operation in question was aimed at managing the patient's transsexualism, and was not capable of changing the patient's sex. The British court relied on medical evidence stating that there are at least four criteria for assessing the sex of a person:

- (a) chromosomes;
- (b) the presence or absence of testes or ovaries;
- (c) genital factors (external and internal sex organs); and
- (d) psychological factors.

The British Court found that the biological sex of an individual is fixed at birth and cannot be changed. (There is no medical procedure which can change chromosomes.) The Court decided that the law's provision on "change of sex" was appropriate only where a mistake has been made in the initial birth registration.¹⁵ As a result, the British Court found that the marriage in question was void because the spouse who was born male had remained male despite the surgery.

The South African court relied on the *Corbett* case's "biological" approach. It rules that the plaintiff was born a male and still remained a male. Unlike the British Court, the South African Court left the door open to the possibility that a medical intervention *could* theoretically change a person's sex – but it did not find sufficient evidence that such a transformation had occurred in the case at hand.¹⁶ The Court concluded that it would not be possible to grant a divorce since the marriage was not valid, but held that it could be annulled.

The 1981 South African case of *Simms v Simms* took a similar approach and produced a similar outcome.¹⁷

12 The relevant provisions of the Births, Marriages and Deaths Registration Act 81 of 1963 were for many years applicable in identical form in both South Africa and Namibia.

13 *W v W* 1976 (2) SA 308 (W).

14 *Corbett v Corbett* (1970) 2 All ER 33 (PDA).

15 *Id* at 46.

16 1976 (2) SA 308 (W) at 314C-E.

17 *Simms v Simms* 1981 (4) SA 186 (D).

This problem will no longer arise in South Africa, as a result of a new law on alteration of sex in the birth register, the Alteration of Sex Description and Sex Status Act 49 of 2003. This Act provides that a person whose sex description has been altered in the birth register “is deemed for all purposes to be a person of the sex description so altered as from the date of the recording of such alteration”.¹⁸

The approach in the *Corbett* case has been widely criticised by many subsequent court cases and commentators.¹⁹ For example, in the 2002 *Goodwin* case, the Grand Chamber of the European Court of Human Rights rejected the approach taken in the *Corbett* case, finding that there is no reason why the unchangeable chromosomal element must be decisive on the question of gender identity for transsexuals in the face of increasingly sophisticated surgeries and hormonal treatments.²⁰

.....

“Some persons have a compelling desire to be recognised and be able to behave as persons of the opposite sex. If society allows such persons to undergo therapy and surgery in order to fulfil that desire, then it ought also to allow such persons to function as fully as possible in their reassigned sex, and this must include the capacity to marry.”

Attorney-General v Otahuhu Family Court (1995) 1 NZLR 603 (New Zealand) at 608

.....

Thus, a Namibian court faced with the question of the effect of a sex change would be likely to take a more up-to-date view based on international jurisprudence. A Namibian court might also find that refusal to give legal effect to a sex change operation constitutes a form of unconstitutional sex discrimination.

However, the ideal solution to this problem would be for Namibia to add a provision to the forthcoming new law on sex change stating that when the description of a person’s sex has been altered on a birth certificate, that person will be deemed to be a person of the sex stated on the birth certificate for all purposes from the date of the alteration. The provision should also state that no rights or obligations pre-dating the change of sex on the birth certificate will be affected.

Such a statement would also take care of legal ramifications of a sex change aside from the right to marry a person of the opposite sex. For example the legal sex of a person could be relevant in respect of a civil case alleging adultery or in respect of a criminal charge of sodomy. It could affect the provisions of a will where a testator has made a bequest to “my son” or “my daughter” before the son or daughter underwent a sex change. Certain parental rights and responsibilities might be affected by the sex of the parent.²¹ A general legal statement would be the best way to address all of the legal issues which might arise after a change of sex.

18 Alteration of Sex Description and Sex Status Act 49 of 2003 (South Africa), section 3(2).

19 According to an analysis by the International Commission of Jurists: “Transgender marriage cases are dominated by the 1970 British decision on *Corbett v Corbett*. In some sense, all transgender marriage cases are either an extension of *Corbett* reasoning or a reaction to it.” *SOGI Casebook*, “Chapter Nine-Transgender Marriage”, <www.icj.org/sogi-casebook-introduction/chapter-nine-transgender-marriage/>, (footnotes omitted). This source provides an overview of case law development on this issue.

20 *Christine Goodwin v The United Kingdom*, Case No 28957/1995 (also known as *Christine Goodwin and I v United Kingdom* [2002] 2 FCR 577) at para 82. See also *Attorney-General v Otahuhu Family Court* [1995] 1 NZLR 603 (New Zealand); *Kevin*, [2003] FamCA 94; (2003) 172 FLR 300 (Australia); and *The State of Western Australia v AH* [2010] WASCA 172.

21 See *W v W* 1976 (2) SA 308 (W) at 310H-311B. One of the few legal differences remaining in Namibian law between mothers and fathers is the retention of the common-law position that the mother is the guardian of a child born outside marriage, to fill the void where no agreement or court ruling has been made in terms of the Children’s Status Act 6 of 2006 (which is expected to be replaced by similar provisions in the forthcoming Child Care and Protection Act).

10.4 Examples of sex change laws in other countries

SUMMARY

Many countries, including African countries, have statutes which allow for sex changes in birth registration records. South Africa provides a useful example of a law which allows for the possibility of gender reassignment in a variety of ways not limited to surgical or hormonal interventions, but also covering natural development and intersex situations. The UK provides an example of a provision aimed at ensuring that sex changes do not result in any unfairness in sport.

Some countries (including Australia, Bangladesh, Germany, India, Nepal, New Zealand and Pakistan) allow for a “third sex” or an “indeterminate sex” to be entered on official documents in appropriate cases, while Kenya has rejected this option even in clear cases of intersexuality.

10.4.1 Laws allowing sex changes in birth registration records

South Africa has dealt with the question of changes of sex through a comprehensive law, the Alteration of Sex Description and Sex Status Act 49 of 2003. This law provides the following possibilities for motivating a sex change in the birth register:

- where a gender reassignment has resulted from alterations in a person’s sexual characteristics by surgical or medical treatment, which requires supporting documentation from a medical practitioner;
- where a gender reassignment has resulted from alterations in a person’s sexual characteristics by natural development, which also requires supporting documentation from a medical practitioner; or
- where a person is intersexed, in which case the application must be supported by a statement from a medical practitioner confirming that the applicant is intersexed and a statement from a psychologist or a social worker confirming that the person in question has lived stably and satisfactorily for at least two years in the gender role corresponding to the sex description which is being requested.²²

The law includes a broad definition of “gender reassignment” as “a process which is undertaken for the purpose of reassigning a person’s sex by changing physiological or other sexual characteristics, and includes any part of such a process”. It defines “sexual characteristics” as referring to any one of three possible components:

- primary sexual characteristics, meaning “the form of the genitalia at birth”;
- secondary sexual characteristics, meaning “those which develop throughout life and which are dependent upon the hormonal base of the individual person”; and
- gender characteristics, which are “the ways in which a person expresses his or her social identity as a member of a particular sex by using style of dressing, the wearing of prostheses or other means”.²³

²² Alteration of Sex Description and Sex Status Act 49 of 2003 (South Africa), sections 1-2.

²³ Id, section 1.

Most importantly, the statute contains two clear principles:

- A person whose sex description has been altered in the birth register “is deemed for all purposes to be a person of the sex description so altered as from the date of the recording of such alteration”.
- “Rights and obligations that have been acquired by or accrued to such a person before the alteration of his or her sex description are not adversely affected by the alteration.”²⁴

Another useful model is the **United Kingdom’s** Gender Recognition Act 2004, which allows persons to apply for a Gender Recognition Certificate where they are “living in the other gender”. The requirements are that the applicant –

- (a) has or has had gender dysphoria;
- (b) has lived in the acquired gender for the period of at least two years;
- (c) intends to continue to live in the acquired gender until death; and
- (d) can provide two medical/psychological reports with details of the treatment which has been undertaken for the purpose of modifying sexual characteristics.²⁵

Decisions on applications are made by a panel composed of people with prescribed qualifications in law, medicine or psychology.

Once a Gender Recognition Certificate is issued, the person’s sex is changed in the birth register and a new birth certificate can be issued. The result of a Gender Recognition Certificate is that the person in question becomes the gender listed on that certificate for all purposes – subject to some specific rules contained in the law.

The UK law provides a useful practical model on the question of participation in gender-specific sport after a sex change. The law allows a body responsible for regulating particular sports event to prohibit or restrict the participation of persons who have had a sex change if this is necessary to ensure fair competition or the safety of other competitors. This rule applies only to “gender-affected sports”, where the physical strength, stamina or physique of average persons of one sex would put them at a disadvantage in comparison to average persons of the other sex in that sport.²⁶

The UK law prohibits disclosure of the fact that someone has applied to change their sex designation, or disclosure of the sex of any person prior to the issue of the Gender Recognition Certificate except in narrow, specific circumstances – such as for the purpose of preventing or investigating a crime.

10.4.2 Laws allowing “third sex” or “indeterminate sex” designations

Birth certificates and other official documents can record a person’s sex as “indeterminate” or “transgender” or other “third gender” categories in some countries, including Australia, Bangladesh, Germany, India, Nepal, New Zealand and Pakistan.

For example, an “indeterminate” sex option for intersex infants with ambiguous genitalia was introduced on birth certificates in **Germany** in 2013.²⁷

24 Section 3(2)-(3).

25 Gender Recognition Act 2004 (UK), sections 2-3.

26 Id, section 19.

27 Natalie Muller, “Third sex option on birth certificates”, *Deutsche Welle*, 1 November 2013 <www.dw.de/third-sex-option-on-birth-certificates/a-17193869>.

In 2014, the High Court of **Australia** ruled that the New South Wales Births, Deaths and Marriages Registration Act allows a person's sex to be recorded as "non-specific". The plaintiff, Norrie, was born with male reproductive organs but underwent a sex change operation. However, she felt that this surgery failed to resolve her sexual ambiguity and so sought registration of her sex as "non-specific". The High Court found that the sex of a person is not always unequivocally male or female and interpreted the applicable law to permit the registration of a person's sex as "non-specific".²⁸

In April 2014, the Supreme Court of **India** created a third gender category that allows for legal recognition as male, female or "transgender" on official documents.²⁹ The Court held that the prohibitions on sex discrimination in the Indian Constitution cover "people who consider themselves to be neither male or female".³⁰ The Court also found that the constitutional rights to freedom of speech and expression protect the right to expression of a person's self-identified gender through appearance, words, behaviour or in any other way.³¹ In addition, the Court held that recognition of a person's identity "lies at the heart of the fundamental right to dignity" and that legal recognition of gender identity is therefore required in terms of the constitutional rights to dignity and personal liberty.³²

In contrast, a 2010 bid to have a third sex recognised in **Kenya** was unsuccessful. This case involved a petitioner who was born with both male and female genitalia. His parents could not afford surgery to address this situation. They gave him a male name, but because of his gender ambiguity he asserted that he was unable to secure a birth certificate, an identity card, or a passport. He attempted to marry a woman, but this marriage could not be given legal recognition. He became secluded and ended up in conflict with the law, being charged with an offence of robbery with violence. He was found guilty and sentenced to death, suffering abuse, ridicule and sexual molestation from male prisoners while waiting for the sentence to be carried out. He claimed that various of his constitutional rights had been violated and approached the court for appropriate redress.³³

Relying on the *Corbett* case, the Court found that the petitioner must fall into the sex of a biological male or female from birth, despite his ambiguous genitalia. Although it may have been difficult to determine on "which side of the divide" the petitioner fell, the Court held that he could have been registered as male or female depending on which external genitalia "appeared more dominant at that stage".³⁴ The Court found further that the term "sex" in the constitutional prohibition on sex discrimination "encompasses the two categories of male and female gender only".³⁵ It also found that discrimination on the basis of intersexuality did not fall within the prohibition of discrimination on "other status" because intersex persons – being either male or female in the view of the court – were already covered by the prohibition on sex discrimination.³⁶

28 *New South Wales Registrar of Births, Deaths and Marriages v Norrie* [2014] HCA 11 (2 April 2014), full text of case available at <<https://jade.barnet.com.au/Jade.html#!article=318475>>; summary of case at <www.hcourt.gov.au/assets/publications/judgment-summaries/2014/hca-11-2014-04-02.pdf>; see also *Norrie v NSW Registrar of Births, Deaths and Marriages* [2013] NSWCA 145 (New South Wales Court of Appeal, 31 May 2013), full text of case available at <www.caselaw.nsw.gov.au/action/PJUDG?jgmid=165088>.

29 *National Legal Services Authority v Union of India and others*, Supreme Court of India, Writ Petition (Civil) No. 604 of 2013, 15 April 2014, available at <<http://pastebin.com/9a5g8Qmr>>.

30 *Id* at para 59.

31 *Id* at para 62.

32 *Id* at para 69.

33 *RM v Attorney General & 4 others*, Petition 705 of 2007, [2010] eKLR (High Court of Kenya at Nairobi), <http://kenyalaw.org/Downloads_FreeCases/79392.pdf> at paras 4-7.

34 *Id* at paras 125-129.

35 To interpret the term sex as including intersex would be akin to introducing intersex as a third category of gender in addition to in addition to male and female. As we have endeavoured to demonstrate above, an intersex person falls within one of the two categories of male and female gender included in the term sex. To introduce intersex as a third category of gender would be a fallacy. *Id* at para 130.

36 *Id* at paras 132-133.

The Court did award damages in respect of strip searches conducted by the prison authorities, on the grounds that unnecessarily exposing the prisoner’s ambiguous genitalia to others was inhuman and degrading treatment which damaged his dignity,³⁷ and ordered that he should be held separate from other male prisoners in future.³⁸

10.5 Right to cross-dress

SUMMARY

There is no Namibian law which explicitly covers cross-dressing, although the Prohibition of Disguises Act inherited from South Africa at Independence was used in South Africa in the past to prohibit cross-dressing. However, application of the law in this way now would probably be unconstitutional. Case law in other jurisdictions has found that the expression of gender identity is protected by the rights to freedom of speech and expression, as well as by the rights to dignity and equality. Some countries have enacted statutes which explicitly protect the right to express gender identity through dress and appearance.

10.5.1 Namibian law

The **Prohibition of Disguises Act 16 of 1969** is a South African statute inherited by Namibia at independence. This Act makes it a crime to be in disguise in certain suspicious circumstances, where it is reasonable to infer that the person in disguise intends to commit an offence or to encourage or assist someone else in committing an offence.³⁹ Several commentators have discussed the potential applicability of this offence to “transvestites”.⁴⁰

The 1968 South African case of *S v Kola* upheld the conviction of a man dressed in women’s clothing under a similar statute.⁴¹ However, no more recent prosecutions of this nature could be located, so it appears that this statute is not being applied in practice to harass transgender persons. In any event, jurisprudence from other countries suggests that such an application of this statute would be unconstitutional.

10.5.2 Jurisprudence in other countries

The 2012 **Kenyan** case of *ANN v Attorney-General* involved a man who was arrested on suspicion of a past offence of assault. He was dressed in some way which appears to have given police some doubts about his sex, so they forced him to strip in full view of the public and the media,

37 Id at para 167.

38 Id at paras 169-170. The conviction of the petitioner in this case was ultimately overturned, on the grounds that the witness could not have made a positive identification given that the incident took place at night. Jillo Kadida, “Intersex convict on death row walks free”, *The Star*, 14 December 2012 (Kenya).

39 WA Joubert, ed, *The Law of South Africa, Volume 6*, Durban & Pretoria: Butterworth’s, 1981 at para 451.

40 For example, one commentary states: For instance, where a male dons female apparel merely to satisfy some female instinct or urge or for some other personal or psychological motive and there is no evidence of any intention to commit a crime such as soliciting for unnatural sexual motives, the offence is not committed. However, where the accused has persisted in such deliberate conduct over an appreciable period and the only reasonable and probable consequence of his conduct is the concealment of his identity, it must be presumed, in the absence of any evidence from him (raising a reasonable doubt concerning an intent to commit some crime) that his intention was to conceal his identity.

Ibid. This source also cites Milton and Fuller, *Criminal Law and Procedure, Vol 3* at 208-210 for the proposition that this crime could be applied to persons engaged in cross-dressing.

41 *S v Kola* 1966 (4) SA 322 (A).

resulting in the incident being broadcast on national television.⁴² The Court found that this must have been done with the intention of humiliating him because of his unconventional dress.⁴³ The Court found that the police had violated the suspect's constitutional right to dignity and privacy and awarded him damages.⁴⁴

In 1978, in the US case of *City of Chicago v Wilson*, the Supreme Court of the State of Illinois considered a municipal law which made it a crime for any person to appear in a public place in attire "not belonging to his or her sex, with intent to conceal his or her sex". The law had been used as a basis for arresting two transsexual men who were leaving a restaurant. The city offered four justifications for this law cross-dressing in public:

- (1) to protect citizens from being misled or defrauded;
 - (2) to aid in the description and detection of criminals;
 - (3) to prevent crimes in washrooms; and
 - (4) to prevent inherently antisocial conduct which is contrary to the accepted norms of our society.
- The Court rejected the justifications offered for criminalising cross-dressing and concluded that the application of the law to transsexuals was an unconstitutional infringement of their liberty.⁴⁵

In a US case decided in 2000, *Doe v Yunits et al*,⁴⁶ the Superior Court of Massachusetts upheld the right of a school student to wear clothes which expressed her gender identity. The Court held that this issue implicated the right to freedom of expression as well as liberty interests. The dress restrictions imposed by the school were also a form of sex discrimination, since the school was attempting to force the student in question to adhere to gender stereotypes regarding dress. The Court held that it could not "allow the stifling of plaintiff's selfhood merely because it causes some members of the community discomfort".⁴⁷

10.5.3 Examples of law reform protecting the right to cross-dress

One example of law reform to protect the expression of gender identity through appearance is the **Massachusetts (USA)** "Act Relative to Gender Identity" which became law in 2011. This law added the term "gender identity" to the list of grounds on which discrimination is forbidden. The law defines "gender identity" as "a person's gender-related identity, appearance or behaviour, whether or not that gender-related identity, appearance or behaviour is different from that traditionally associated with the person's physiology or assigned sex at birth".⁴⁸ Another example can be found in **Sweden**, which prohibits discrimination based on "transgender identity and expression", which is described as a situation where "someone does not identify herself or himself as a woman or a man or expresses by their manner of dressing or in some other way that they belong to another sex".⁴⁹

42 *ANN v Attorney-General*, Petition No 240 of 2012, High Court of Nairobi, <<http://kenyalaw.org/caselaw/cases/view/83334/>> at para 45.

43 *Id* at para 51.

44 *Id* at paras 53, 58.

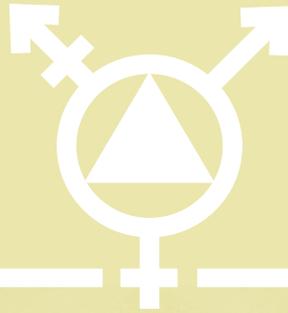
45 *City of Chicago v Wilson et al*, 75 Ill.2d 525 (1978).

46 *Doe v Yunits et al* 2000 WL 33162199 (Mass.Super.), <<http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2012/07/Doe-v-Yunits-et-al-Superior-Court-of-Massachusetts-United-States.pdf>>; affirmed in *Doe v Brockton School Committee*, No. 2000-J-638, 2000 WL 33342399 (Mass. App. Ct. Nov. 30, 2000).

47 *Id* at 7.

48 Emphasis added. See <<https://malegislature.gov/Laws/SessionLaws/Acts/2011/Chapter199>> and "From the Boston Bar Journal: Transgender Equal Rights In Massachusetts: Likely Broader Than You Think", *The Boston Bar Journal*, 19 April 2012, <www.bostonbar.org/pub/bbj/bbj_online/bbj1112/spring2012/Heads-Up-Reuben.pdf>.

49 Swedish Discrimination Act, Code of Statutes 2008:567, as summarised in *Homophobia, transphobia and discrimination on grounds of sexual orientation and gender identity: Comparative legal analysis, 2010 Update*, European Agency for Fundamental Human Rights, Luxembourg: Publications Office of the European Union, 2010, <http://fra.europa.eu/sites/default/files/fra_uploads/1759-FRA-2011-Homophobia-Update-Report_EN.pdf> at 21.



Chapter 11

REFUGEES

11.1	Introduction	178
11.2	Namibian domestic law	179
11.3	International refugee and human rights law	180
11.3.1	“Membership of a particular social group”, “political opinion” or “religion”	182
11.3.2	“Well-founded fear of being persecuted”	183
11.3.3	“For reasons of”	185
11.4	Conclusion	186

SUMMARY

In many parts of the world, LGBT individuals experience serious human rights abuses and other forms of persecution due to their actual or perceived sexual orientation or gender identity. Some such individuals have already sought asylum based on sexual orientation or gender identity in Namibia, and more may do so in future.

While Namibian domestic law does not yet seem to have fully considered any asylum claims based on sexual orientation or gender identity, such claims have been extensively addressed in international refugee and human rights law which applies to Namibia through Article 144 of the Namibian Constitution.

An applicant who is outside the country of his or her nationality must be recognised as a refugee in Namibia if he or she can show a “*well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion*”. Depending on the circumstances of each individual case, both the United Nations Refugee Agency (UNHCR) and numerous national courts have on many occasions established that LGBT individuals can be recognised as refugees where the fear of persecution is based on LGBT status.

11.1 Introduction

Article 14 of the Universal Declaration of Human Rights provides that “everyone has the right to seek and enjoy in other countries asylum from persecution”.¹

In many parts of the world, LGBT individuals experience serious human rights abuses and other forms of persecution due to their actual or perceived sexual orientation or gender identity. It is widely documented that LGBT individuals are the targets of, for example, physical attacks and killings; sexual and gender-based violence; detention; torture; denial of the rights to assembly, expression and information; and discrimination in employment, health and education.² In addition, many countries have laws which criminalise consensual same-sex conduct, a number of which provide for imprisonment, corporal punishment or the death penalty.³

It has been reported that due to these and other forms of persecution, the number of LGBT individuals fleeing from African countries such as Cameroon, Senegal, Nigeria, the Gambia, Liberia, Mauritania, Sierra Leone, Sudan, Uganda and Tanzania, has increased.⁴ As a result, LGBT individuals have already and may in the future seek asylum based on sexual orientation or gender identity in Namibia.⁵

1 Universal Declaration of Human Rights, Article 14(1).

2 See, for example, UN Human Rights Council, “Report of the United Nations High Commissioner for Human Rights on Discriminatory Laws and Practices and Acts of Violence against Individuals based on their Sexual Orientation and Gender Identity”, 17 November 2011, <www.unhcr.org/refworld/docid/4ef09202.html>.

3 International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA) reports 76 countries to have some form of criminalisation for same-sex conduct, of which 38 are in Africa. ILGA, “State-sponsored Homophobia, A World Survey of Laws Prohibiting Same-Sex Activity between Consenting Adults”, May 2013, at 5 and 33, <http://old.ilga.org/Statehomophobia/ILGA_State_Sponsored_Homophobia_2013.pdf>.

4 See ILGA, “State-sponsored Homophobia, A World Survey of Laws Prohibiting Same-Sex Activity between Consenting Adults”, May 2013, at 34.

5 See, for example, S Ikela, “No refugee status for foreign gays in Namibia”, *Namibian Sun*, 14 April 2014.



The guarantees of non-discrimination and equality in both Namibian constitutional law and international law mean that LGBT individuals who seek asylum due to persecution based on their sexual orientation or gender identity enjoy the same rights as asylum seekers who base their claims on other reasons for persecution, such as race or nationality. Equally, the rights of LGBT individuals who have been granted refugee status in Namibia do not differ substantially from the rights of other refugees.⁶

Ugandan gays who fled to Kenya still feel danger

NAIROBI – When a Ugandan court overturned the country’s Anti-Homosexuality Act this month, rights activists worldwide claimed a victory. But not gay Ugandans who fled persecution to live in a refugee camp in neighbouring Kenya.

“The reaction shocked me. I went there. I thought it would be a celebration, but ... nothing,” said Brizan Ogollan, founder of an aid organisation that works in Kenya’s Kakuma refugee camp. “They knew at an international level and at the diplomatic level, the decision is going to have impact, but at the local level, it won’t really. You can overrule the law, but you can’t overrule the mind.”

Of the 155 000 refugees at Kakuma camp, 35 are registered with the UN refugee agency as lesbian, gay, bisexual and transgender (LGBT) Ugandans who fled because of the country’s Anti-Homosexuality Act, which became law in February.

The now-overturned law called for life jail sentences for those convicted of engaging in gay sex and criminalised vague offenses like “attempted homosexuality” and “promoting homosexuality” in a country where being gay has long been illegal. Since the law was first proposed in 2009, public opinion in Uganda has grown increasingly anti-gay, said Geoffrey Ogwaro, a co-ordinator for the Civil Society Coalition for Human Rights and Constitutional Law, which is based in Uganda’s capital, Kampala.

Many gay Ugandans have lived in constant fear of arrest. Some were imprisoned. Landlords evicted tenants. One man tried to run over his gay son with a car, Ogwaro said.

“Unfortunately, the law’s nullification has actually polarised society more,” Ogwaro said. Members of parliament have started petitions to resurrect the legislation, although President Yoweri Museveni is reported to have requested the parliamentarians to reconsider.

Three years ago, when a 26-year-old gay Ugandan man was caught with another man, his stepfather threatened to report him to authorities and he fled to Nairobi.

“I thought, ‘No one loves you in your family,’” said the man, who insisted on anonymity because of fears for his safety. With little money in his pocket, he could not afford to stay in the Kenyan capital. He registered with the UN’s refugee agency, and for three years he has waited in Kakuma camp for refugee status, which would make him eligible for resettlement in a new country.

The man does not want to stay in Kenya, where same-sex conduct is also illegal, and where a bill recently introduced in parliament proposes that foreign gays be stoned to death. He continued to face harassment in Kakuma but at least he got support from fellow gay Ugandans, he said.

“For the first time, I met these people who were just like me,” he said. “You think to yourself, ‘OK, I’m not alone.’ At least I felt there was someone who understood me.”

Kenyan police could legally send him back to Kakuma. Some police officers have even deported asylum seekers back to Uganda against their will, said Neela Ghoshal, an LGBT rights researcher for Human Rights Watch.

Nampa-AP, *The Namibian*, 19 August 2014

11.2 Namibian domestic law

Claims to refugee status in Namibia are primarily addressed in the Refugees (Recognition and Control) Act 2 of 1999 (hereinafter referred to as the “Refugees Act”), which sets forth the

⁶ See, for example, *UNHCR Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, <<http://www.unhcr.org/refworld/docid/4f33c8d92.html>>; G Goodwin-Gill & J McAdam, *The Refugee in International Law*, Oxford: Oxford University Press, 2007 and J Hathaway, *The Rights of Refugees under International Law*, Cambridge: Cambridge University Press, 2005.

procedure for applying for refugee status in Namibia. Included in this Act’s definition of refugee are persons with “a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion” in their country of nationality.⁷

Similarly, the Namibian Constitution provides that the State “shall, where it is reasonable to do so, grant asylum to persons who reasonably fear persecution on the ground of their political beliefs, race, religion or membership of a particular social group”.⁸

There appears to be no reported case law in Namibia on the determination of refugee status under the Refugees Act. However, these issues have been extensively addressed in international refugee and human rights law.

As discussed in greater length in Chapter 3 of this report, Article 144 of the Namibian Constitution provides for the direct application of international law binding on Namibia – which includes international refugee law and human rights law relevant to asylum claims. In addition, the 1951 United Nations Convention relating to the Status of Refugees and its 1967 Protocol relating to the Status of Refugees (hereinafter referred to as “the 1951 Refugee Convention” and “the 1967 Protocol”)⁹ – the main international instruments addressing refugees – expressly form part of Namibian law in terms of the Refugees Act.¹⁰

In a situation where the Namibian domestic legal system has not yet addressed certain issues, international law and its interpretations provide particularly valuable guidance for Namibia.

11.3 International refugee and human rights law

The 1951 Refugee Convention is the key international legal document in defining who is a refugee, the rights of refugees and the legal obligations of States regarding the treatment of people fleeing across borders due to persecution. The 1967 Protocol removed geographical and temporal restrictions from the Convention.¹¹

The United Nations High Commissioner for Refugees (“UNHCR”) oversees the application of the Convention and is also mandated to provide guidance on its interpretation.¹² In the context of asylum claims based on sexual orientation or gender identity, the UNHCR’s “Guidelines on

⁷ Refugees (Recognition and Control) Act 2 of 1999, section 3.

⁸ Namibian Constitution, Article 97. Article 97 is part of Chapter 11 on “Principles of State Policies”. These principles are not in themselves legally enforceable by the courts, but are nevertheless intended to “guide the Government in making and applying laws to give effect to the fundamental objectives of the said principles” as well as to guide judicial interpretation of any laws based on these principles. *Id.*, Article 101.

⁹ UN Convention Relating to the Status of Refugees, 28 July 1951 and Protocol Relating to the Status of Refugees, 31 January 1967. Namibia acceded to the 1951 Refugee Convention on 17 February 1995 and it subsequently entered into force for Namibia on 18 May 1995 in accordance with Article 43(2) of the Convention. Namibia acceded to the 1967 Protocol on 17 February 1995 and it subsequently entered into force for Namibia on 17 February 1995 in accordance with Article XIII(2) of the Protocol. (Information from United Nations Treaty Collection.)

¹⁰ Refugees Act, section 2 (emphasis added). The Schedule also makes reference to the 1969 Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa. However, this Convention does not seem to be binding on Namibia since – according to the African Union as the depository – Namibia signed the Convention on 11 November 2009, but has not acceded to it. Namibia’s Ministry of Foreign Affairs reports accession on 2 September 1994 and seems to consider itself bound by the Convention. The information provided by the United High Commissioner for Refugees agrees with the view of the African Union (see for example, UNHCR, “New Issues in Refugee Research”, Research Paper No. 226, *Engaging with refugee protection? The Organization of African Unity and African Union since 1963*, 2011 at footnote 110, <www.unhcr.org/4edf8e959.pdf>).

¹¹ The 1951 Refugee Convention had restricted refugee status to claims “as a result of events occurring before 1 January 1951”, as well as giving States parties to the Convention the option of interpreting this as “events occurring in Europe” or “events occurring in Europe or elsewhere”. The 1967 Protocol removed these potential restrictions.

¹² See UN General Assembly, Statute of the Office of the United Nations High Commissioner for Refugees, 14 December 1950, <www.refworld.org/docid/3ae6b3628.html> in conjunction with Article 35 of the 1951 Refugee Convention and Article II of the 1967 Protocol.

International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity” (hereinafter “Guidelines No. 9”) are of particular relevance.¹³

Article 1A(2) of the 1951 Refugee Convention defines who is a refugee. It provides that the term shall apply to any person who –

... owing to *well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion*, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.¹⁴

In addition, Article 33(1) of the 1951 Refugee Convention contains the “principle of non-refoulement”:

No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.¹⁵

Because respect for fundamental rights and the principle of non-discrimination are core aspects of both the 1951 Refugee Convention and its 1967 Protocol,¹⁶ the refugee definition must be interpreted and applied with due regard to these principles.¹⁷ In other words, the refugee definition applies to all persons without distinction as to sex, age, disability, sexual orientation, marital status, family status, race, religious belief, ethnic or national origins, political opinion, or any other status or characteristic.¹⁸

.....

“LGBTI persons are entitled to all human rights on an equal basis as others. These rights are enshrined in international human rights and refugee law instruments. States have a duty to protect asylum seekers and refugees from human rights violations regardless of their sexual orientation and gender identity.”

UNHCR, “Summary Conclusions: Asylum-Seekers and Refugees Seeking Protection on Account of their Sexual Orientation and Gender Identity”, November 2010, <www.refworld.org/pdfid/4cff99a42.pdf> at para 1

.....

According to the UNHCR, there is nowadays greater awareness in many countries that people fleeing persecution for reasons of their sexual orientation or gender identity can qualify for asylum.¹⁹ The determination of refugee status always depends on the circumstances of

13 The full title of this document is “Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees of 23 October 2012”, available at <www.unhcr.org/509136ca9.pdf> (hereinafter “Guidelines No. 9”). The current guidelines should be read together with UNHCR, “Guidelines on International Protection No. 1: Gender-Related Persecution Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees”, 7 May 2002, <www.unhcr.org/refworld/docid/3d36f1c64.html> (hereinafter “Guidelines No. 1”), UNHCR, “Guidelines on International Protection No. 2: ‘Membership of a Particular Social Group’ Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees”, 7 May 2002, www.refworld.org/docid/3d36f23f4.html (hereinafter “Guidelines No. 2”), and UNHCR, “Guidelines on International Protection No. 6: Religion-Based Refugee Claims under Article 1A(2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees”, 28 April 2004, <www.unhcr.org/40d8427a4.html>.

14 Emphasis added.

15 Emphasis added.

16 See for example, 1951 Refugee Convention, Preamble, para 1 and Article 3.

17 See UNHCR, “Guidelines No. 9” at para 6.

18 R Haines, “Gender-related persecution”, in E Feller, V Turk & F Nicholson, eds, *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection*, Cambridge: Cambridge University Press, 2003 at 324.

19 UNHCR, “Guidelines No. 9” at para 1.

each individual case. However, a person seeking asylum on the basis of LGBT status needs to show that he or she has a “well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion”.²⁰

11.3.1 “Membership of a particular social group”, “political opinion” or “religion”

Most major refugee-receiving States have examined potential asylum claims based on sexual orientation or gender identity in the context of a “particular social group”.²¹ However, depending on the circumstances it may also be possible to base such asylum claims on “political opinion” or “religion”.

Membership of a particular social group: While there remains some confusion as to the exact interpretation of “membership of a particular social group”,²² the guidance of the UNHCR and national jurisprudence in various countries have established that lesbians,²³ gay men,²⁴ bisexuals²⁵ and transgender persons²⁶ can be members of “particular social groups” within the meaning of the refugee definition. For example, in a US case involving a gay asylum seeker from Lebanon, a Federal Court stated that “to the extent that our case-law has been unclear, we affirm that all alien homosexuals are members of a ‘particular social group’”.²⁷ Similarly, in the United Kingdom, the Supreme Court has stated that there “is no doubt that gay men and women may be considered

20 This report addresses only the main criteria relating to asylum claims based on sexual orientation or gender identity under the 1951 Refugee Convention. For more information, see, for example, the recent and very detailed publication by M Kapron & N LaViolette, “Refugee Claims Based on Sexual Orientation and Gender Identity: An Annotated Bibliography”, June 2014, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2457503>.

21 See J Millbank, “From Discretion to Disbelief: Recent Trends in Refugee Determinations on the Basis of Sexual Orientation in Australia and the United Kingdom”, 13(2/3) *The International Journal of Human Rights* 391-414 (2009) at 405.

22 See for example, the relatively recent *MK (Lesbians) Albania* case, where the decision-makers avoided a finding on the social group, arguing that it was not constructive as they had found a lack of a well-founded fear of serious harm on the part of lesbians in Albania. *MK (Lesbians) Albania v Secretary of State for the Home Department* CG [2009] UKAIT 00036, United Kingdom Asylum and Immigration Tribunal, Immigration Appellate Authority, 9 September 2009, <www.refworld.org/docid/4aae208b2.html>.

23 See, for example, the US case *Alla Konstantinova Pitcherskaia v Immigration and Naturalization Service*, 95-70887, (9th Cir. 1997), 24 June 1997, <www.unhcr.org/refworld/docid/4152e0fb26.html> at footnote 5; the Canadian decisions *VA0-01624* and *VA0-01625 (In Camera)*, Canada Immigration and Refugee Board, 14 May 2001, <www.unhcr.org/refworld/docid/48246f092.html> at 5; and the UK case *Islam (AP) v Secretary of State for the Home Department; R v Immigration Appeal Tribunal and Another; Ex Parte Shah (AP)*, House of Lords (Judicial Committee), 25 March 1999, <www.unhcr.org/refworld/docid/3dec8abe4.html> at 8-10.

24 See for example, the US case *Matter of Toboso Alfonso*, US Board of Immigration Appeals, 12 March 1990, <www.unhcr.org/refworld/docid/3ae6b6b84.html> which was ordered to be precedent in 1994 (Attorney General Order No. 1895-94, 19 June 1994); the US case *Nasser Mustapha Karouni v Alberto Gonzales, Attorney General*, No. 02-72651, United States Court of Appeals for the Ninth Circuit, 7 March 2005, <www.refworld.org/docid/4721b5c32.html>; the New Zealand case *Refugee Appeal No. 1312/93: Re GJ*, New Zealand Refugee Status Appeals Authority, 30 August 1995, <www.unhcr.org/refworld/docid/3ae6b6938.html> at 58; the US case *Kwasi Amanfi v John Ashcroft, Attorney General*, Nos. 01-4477 and 02-1541, United States Court of Appeals for the Third Circuit, 16 May 2003, <www.refworld.org/docid/47fdfb2c1a.html> at 17; the UK case *HJ (Iran) and HT (Cameroon) v Secretary of State for the Home Department* [2010] UKSC 31, Supreme Court, 7 July 2010, <www.unhcr.org/refworld/docid/4c3456752.html> at para 10; and the European Court of Justice case, *Judgment in Case C-199/12, C-200/12, C-201/12 X, Y, Z v Minister voor Immigratie en Asiel*, 7 November 2013, <<http://curia.europa.eu/juris/document/document.jsf?text=&docid=144215&pageIndex=0&doclang=EN>> at para 58.

25 See for example, the Australian case *VRAW v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCA 1133, Federal Court, 3 September 2004, <www.unhcr.org/refworld/docid/4dada05c2.html> at para 1 and the Canadian case *Decision T98-04159*, Immigration and Refugee Board of Canada, 13 March 2000, <www.unhcr.org/refworld/docid/4dada1672.html> at 2.

26 See, for example, the Australian case *RRT Case No. 0903346* [2010] RRTA 41, Australian Refugee Review Tribunal, 5 February 2010, <www.unhcr.org/refworld/docid/4b8e783f2.html> at para 52; the French case *CE, SSR*, 23 June 1997, 171858, Ourbih, 171858, Conseil d'Etat, 23 June 1997, <www.unhcr.org/refworld/docid/3ae6b67c14.html> (reversing the decision of the Conseil des Recours des Réfugiés and remanding for reconsideration an application for asylum of a transgender individual from Algeria and noting that a social group could be defined by the fact of persecution); the US case *Geovanni Hernandez-Montiel v Immigration and Naturalization Service*, 225 F.3d 1084 (9th Cir. 2000), A72-994-275, United States Court of Appeals for the Ninth Circuit, 24 August 2000, <www.refworld.org/docid/3ba9c1119.html>; and the Canadian case *Decision T98-04159*, Immigration and Refugee Board of Canada, 13 March 2000, <www.refworld.org/docid/4dada1672.html> at 2.

27 *Nasser Mustapha Karouni v Alberto Gonzales*, Attorney General, No. 02-72651, United States Court of Appeals for the Ninth Circuit, 7 March 2005 at paras 2851, 2854.

to be a particular social group ...”.²⁸ In a recent case concerning three asylum applicants in the Netherlands from Sierra Leone, Uganda and Senegal, the European Court of Justice also held that homosexuals “must be regarded as forming a particular social group”.²⁹ The UNHCR has also recognised on several occasions that LGBT applicants can form members of a “particular social group” for the purposes of refugee status.³⁰ This can be the case where the sexual orientation in question is criminalised, and where local and State police either tolerate or encourage violence against homosexuals.³¹ The UNHCR also notes that homosexuals are members of a particular social group because they share a common characteristic which is innate, unchangeable or fundamental to their identity, and because they are perceived as a group by society.³²

Political opinion: “Political opinion” as a basis for fear of persecution could apply to LGBT applicants in some circumstances. This could refer to an opinion that LGBT people should enjoy equal rights, or an opinion about gender roles expected in the family, for example.³³ Simply expressing a diverse sexual orientation or gender identity can be considered political in certain circumstances, particularly in countries where such non-conformity is viewed as challenging government policy or threatening dominant social norms and values.³⁴

Religion: Where a person is viewed as not conforming to the teachings of a particular religion due to his or her sexual orientation or gender identity, and is subjected to serious harm or punishment as a consequence, he or she may have a well-founded fear of persecution for reasons of religion.³⁵

11.3.2 “Well-founded fear of being persecuted”

What amounts to persecution will depend on the circumstances of each case, including the opinions, age, gender, feelings and psychological make-up of the applicant.³⁶ Discrimination will be considered persecution where “measures of discrimination, individually or cumulatively, lead to consequences of a substantially prejudicial nature for the person concerned”.³⁷

Past persecution is *not* a prerequisite to refugee status and, in fact, the assessment is to be based on the predicament that the applicant would have to face *in the future* if returned to the country of origin.³⁸ The applicant does not need to show that the authorities knew about his or

28 *HJ (Iran) and HT (Cameroon) v Secretary of State for the Home Department* [2010] UKSC 31, Supreme Court, 7 July 2010, <www.unhcr.org/refworld/docid/4c3456752.html> at para 10.

29 ECJ, *Judgment in Case C-199/12, C-200/12, C-201/12 X, Y, Z v Minister voor Immigratie en Asiel*, 7 November 2013, at para 49.

30 See for example, UNHCR, “Guidelines No. 9”; UNHCR, “Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity”, 21 November 2008; UNHCR, “UNHCR letter to the Tokyo Bar Association Regarding Refugee Claims Based on Sexual Orientation”, 3 September 2004, <www.refworld.org/docid/4551c0d04.html> ; UNHCR, “Guidelines No. 2”.

31 TA Aleinikoff, “Protected characteristics and social perceptions: an analysis of the meaning of ‘membership of a particular social group’”, in E Feller, V Turk & F. Nicholson, eds, *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection*, Cambridge: Cambridge University Press 2003 at 304.

32 UNHCR, “Guidelines No. 2” at para 11, in combination with UNHCR, “Guidelines No. 9”, at paras 44-49. For the purposes of the refugee definition, it is not a requirement that members of the particular social group associate with one another, or that they are socially visible. Thus, members of a social group may not be recognisable even to each other. UNHCR, “Guidelines No. 2” at paras 15-16; UNHCR, “Guidelines No. 9” at para 48.

33 UNHCR, “Guidelines No. 1” at para 32.

34 UNHCR, “Guidelines No. 9” at para 50.

35 UNHCR, “Guidelines No. 1” at para 25. See, by analogy, *In Re S-A*, Interim Decision No. 3433, US Board of Immigration Appeals, 27 June 2000, <www.unhcr.org/refworld/docid/3ae6b6f224.html>, at 1336 in particular.

36 *UNHCR Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* at paras 51-53; UNHCR, “Guidelines No. 9” at para 16.

37 *UNHCR Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* at para 54.

38 See, for example, *Bromfield v Mukasey*, 543 F.3d 1071, 1076-77 (9th Cir. 2008), 15 September 2008, <www.unhcr.org/refworld/docid/498b08a12.html>, at 12853-12854 in particular; *RRT Case No. 1102877* [2012] RRTA 101, Australian Refugee Review Tribunal, 23 February 2012 at para 91.

her sexual orientation or gender identity before he or she left the country of origin,³⁹ or even that “his homosexuality plays a particularly prominent part in his life. All that matters is that he has a well-founded fear that he will be persecuted because of that particular characteristic which he either cannot change or cannot be required to change.”⁴⁰

Physical, psychological and sexual violence, including rape, would generally rise to the level of persecution. Rape in particular has been recognised as a form of torture, leaving “deep psychological scars on the victim”.⁴¹

Efforts to change a person’s sexual orientation or gender identity by force or coercion may constitute torture, or inhuman or degrading treatment, and implicate other serious human rights violations such as the rights to liberty and security of a person. Extreme examples which clearly reach the threshold of persecution include forced institutionalisation, forced sex-reassignment surgery, forced electroshock therapy and forced drug injection or hormonal therapy.⁴² Non-consensual medical and scientific experiments are also explicitly identified as a form of torture or inhuman or degrading treatment under the International Covenant on Civil and Political Rights.⁴³

Detention of any form on the sole basis of sexual orientation or gender identity would normally constitute persecution.⁴⁴ Many LGBT applicants come from countries of origin in which consensual same-sex relations are criminalised.⁴⁵ Where LGBT individuals are at risk of being subjected to punishment – such as the death penalty, prison terms, or severe corporal punishment, including flogging⁴⁶ – this would constitute persecution.⁴⁷

Even if rarely or never enforced, laws criminalising same-sex relations could lead to an intolerable predicament considered to be persecution.⁴⁸ The existence of such laws can be used for blackmail and extortion purposes by State or non-State actors, which might be considered persecution.⁴⁹

39 UNHCR *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* at para 83.

40 *HJ (Iran) and HT (Cameroon) v Secretary of State for the Home Department* [2010] UKSC 31, UK Supreme Court, 7 July 2010, at para 79.

41 *Aydin v Turkey*, 57/1996/676/866, Council of Europe, European Court of Human Rights, 25 September 1997, <www.unhcr.org/refworld/docid/3ae6b7228.html> at para 83. See also *HS (Homosexuals: Minors, Risk on Return) Iran v Secretary of State for the Home Department* [2005] UKAIT 00120, UK Asylum and Immigration Tribunal (AIT), 4 August 2005, <www.unhcr.org/refworld/docid/47fdafe0.html> at paras 57, 134.

42 *Yogyakarta Principles*, Principle 18: “Notwithstanding any classifications to the contrary, a person’s sexual orientation and gender identity are not, in and of themselves, medical conditions and are not to be treated, cured or suppressed”. See also *Alla Konstantinova Pitcherskaia v Immigration and Naturalization Service*, US, 95-70887, (9th Cir. 1997), 24 June 1997, at n 4; UNHCR, “Guidelines No. 9”, 23 October 2012 at para 21.

43 ICCPR, Article 7: “... In particular, no one shall be subjected without his free consent to medical or scientific experimentation”. See also, UN Human Rights Council, “Report of the United Nations High Commissioner for Human Rights on Discriminatory Laws and Practices and Acts of Violence against Individuals based on their Sexual Orientation and Gender Identity”, 17 November 2011 at para 37.

44 See UN Working Group on Arbitrary Detention, Opinions No. 22/2006 on Cameroon and No. 42/2008 on Egypt, <http://ap.ohchr.org/documents/dpage_e.aspx?m=117>. See also, UNHCR, “Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention”, 2012, <www.unhcr.org/refworld/docid/503489533b8.html>.

45 For a more general discussion on the incompatibility of such laws with international human rights norms, see Chapter 3 on International Law.

46 See footnote 3 above.

47 UNHCR, “Guidelines No. 9”, 23 October 2012 at para 26. See also Arrêt n° 50 966, Belgium, Conseil du Contentieux des Etrangers, 9 November 2010, <www.unhcr.org/refworld/docid/4dad967f2.html> at para 5.7.1, where it was held that a prison term for homosexual conduct of 1–5 years and fines from 100 000 to 1 500 000 francs CFA (N\$21,000 to N\$31,000), and the fact that society was homophobic, were sufficient grounds to constitute persecution in the circumstances of the case. See ECJ, *Judgment in Case C-199/12, C-200/12, C-201/12 X, Y, Z v Minister voor Immigratie en Aisiel*, 7 November 2013 at para 56.

48 See for example, *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs; Appellant S396/2002 v Minister for Immigration and Multicultural Affairs* [2003] HCA 71, Australian High Court, 9 December 2003, <www.refworld.org/docid/3fd9eca84.html> at para 47.

49 UNHCR, “Guidelines No. 9”, 23 October 2012 at para 28.

Even where consensual same-sex relations are not criminalised by specific provisions, more general laws such as public morality or public order laws may be selectively applied against LGBT individuals in a discriminatory manner, making life intolerable for the applicant, and thus amounting to persecution.⁵⁰

It should also be noted that the fact that an applicant may be able to avoid persecution by concealing, or being discreet, about his or her sexual orientation or gender identity is not a valid reason to deny refugee status. A person cannot be denied refugee status based on a requirement that they change or conceal their identity, opinions or characteristics in order to avoid persecution.⁵¹ LGBT people are as much entitled to freedom of expression and association as others.⁵²

The persecution could come from State actors (such as government officials or police)⁵³ or non-State actors (such as family members, neighbours, or the broader community) in a situation where the State is unable or unwilling to provide protection against such harm.⁵⁴ A typical example of a situation where the State is considered unable or unwilling to provide protection is where police fail to respond to requests for protection or the authorities refuse to investigate, prosecute or punish the perpetrators of violence against LGBT individuals. As in asylum claims based on other reasons, an applicant does not need to show that he or she approached the authorities for protection before fleeing to another country but only that the protection was unlikely to be available upon his or her return.⁵⁵ Furthermore, the existence of, for example, anti-discrimination laws or LGBT organisations and events, does not necessarily undermine an applicant's well-founded fear of being persecuted.⁵⁶

11.3.3 “For reasons of”

The well-founded fear of persecution must be “for reasons of” one or more of the grounds contained in the refugee definition. While the Convention ground should be a contributing factor to the well-founded fear of persecution, it does not need to be the only, or even dominant, reason.⁵⁷

50 *RRT Case No. 1102877* [2012] RRTA 101, Australian Refugee Review Tribunal, 23 February 2012 at paras 89, 96. See in general, UNHCR, “Guidelines No. 9”, 23 October 2012 at paras 26-29.

51 For example, *HJ (Iran) and HT (Cameroon) v Secretary of State for the Home Department*, [2010] UKSC 31, UK Supreme Court, 7 July 2010 at paras 75, 76; UNHCR, *HJ (Iran) and HT (Cameroon) v Secretary of State for the Home Department – Case for the First Intervener*, 19 April 2010, <www.unhcr.org/refworld/docid/4bd1abbc2.html> at paras 26-33; *Refugee Appeal No. 74665*, New Zealand Refugee Status Appeals Authority, 7 July 2004, <www.unhcr.org/refworld/docid/42234ca54.html> at para 81; *Nasser Mustapha Karouni v Alberto Gonzales*, Attorney General, No. 02-72651, United States Court of Appeals for the Ninth Circuit, 7 March 2005. See also, UNHCR, “Guidelines No. 2”, 7 May 2002 at paras 6, 12; UNHCR, *Secretary of State for the Home Department (Appellant) v RT (Zimbabwe), SM (Zimbabwe) and AM (Zimbabwe) (Respondents) and the United Nations High Commissioner for Refugees (Intervener) – Case for the Intervener*, 25 May 2012, 2011/0011, <www.unhcr.org/refworld/docid/4fc369022.html> at para 9; ECJ, *Judgment in Case C-199/12, C-200/12, C-201/12 X, Y, Z v Minister voor Immigratie en Asiel*, 7 November 2013 at paras 76, 79.

52 See, for example, *HJ (Iran) and HT (Cameroon) v Secretary of State for the Home Department*, [2010] UKSC 31, UK Supreme Court, 7 July 2010 at para 53.

53 UNHCR, “Guidelines No. 9”, 23 October 2012 at para 34, referencing *Ayala v US Attorney General*, No. 09-12113, United States Court of Appeals for the Eleventh Circuit, 7 May 2010, where certain treatment by a group of police officers (robbery and sexual assault) was deemed to be on account of the applicant's sexual orientation and constituted persecution.

54 See *Nabulwala v Alberto R Gonzales, Attorney General*, No. 05-4128, United States Court of Appeals for the Eighth Circuit, 21 March 2007, <www.refworld.org/docid/4603b7152.html>, where a lesbian woman from Uganda claimed that she had suffered repeated abuse at the hands of her family members, including a family-arranged rape. The immigration judge found her evidence credible but said that the incidents amounted to private family mistreatment rather than being sponsored or authorised by government. Consequently, the immigration judge denied her application for asylum. On appeal, the US Court of Appeals for the 8th Circuit found that the immigration judge had erred in failing to consider whether the harm had been inflicted by persons whom the government was unable or unwilling to control.

55 UNHCR, “Guidelines No. 9”, 23 October 2012 at para 36.

56 See, for example, *Guerrero v Canada (Minister of Citizenship and Immigration)*, 2011 FC 860, Canadian Federal Court, 8 July 2011, <www.unhcr.org/refworld/docid/4fa952572.html> at para 11, which noted that the presence of many non-governmental organisations that fight against discrimination based on sexual orientation is in itself a telling factor in considering the country conditions.

57 UNHCR, “Guidelines No. 9”, 23 October 2012 at para 38. See also *Refugee Appeal No. 71427/99, 71427/99*, New Zealand Refugee Status Appeals Authority, 16 August 2000> at para 112.

Home Affairs loses bid to deport gay Ugandan

A UGANDAN man fearing persecution in his home country because of his sexual orientation yesterday obtained an urgent order in the Windhoek High Court to stop plans to deport him . . .

... Kelly, who is represented by lawyer Norman Tjombe, is claiming that he was in a same-sex relationship in Uganda when he and his partner decided in November last year to leave the country, where homosexual relationships are not only not accepted by a large part of the population, but were also outlawed and criminalised in terms of a controversial law early this year.

Uganda's Anti-Homosexuality Act was declared unconstitutional by the Ugandan Constitutional Court last week. However, the court declared the law unconstitutional on a technical point only, after finding that the Ugandan parliament did not have a quorum when it voted to enact the law, which has drawn international criticism and condemnation for infringing on the human rights of gay people.

The law defines homosexuality as "same gender or same sex sexual acts", and states that anyone who "commits the offence of homosexuality" would be liable to imprisonment for life if convicted of that crime . . .

... Kelly is arguing in his affidavit that persecution on the grounds of sexuality is a ground that would entitle him to be granted refugee status, under both Namibian law and international law . . .

Werner Menges, *The Namibian*, 8 August 2014

11.4 Conclusion

An LGBT applicant can be a refugee under the 1951 Refugee Convention and its 1967 Protocol provided that he or she, like any other applicant, fulfils the criteria set out in the Convention.

Namibia has an obligation to ensure that asylum claims based on sexual orientation or gender identity are heard in accordance with the applicable national and international law. It is also recommended that the laws criminalising sodomy and all other laws which discriminate against LGBT people in Namibia be repealed, to avoid international embarrassment where a resident of Namibia flees elsewhere and claims asylum on the basis of persecution in Namibia.

In addition, Namibia should ensure that the refugee status determination procedure, including pre-screening, is adapted to LGBT asylum claims so that LGBT persons can present their claims fully and without fear.⁵⁸ The UNHCR notes that where an LGBT individual seeks asylum in a country where same-sex relations are criminalised, "these laws can impede his or her access to asylum procedures or deter the person from mentioning his or her sexual orientation or gender identity within status determination interviews. In such situations, it may be necessary for UNHCR to become directly involved in the case, including by conducting refugee status determination under its mandate."⁵⁹

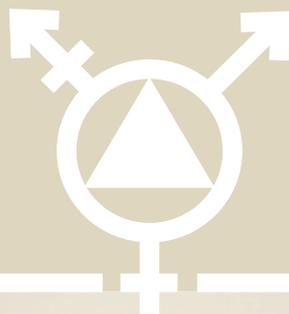
Recommendation in 2013 Baseline Study Report on Human Rights in Namibia

"Ensure that no one fleeing persecution on the grounds of sexual orientation or gender identity or returned to a territory where his or her life or freedom would be threatened and that asylum laws and policies recognize that persecution on account of one's sexual orientation or gender identity may be a valid basis for an asylum claim."

Office of the Ombudsman, *2013 Baseline Study Report on Human Rights in Namibia*, 2013 at 101

58 See N LaViolette, "Sexual Orientation and the Refugee Determination Process: Questioning a Claimant about Their Membership in the Particular Social Group", *Training Manual for Immigration and Refugee Board (IRB) Members*, last updated: May 2004, available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2294763>.

59 UNHCR, "Guidelines No. 9", 23 October 2012 at para 61.



Chapter 12

CONCLUSION

“We must be entirely clear about this: the history of people is littered with attempts to legislate against love or marriage across class, caste, and race. But there is no scientific basis or genetic rationale for love. There is only the grace of God. There is no scientific justification for prejudice and discrimination, ever. And nor is there any moral justification. Nazi Germany and apartheid South Africa, among others, attest to these facts.”

Desmond Tutu,
former Archbishop of Cape Town,
February 2014



There is no consensus about LGBT issues in Namibian society. Vocal disapproval from prominent politicians and Parliamentarians and some community members sits alongside attitudes ranging from tolerance to acceptance in some communities.

The Namibian media gives coverage to a spectrum of LGBT issues, often sympathetically. NGOs formed and staffed by Namibians have advocated for LGBT rights since even before Independence – including Sister Namibia (established in 1989), The Rainbow Project (established in 1997 and now defunct), the Women’s Leadership Centre (established in 2004) and OutRight Namibia (established in 2010) – and none have been obstructed in their work by government officials, although the relationship between these groups and government has not always been completely cordial. So there is official disapproval and sometimes shocking rhetoric by political figures, but no official repression of the LGBT community as a group.

As is the case in respect of many other social issues (such as the equality of men and women), there seem to be cycles of advance and backlash (such as the insertion and then the removal of sexual orientation as a prohibited ground of discrimination in Namibian labour legislation).

In Africa at large, there is also evidence of contradictory attitudes. For example, in 2014, while several African countries were enacting more stringent anti-gay laws, the African Commission on Human Rights adopted its first resolution on LGBT issues, expressing concern about violence and other human rights violations on the basis of real or imputed sexual orientation or gender identity. Furthermore, South Africa sits at one end of the continent with some extremely LGBT-sensitive laws and court decisions, while at the other end of the continent there are a handful of countries where homosexuality is still punishable by the death penalty.

This spectrum of opinions shows why it is important to utilise a human rights framework. LGBT individuals are a minority group in Namibian society, as they are around the world. This makes protection via constitutional rights and international human rights instruments particularly important since legislation to protect LGBT rights may never find a political majority in some states. Indeed, one of the fundamental purposes of constitutions and human rights instruments is to protect minorities who cannot count on having their rights protected through the democratic process. Furthermore, the very concept of the rule of law is premised on the idea that laws must be fairly applied to everyone.

.....

Homosexuality and the importance of children in Africa?

“A permanent homosexual identity – as opposed to same-sex relationships or experiences that do not preclude heterosexual relationships at the same time or later – is not easy to accept for many Africans because of the great importance attached to having children. In this respect the acceptance of homosexuality is concomitant with the changes from predominantly rural peasant society – where children are not only welcome but, in fact, necessary for survival and old-age care – to an urbanised society with a greater variety of household and family patterns. Homosexuality is far less frequent in Africa than are same-sex experiences, especially among men, although they are seldom spoken of in public.”

Mai Palmberg, “Emerging Visibility of Gays and Lesbians in Southern Africa” in Barry D Adam, Jan Willem Duyvendak & André Krouwel (eds), *Global Emergence Of Gay & Lesbian Politics: National Imprints of a Worldwide Movement*, Philadelphia: Temple University Press, 1999 at 267

.....



.....

A legacy of past trauma?

“One must look on Namibia as a traumatized place, perhaps a schizophrenic place. There is an unresolved history in this country, a history of authoritarian personality structures. The country has been through trauma, a terrible period of repression and a war. This produces a typical phenomenon of very dependent individual personalities, the result of a long history of colonialism and brutality and fear. Such personalities can easily be mobilized against a minority. And sexuality is very much bound up with fear.

Then, though, there is a split in public awareness and political awareness. Repression co-exists with liberalism. One part of the government will say it wants to eradicate the enemy. Another part hurries in to say that it wants to give everyone rights.

And the fear of the internal enemy is tied to fears of external enemies. Homophobic sentiments are mixed with xenophobic sentiments. It is terrible. And it is depressing.”

Henning Melber, who was at the time the director of the Namibian Economic Research Policy Unit (NEPRU), in a 1998 interview reported in Human Rights Watch & International Gay and Lesbian Human Rights Commission, *More Than A Name: State-Sponsored Homophobia and Its Consequences in Southern Africa*, 2003 at 33

.....

.....

Homophobia to distract the masses?

“Homosexuality has become an issue that can be used to divert attention from other, more serious issues that plague Uganda. Instead of politicians discussing why they haven’t been able to provide medicine in hospitals, why they haven’t been able to provide good roads, or why they haven’t even gone to their constituents they distract people by bringing up homosexuality,’ says [Richard Lusimbo, a research and documentation manager for Sexual Minorities Uganda]. ‘Because they know the society is going to jump onto the boda and no one will question about corruption or where the money went.’

[Patience Akuna, a human rights lawyer and winner of the 2013 David Astor Journalism Award] agrees, believing that homosexuality might be used as a political tool for a very long time. ‘What do you think Museveni will say in 2021 when he wants to stand for the seventh time?’ she asks. ‘He’s going to pull out the anti-gay law. He will hold it over Ugandans forever.”

Thomas Kleinveld, “Uganda’s Anti-Gay Law – Gone, but Not Forgotten”, *allAfrica*, 27 October 2012

.....

The purpose of this paper has been to look at the current laws relevant to LGBT issues in Namibia, to identify areas where existing law can be creatively applied to address LGBT issues and to identify gaps where law reform or judicial development may be needed to prevent unfair discrimination against LGBT individuals. The report is intended to provide clear information which can be useful in practical, everyday life, as well as inspiration for advocacy for law reform and ideas for future test cases to understand how the Namibian Constitution and laws may be interpreted in ways that protect and advance LGBT rights.

It is important to remember that human rights are universal. Every human being is entitled to the same basic rights, regardless of any attitudes deriving from history, culture or religion. All states have a duty to promote and protect the human rights of all persons, including LGBT persons. We hope that this research will be helpful to that end.



NATIONAL HUMAN RIGHTS ACTION PLAN REPUBLIC OF NAMIBIA 2015-2019

Focus Area 7: The right not to be discriminated against

The National Human Rights Plan 2015-2019, which was approved by Parliament in late 2014, highlights the need to protect members of vulnerable groups against discrimination. Amongst the vulnerable groups listed are LGBTIs.

“Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTIs) – Key concerns included widespread social exclusion and rejection of LGBTIs (but evidence lack to support), the continued criminalization of sodomy, the omission of sexual orientation as a prohibited ground for discrimination in the work place, the continued criminalization of sex work and how it impacts the right to fair/just and safe work conditions, continued insensitivity by the Namibian police of the plight of LGBTIs, and the lack of extensive research on LGBTIs’ human rights situation. Further concerns include discrimination, violence and punitive acts against homosexuals by the police and the lack of facilities to cater for LGBTI needs, especially in detention facilities or holding cells.”

The plan identifies the vision for non-discrimination as being that

“Namibia becomes a society based on equality and a country that acknowledges, recognizes, respects and values individual differences, common humanity, dignity and equality.”

Four strategic objectives are identified:

- to enhance affirmation of the rights of people with disabilities, indigenous peoples, women and LGBTIs;
- to have information on the extent to which the human rights of people with disabilities, indigenous peoples, women and LGBTIs are infringed upon;
- to intensify public education and awareness raising; and
- to implement legal and regulatory reform that will give effect to non-discrimination provisions in various international and regional instruments.

Key interventions aimed at LGBTI persons in respect of protection against discrimination include:

- commissioning research on discrimination, exclusion and marginalization of vulnerable groups;
- commissioning research on discrimination in the workplace and in recruitment, that is currently characterizing recruitment in the public service
- public education and awareness campaigns aimed at eradicating discriminatory practices against LGBTIs and others, involving churches and community leaders;
- incorporating human rights education and tolerance education into the school curriculum;
- incorporating training on a human rights approach in dealing with LGBTIs into training curriculum of law enforcement officials;
- research and review of laws and policies to identify and rectify provisions that discriminate against vulnerable groups, including sexual minorities
- review of the current Racial Discrimination Prohibition Act 26 of 1991 with a view to enacting new legislation against discrimination.

Sexual minorities are also specifically mentioned in one intervention relating to the right to health:

- improving interpersonal and communication skills of health professionals, including skills in dealing with children, indigenous peoples, sexual minorities and people with disabilities.
-

