

Submission to the 69th Ordinary Session of the African Commission on Human and Peoples' Rights on the situation of the LGBT community and defenders

NAMIBIA

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The Republic of Namibia's 6th Periodic Report was presented to the 58th Ordinary Session of the African Commission on Human and Peoples' Rights (ACHPR) in 2015. The ACHPR concluded that despite Namibia taking several progressive measures to promote and protect human rights, the country continues to enforce repressive laws that infringe on the rights of the Lesbian, Gay, Bi-sexual and Transgender (LGBT) community, commercial sex workers and other vulnerable groups. The ACHPR recommended, among other things, that Namibia end the discrimination and stigmatisation limiting health care access for the LGBT community, commercial sex workers and other vulnerable groups, take measures to protect and promote human rights in conformity with the UN Declaration on Human rights Defenders, the African Charter and other regional and international human rights instruments that guarantee the right to freedom of association and assembly.ⁱ

The purpose of this paper is to highlight the situation of the LGBT community and defenders in Namibia since its last review by the ACHPR; the steps taken by the Namibian Government to implement the ACHPR's past recommendations; and key recommendations for the ACHPR to consider making to Namibia during its current review.

This Shadow Report is a joint submission by the International Service for Human Rights (ISHR) and the Intersectional Network of Namibia, a network of independent and nonpartisan national LGBT and Women's rights organisations, including: Khaibasen Trust of Namibia (KTN); Namibia Diverse Women's Association (NDWA); Transgender Intersex Androgynous Movement of Namibia (TIAMON); Healing Wound Associations (HWA); Equal Rights for All Movement (ERAM); Mental Medical Counselling Network (MMCN); Trans Masculine Namibia (TMN); Namibia Sex Workers Alliance (NAMSWA); and LIDAR Foundation (LIDAR).

1. Risks facing LGBT human rights defenders

- The LGBT community, including defenders and women continue to face widespread discrimination and same-sex marriages remains unrecognised.ⁱⁱ According to a 2021 report of OHCHR, there are no laws prohibiting discrimination against the LGBT community in Namibia, and they face barriers to accessing health care which includes ridicule, prejudice and discrimination, fears that breaches of confidentiality would reveal their sexual orientation in a hostile environment, and the criminalisation of consensual same sex conduct.ⁱⁱⁱ
- The OHCHR report has also indicated that transgender persons face distinct discrimination and prejudice as the services they receive are not gender affirmative or appropriate to enhance their wellbeing. Health care workers deny LGBT persons

access to health care because of the general assumption that homosexuality is illegal or in violation of their own moral values.^{iv}

- Sexual and Gender Based Violence remains a big challenge for Namibia and specifically, for the LGBT community as there is a lack of protection of domestic relationships amongst LGBT partnerships and their domestic setting. Protection and safety of members of the LGBT community is compromised as homophobic and transphobic rape, harassment, and hate speech continue to exist and go unreported and or no justice is realised.^v

2. Official restrictions on the space for LGBT human rights defenders

- Article 10 of Namibia's 1990 Constitution provides for equality for all persons before the law and prohibits discrimination on the grounds of sex, race, colour and ethnic origin, creed or social or economic status.^{vi} However, neither sexual orientation nor gender identity are included among the grounds of discrimination.
- Although Namibia does not criminalise sexual orientation and gender identity, consensual same sex sexual practices between two males are still illegal and criminalised under common law sodomy under Section 299 of the Criminal Procedure Act 25 of 2004,^{vii} while the law is silent on consensual sex between two women. Beyond this, sections 42 and 44 of the Criminal Procedure Act permit the arrest of a person for sodomy, without a warrant. Section 44 allows a private person to make such an arrest without a warrant. These sodomy provisions legitimise societal and State sponsored discrimination against LGBTQ persons, even in circumstances where the specific provisions are not enforced.
- In a 2020 Namibian Joint CSO submission to the Universal Periodic Review, the stakeholders stated that despite Namibia maintaining a firm position in upholding the human rights and fundamental freedoms of all citizens over its 30 years of independence, it is imperative to note that within such decades of democratic progress, the country has maintained punitive laws that violate international frameworks and constitutional provisions of specific minority groups of Namibian community.^{viii}
- Namibia passed its first labour law change by Parliament in 2004, of which the Labour Act 15 of 2004 was intended to replace the Labour Act 6 of 1992. It was then further amended and the Labour Act 11 of 2007 was introduced. This replacement included the removal of the explicit protection against discrimination on the basis of sexual orientation, despite protests from both inside and outside of Parliament. Owing to the lack of protection in the workplace, LGBT people continue to experience vast realities of sexual harassment, discrimination on the basis of sexual orientation and gender identity/expression at their places of work.^{ix}
- Civil society and LGBTI defenders hope that the recent Repeal of Obsolete Laws Act (No. 2 of 2018) which provides for the real of certain obsolete laws can be used by Government to free the LGBTI community from punitive colonial laws and policies that directly violate them.^x

3. Particular risks facing LGBT people

- In 2017, the Other Foundation report noted that LGBTI people experienced a prevalence of physical and sexual violence, including general violence, police violence, rape and rape by police. It noted that police create methods to humiliate trans people, including forcing them to striping public.^{xi} Similarly, the UN Committee Against Torture noted in its concluding observations on Namibia in 2017 that LGBT and intersex persons were subject to ill-treatment in detention. Further, transgender women had been placed together with male detainees, exposing them to a high risk of sexual assault.^{xii}
- In April 2020, video of a local community leader verbally insulting and physically assaulting a transgender woman in the eastern city of Gobabis was made public. Police reportedly turned the woman away when she attempted to press charges, though charges were filed after a nongovernmental organisation (NGO) intervened.^{xiii} LGBT human rights defenders and civil society organisation in Namibia strongly condemned this gross dehumanisation, unlawful detention and torture of a transwoman.^{xiv}

4. The response of the State regarding the protection of LGBT human rights defenders

- Since Namibia adopts a monist approach to international treaties and has ratified the ILO Discrimination (Employment and Occupation) Convention, 1958 (No. 111),^{xv} the Government has a constitutional commitment to act in accordance with this Convention and prohibit discrimination on the basis of sexual orientation and gender identity in the workplace. However, the Government has not taken any measures to address this.
- Although Namibia has passed a number of progressive human rights related laws and policies in the last decade, it is noticeable that no direct legal or policy frameworks have been advanced with a specific inclusion of protections for discrimination or violence on the basis of sexual orientation and gender identity.^{xvi}
- The Government has not taken affirmative steps to ensure that the right to health for all its citizens under the National Health Act No. 2 of 2015 is guaranteed, even for vulnerable groups like the LGBTI community. Members of the LGBT community still face discrimination in accessing health services.
- Namibia passed a progressive National Human Rights Action Plan for 2015-2019 which was explicit and inclusive of LGBT persons and their rights to access public services. The plan has now reached its life-span of implementation, and there was no accountability of direct services completed by the State.
- Although the amendment Bills to the Combating of Domestic Violence Act, Combating of Rape Act, Maintenance Act and the Criminal Procedure Act are forward initiatives seeking to strengthen these laws so as to provide greater protection for women and girls, these Bills do not explicitly recognise same-sex relationships or LGBT people, denying LGBT people equal protection before the law.
- Further, Namibia's lack of inclusion in documenting data on LGBT persons' domestic violence cases impedes on the intersectional response to combat Sexual Gender Based Violence.^{xvii}
- In respect to labour laws, despite Article 5(2) of Namibian Labour Act 11 of 2007 prohibiting discrimination in the work place on several grounds, it does not list

discrimination on the basis of sexual orientation and gender identity. Consequently, people who identify as LGBT continue to experience employment denial and harassment from employment institutions.

- While sex work has not been made into an offence in terms of any Namibian statute, various other aspects of sex work are currently criminalised by the Combating of Immoral Practices Act (No. 21 of 1980). This Act prohibits for instance soliciting, living off the earnings of prostitution and keeping a brothel. The Act is aimed primarily at third parties such as pimps and brothel owners, and at public manifestations of prostitution such as public solicitation. There are four basic legal approaches to prostitution which the Act outlines- prohibition, abolition, regulation and decriminalisation. Such thematic descriptions negatively impact on sex worker's the right to practise any profession, or carry on any occupation, trade or business guaranteed under Article 21 (j) of the Namibian Constitution.
- In respect to health, although the right to access health care is universal in the Namibia, stigma and discrimination towards LGBT persons within the health fraternity has continued. There is a lack of national health guidelines and standards of care for gender affirming care which could assist health professionals in providing services for transgender people in the healthcare system. Consequently, health care workers continue to deny LGBT persons access to healthcare because of the general assumption that homosexuality is illegal, alongside their personal prejudice, as well as a fear that they are breaking the law or their moral values by providing health services to LGBT persons.^{xviii}
- With the status of Sexual and Gender Based Violence increasing in the country, the Namibian LGBT community has been experiencing inequality, discrimination and injustices, while no recognition is given to domestic same-sex relationships as the Namibian Domestic Violence Act explicitly mentions opposite sex relationships. Civil society organisations over the years have reported and called upon the Government to extend recognition, protection and safety for members of their communities.
- Lastly, although Namibia has adopted a curriculum on Comprehensive Sexuality Education (CSE) which includes a section on sexual orientation, schools continue to have rallies that subject learners who are LGBT to discrimination and bullying. Very minimal to no action is taken by the school against bullying on the basis of sexual orientation, gender identity and gender expression.

5. Recommendations to the Government of Namibia

- Repeal the crime of sodomy and unnatural sexual offences within the Criminal Procedure Act No. 25 of 2004 and all punitive and discriminatory laws which criminalise sexual activity between consenting adults of the same sex.
- Repeal the Combating of Immoral Practices Act (No. 21 of 1980) which unconstitutionally infringes sex workers' right to an occupation.
- Expeditiously amend the Labour Act 2007 to include a prohibition of discrimination on the grounds of sexual orientation, gender identity and gender expression and enact specific legislation that prohibits discrimination on these grounds thereby enabling LGBT persons to enjoy their Constitutional rights. Further, support the draft Prohibition of Discrimination, Harassment and Hate Speech Bill to explicitly provide for a prohibition on discrimination on these grounds.
- Amend and expand the definition of a domestic relationship in the Combating of Domestic Violence Act 4 of 2003 to include LGBT couples.
- Amend the Criminal Procedure Act No. 25 of 2004 to mandate tougher punishment for crimes motivated by hatred and prejudice towards LGBT persons.
- Support efforts made by civil society to educate the general public and change mind-sets on LGBT issues by openly condemning discrimination of LGBT people.
- Provide funding and resources to facilitate the collection of information, including research data, on violence against LGBT persons to enable policy formulation and implementation.
- Prohibit violent, stigmatising and discriminatory treatment of transgender and LGBT persons by public service providers
- Provide training and education on informed consent, bodily diversity and the right to bodily integrity for all healthcare professionals to ensure the medical information of and healthcare services provided to LGBT persons are balanced, accurate, evidence based and informed by human rights approaches.

Questions to the Government:

- Will the Government of Namibia consider taking steps to reform outdated legislation that criminalises same sex consensual sexual conduct and provide legal protections to ensure its citizens are not discriminated against on the basis of their sexual orientation or gender identity, including as set out in the Law Reform Development Commission Report on Repealing the Sodomy Law?
- What measures have been taken to prevent ill treatment of LGBTI people by police, health care workers and from employment institutions?
- What has been done towards legislative reform on Gender Based Violence to ensure sexual and gender minority communities are protected from violence?
- In light of the current report of the Law Reform Development Commission on Repealing the Sodomy Law, what has the Government done thus far to elevate the protection and safety of LGBT people?
- Where individuals and organisations working on gender issues, including those working on LGBTI issues, involved in the preparation of Namibia's 7th Periodic Report?

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ⁱ ACHPR, 'Concluding Observations and Recommendations - Namibia: 6th Periodic Report',

<https://www.achpr.org/statereportsandconcludingobservations>

ⁱⁱ Freedom House, 'Namibia', <https://freedomhouse.org/country/namibia/freedom-world/2021>

ⁱⁱⁱ Human Rights Council, 'Report of the Office of the United Nations High Commissioner for Human Rights: Summary of Stakeholders' submissions on Namibia', A/HRC/WG.6/38/NAM/3, Paragraph 8.

<https://undocs.org/Home/Mobile?FinalSymbol=A%2FHRC%2FWG.6%2F38%2FNAM%2F3&Language=S&DeviceType=Desktop>

^{iv} Human Rights Council, 'Report of the Office of the United Nations High Commissioner for Human Rights: Summary of Stakeholders' submissions on Namibia', A/HRC/WG.6/38/NAM/3, Paragraph

36. <https://undocs.org/Home/Mobile?FinalSymbol=A%2FHRC%2FWG.6%2F38%2FNAM%2F3&Language=S&DeviceType=Desktop>

^v Namibia Diverse Women's Association (NDWA), 'Joint Universal Periodic Review Report Submission - 3rd Cycle by Namibian Civil Society Organisation (CSO)' [Namibia Diverse Women's Association \(NDWA\)](https://uprdoc.ohchr.org)<https://uprdoc.ohchr.org> › [uprweb](#) › [downloadfile](#)

^{vi} Constitute Project, 'Namibia's Constitution of 1990 with Amendments through 2010',

https://www.constituteproject.org/constitution/Namibia_2010.pdf

^{vii} Government Gazette of the Republic of Namibia, 'Criminal Procedure Act',

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

^{viii} Namibia Diverse Women's Association (NDWA), 'Joint Universal Periodic Review Report Submission - 3rd Cycle by Namibian Civil Society Organisation (CSO)' [Namibia Diverse Women's Association \(NDWA\)](https://uprdoc.ohchr.org)<https://uprdoc.ohchr.org> › [uprweb](#) › [downloadfile](#)

^{ix} Namibia Diverse Women's Association (NDWA), 'Joint Universal Periodic Review Report Submission - 3rd Cycle by Namibian Civil Society Organisation (CSO)' [Namibia Diverse Women's Association \(NDWA\)](https://uprdoc.ohchr.org)<https://uprdoc.ohchr.org> › [uprweb](#) › [downloadfile](#)

^x Namibia Diverse Women's Association (NDWA), 'Joint Universal Periodic Review Report Submission - 3rd Cycle by Namibian Civil Society Organisation (CSO)' [Namibia Diverse Women's Association \(NDWA\)](https://uprdoc.ohchr.org)<https://uprdoc.ohchr.org> › [uprweb](#) › [downloadfile](#)

^{xi} The Other Foundation, 'Canaries in the coal mines, An analysis of spaces for LGBTI activism in Namibia',

http://theotherfoundation.org/wp-content/uploads/2017/06/Canaries_Namibia_epub_Draft2_CB2.pdf

^{xii} UN, Committee Against Torture, 'Concluding observations on the second periodic report of Namibia' (para 30), 1 February 2017, http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolNo=CAT%2fC%2fNAM%2fCO%2f2&Lang=en

^{xiii} Freedom House, 'Namibia', <https://freedomhouse.org/country/namibia/freedom-world/2021> See also: The Namibian,

'/Goagoseb remanded in custody on assault charges', <https://www.namibian.com.na/200703/archive-read/Goagoseb-remanded-in-custody-on-assault-charges>

^{xiv} ARASA, 'Civil Society Statement "Condemning Human Rights Violations and Transphobia in Namibia',

<https://www.arasa.info/blog-news-details/civil-society-statement-condemning-human-rights-violations-and-transphobia-in-namibia>

^{xv} ILO, 'Ratifications for Namibia',

https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11200:0::NO::P11200_COUNTRY_ID:103008

^{xvi} Namibia Diverse Women's Association (NDWA), 'Joint Universal Periodic Review Report Submission - 3rd Cycle by Namibian Civil Society Organisation (CSO)' [Namibia Diverse Women's Association \(NDWA\)](https://uprdoc.ohchr.org)<https://uprdoc.ohchr.org> › [uprweb](#) › [downloadfile](#)

^{xvii} Namibia Diverse Women's Association (NDWA), 'Joint Universal Periodic Review Report Submission - 3rd Cycle by Namibian Civil Society Organisation (CSO)' [Namibia Diverse Women's Association \(NDWA\)](https://uprdoc.ohchr.org)<https://uprdoc.ohchr.org> › [uprweb](#) › [downloadfile](#)

^{xviii} Namibia Diverse Women's Association (NDWA), 'Joint Universal Periodic Review Report Submission - 3rd Cycle by Namibian Civil Society Organisation (CSO)' [Namibia Diverse Women's Association \(NDWA\)](https://uprdoc.ohchr.org)<https://uprdoc.ohchr.org> › [uprweb](#) › [downloadfile](#)