

Universal Periodic Review of Botswana

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Joint Stakeholder Submission

Joint Stakeholder Report submitted by:

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Iranti is a Johannesburg-based media-advocacy organisation which advocates for the rights of LGBTI+ persons, with specific focus on lesbian, transgender (including gender non-conforming) and intersex persons in Africa. Iranti works within a human rights framework raising issues on gender identities, and sexuality, through the strategic use of multimedia storytelling, research and activism.

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Southern Africa Litigation Centre

SALC promotes and advances human rights and the rule of law in Southern Africa, primarily through strategic litigation and capacity-strengthening support to lawyers and grassroots organisations

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Sexual Rights Initiative

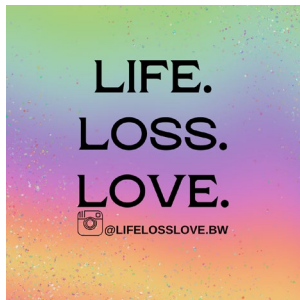
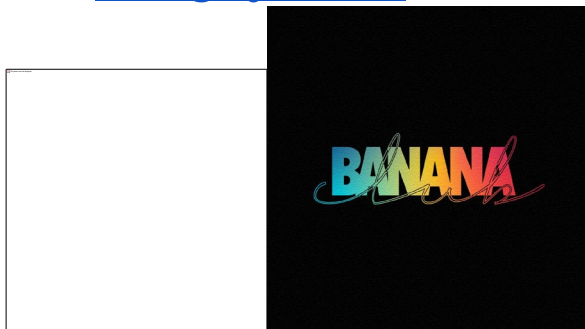
The Sexual Rights Initiative is a coalition of national and regional organizations based in Canada, Poland, India, Argentina, and Southern Africa that work together to advance human rights related to sexuality at the United Nations.

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Dignity, Equality and Freedom



Key Words

Violence against women, gender based violence, legal gender recognition, discrimination, bodily autonomy, safe abortion, marital rape, sexual and reproductive health and rights

Executive Summary

1. This report is a joint submission by autonomous collectives in Botswana, whose work is centred on the promotion and protection of LGBTIQ persons, women in the margins of society and young queer persons' rights and freedoms, with the support of Iranti, Sexual Rights Initiative and Southern Africa Litigation Centre.
2. This report highlights challenges faced by LGBTIQ persons and women seeking abortion services. The collectives that worked on this report represent communities of lesbians, bisexual persons, queer identifying youths, transdiverse persons and women, with decades of contributions to advocacy, research and movement building in Botswana, to assert the rights of these marginalised groups. Collectively, the aim is to reflect on how the strides that Botswana has made in some of its legal and policy frameworks still require strong implementation and monitoring to ensure that the protections in place are accessible, just and protect the integrity of the individuals.
3. With reference to the previous report, recommendations and literature available in the form of research, media articles, the Penal Code and other legislative documents, this report aims to ensure that we concretely offer context and recommendations with regards to the need for robust implementation and added considerations for the fulfilment of the rights of LGBTIQ persons and repealing of abortion laws that deprive women of sexual health rights and their right to bodily autonomy.

Introduction

4. Botswana is a multi-party democracy and holds national elections every five years. The President is the head of the state and of the Government, which comprises three arms: Executive, Legislature and the Judiciary. Botswana follows a dual legal system, combining Roman Dutch law with customary law¹. There is a need to harmonise civil and customary law, to ensure that they speak to the protection and promotion of human rights, especially to the rights of sexual and gender minorities, and to avoid conflicts arising from civil and customary laws that are not in unison.
5. Botswana needs to strengthen its laws and policies to protect lesbian, bisexual, queer and transgender women from violence and to support victims, including by establishing a legal aid system for lesbian, bisexual, queer and transgender women victims of violence, ensuring effective prosecution and punishment of offenders, implementing awareness-raising programmes for the general public, and establishing shelters for lesbian, bisexual, queer and transgender women victims of violence. There is a need to address and eliminate discrimination against women concerning access to healthcare and ensuring access to legal, safe and affordable sexual reproductive healthcare services including abortion and access to hormonal therapy.

¹ <https://www.gov.bw/about-our-country>

6. Since February 2022, the Botswana Government has embarked on a national Constitutional Review consultation process across the country, with a Constitution Review Commission being established under Section 2 of the Commissions of Enquiry Act. The Commission is not mandated to do the review of the Constitution itself, but rather to carry out the consultation process with the public and various Civil Society Organisations.
7. Legal protections and policy commitments in Botswana prohibit discrimination in broad terms and emphasise commitments to equitable access to quality healthcare, despite not providing many explicit protections for vulnerable and marginalised groups such as LGBTIQ+, young adolescent girls and women, and children. There needs to be elimination of discriminatory laws and cultural practices.
8. Section 3 of the Botswana Constitution guarantees fundamental human rights and freedoms of all people, without discrimination on any grounds.² The Constitution under the same provision also ensures individual rights to privacy, liberty and dignity³. Section 7 of the Constitution ensures protection from inhumane and degrading treatment⁴. Sections 12-14 enshrine various freedoms such as the protection of freedom of expression⁵, the protection of freedom of assembly and association⁶, and the protection of freedom of movement⁷, while Section 15 ensures protection from discrimination⁸.
9. However, despite these legal protections, there remain gaps in ensuring the enjoyment of the right to bodily autonomy through the provision of access to safe and legal abortion, sexual and reproductive health commodities, gender-affirming healthcare, and the protection of the right to be free from violence.

Freedom from violence: addressing rape

10. During the third cycle review Botswana received three recommendations specifically on addressing marital rape and it noted all of them. The recommendations included the following:
 - 129.40 Enact specific legislation on marital rape and ensure that all violence against women and girls constitutes a criminal offence, as previously recommended. (Ireland)
 - 129.38 Take measures to eliminate all forms of sexual and gender-based violence, including through criminalizing marital rape, investigating and prosecuting all acts of sexual violence and providing training to law enforcement officials on sexual and gender-based violence. (Canada)
11. It also accepted a recommendation on punishing perpetrators of sexual violence:
 - 127.33 Punish the authors responsible of sexual violence against women and girls (France)

² Constitution of Botswana, Section 3

³ Constitution of Botswana, Section 3

⁴ Constitution of Botswana, Section 7

⁵ Constitution of Botswana, Section 12

⁶ Constitution of Botswana, Section 13

⁷ Constitution of Botswana, Section 14

⁸ Constitution of Botswana, Section 15

12. The contradictions in this approach are reflective of the legal situation on the ground. Although marital rape forms part of the continuum of violence against women and girls, only rape and attempted rape are crimes in Botswana as per sections 141 and 143 of the Botswana Penal Code. Marital rape is not considered a crime in Botswana.
13. Rape is a widespread issue, with the number of rape cases recorded increasing during the COVID-19 lockdown periods. During the COVID-19 lockdowns the Botswana Police Services recorded 2,789 cases of rape between January 2020 and November 2020, compared with 2,265 during all of 2019 - another indicator that Botswana's rape epidemic is one that is fostered in the private sphere, in homes where there is an expectation of safety.
14. In 2019, of 1163 cases of sexual offenses taken to courts, only 195 were convicted guilty and sentenced, while 330 were withdrawn. This history of rape cases having such few convictions means that people are less willing to report issues of sexual and gender based violence. Although Botswana has launched 25 specialised gender violence courts following a rise in cases during the coronavirus pandemic, we are yet to see the impact of these courts on addressing GBV issues.
15. The non-recognition of marital rape has a negative knock on impact on the ability of married persons who experience sexual violence to access justice and enjoy other human rights such as the right to personal security, to bodily autonomy and to health. Further it also means that people who are raped in the context of marriage do not have access to legal abortion services should they fall pregnant.

Gender-Based Violence Against Queer Women

16. In the previous review cycle, Botswana received 10 recommendations regarding violence against women and gender-based violence, and accepted 7 of them including:
 - 127.32 Train police officers and other stakeholders on the handling of reported cases of gender-based violence. (Belgium)
 - 127.66 Take measures aimed at ending violence against women and girls and the discrimination suffered by them by influencing traditional practices that undermine gender equality and promoting greater participation of women in all sectors of society. (Spain)
17. Additionally, Botswana received 2 recommendations on protecting the rights of LGBT people to be free from violence, both of which it noted, namely:
 - 129.9 Adopt specific legislation to protect victims of violence and other human rights violations committed against persons on the basis of their real or imputed sexual orientation or gender identity, in line with resolution 275 of the African Commission on Human and People's Rights. (Netherlands)
 - 129.12 Ensure the adoption of specific legislation to fight discrimination, hate speech and violence based on sexual orientation and gender identity (Brazil);
18. The Botswana Government has committed itself to eliminating all forms of discrimination and inequality against women through its National Gender Commission under the Ministry of Youth, Sports and Gender Affairs. Other efforts include the implementation of the Sexual Offenders Registry Act (2021), setting up of a Human Rights Office under the Office of the President which is mandated to protect and promote human rights in Botswana, and the launch of several anti gender-based violence campaigns. Botswana has ratified the Convention on the Elimination of all

forms of Discrimination Against Women (CEDAW) but there are no specific provisions for its implementation. Botswana has so far failed to ratify the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol), even after this recommendation was made to Botswana at the last review cycle.

19. Whilst we welcome these efforts, there is more to be done as all these mechanisms, are rooted in a heteronormative framework and do not explicitly include lesbian, bisexual, queer, and transgender women. The framework only recognises heterosexuality and assumes gender to only be cisgender men and women, with no provision for any other. This means that the frameworks are ill-equipped to address or to respond to the nuances of the experiences of sexual and gender based violence of queer and trans women, leading to low engagement of these groups with the frameworks, and low enrolment in the programming. This exclusion has also resulted in lack of adequate data on the experiences of queer and trans women in Botswana.
20. Exclusion from support infrastructure and requisite services leads to queer and trans women who have experienced GBV facing high levels of depression, anxiety, and suicide. It also puts them at risk of sexually transmitted diseases and unwanted pregnancies, compounded by discrimination by healthworkers who act as a barrier to accessing services- which also undermines the body autonomy of queer women. Inadequate support also has an impact on queer women being able to build a life after being subjected to violence, including through accessing and completing their education. A lack of service provision to queer women results in a high number of drop-outs by queer women, and thus a loss of opportunity.
21. Gender-based violence is an umbrella term that describes violence that occurs as a result of the unequal power relationships and the normative role expectations associated with each gender in a specific society. The Domestic Violence Act (2008) aims to provide for the protection of any person that experiences domestic violence⁹. The act defines domestic violence as any act that is a controlling or an abusive behavior that harms the health or safety of the applicant and includes: physical abuse or threat thereof, sexual abuse or threat thereof, emotional, verbal or psychological abuse, economic abuse, intimidation, harassment, damage to property, where the applicant and the respondent do not stay in the same home, entry into the applicant's home without his or her consent, unlawful detainment, or stalking¹⁰. Whilst the Domestic Violence Act criminalises many forms of gender-based violence, under customary law and common rural practices, women's rights are not protected.
22. Violence against queer women, particularly intimate partner violence, physical and sexual violence, is a major human rights violation. Lesbian, bisexual, queer and transgender women in Botswana face stigma and high rates of violence in society based on their sexual and gender identities. Further, there is lack of information on queer women's rights and the laws that protect them. In addition, the negative attitudes towards sexual and gender minorities, coupled with the social and cultural pressure influenced by heteronormative and patriarchal practices in Botswana, make it difficult for queer women to report abuse for fear of reinforcing stigma and negative stereotypes, or of experiencing discrimination and secondary victimisation. High levels

⁹ Botswana Domestic Violence Act (2008), Section 2

¹⁰ Botswana Domestic Violence Act (2008), Section 2

of inequality, stigma and discrimination hinder queer and trans women from reporting these cases to law enforcement authorities.

23. Another barrier in accessing the criminal justice system, is that law enforcement authorities lack sufficient training in dealing with matters of abuse and violence related to sexual and gender minorities. Subsequently, there is very little urgency or care taken when reports are done. This has resulted in a lack of confidence in the protective system, with queer women not reporting violent cases.
24. Violence against queer women is preventable through the robust and speedy adoption of protective laws that explicitly protect queer women in Botswana from violence. Protective legislature should be enacted to protect queer women from abuse, ensure safe and accessible shelters for queer women, ensure the safety of women who report cases to the police by having judicial procedures that are inclusive of queer women, and applying laws that prohibit all forms of violence that target queer women. The Botswana courts have recognised same-sex relationships, and have emphasised the need for the protection of queer women, however the courts were not explicit on how queer women should be protected.

Legal Gender Recognition and Access to Hormonal Therapy for Transgender Persons

25. We regret that Botswana did not receive any recommendations focused specifically on legal gender recognition and access to hormonal therapy during its last review.
26. Legal gender recognition is about a person being legally recognised as their gender, having access to necessary documentation and also having full protection and standing before the law, allowing them to live freely. A transgender person's ability to live in dignity, equality and security is severely compromised if they do not have an identity document that matches their gender identity.
27. Transgender people in Botswana are subjected to levels of violence and discrimination that offend the human conscience. They are caught in a spiral of exclusion and marginalisation, often bullied at school, rejected by their family, pushed out onto the streets, and denied access to employment and education particularly in instances where public education policy is strict and restrictive with regards to gender expression with an emphasis on normative - binary, expressions of gender.
28. Legal gender recognition can help ensure that all individuals are able to express themselves freely and enjoy their daily lives in a dignified manner, without inhibiting their movement, education, access to services and privacy, and without risking discrimination, and cruel treatment. While the Botswana High Court ordered the Government to allow transgender persons to change their gender marker, this has not been the case on the ground.¹¹ Instead, of being able to change their name and their gender markers through regular administrative channels, transgender people are instead required to obtain a court order that then allows for a change in their documentation. However, this does not need to be the case and the process must be simplified.
29. Whilst there is no one law that allows transgender persons in Botswana to change the gender marker in their identity documents or passports, there are provisions within the legislation within Botswana that, read together, could allow for a change of documentation both in terms of the gender marker and the name on the documentation. With regards to the former, the provisions in the National Registration

¹¹ ND v Attorney General of Botswana and Another, MAHGB-000449-15, 29 September 2017, para 80.

Act 26 of 1986 could be used by transgender persons to change the sex description on their identity document, Section 16 deals with a material change in a person's particulars leading to the ability to access new documentation, Section 17 of the National Registration Act allows a person to update their photograph in their identity card.

30. With regards to changing the name on identity documentation, Section 12 of the Birth and Death Registration Act allows a person to alter a surname on a birth register. Section 13 of the Births and Death Registration Act 48 of 1968 allows a person to change their forename /s. A person can apply if they are 21 years or older; their parents or guardians would have to apply on their behalf if they are younger than 21 years. In order to use this provision, "... the Registrar must be satisfied that the person has a settled wish and intention to be and to continue to be generally known by the new forename or forenames either in substitution for or in addition to the forename or forenames under which his birth was registered."¹²
31. Unfortunately the process for transgender persons to access proper documentation is lengthier than the mere administrative procedures outlined in the provisions above. The lack of easy access to the necessary documentation has a knock-on effect on other rights, such as the right to education, the right to work, and the right to health. Transgender and gender-diverse Botswana are unable to access basic human rights and public services due to identity cards that do not correctly reflect their gender identity, an issue that was noted by the Ministry of Health and Wellness in the 2010-2017 National Strategic Framework for HIV/AIDS.
32. Accessing necessary healthcare is difficult for transgender people. In Botswana, there is no public healthcare support for transgender persons to medically transition. Botswana does not offer gender reassignment surgery, as in most cases it is regarded as elective cosmetic surgery. In terms of hormonal therapy, whilst government facilities do have medication, it is often prescribed at the discretion of the medical staff, who may have personal opinions about what constitutes legitimate need, when hormones should be used, and to whom they should be accessible.
33. This lack of a standard procedure on how to access gender affirming healthcare means that only those who can afford private healthcare are able to access hormonal therapy and other care as needed. This means that the availability and the accessibility of hormone therapy is based on socio-economic factors, therefore poor transgender people lack access to hormonal treatment, thus disrupting their lives.

Access to Safe Abortion Services and other sexual and reproductive health services

34. We regret that Botswana didn't receive any recommendations aimed at the decriminalisation of abortion laws in the country, and related to advancing sexual and reproductive health and rights in general.
35. Abortion is criminalised in Botswana with three exceptions, namely (a) where the pregnancy is the result of rape, defilement, or incest¹³, (b) where the pregnancy poses a threat to the life or physical or mental health of the pregnant person¹⁴, and where (c)

¹² Section 13(3)(a) Birth and Death Registration act

¹³ See section 160(a) of the Botswana Penal Code

¹⁴ See section 160(b) of the Botswana Penal Code

there is foetal abnormality or disease.¹⁵ Provided one of these exceptions is met, a pregnant person is legally permitted to access abortion within the first 16 weeks of a pregnancy, as long as it is carried out by a medical practitioner at an approved hospital or clinic¹⁶. An additional requirement for grounds (b) and (c) is that medical practitioners have to give their opinions in writing and in good faith that the person in question meets the criteria for an abortion on those grounds.

36. Despite the provision for abortion in these circumstances, abortion access in Botswana is still largely inaccessible outside of where it may endanger the life of a pregnant person or where there is the risk of a child being born with some abnormality. There is inadequate information on the availability of abortion services in the case of rape, for example in terms of how to access it, and in terms of data generated by the government to monitor its provision of this health service.
37. There is undue power placed in the hands of medical practitioners by the Penal Code in determining access to safe abortion. These medical practitioners may be biased in terms of what they think constitutes evidence of rape or incest. In a country where Nearly 70% of women have experienced physical or sexual abuse - more than double the global average, according to the United Nations Population Fund (UNPF), and where majority of these were perpetrated by people known to victims, only one in nine women report rape to the police and only one in seven women seek medical attention.
38. In Botswana, unsafe abortion accounted for 25% of total maternal deaths from 2014-2015- a clear indicator that limiting access to safe abortions does not stop abortions, but increases risks of infections and complications, making them harmful and unsafe. According to the World Health Organisation (WHO), complications related to pregnancy and childbirth are the leading cause of death for girls and young women ages 15 to 19, and children ages 10 to 14 have a higher risk of health complications and death from pregnancy than adults.
39. WHO has also found that the removal of restrictions on abortion results in the reduction of maternal mortality. Furthermore, decriminalising abortion may be a way to combat infanticide and the abandonment of babies, both of which are common in Botswana.
40. Where safe and legal abortion services are restricted or not fully available, many other internationally-protected human rights are at risk, including rights to non-discrimination and equality, the right to life, health, and information, to privacy and bodily autonomy and integrity, to decide the number and spacing of children, and to liberty.

Repeal of Section 167 of the Penal Code

41. In the previous UPR cycle, Botswana received the following recommendations on the issue of laws that criminalise consensual same sex activities, which it has accepted:
 - 129.13 Protect lesbian, gay, bisexual, transgender and intersex persons from discrimination by amending sections 164, 165 and 167 of the Penal Code of Botswana to decriminalize same-sex activities among consenting adults and by explicitly including sexual orientation and gender identity as listed grounds of non-discrimination in section 3 of the Constitution (Germany)
 - 129.47 Repeal laws that criminalize consensual same-sex conduct between adults and ensure all legislation, policies and programs do not discriminate on the bases of sexual orientation or gender identity. (Canada)

¹⁵ See section 160(c) of the Botswana Penal Code

¹⁶ See section 135(i) of the Botswana Penal Code

- 129.48 Decriminalize consensual sexual relations between people of the same sex and act to stop the discrimination suffered by people because of their sexual orientation. (Spain)
- 129.50 Repeal the law repressing homosexuality. (France)

42. In addition to the above recommendations, Botswana is obligated under the African human rights system to actively address violence and discrimination on the basis of real or imputed sexuality and gender identity. In 2014, the African Commission on Human and Peoples' Rights adopted Resolution 275¹⁷, which calls for the protection against violence and human rights violations on the basis of one's actual or imputed sexual orientation or gender identity. The resolution calls for all States, including Botswana, to end all acts of violence by enacting and effectively applying laws that prohibit violence towards sexual and gender minorities, and establishing judicial procedures that respond to the needs of the victim in a timely and urgent manner.
43. Though there has been some progress in repealing the offending criminal laws, there still remains Section 167 of the Penal Code, which could still be used to criminalise same sex relations between consenting lesbian, bisexual and queer women. This shall further be illustrated below.
44. In 2019, the landmark case of *Letsweletse Motshidiemang v The State*, the Court of Appeal of Botswana repealed Section 164(a), 164(c) and 165 of the Penal Code that sought to assert the rights to personal liberty and privacy with regards to same-sex sexual acts. The repealed sections stated :

“164. Any person who-
(a) has carnal knowledge of any person against the order of nature
(c) permits any other person to have carnal knowledge of him or her against the order of nature
is guilty of an offence and is liable to imprisonment for a term not exceeding seven years.
165. Any person who attempts to commit any of the offences specified in section 164 is guilty of an offence and is liable to imprisonment for a term not exceeding five years.”

45. In the *Letsweletse Motshidemang* case, the courts provided clarity that the offending sections¹⁸ referred exclusively to anal sexual penetration. The Court held that the impugned provisions were not vague, as carnal knowledge against the order of nature meant “anal sexual penetration” in particular.
46. Prior to the repeal of the above provisions, section 167 would have been used in tandem with and to supplement sections 164 and 165 in criminalising same-sexual acts and LGBTIQ persons as an additional charge to the above charges. Section 167 states, *“Any person who, whether in public or private, commits any act of gross indecency with another person, or procures another person to commit any act of gross indecency with him or her, or attempts to procure the commission of any such act by*

¹⁷ Resolution 275 on Protection against Violence and other Human Rights Violations against Persons on the basis of their real or imputed Sexual Orientation or Gender Identity - ACHPR/Res.275(LV)2014

¹⁸ Penal Code Section 164(a) and (c) (now repealed)

any person with himself or herself or with another person, whether in public or private, is guilty of an offence.”

47. The existence of Section 167 poses a threat to the enjoyment of the rights to bodily autonomy and privacy by LGBT persons, especially lesbian, bisexual and transdiverse persons. If the provision is left on the books, it has the potential to perpetuate and open doors to discrimination, violence and deprivation of access to sexual and reproductive health services. It also leaves a legal loophole open for legal sanction for consensual same sex sexual conduct, particularly with regards to sexual relations between Lesbian, Bisexual and Queer women, whose sexual expression was not criminalised under the repealed sections, but fell under the purview of section 167.
48. There is reluctance to undertake litigation surrounding the same section as it creates a window for consensual sexual relations between Lesbian, Bisexual and Queer women to become encompassed in the definition of gross indecency, be it in private or public. The indication that the interpretation of the law was balanced with morality, especially in the overturned Kanane Case, means that Lesbian, Bisexual and Queer women face the risk of prosecution based on that section of the Penal Code.

Recommendations for action

We call on the Government of Botswana to:

1. Declare gender-based violence a national crisis and to develop initiatives that address the root causes of gender based violence, and that are inclusive and reflective of the experiences of violence of lesbian, bisexual, queer and transdiverse persons.
2. Develop standard, multisectoral, multidimensional operating procedures for supporting survivors of gender-based violence, to ensure their protection and their access to justice.
3. Ensure that perpetrators of all forms of violence are held accountable to the fullest extent of the law.
4. Repeal Section 167 of the Penal Code.
5. Adopt policy guidelines on legal gender recognition, and simplify the process for transdiverse people seeking gender recognition, or to change their name and gender marker, by eliminating need for a court order.
6. Ensure that gender-affirming healthcare is available, acceptable, accessible and of good quality, in public health facilities throughout the country.
7. Develop a new abortion bill in consultation with relevant stakeholders, including civil society.
8. Develop a Comprehensive Abortion Care (CAC) program and campaign that holistically considers political and socioeconomic impacts of the abortion bill- supplemented by a Comprehensive Sexual Education and Sexual Reproductive Health Rights curricula, training, post-abortion care and family planning.
9. Decriminalise abortion and ensure that safe abortion is available, acceptable, and accessible to all across the country up to 28 weeks.