

# Universal Periodic Review of Lesotho

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## JOINT STAKEHOLDER SUBMISSION

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**Key Words: criminalisation; same sex sexual conduct; sex work; stigma and discrimination; sexual orientation and gender identity; conservative religious, social and cultural norms and stereotypes; limitations of public health approach; sexual and reproductive health and rights.**

## **Summary**

1. This joint submission was written by The Collective of Lesotho comprising representatives of civil society organisations including Rainbow Alliance of Lesotho, Masters of Healing Foundations and Independent Activists with technical support from the Coalition of African Lesbians and Sexual Rights Initiative. The report focuses on the lived experiences of lesbian, gay, bisexual, transgender and intersex persons in Lesotho and identifies human rights violations and protection gaps in the areas of violence, stigma and discrimination and access to health services.
2. Lesotho received 60 recommendations relating to sexual and reproductive health and rights during its last Universal Periodic Review. Of these, 45 recommendations were accepted. Implementation of accepted recommendations was reported on in the national mid-term report of March 2018. Among the positive developments reported on, are measures aimed at increasing formal gender equality through law and policy reform, fulfilling international human rights reporting obligations.
3. Six of the fifteen recommendations noted by Lesotho related to sexual orientation and gender identity (SOGI) decriminalisation and anti-discrimination measures. Same sex conduct between men is still criminalised under Section 187 (5) of the Criminal Procedure and Evidence Act. While the Penal Code of 2010 criminalises public indecency and not same sex sexual conduct, the absence of a clear and harmonised legal framework leaves room for interpretation and misuse by state and non-state actors.
4. Lesotho has however increasingly recognised men who have sex with men (MSM) and LGBTI persons as key populations requiring HIV prevention, treatment and response services. Despite naming LGBTI persons as key populations (i.e. requiring services and information) the actual programming continues to focus primarily on men who have sex with men and to some extent transgender women, excluding lesbians and other women who have sex with women. Even for MSM, it has not translated into positive changes in other spheres of life beyond health services. Indeed, given the criminalisation of same sex conduct between men and the high levels of stigma and discrimination at healthcare services it has not even improved the health outcomes for MSM and transgender persons.
5. Little has been done by the state to tackle the pervasive patriarchal and heteronormative beliefs and practices. Instead, Lesotho has used these to justify its reluctance to change discriminatory laws in the area of land inheritance and female chieftainship. Even in the school curriculum, traditional values and morals are given precedence over human rights and while comprehensive sexuality education is in theory incorporated into the curricula, it's left to the teachers how and how much of it they actually deliver in the classroom. The church and the family are two of the other institutions used to police and reinforce rigid gender roles and compulsory heterosexuality.

6. The impact of the current legal and policy framework combined with patriarchal and heteronormative religious and social beliefs and practices translates into a context that prevents most LGBTI persons from expressing their sexual orientation and gender identity openly for fear of violence, discrimination and stigma. This translates into poor mental, physical, sexual and reproductive health outcomes for LGBTI persons. LGBTI persons are also less likely to report cases of violence and discrimination to police and even when these cases are reported, are less likely to receive support and justice.

## **THEME ONE: VIOLENCE, DISCRIMINATION AND STIGMA**

Lesotho received and noted six recommendations during its last UPR regarding LGBTI rights of lesbian, gay, bisexual, transgender and intersex (LGBTI) persons and rights relating to sexual orientation and gender identity (SOGI), including:

- Repeal legislation criminalizing the consensual same-sex relations between adults (Canada)
- Make progress towards the protection of LGBTI people, by creating the conditions allowing them to access to basic services in the fields of Health, Work, and Religious Activities, and in addition by eliminating definitely from the Criminal Code Sodomy as a crime. (Chile)

### **Legal and policy framework**

7. The legal framework for same sex sexual conduct remains restrictive and contradictory. *Chapter II of the Lesotho Constitution* makes provision for a number of rights including the right to equality and freedom from discrimination (Section 18), the right to personal liberty (Section 6), the right to respect for private and family life (Section 11), the right to protection from inhumane treatment (Section 8) and the protection of health (Section 27) but does not specifically cite sexual orientation and gender identity as a grounds for non-discrimination. *Section 187 (5) of the Criminal Procedure and Evidence Act* (Act No. 9 of 1981) criminalises same sex conduct, specifically sodomy, between men and allows for arrest without warrant. *The Penal Code of 2010* criminalises public indecency and not same sex sexual conduct.
8. As mentioned above, sexual orientation and gender identity is not recognised as a ground for non-discrimination in the Constitution. There are also no other laws that protect against discrimination, hate speech or hate crimes against LGBTI persons in any sphere of life be it in employment, schools and educational facilities, housing and social services or health services.
9. While there have been few recorded cases of arrests of persons engaging in consensual same sex conduct under the sodomy law, the existence of the law coupled with lack of awareness of the exact nature of the law, fosters a climate of fear among LGBTI persons and fuels stigma and discrimination against LGBTI persons. The incorrect belief that sodomy laws extend to criminalise all LGBTI identities, also prevents LGBTI persons from reporting cases of violence and discrimination to police for fear that they will face prosecution should they disclose their sexual orientation.

### **Patriarchal and heteronormative norms and beliefs**

10. The Church has a powerful role in maintaining gender stereotypes and roles. Given that the overwhelming majority of the population identify as Christian, the Church is an important site for reinforcing and policing gender and sexuality norms. It also has the power to exclude and expel from its membership those seen as not conforming or violating its rules and policies. Exclusion from the Church often leads to, and is compounded by, exclusion and isolation within the community and other social and political spaces and institutions.
11. LGBTI led organisations, with the support of church leaders like CCL (Christian Council of Lesotho), have recently been providing talks, workshops and seminars to foster inclusive environments for LGBTI congregants within churches. However, discriminatory perspectives continue to be preached from the pulpit and reinforced by other congregants and these bar LGBTI persons from feeling safe and welcome within their churches, denying them a space to find solace in their spirituality or as part of congregation. Masculine presenting lesbians are told that their preferred attire is immoral and therefore not accepted. Gay men are told to 'tone down' their 'gayness' because a man has to conform to and perform very traditional notions of (heterosexual) masculinity. For transgender persons who have transitioned, this treatment is even worse. The policing of clothing and mannerisms is carried out by individual church members but also by the church societies who also take it upon themselves to develop and reinforce rules, and to condemn or 'correct' transgression of these rigid gender and sexuality rule.
12. Organisations and individuals claiming to be the custodians of tradition and culture in Lesotho are often reported in the media or use social media and other public platforms to reinforce ideas that homosexuality runs counter to Basotho culture<sup>1</sup>. In an interview conducted on an afternoon current affairs show on Radio Lesotho, Minister of Development Planning Tlohelang Aumane was asked if a dual citizen of Lesotho who was legally married to a person of the same sex in another legal jurisdiction would have this marriage recognized in Lesotho replied by saying: "Lesotho mona Lenyalo le Lumelletsoeng Ka Molao le tla lule e le pakeng tsa Monna le Mosali ba Lilemong" which translates to marriage will remain between a man and a woman by law in Lesotho.<sup>2</sup>
13. Schools and educational facilities – Lesotho adopted the Comprehensive Sexuality Education (CSE) into their curriculum in 2017 in an effort to reduce adolescent and teen pregnancies, reduce misinformation about sexual practices and HIV/AIDS risks. The curriculum includes sexuality, how the biological body works in depth in terms of reproduction, healthy and safe sexual practices and sexual health. However, the subject is being taught by teachers who have only received minimum training and support, which is not CSE specific. For instance, a math teacher will also be given CSE to teach in addition to their existing subject. CSE is still non-examinable and so not viewed as a serious subject by either the educators or students. The usefulness of the subject for students is also reduced by the conservative, heteronormative manner in which teachers approach the subject.

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<sup>1</sup> See for instance reported comments by Moletsane Liau in Public Eye News "Being neither a 'he' nor 'she' in Lesotho" available online <https://publiceyenews.com/being-neither-a-he-nor-she-in-lesotho/>

<sup>2</sup> Account presented by Joshua Monkoe.

14. Workplace, employment, policing of dress codes – The majority of workplaces, including private companies, apply strict gender dress codes and who do not accept masculine presenting lesbians and transmen (particularly those who are not on hormone treatment and therefore less likely to ‘pass’) wearing “men’s clothing”, short haircuts. Similarly, gay men and transwomen wearing make-up and wigs these expressions of self are highly frowned upon in the work environment.
15. Discrimination and violence from family members - Basotho families consider marriage to be the success of the family. Daughters are groomed for marriage. Boys are trained to be a man from young age to learn how to provide, to be the “head of the household” and this is shown by being aggressive and “macho”. If children or young person displays behaviour or characteristics associated with other genders (daughters “seeking to be men” or boys being “sissies” - a derogatory word for feminine men) families interpret this as their having failed them. This will be seen as an embarrassment to the entire family and these children and young persons may be disowned and thrown out of the house and forced to live on the streets.
16. Intimate partner violence – while little data and research exists, there is anecdotal evidence to suggest that the incidence of intimate partner violence in same sex relationships is high. The absence of support services for those experiencing this violence, coupled with absence of family support often means that these individuals remain in these abusive relationships. Most of the services set up to respond to domestic violence in Lesotho are geared for heterosexual relationships and do not provide services for LGBTI persons.
17. The legal ambiguity in relation to same sex conduct, the government’s silence and so-called ‘neutral position’ in matters of LGBTI rights, coupled with dominant patriarchal and heteronormative norms, leaves legal and social loopholes for homophobic state and non-state actors to exploit and use against LGBTI persons making them vulnerable to violence, harassment and discrimination in all avenues of life.

## **THEME TWO: ACCESS TO HEALTH SERVICES**

### **HIV prevention, treatment and response and ‘key populations’**

18. Lesotho has the world’s second highest recorded HIV prevalence rate. Significant national and international resources have been allocated to preventing and responding to the HIV crisis. One of the strategies adopted by Lesotho in addressing HIV has been to adopt a key populations approach as one way of preventing new infections. While Lesotho has at times interpreted key populations to include groups other than UNAIDS defined key populations, they have nevertheless included LGBTI persons as key populations requiring access to HIV services.

*Lesotho's National Health Strategic Plan (2017 - 2022)* names key populations with high HIV prevalence to include female sex workers (FSWs), men who have sex with men (MSM), migrant and factory workers and transgender persons<sup>3</sup>.

*Lesotho's HIV Strategic Plan (2018 - 2023)* states "self and external stigma and discrimination including by health providers and duty bearers such as police expose MSM to further abuse and makes some hide their sexual orientation, thereby missing critical knowledge and service packages"<sup>4</sup>. It goes on to state that "There is a hostile legal environment wherein sex work and sodomy between males are penalised, and laws have yet to be changed (notably the Criminal Prosecution Act) to create an enabling policy and legal environment."<sup>5</sup>

19. In February 2019 the Minister of Health in the National Budget Speech<sup>6</sup> issued a call for increasing the Health sector budget to fulfil issues of "Key Populations" more specifically the LGBTI community, people living with disabilities etc.
20. In a separate incident, Moshoeshe Fako for the Parliamentarian Social Cluster Portfolio Committee ensuring we leave no one behind, said, "*We are now aware of that everyone has rights, including sex workers & LGBTI (Lesbian, Gay, Bisexual, Transgender, Intersexual people)*".<sup>7</sup>
21. While the policies may name at least some members of the LGBTI population - MSM and transgender persons - the implementation of these policies has been poor and inconsistent and has not translated into improved access to health services for these individuals.
22. Data collection on key populations remains weak and insufficient. The HIV Strategic Plan acknowledges that the lack of information and data about transgender persons is a serious challenge and for this reason subsumes this group under the strategies and actions undertaken for the MSM population. While statistics on HIV prevalence among women who have sex with women were included in earlier HIV strategies and on this basis were also included as a key population or a population at risk, in subsequent and current strategies there is no data available for this group. On this basis, WSW have also been excluded from the strategic plan altogether.
23. There is also limited research on MSMs and therefore little knowledge of the impact of the HIV/AIDs pandemic in this population. Studies show that it has grown to 32.9% in the last 10 years.<sup>8</sup> Many respondents in the urban regions have experienced tremendous stigma, human

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<sup>3</sup> Accessed [https://www.childrenandaids.org/sites/default/files/2018-05/Lesotho\\_Nat%20Health%20Strat%20Plan\\_2017-2022.pdf](https://www.childrenandaids.org/sites/default/files/2018-05/Lesotho_Nat%20Health%20Strat%20Plan_2017-2022.pdf)

<sup>4</sup> Accessed <http://nac.org.ls/wp-content/uploads/2019/06/Lesotho-HIV-Strategic-Plan-2018-2023.pdf>

<sup>5</sup> Ibid p28

<sup>6</sup> Budget speech to the parliament of Lesotho for the 2019/2020 fiscal year. 12<sup>th</sup> March 2019

<sup>7</sup> Accessed <https://allafrica.com/stories/201907010767.html>

<sup>8</sup> <https://www.avert.org/professionals/hiv-around-world/sub-saharan-africa/lesotho>

rights abuses, particularly verbal abuse. This furthers the fear and reluctance by MSM to access health services.

24. There has also been a failure to adequately roll out HIV prevention services to incarcerated persons. This is despite findings in Ombudsman Sekara Mafisa's study (2016) on prisons and the recommendation that incarcerated persons should be given condoms because they were dying in the masse with illnesses related to HIV/AIDS.<sup>9</sup> Maseru Central Prison's rehabilitation officer Moliehi Mokoteli said there was no law in Lesotho that permitted homosexuality, making Sodomy illegal. Mokoteli is quoted saying they could "not give them condoms because that would mean we condone sodomy, but at the same time they are dying." Asked if they ever consider masturbation as an alternative, while counselling inmates, Mokoteli said "that is very immoral".

#### **Discriminatory attitudes and behaviour among healthcare providers**

25. The state has not done enough to ensure that healthcare providers are adequately trained and supervised in providing health services and information to LGBTI persons in a non-discriminatory, rights-based manner. This has meant that LGBTI organisations have taken up the responsibility of the state to provide this training, despite the hostile legal situation in the country. While these trainings have proved effective in increasing information base of providers and decreasing stigma and discrimination, the trainings are not mandatory and only reach a small number of the overall public health workforce.
26. Most healthcare providers attitudes towards LGBTI persons seeking health services remain very judgmental – reports from members of LGBTI communities report having been asked irrelevant and discriminatory questions, have been mocked, called names and in some instances simply ignored and dismissed from receiving any services whatsoever. Other examples provided by members of the LGBTI communities for the purposes of this report, include:

Healthcare providers at their own discretion calling their colleagues (without the client or patient's consent and about issues not relevant to the client or patient's presenting issue) to either discuss how to assist the client or patient as a group while ridiculing them by bringing religion and or other conservative beliefs about homosexuality. In some instances, healthcare providers will cite conscientious objection or their job description as the reason for refusing to provide services to LGBTI persons.

27. LGBTI persons seeking services have also been required to disclose very private (and irrelevant) information to healthcare providers in order to access services. For example, they are asked to explain their sexual activity and how they have sex sometimes they are told to bring their partner(s) before they can be assistance.

#### **HIV prophylaxis and safer sex materials and information not available for women who have sex with women**

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<sup>9</sup> <https://www.thepost.co.ls/local-news/the-scourge-of-sodomy/>

28. The only contraceptives provided through the public health system are condoms, there is a very low access to lubricants, dental dams and finger cots.

**Access to gender confirmation surgery and treatment for transgender and gender non-conforming individuals.**

29. While the law recognises the right of individuals to change their gender marker in their identity documents, gender confirmation surgery is not provided for through the public health system. Maseru Private hospital is the only hospital in the country that has agreed to provide hormone treatment for transgender persons and Tsepong hospital provided the first “top” i.e double mastectomy surgery to a well-known trans activist, however this seems to have been an isolated incident.

**RECOMMENDATIONS**

30. Review and amend where necessary the legislative framework to ensure that same sex conduct is decriminalised and that sexual orientation and gender identity is included as a ground for non-discrimination.
31. Develop and implement in collaboration with LGBTI civil society organisations, rights-based public facing campaigns and mandatory service training for all state actors to promote non-discrimination on the grounds of sexual orientation and gender identity.
32. Collaborate with LGBTI civil society organisations to develop and implement mandatory training programs for health care workers to reduce stigma and discrimination against all members of key populations, and to promote a human rights-based approach to healthcare and service delivery.
33. Review the current implementation of comprehensive sexuality education programs offered in schools to assess the extent to which these programs are meeting the international standards and regional inter-ministerial commitments to which Lesotho is a signatory.
34. Review the current data collection in the areas of health, gender based violence, education and training to ensure that the information collected is disaggregated by sexual orientation and gender identity. Use this data to review and improve access for LGBTI persons to current programs and services provided in these areas.