

BOTSWANA POLITICAL SCAN





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LEGAL FRAMEWORK AND CONTEXT

Botswana is a Constitutional democracy and the Constitution is the supreme law of the land. Botswana's Constitution guarantees the fundamental rights and freedoms of every person in Botswana, which includes people living with HIV, Key Populations and other vulnerable groups. Chapter II, sections 3 to 19 provide a wide range of human rights protections including the right to non-discrimination, the right to life, the right to personal liberty, protection from inhuman treatment, protection for privacy of home and property, the right to freedom of expression, the rights to assembly and association, and freedom of movement. Notably economic, social and cultural rights—including the right to health—are not expressly guaranteed in the Constitution.

On 3 June 2016, Botswana launched the Treat All strategy, which provides treatment for all persons who test HIV-positive regardless of viral load and CD4 count.

² While Botswana has enacted progressive laws and policies that promote access to HIV-related services and human rights, there remain legal barriers including laws that criminalise HIV-related conduct, consensual sexual acts between persons of the same sex, and aspects of sex work.

Further, as a result of discriminatory attitudes and stigma, protective laws and state services that are universally applicable and available, are not always enforced and accessible in practice for key populations including in the context of access to health services

and access to justice.

In 2015, the HIV prevalence rate was 22.2% amongst adults aged 15 and 49.³ Botswana's HIV epidemic is fuelled primarily by unsafe heterosexual sex with multiple partners.⁴ Key populations are disproportionately impacted by HIV—prevalence amongst female sex workers is 61.9% and 13.1% amongst MSM.⁵ There is limited information about HIV amongst drug users or inmates. Government has conducted a study on HIV prevalence of inmates, but the findings were never released.⁶ Botswana funds approximately 80% of its HIV response, while international donors also provide support. There is concern that in coming years, there will not be adequate funds available for Key Population programming.⁷

¹ This Political Scan and the accompanying Advocacy Opportunities Timeline were written by Drew Aiken, a consultant for the AIDS and Rights Alliance for Southern Africa (ARASA). In addition to desk research, Key Informant Interviews took place in Gaborone, Botswana from 21-24 June 2016.

² World Health Organisation, Botswana Launches Treat All Strategy, available at <http://www.afro.who.int/en/botswana/press-materials/item/8739-botswana-launches-treat-all-strategy.html>.

³ UNAIDS, HIV and AIDS estimates (2015), available at <http://www.unaids.org/en/regionscountries/countries/botswana>.

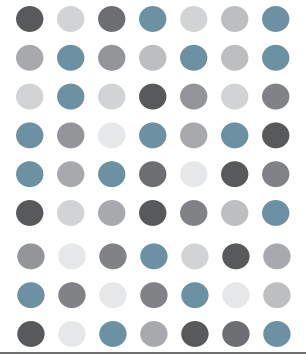
⁴ Global AIDS Response Progress Report 2014.

⁵ Botswana Narrative Report, Progress report of the National Response to the 2011 Declaration of Commitments on HIV and AIDS, at 16.

⁶ Meeting with ACHAP, Gaborone, 24 June 2016

⁷ HPP Policy Brief, How the Decline in PEPFAR Funding Could Affect Key Populations, (2016).





The Botswana Network on Ethics, Law & HIV/AIDS (BONELA) and other CSOs document cases of HIV-related discrimination and provide assistance for seeking redress for rights violations.⁸

There is a need for greater Government transparency and communication between Government and other stakeholders in Botswana as processes, studies, policies, and even draft bills are not always available to the public, nor is it clear that there is always meaningful public consultation. There have been instances in which civil society was unaware of important meetings and opportunities to advocate for human rights priorities or programming in the context of HIV.⁹

In addition to increased levels of engagement with relevant Government institutions, improved coordination amongst civil society organisations would be beneficial. There is also a need to sensitise some civil society organisations on key and criminalised population issues.

TREATY RATIFICATIONS:

Botswana has ratified:

- African Charter on Human and Peoples' Rights, 1986
- African Charter on the Rights and Welfare of the Child, 2001
- Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment, 2000
- Convention on the Rights of the Child (CRC), 1995
- Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), 1996 (individual complaint mechanism also ratified)
- Convention on the Elimination of All Forms of Racial Discrimination (CERD), 1974
- ILO Convention Concerning Discrimination in Respect of Employment and Occupation, 1997
- International Covenant on Civil and Political Rights (ICCPR), 2000

Botswana has not ratified:

- Convention on the Rights of Persons with Disabilities
- Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa
- International Covenant on Economic, Social and Cultural Rights (ICESCR)

Key informants indicate that there is a lack of knowledge amongst the general public on human rights and the importance of ratification and domestication of regional and international treaties. Due to lack of knowledge and the perception that international law is 'foreign', the public does not push for ratification or domestication.

Opportunities:

Utilise human rights day, women's day, worker's day and other opportunities to discuss human rights issues and human rights law and frameworks in general and in the context of HIV and to increase general awareness about the importance of ratification and domestication of international treaties.

⁸ ARASA, HIV, TB and Human Rights in Southern and East Africa Report, 2016, at 79.

⁹ Meeting with Wame Mosime, ITPC, Gaborone, June 2016.



KEY INSTITUTIONS RELEVANT TO LAW AND POLICY REFORM

The Constitution sets forth the structure and outlines the powers, structures and duties of the legislative, executive and judiciary branches of Government.

A. LEGISLATURE

Parliament

Parliament is composed of the President and the National Assembly.¹⁰ The National Assembly is composed of: (a) the President (ex officio); (b) 57 Elected Members; (c) four Specially Elected Members; and (d) the Attorney General.¹¹ The Speaker can be a member of the National Assembly or a non-member. Parliament has the power to make laws “for the peace, order and good governance of Botswana,”¹² subject to approval by the President and in some cases referral to the Ntlo ya Dikgosi.¹³ Parliament also has the power to alter the Constitution.¹⁴

Previously there was a Parliamentary Law Reform Committee. However, as of June 2016 this is no longer the case,¹⁵ though it is not clear why or how it was dissolved.

Ntlo ya Dikgosi (House of Chiefs)

The Ntlo ya Dikgosi (House of Chiefs) is an advisory body to Parliament.¹⁶ There are ex officio members, elected members and specially elected members in the House of Chiefs.¹⁷ Laws pertaining to customary courts, customary law, and the powers of chiefs, sub-chiefs and headmen must be referred to the Ntlo ya Dikgosi.¹⁸ Coordinates the HIV/AIDS response. NACA currently functions as a separate entity but will be subsumed under the Ministry of Health at an unknown date in the future.¹⁹

Ministry of Health

The Ministry of Health is responsible for the provision of public health services. The Department of AIDS Prevention and Care provides services in the contexts of prevention and control, care and support, and information management.²⁰

Ministry of Defence, Justice and Security

The Office of the Attorney General, Botswana Prison Service and Botswana Police Service are departments under the Ministry of Defence, Justice and Security.

Office of the Attorney General

The Attorney General is appointed by the President and is the principal legal adviser to the Government.²¹ The Office of the Attorney General is responsible for drafting laws. The Attorney General is also a member of Parliament.²²

Botswana Prison Service

The mission statement of the Botswana Prison Service is to “provide safe custodial care and correction to offenders through effective rehabilitation and reintegration programmes for the protection of the society.”²³ The prison service is regulated by the Prisons Act (Cap 21:03), Act 28 of 1979.

¹⁰ Constitution of Botswana, Section 57.

¹¹ Constitution of Botswana, Section 58.

¹² Constitution of Botswana, Section 86.

¹³ Constitution of Botswana, Section 86-87.

¹⁴ Constitution of Botswana, Section 89(1).

¹⁵ Call with Monsui Kraai, National Assembly, June 2016.

¹⁶ Constitution of Botswana, Section 77-85.

¹⁷ Id.

¹⁸ Constitution of Botswana, Section 88(b).

¹⁹ T. Poisa, NACA, Gaborone, Botswana, June 2016.

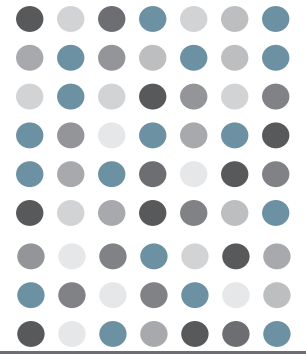
²⁰ Department of AIDS Care Prevention, available at http://www.moh.gov.bw/aids_care.html.

²¹ Constitution of Botswana, Section 51(1) and (3).

²² Constitution of Botswana, Section 58.

²³ Botswana Prison Service, <http://www.gov.bw/en/Ministries--Authorities/Ministries/Ministry-Of-Defence-Justice-and-Security1/Departments/Botswana-Prison-Service1/About-Us/Mission-Vision-and-Values/>.





BOTSWANA POLICE SERVICE

The Botswana Police Act²⁴ sets forth the duties and functions of the Botswana Police Service who are obligated to “protect life and property, prevent and detect crime, repress internal disturbances, maintain security and public tranquillity, apprehend offenders, bring offenders to justice, duly enforce all written laws with which it is directly charged and generally maintain the peace.”²⁵

MINISTRY OF LABOUR AND HOME AFFAIRS

The Ministry of Labour and Home Affairs is responsible for labour and employment matters and immigration. The Gender Affairs Department and Occupational Health and Safety Department are relevant sub-entities.

C. JUDICIARY

Magistrates Courts

The Magistrates’ Court Act creates the Magistrate Courts and provides jurisdiction over civil and criminal matters.²⁶ The High Courts have authority to review Magistrate Court decisions.²⁷

Labour/Industrial Courts

The Industrial Courts have jurisdiction over employment matters.

High Courts

The High Court has unlimited original jurisdiction to hear and determine any civil and criminal matter under any law. A legal matter concerning a constitutional issue can be referred to the High Court.

Court of Appeal

The Court of Appeal is the highest and final court in Botswana. The Court of Appeal is headed by the President of the Court of Appeal who is appointed by the President of Botswana. There is a right of appeal to the Court of Appeal for any constitutional decision made by the High Court.

Customary Courts

Customary Courts have civil and criminal jurisdiction, subject to the exclusions listed in Section 13 of the Customary Courts Act. Customary Courts administer “customary law” (defined as “in relation to any particular tribe or tribal community, the customary law of that tribe or tribal community so far as it is not incompatible with the provisions of any written law or contrary to morality, humanity or natural justice”) and written laws that the Courts have been specifically authorised to administer.³⁴

²⁴ Act 29 of 1978, (Cap 21:01).

²⁵ Section 6(1).

²⁶ The Magistrates’ Courts Act, Act No. 20 of 1974 (Cap. 04:04), Parts V and VI.

²⁷ Administration of Justice, available at <http://www.gov.bw/en/ministries--authorities/ministries/administration-of-justice-aoj/about-aoj1/the-hierarchy-of-the-courts/>.

²⁸ Constitution of Botswana, Section 95(1).

²⁹ Constitution of Botswana, Section 105.

³⁰ Botswana Ministries, Administration of Justice, available at <http://www.gov.bw/en/ministries--authorities/ministries/administration-of-justice-aoj/about-aoj1/the-hierarchy-of-the-courts/>.

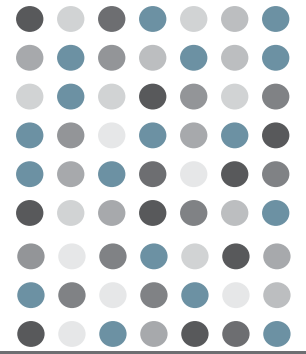
³¹ Constitution of Botswana, Sections 99(2)(a) and 100(1).

³² Id, Section 106.

³³ Customary Courts Act, No. 57 of 1968.

³⁴ Id, Section 15.





D. OTHER INSTITUTIONS

In Botswana, there is neither a law commission nor a human rights commission.

Office of the Ombudsman

The powers and responsibilities of the Office of the Ombudsman are set forth in the Ombudsman Act.³⁵ The Ombudsman may investigate any action taken by or on behalf of a Government department or other authority in exercise of administrative functions of that department or authority.³⁶

Investigations can arise from:

- (i) complaints by members of the public who claim to have sustained injustice;
- (ii) where a complaint is referred to the Office of the Ombudsman with consent of the person who made it and consent of the President, a Minister, or a member of the National Assembly; or
- (iii) in circumstances in which the Ombudsman considers it necessary to investigate an action where an individual has or may have sustained injustice.

The Ombudsman is prohibited from investigating some types of actions including, for example, matters the President or a Minister certify affect the Government's relations with other Governments or International Organisations and actions taken in respect of appointments to offices or other employment for the Government.³⁷

The Government is in the process of changing the structure so that the office also functions as a human rights commission.³⁸ The Office of the Ombudsman produces an annual report which highlights which actions its office have taken. The 2012-2013 report (the most recent report available) does not include any actions taken in the context of HIV or health.³⁹

Opportunity:

- Advocacy for an independent human rights commission and an independent law/law reform commission.
- Engagement with the Office of the Ombudsman on HIV rights, discrimination and priority issues.

³⁵ The Ombudsman Act, No. 5 of 1995, (Cap 02:12).

³⁶ Section 3(1).

³⁷ Id, Section 4.

³⁸ Meeting with Fenny Letshwiti, Public Relations, Office of the Ombudsman, Gaborone, 21 June 2016.

³⁹ Ombudsman Annual Report, 2012-2013.



OUTLINE OF PROCESSES

A. LAW REFORM/REVIEW AND ENACTING NEW LEGISLATION⁴⁰

Note, below is an outline of the process generally followed. Depending on the nature of the Bill, this process may vary.

Context

Laws cannot be shared with the public until the draft law is gazetted. The Attorney General's Chambers (AGC) indicates that this is to avoid undue influence from outside parties. Once a bill is published it is difficult to change.

There is no database of laws being proposed or reviewed. CSOs and other stakeholders must stay in contact with relevant ministries and lawmakers. It is essential for stakeholders to engage with the relevant ministry when the future law is conceptual and/or in policy form.

Rather than law reform, the term law review is preferred. When a law is being reviewed, sometimes there is notice in newspapers and in a few cases, perhaps on the radio. Some ministries do not reach out to the public and the public may not know that a law is being reviewed until the draft is gazetted.

Drafting a Bill

Generally, law review is initiated within the relevant ministry. Once a ministry is interested in creating a new law or law review, studies are conducted and policy experts are engaged.

At this point, CSOs and other stakeholders may or may not be engaged. This process—formulating a policy—

is referred to as a PITSO (stakeholder meeting). The policy formulated by the ministry (with or without the involvement of stakeholders) then goes to Parliament, who gives input, including recommendations. The policy document is then tabled.

The ministry then creates drafting instructions for the policy with input from consultants, the AGC and other stakeholders. There are a number of legal drafters in the AGC. At this point (before drafting) there may or may not be stakeholder consultations with communities, chiefs and other members of the public.

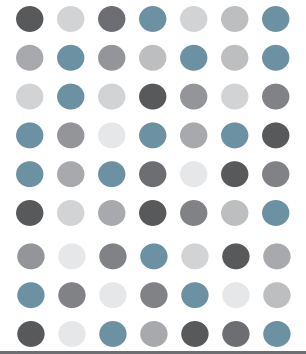
The AGC drafts a Bill based on the instructions, which may or may not be inclusive of public input. The AGC then does its own research, ensures the Bill complies with the constitution and is otherwise consistent with existing legislation. In particular, Acts of Parliament must comply/be consistent with Volume I of the laws of Botswana, chapters 1 to 7, as they are of general application.

The draft produced by the AGC must be approved by Cabinet and Parliament. It is more difficult to make changes once the bill has been approved.

Confidentiality of a bill is a concern for legal drafters in the AGC. Before a bill can be shared, this must be approved by Cabinet and the Public Relations officer from the relevant Ministry.

After the draft is complete, Cabinet must approve the law. The law must be approved while the same Government is in power (a Government is in power for 5 years). After Cabinet approval, the yellow (draft version) of the bill is gazetted.

⁴⁰Interview with Bojotlhe Morolong, Chief Legislative Drafter, AGC, 22 June 2016. Lini Aron, Nkawana, Gaborekwe and Kachiboda of the AGC were also present



Introduction of Bills

If a bill concerns taxation, revenue, public funds or Government debt, it can only be introduced upon recommendation by the President.⁴¹ Laws concerning the customary courts and customary law and the powers of the Chiefs, sub-Chiefs and headmen must be referred to the Ntlo ya Dikgosi.⁴²

After approval by Cabinet, a draft Bill then goes to Members of Parliament who provide input.⁴³

At this point, the Bill returns to Cabinet. Once a Bill reaches this stage, the AG is primarily concerned with inconsistencies and constitutionality and is required to sit in on parliamentary sessions for these purposes.

When a Bill is tabled by Parliament, anyone can suggest an amendment and if there is an amendment, then Parliament has 72 hours to consider the amendment and give notice to the public. MPs can also move without notice, meaning the bill can be immediately voted on and approved.

Publication

Under Section 3 of the Revision of the Laws Act 16 of 2002, the Attorney General is the Law Revision Commissioner. As Commissioner, the Attorney General is responsible for publication of the laws of Botswana in the Gazette⁴⁴ as well as periodic revision.⁴⁵

Final Steps

Once a Bill passes, the AG must sign off that the law does not create inconsistencies and that the law is constitutional. The clerk of Parliament then

authenticates the particular version and the bill is sealed. The AG sends a legal certification and a seal is required.

If the Bill does not include a date of effect or commencement, this can cause serious delay in implementation. This has been an issue in the past.

B. CONSTITUTIONAL REFORM

Parliament has the power to alter the Constitution.⁴⁶ Before a Bill altering the Constitution can be introduced, the text must have been published in the Gazette 30 days prior.⁴⁷ Where a Bill alters the Constitutional Sections listed below, (i) the final voting must take place at least three months after the previous vote in the Assembly and (ii) the final voting must be supported by at least two-thirds of all the Members of the Assembly.⁴⁸

1. Sections 30-44, 47-51, 56, 77-79, 85, 117-120, 127
2. Sections 57, 63-66, 86-89, 90(2) and (3), 91(2), (3), (4) and (5) and 92, Chapter VI, and 127.

*Any alteration of these sections also requires a public referendum in which a majority of voters have approved the Bill.⁴⁹

⁴¹ Constitution of Botswana, Section 88(a).

⁴² Constitution of Botswana, Section 88(b).

⁴³ Several persons interviewed emphasised that the executive branch largely controls the legislative process in Botswana and there is a need to review the balance of powers and to strengthen the legislative branch.

⁴⁴ Revision of the Laws Act (2002), Section 5.

⁴⁵ Ibid, Section 6.

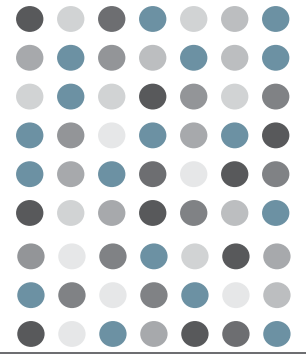
⁴⁶ Constitution of Botswana, Section 89(1).

⁴⁷ Constitution of Botswana, Section 89(2).

⁴⁸ Constitution of Botswana, Section 89(3).

⁴⁹ Constitution of Botswana, Section 89(4).





C. LITIGATION

There may be different procedures depending on the Court in which a case is brought.⁵⁰ The Rules of the High Court provide an outline of litigation rules and requirements for cases in the High Court.

Litigation against the Government must meet the requirements of the State Proceedings Act,⁵¹ including a 30-day notice requirement.

For a case in the High Court, (for cases by summons) an initial summons must include, inter alia:⁵²

Personal information of the Plaintiff and Defendant.
The basis on which the Court has jurisdiction. The basis on which the Plaintiff claims locus standi.
A summary of the Plaintiff's cause of action.
The relief claimed.

After the writ of summons, the Defendant has an opportunity to enter an Appearance to Defend. The Plaintiff then must submit a Plaintiff's Declaration and supporting affidavits and documentation.⁵³

The Defendant then has 14 days to submit the Defendant's Plea, Request for Further Particulars or other answer to the Plaintiff's claim. Before trial, Case Management and Pre-trial Meetings and Conferences are required.

During trial, the Plaintiff and Defendant present evidence to support their side of the case, including through witness's testimony and exhibits. Witnesses may also need to provide a Witness Statement before trial. A judge will make a ruling based on the facts of the case, evidence presented and applicable laws.

If there is a case in which an individual or group identifies as a potential court case which might meet the standing requirements outlined below, a Botswana lawyer—ideally an individual with experience with human rights and/or HIV rights litigation—should be consulted to discuss the possibility of filing and otherwise pursuing a case.

Locus Standi

Locus Standi, or standing is the right to bring a court case challenging a law or on a particular matter. One must have locus standi for their case to be heard.

If a Court finds that a Petitioner does not meet locus standi requirements, the case will be dismissed.

To establish locus standi in Botswana, an applicant must show the individual has a substantial interest in a case.⁵⁴

Section 18(1) of the Botswana Constitution allows any person alleging a violation of the Constitution to apply to court for redress. The Court in *Unity Dow* articulated what must be shown for an aggrieved individual to establish standing under the Section:

Under section 18(1), an applicant has the right to come before the courts for redress if he declares with some foundation of fact that the breach he complains of has, or is in the process of being or is likely to be committed in respect of him...the question which has to be asked in order that the courts might listen to the merits of his case is whether he makes the required allegation with reasonable foundation. If that is shown the courts ought to hear him. Any more rigid tests would deny persons their right on some purely technical grounds."⁵⁵

⁵⁰ Statutory Instrument No. 1 of 2011, 12 January 2011, available at http://www.justice.gov.bw/sites/default/files/Court%20Rules/SI_1_12_01_11_High%20Court.pdf.

⁵¹ Law 24 of 1966.

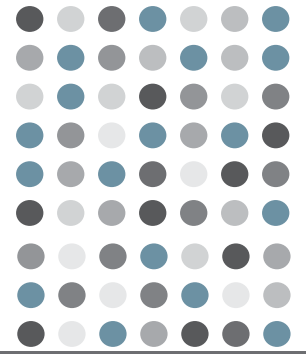
⁵² High Court Act, Order 6, Writ of Summons. See also, *Re: Civil Procedure and High Court Rules in Botswana*, available at <http://www.armstrongs.bw/uploads/High%20Court%20Procedure%20Rules%20May%202011ff.pdf>.

⁵³ *Id.*

⁵⁴ *Kamanakao and others v Attorney General and Another*, 2002 (1) BLR 110 (HC).

⁵⁵ *Attorney-General v Unity Dow*, 1992 BLR 119 (CA).





To establish standing under Section 18, an applicant must show that a right (or rights) protected by section 3 to 16 of the Constitution has been, is being, or is likely to be contravened.

D. POLICY FORMULATION⁵⁶

The AGC indicated that creation of a policy is similar to a law, in that a new policy typically initiates in the office of the relevant Ministry who drives the process. The process begins with community consultative processes, which inform the content of the draft policy. Either a policy is drafted and validated through the community consultations or the community consultations inform the draft of the policy.

Once finalised, the draft goes through a series of review with technical panels with internal and external stakeholders. The more evidence there is of consultation and buy-in by relevant stakeholders, the more likely that the policy is passed and goes into effect. The policy drivers use various media platforms to notify the public about the proposed policy which provides an opportunity for objections and endorsements.

Once approved by the Minister of the relevant Ministry, the policy is tabled in a Cabinet meeting for discussion. Policies must be approved by cabinet and the President and in some cases Parliament.⁵⁷

Botswana has not yet completed its Legal Environment Assessment, which should begin in 2016. Below is an outline of many of the laws and policies pertaining to or applicable to HIV and the response, impacting people living with HIV and otherwise relevant to marginalised and/or vulnerable populations.

Constitution

Chapter II, sections 3 to 19 provide a wide range of human rights protections including the right to non-discrimination, the right to life, the right to personal liberty, protection from inhuman treatment, and protection for privacy of home and property. Notably, economic, social and cultural rights—including the right to health—are not expressly guaranteed in the constitution. The possibility of constitutional reform has been discussed by individual Members of Parliament but as of yet, there has been little action.

Relevant Context:

In 2014, BONELA engaged with MPs on economic, social and cultural rights. The media was interested in this issue, which forced candidates to discuss economic, social and cultural rights during the election process.

⁵⁶ Note: this is an outline of the process that should occur. However, informants indicated that sometimes the level of consultation is weak and MPs are not present to contest and/or debate a policy prior to enactment.

⁵⁷ The Attorney General's Chambers indicated that some policies must be approved by Parliament, though it is not clear which policies. Interview with Bojotlhe Morolong, Chief Legislative Drafter, AGC, 22 June 2016.



RELEVANT LAWS AND POLICIES

Proposed Constitutional reforms:

Inclusion of economic, social and cultural rights into the constitution, including the right to health.

It was also mentioned that reduction of presidential power should be considered. This would be challenging to achieve since most members of Parliament are from the ruling party, Cabinet Ministers are all from the ruling party and the President would also have to assent to such changes.

Opportunity:

When strategic, research and advocacy for constitutional reform for express inclusion of economic, social and cultural rights, including the right to health.

Interpretation Act⁵⁸

The Constitution, Acts and instruments must be consistent with the Interpretation Act in terms of for example, procedure and construction. For example, the Interpretation Act defines the effect of repeal and expiry of an enactment and provides guidelines for the reckoning of periods of time.⁵⁹

Equality/Non-Discrimination and Stigma

There is no general non-discrimination or equality law (similar to South Africa's Promotion of Equality and Prevention of Anti-Discrimination Act, No. 4 of 2000). If enacted, such a law could provide specific protection on the basis of HIV and health status.

Recommendation:

Enact legislation specifically protecting the rights to equality and non-discrimination on the bases of inter alia, gender, sex, HIV and other status, health status, sexual orientation, and gender identity. Such legislation would provide protection for vulnerable groups and key populations.

Stigma

The 2014 Stigma index survey report conducted among people living with HIV showed that 87% of people living with HIV do not experience HIV-related stigma and discrimination.

Opportunity:

There is a need for a stigma survey for key populations, including LGBTI persons, sex workers, people with disabilities, people who use drugs, migrants, inmates.

COURT CASES PERTAINING TO THE RIGHTS OF PEOPLE LIVING WITH HIV

In Botswana, the Courts have protected the rights of people living with HIV.

In *Diau v BBS*, the Court held that terminating an employee's contract for refusal to undergo an HIV test was an unconstitutional violation of the employee's rights to liberty and freedom from inhuman and degrading treatment.⁶⁰ The termination was held procedurally and substantively unfair and the employer was ordered to reinstate the employee and pay compensation.

In *Rapula Jimson v BBS* the Court of Appeal held that a dismissal on the basis of a positive HIV test amounted to an unfair dismissal and ordered payment of compensation.⁶¹

See also, *Monare v Botswana Ash* and *Lemo v Northern Air Maintenance*.⁶²

Opportunities:

- Utilise these cases for advocacy, education and outreach, including in the formulation of laws and policies that protect the rights of people living with HIV.

⁵⁸ Act No. 20 of 1984.

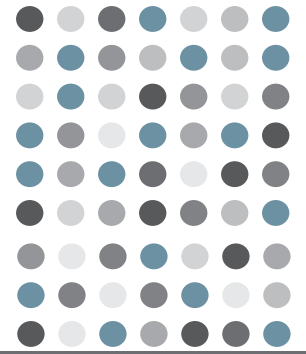
⁵⁹ Id, Sections 13 and 41.

⁶⁰ *Diau v. BBS*, Industrial Court, Gaborone, No. 50 of 2003.

⁶¹ *Rapula Jimson v. BBS*, Industrial Court, Gaborone, No. 35 of 2003.

⁶² *Monare v. Botswana Ash (Pty) Ltd*, Industrial Court, No. 112 of 1998; *Lemo v Northern Air Maintenance*, Industrial Court, Gaborone, No. 144 of 2004.





HEALTH LAWS, POLICIES AND PROGRAMMES

Public Health Act (Act 95 of 2013)

Botswana’s 2013 Public Health Act broadly criminalises wilfully exposing the public to any communicable disease.⁶³ The Act has a number of provisions inconsistent with best practices that do not support a human rights-based approach to HIV including authorising: forced and mandatory HIV testing;⁶⁴ non-consensual disclosure of HIV status;⁶⁵ and isolation and detention of persons with communicable diseases⁶⁶ under certain circumstances. The Act makes “communicable diseases” notifiable, including HIV.⁶⁷ These and other provisions of the Act have been criticised as stigmatising, discriminatory, inconsistent with a human-rights based approach to addressing HIV and have the potential to impede access to HIV-related health care.

Some positive aspects of the Act include provisions protecting the confidentiality of HIV test results and prohibiting pre-employment mandatory HIV testing, which should be retained.

Context:

The Public Health Act was enacted into law despite strong opposition from civil society and other stakeholders—both local and international institutions. Although during discussions, the Government agreed with some views of the groups who opposed discriminatory provisions of the law, the law remained unchanged when enacted. Some have expressed the view that the harmful law went into effect because CSOs and others opposing the bill were ‘overly vocal’ and enactment of the Public Health Act was a way to

punish them for “making the Government look bad.”

Recommendation:

The Public Health Act should be revised or repealed and replaced with legislation that affirms and protects the rights of people living with HIV and consistent with the recommendations of the Global Commission on HIV and the Law that do not criminalise HIV or people living with HIV, protect against mandatory HIV testing and disclosure, and otherwise protects the rights of people living with HIV.

Opportunities:

- Continue to collect information on implementation of the Public Health Act from healthcare practitioners and others, including challenges with implementation.
- Continue to document the ways in which the HIV-related provisions identified above impact access to HIV-related health services and whether (and if so, to what extent) the provisions increase stigma against people living with HIV.
- Document any rights violations that have occurred on the basis of the Public Health Act including:
 - Instances in which individuals have been required to undergo mandatory HIV testing, services or disclosure of HIV status.
 - Instances of prosecution against people living with HIV, on the basis of non-disclosure or other instances of arrest or prosecution.
 - Any anecdotal evidence confirming whether and to what extent the provisions of the Public Health Act have resulted in further stigma against people living with HIV.
 - Where any violations are documented that interfere with constitutional or other rights, utilise existing

⁶³ Public Health Act (2013) Section 58(1).

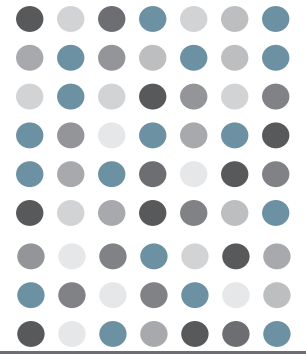
⁶⁴ Section 104(3)(b).

⁶⁵ Section 116(7).

⁶⁶ Section 57.

⁶⁷ Section 52.





mechanisms to file a complaint. For example, if a violation occurs in a hospital or place of employment, utilise existing complaint procedures for the hospital or business and complaint mechanisms through professional regulatory bodies for doctors and nurses. If the existing mechanism(s) fail to adequately address the rights violations or provide a legal remedy, consider additional legal action, such as in a labour/industrial or other Court.

- Engage with decision and policy makers and communities on the issues of HIV criminalisation and mandatory testing and disclosure, including the human rights and public health implications and the ways in which such laws impede the HIV response by driving people underground.
- Create pamphlets or other materials that explain these issues and conduct outreach activities to sensitise the public, health providers, law enforcement and other relevant stakeholders.
- Make submissions to Parliament, MOH, NACA and other policy and law-making bodies explaining concerns with these issues, the impact on the ground, and the ways in which these laws are inconsistent with Botswana's commitments to addressing HIV/AIDS, human rights obligations and good practices.
- Advocate and lobby for the revision or repeal of the Public Health Act and enactment of a law that protects the rights of people living with HIV including through submissions, meetings, media and other appropriate activities.
- Engage with participants during the Legal Environment Assessment process, including relevant Government

ministries, the executive, the Attorney General's Chambers and Members of Parliament.

National Strategic Framework (NSF) II (revised in 2014 and extended to 2017)

NSF II identifies key and vulnerable populations including women and girls, orphans and other vulnerable children, men who have sex with men, female sex workers, migrants and mobile populations, people with disabilities, adolescents and young men and women. The NSF will be up for review since it expires in 2017. CSOs working on key population issues have recently established a coalition aiming to draw focus on key population issues.

Opportunity:

- The Coalition and other CSOs should prioritise contributing to the new NSF and evaluating the extent to which commitments made in the previous NSF were accomplished.
- Hold Government accountable for commitments made in the previous NSF including by outlining successes and shortcomings in a letter or memo to NACA, Ministry of Health and other appropriate Government Ministries. Utilise this information to push for language in the next NSF that will adequately commit the Government to meeting programming gaps, addressing legal and policy barriers, and any other concerns.

National HIV Treatment Guidelines, 2012

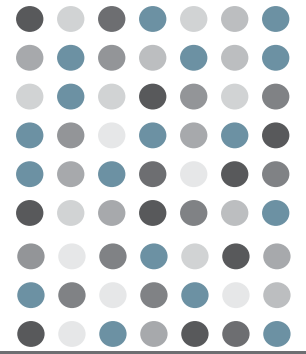
The 2012 National HIV Treatment Guidelines provided a framework for HIV-related care in the country and recognised that "reproductive rights are derived from fundamental human rights which are protected by the Constitution of Botswana. Therefore, women and men living with HIV have the same reproductive rights as

⁶⁸ Act No. 20 of 1984.

⁶⁹ Id, Sections 13 and 41.

⁷⁰ Id, Sections 13 and 41.





individuals without HIV infection.”⁷¹

The 2016 Integrated HIV Clinical Care Guidelines⁷²

These newly introduced guidelines implement the Treat All Strategy and provide a framework for HIV-related services in Botswana. The Guidelines have a number of protective, rights-based provisions including for example:

- Allowing for minors to access family planning methods in appropriate cases.⁷³
- Recognising that people living with HIV have a fundamental right to “a satisfying and safe sexual and reproductive life.”⁷⁴

National Policy on HIV and AIDS, 2012

The National Policy provides general principles to manage the national response to HIV and AIDS. Stated objectives include the following:

2.1.1 Prevent the spread of HIV infection and reduce the socioeconomic impact of this disease.

2.1.2 Create a policy environment for the provision of adequate and equitable care and support to those infected and affected with HIV and AIDS.

2.1.3 To reduce HIV and AIDS related stigma and discrimination towards persons infected with or affected by HIV and AIDS and draw attention to the compelling public health rationale for overcoming stigmatization and discrimination against them in society.

2.1.4 Promote coordination in order to enhance implementation of the National Response to HIV and AIDS.

2.1.5 Provide platform to support legislative and legal reform that recognises the impact HIV and AIDS has on individual and community rights.

The National Policy provides that HIV testing will only be performed with informed consent. The Policy also provides however that HIV testing will be mandatory prior to sentencing for all persons convicted of a sexual crime.⁷⁶

The policy recognises that “discrimination especially in relation to an individual’s HIV status has a detrimental effect on the ability of individuals to make informed choices about their own welfare and, further, limits the efficacy of the national response to the epidemic.”⁷⁷ The policy prohibits mandatory testing as a precondition to employment⁷⁸ but also specifies that “where circumstances demand, HIV testing may be required.”⁷⁹ Mandatory HIV testing is to be regulated through guidelines.⁸⁰

The *Botswana Charter on HIV/AIDS and Human Rights*⁸¹ emphasises that people living with HIV have a full range of human rights including the right to equality, and all other legal, civil, political, social and economic rights applicable to everyone.

The Botswana TB/HIV Policy Guidelines creates a framework for coordinating HIV and TB systems to reduce disease burdens and strengthen the response.

⁷¹ National HIV Treatment Guidelines, 2012, at 65.

⁷² Republic of Botswana, Handbook of the Botswana 2016 Integrated HIV Clinical Care Guidelines.

⁷³ Id, at 7.

⁷⁴ Id, at 8.

⁷⁵ At 5.3.

⁷⁶ At 5.7.

⁷⁷ At 7.1.

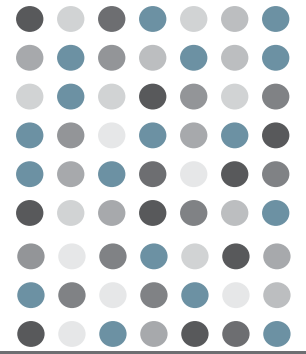
⁷⁸ At 7.1.1.

⁷⁹ At 7.1.2.

⁸⁰ At 7.1.3.

⁸¹ Available at <http://www.ditshwanelo.org/bw/images/new%20charter.pdf>.





living with HIV have a full range of human rights including the right to equality, and all other legal, civil, political, social and economic rights applicable to everyone.

*The Botswana TB/HIV Policy Guidelines*⁸² creates a framework for coordinating HIV and TB systems to reduce disease burdens and strengthen the response.

LABOUR AND EMPLOYMENT

The Botswana Courts have protected the rights of people living with HIV in the context of employment.⁸³

Employment Act

The Employment Act 10 of 2010 prohibits dismissal based on “the employee’s race, tribe, place of origin, social origin, marital status, gender, sexual orientation, colour, creed, health status or disability”.⁸⁴ Section 23 (e) also provides protection against discrimination for “any other reason which does not affect the employee’s ability to perform that employee’s duties under the contract of employment”. Constitutional and labour rights have been used successfully by the courts to protect people living with HIV from discrimination and from unlawful HIV testing in the workplace.⁸⁵

The Code of Good Practice:

HIV/AIDS and Employment, 2002 (attached to the Trade Disputes Act 15 of 2004) protects employees living with HIV against discrimination,⁸⁶ protects the right to confidentiality,⁸⁷ and prohibits mandatory testing⁸⁸ and unfair dismissals.⁸⁹

Recommendations:

Provisions protecting the rights of people living with HIV in the context of labour should be maintained and strengthened including through sensitisation and outreach.

Opportunities:

Continue to document evidence of discrimination and where appropriate, utilise evidence for advocacy. This includes employment discrimination (including in hiring, non-promotion, termination, and other discrimination) on the basis of HIV or health status, sexual orientation, gender identity and expression, against sex workers and discrimination against other vulnerable groups.

Document other HIV-related employment practices such as (i) the extent to which medical information confidentiality is protected in practice; (ii) incidents of mandatory disclosure; (iii) incidents of HIV-testing as a pre-condition to employment and other human rights concerns.

Continue to monitor relevant labour/industrial court cases.

Where wrongful dismissals take place on the basis of HIV status, sexual orientation, or other status, CSOs should continue to record cases, assist individuals file complaints when appropriate, and follow-up with relevant entities.

All existing mechanisms should be pursued to seek redress including internal mechanisms at a place of employment. If internal mechanisms are inadequate or ineffective, CSOs should consider litigation.

⁸² Botswana Ministry of Health, Botswana TB/HIV Policy Guidelines (2011).

⁸³ See supra, Court Cases Pertaining to the Rights of PLWHIV.

⁸⁴ Section 23(d)

⁸⁵ ARASA, HIV, TB and Human Rights in Southern and East Africa Report, 2016, at 78, available at <http://www.arasa.info/news/arasa-annual-report/>.

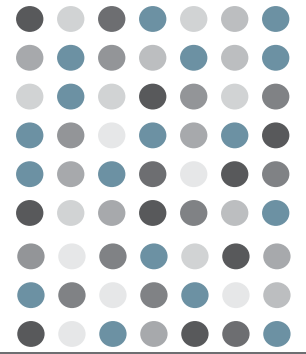
⁸⁶ Section 6.

⁸⁷ Section 6.

⁸⁸ Section 5.1.

⁸⁹ Section 9.1.





LAWS CRIMINALISING HIV AND KEY POPULATIONS

⁹⁰

HIV Criminalisation

Though not HIV specific, Section 184 of the Penal Code broadly criminalises “spreading infection” providing, “[a]ny person who unlawfully or negligently does any act which is, and which he knows or has reason to believe to be, likely to spread the infection of any disease dangerous to life, is guilty of an offence.”⁹¹

Consensual Sex between Adults of the Same Sex

In Botswana, consensual sex between persons of the same sex is a criminal offence. Sections 164, 165 and 167 of the Penal Code prohibit “unnatural offences” and “indecent practices.

- Section 164 on unnatural offences criminalises “carnal knowledge against the order of nature” and such acts are punishable with up to seven years of prison.
- The Botswana Court of Appeal has defined “carnal knowledge against the order of nature” as anal sex⁹² and both parties committing such acts can be held criminally liable.
- Section 165 criminalises attempts to commit the offences under Section 164 and are punishable with up to five years of prison.
- Section 167 criminalises “indecent practices between persons”⁹³ which are defined as “acts of gross indecency” or procuring or attempting to procure another person to engage in “acts of gross indecency” whether they take place in public or private. The Kanane Court found that “[o]ral sexual stimulation of either a male or a female

by either another male or female would no doubt be an example of gross indecency” under Section 167.⁹⁴

Sex Workers

The Penal Code criminalises acts associated with sex work including procurement,⁹⁵ solicitation, living off the earnings of sex work,⁹⁶ brothel keeping,⁹⁷ idle or disorderly public conduct⁹⁸ and ‘rogue and vagabond’ laws.⁹⁹

Recommendation:

The Penal Code should be reviewed and aligned with Botswana’s domestic, regional and international obligations including commitments to address HIV and AIDS, for key populations and vulnerable groups with applicable constitutional rights, as well as regional and international law. Botswana should implement recommendations of the Global Commission on HIV and the Law including to decriminalise the provisions listed above.

Opportunities:

- Continue to document rights violations against people living with HIV, lesbian, gay, bisexual, transgender and intersex persons and sex workers.
- Continue and increase scale of outreach, sensitisation and trainings with police, health workers, parliamentarians, ministries, members of the public, traditional leaders, and other stakeholders.
- Make formal submissions on violations against lesbian, gay, bisexual, transgender and intersex persons, sex workers and other criminalised populations to national entities (Office of the Ombudsman,

⁹⁰ See ARASA, Identifying Injustice: Law and Policy on Sexual Orientation, Gender Identity and HIV in Southern Africa, at 94-95, available at <http://www.arasa.info/news/laws-and-policies-sexual-orientation-and-gender-identity-southern-africa-need-urgent-revision/>.

⁹¹ See supra, Public Health Act of 2013 Section, at 11-12.

⁹² Kanane v the State 2003 (2) BCLR 67, p. 3.

⁹³ Section 167 as amended provides “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 any person with himself or herself or with another person, whether in public or private, is guilty of an offence.”

⁹⁴ Kanane v the State 2003 (2) BCLR 67.

⁹⁵ Section 149.

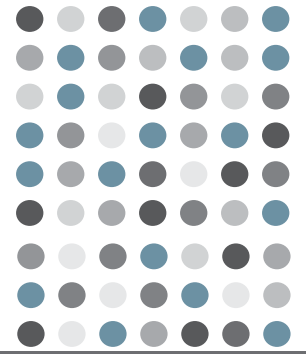
⁹⁶ Section 155.

⁹⁷ Section 158.

⁹⁸ Section 179.

⁹⁹ Section 182.





- Parliamentary Committees or other) as well as regional and international entities (African Commission and UN Bodies).
 - Utilise the *4th Pan-African ILGA Regional Conference* as a major advocacy opportunity as it will be held in Gaborone in 2018 (exact date TBD) including by continuing to engage with Government and the public on LGBTI issues prior to the conference and utilising the conference to raise awareness of LGBTI issues and for advocacy.
- Opportunities:**
- Dialogue and outreach with/to traditional leaders (including through use of case studies) on HIV and human rights and issues facing lesbian, gay, bisexual, transgender and intersex persons and sex workers.
 - Dialogues with politicians and parliamentarians on customary law issues and HIV.

CUSTOMARY LAW AND TRADITIONAL LEADERS

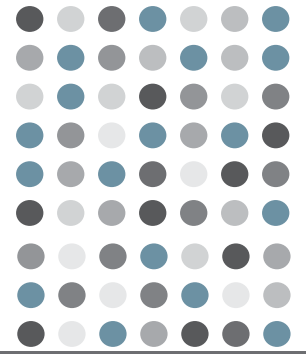
The Customary Law Act¹⁰⁰ and the Customary Courts Act¹⁰¹ regulate the application of customary law in Botswana. Section 3 of the Customary Law Act provides:

The courts of Botswana shall, within the limits of their jurisdiction, apply customary law in all cases and proceedings in which, by virtue of the provisions of this Act or any other law, customary law is properly applied and where it is not properly applied such courts shall apply the common law.

¹⁰⁰ Act No. 51 of 1969 (Cap 16:01).

¹⁰¹ Act No. 57 of 1968.





CHILDREN AND THE CHILDREN’S ACT

The Children’s Act

The Children’s Act provides specific protections for children including the rights to non-discrimination,¹⁰² privacy, the right to participate in decision-making,¹⁰³ and a child’s right to the highest attainable standard of health and medical care.¹⁰⁴ The Act specifically safeguards against violence, abuse, and sexual assault and prohibits harmful practices such as child marriage. The Act also provides for the establishment of Children’s Courts.

Opportunities:

- Outreach and sensitisation on the Children’s Act, particularly to parents and families.
- Document violations. When rights violations occur, assist victims initiate and continue with criminal cases. Utilise documented violations for advocacy when appropriate.
- Research, document and analyse customary law issues pertinent to children and the Children’s Act. Make recommendations as to how to ensure customary law does not inhibit the realisation of children’s rights.

GENDER EQUALITY AND NON-DISCRIMINATION

There are laws and policies protecting gender equality and prohibiting harmful practices, including in domestic contexts.

The Domestic Violence Act¹⁰⁵ provides protection against physical, sexual, emotional, economic and other abuse and harassment by intimate partners. The Act does not specifically criminalise marital rape.

The Marriage Act establishes 18 years as the minimum age for marriage.¹⁰⁶

The Abolition of Marital Power Act¹⁰⁷ abolishes the common law rule in which a husband acquires marital power over the person and property of his wife,¹⁰⁸ guarantees women and men married in community of property equal powers in marriage, including to dispose of assets of the joint estate,¹⁰⁹ contract debts and to administer the joint estate. However, the Act does not apply to customary or religious marriages.¹¹⁰

Opportunities:

- Outreach and sensitisation on existing protective laws in the context of gender, including on gender equality and domestic violence. Continue to document violations.
- Encourage victims to report cases of gender discrimination and rights violations to relevant authorities (including instances in which rights protected by the Domestic Violence Act, the Marriage Act, and the Abolition of Marital Power Act are violated or infringed upon). Assist with follow up as needed.
- When appropriate, utilise evidence for advocacy.
- When rights violations occur, accompany victims to the police station, ensure that a statement is taken and assist the victim with continuance of the case where appropriate.
- Advocacy for language specifically prohibiting marital rape, in the Domestic Violence Act or other appropriate law.
- Research, document and analyse customary law issues pertinent to gender. Make recommendations as to how to ensure customary law does not interfere with the rights to non-discrimination and equality.

¹⁰² The Children’s Act, No. 8 of 2009, Section 7(a).

¹⁰³ Section 8.

¹⁰⁴ Section 15(1).

¹⁰⁵ Act No. 10 of 2008.

¹⁰⁶ The Marriage Act, No. 18 of 2001, Section 14.

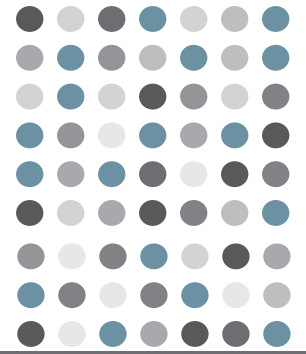
¹⁰⁷ Act No. 34 of 2004.

¹⁰⁸ Section 4. Section 5 provides, “the effect of the abolition of marital power is to remove the restrictions which the marital power places on the legal capacity of a wife and abolishes the common law position of the husband as head of the family.”

¹⁰⁹ Section 7.

¹¹⁰ Section 3





PRISONS AND INMATES

In 2012, NACA conducted a study on HIV in prisoners but it has not been released.

The Prisons Act and Prison Regulations of 1965

The Prisons Act provides that every prisoner is subject to provisions of the Act, that a medical officer shall be responsible for the health of all prisoners and cause all prisoners to be medically examined at such times as shall be prescribed, and that a medical officer may...take or cause to be taken or direct to be taken such action...as he considers necessary to safeguard or restore the health of the prisoner or to prevent the spread of disease.

Regulation 13 of the Prison Regulations provides that a medical officer shall inter alia, (a) examine all prisoners who complain of illness; (b) treat all sick prisoners.

Success in the Courts

On the basis of these protective provisions, in August 2015, the Court of Appeals held that the Government policy of refusing HIV treatment to non-citizen inmates was unlawful and ordered the Government to provide free testing, assessment and ARV treatment to all foreign inmates.

Opportunities:

Engage with NACA and other policy and decision makers to push for release of the 2012 study. If appropriate, publicise the refusal to make the study available including through the media.

To the extent possible, research the HIV situation in prisons including access to testing, treatment and counselling.

- Ensure that the Court decision on provision of HIV treatment for foreign inmates has been fully implemented and document any cases in which foreign inmates have been refused treatment or other HIV-related health services. In such cases, pursue the case with the Botswana Prison Service and the Ministry of Justice.
- Outreach and engagement with the prison service, decision and policy makers to ensure all inmates have access to comprehensive, high quality HIV-related services.
- Advocate for the provision of HIV prevention services, including condoms in prisons and PEP. Utilise the recent Court case and other existing legal protections to argue for comprehensive HIV and health services, which are essential to protect human rights and prevent the spread of HIV regardless of the criminal sodomy law.

DRUG LAWS AND PEOPLE WHO USE DRUG

- The Drugs and Related Substances prohibits the use, possession and sale of “habit-forming” drugs.¹¹⁶
- There is little information on the population or relevant health information of people who use drugs in Botswana. There is limited information concerning harm reduction programmes which do not seem to be widely available—if available whatsoever.

Recommendation:

A baseline study on people who use drugs should be conducted to inter alia, ensure there are targeted programmes to address the needs of people who use drugs, including harm reduction programmes.

¹¹¹ Act No. 28 of 1979.

¹¹² Section 65.

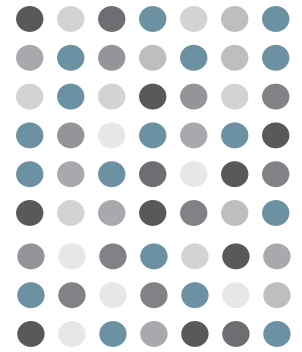
¹¹³ Section 56(2).

¹¹⁴ Section 57(1).

¹¹⁵ Attorney General and Others v. Tapela and Others, Botswana Court of Appeal, Civil Case No. CACGB-096-14 (26 August 2015).

¹¹⁶ Act No. 18 of 1992, Section 16.





There is anecdotal information on drug use amongst lesbian, gay, bisexual, transgender and intersex persons, but there is a need for more information, including linkages with HIV and whether and to what extent existing regulations are barriers to accessing HIV-related health services.¹¹⁷

Opportunity:

- Advocate for NACA or other appropriate institutions to conduct a baseline study on people who use drugs and HIV.
- Collect information about the situation on the ground concerning people who use drugs and HIV in Botswana.

INTELLECTUAL PROPERTY AND TRIPS FLEXIBILITIES

Background and Context

The World Trade Organisation Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) regulates patents at the international level. TRIPS provides minimum standards of patent protections but also includes ‘flexibilities’ that allow developing countries to access essential medicines at a lower cost.

In 2001, the WTO Ministerial made the Declaration on the TRIPS Agreement and Public Health, or the ‘Doha Declaration’, which states that the TRIPS Agreement “does not and should not” prevent WTO Members from protecting public health.¹¹⁸

Botswana has taken steps to implement TRIPS flexibilities through domestic legislation, though there

remain barriers in the legal environment. In 2013, a national workshop was held on TRIPS and Access to Medicines. A technical working group was set up to review priority recommendations by using TRIPS flexibilities.

The Law

Through the Industrial Property Act¹¹⁹ and the Industrial Property Act Regulations of 2012, Botswana has domesticated TRIPS flexibilities including compulsory licensing, parallel importation, pre- and post-patent application challenges, patent examination and a list of exclusions from patentability.¹²⁰ However, the legal environment can be improved further, including by implementing recommendations identified during the 2013 meeting.¹²¹

Of particular concern is that intellectual property rights are excluded from the competition legislation, meaning that pharmaceutical companies and others cannot be legally challenged on the grounds of anti-competitive practices.

Recommendation:

Botswana’s competition legislation should be revised to include intellectual property, which would allow for legal challenges on the basis of anti-competitive practices.

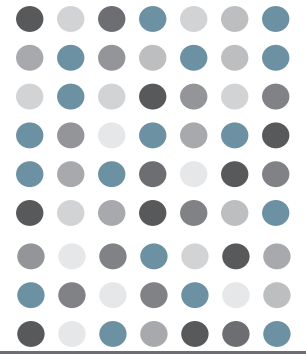
The Working Group made a number of recommendations with respect to creating an enabling legal environment to facilitate access to essential medicines. Importantly, Botswana has legislated an

¹¹⁷ LEGABIBO interview, Gaborone, Botswana 21 June 2016.

¹¹⁸ At para. 4.

¹¹⁹ Act No. 8 of 2010.





unnecessary TRIPS-plus measure by criminalising patent infringements. At the 2013 meeting, with regard to this TRIPS-plus provision, the working group found:

This is a controversial provision that has the effect of stifling innovation and the provision of affordable medicines that can come with such processes as reverse engineering in the context of the creation and procurement of generic medicines. The provision should be repealed.

Recommendation:

As recommended in the Action Brief, this provision should be repealed.

Opportunities:

- Engage with NACA, MOH, Members of Parliament, UNDP, SARPAM and other stakeholders on TRIPS flexibility in Botswana.
- Advocate for full domestic use of all TRIPS flexibilities to increase access to cheaper medicines and repeal of unnecessary TRIPS-plus provision.
- Follow up on recommendations from 2013 workshop and any actions taken concerning these recommendations.
- Facilitate a follow-up meeting for set date in the future to hold Government accountable for taking steps to implement the recommendations.
- Engage and/or follow-up with individual stakeholders including from NACA, MOH and members of Parliament on the need to fully domesticate TRIPS flexibilities and the need to remove/repeal the TRIPS-plus provision.

¹²⁰ ARASA, HIV, TB and Human Rights in Southern and East Africa Report 2016, at 78, available at <http://www.arasa.info/news/arasa-annual-report/>.

¹²¹ Action Brief, The Implementation of TRIPS Flexibilities in National IP Legislation for Strengthening Access to Medicines in Botswana, A UNDP-SARPAM-Botswana Government Workshop, Gaborone, 25-27 March 2013, available at <http://www.undp.org/>



CHART FROM 2013 WORKING GROUP ACTION BRIEF

TYPE OF FLEXIBILITY	EXAMPLE	IMPLEMENTATION GAPS AND CHALLENGES
<p>PREVENTATIVE: Policy options to ensure that patents do not hinder access to affordable medicines.</p> <p>ADVANTAGES: easier, faster, less politically sensitive compared to some remedial measures.</p>	<p>EXCLUSION FROM PATENTABILITY: Exclude new use of known substances, methods and processes (Articles 27.2 and 27.3)</p> <p>PATENTABILITY CRITERIA: Develop and apply strict patentability criteria for examination of pharmaceutical patents. Mitigate frivolous patents and “ever-greening” opportunities. (Articles 1 and 27.1).</p> <p>PATENT OPPOSITION: Allow pre-grant and post-grant patent opposition in fast, accessible and cost-efficient manner.</p> <p>WAIVER FOR LDCS3: LDCs should utilize the waiver to provide patent protection for pharmaceuticals until 1 January 2016 (and possibly longer, if extended).</p>	<p>The Act is not explicit enough to prevent the practice of evergreening. The Registrar of Patents would need to develop operational rules/guidelines that ensure an exhaustive examination of applications for extension of patent life spans to prevent evergreening.</p> <p>The Act also makes certain applications for patents escape the more rigorous examination by the Registrar of Patents through a provision that allows the executive to create such exclusions by way of ministerial discretion. This provision should be repealed as it creates non-scientific grounds for the granting of patents.</p> <p>The Act allows for pre- and post patent grant opposition but the Regulations omitted to make provision for the procedure to cater for this important process. The Regulations have to be amended to enable the use of this provision to ensure that patents application that do not deserve to be awarded are effectively monitored.</p>
<p>REMEDIAL: Preventative flexibilities cannot always be used to meet existing and emerging needs to secure access to affordable medicines. Therefore, series of remedial flexibilities are included in the TRIPS Agreement.</p>	<p>Compulsory Licenses and Government Use Orders (Article 31 (a)–(j))</p> <p>Compulsory Licenses for Export under the WTO 30 August, 2003 Decision.</p> <p>Parallel Importation (Article 6) Exceptions: Bolar4 (early working) exception, research and experimental use exception, individual use (Article 30)</p> <p>Use of National Competition Laws to prevent IPR abuse and provide remedies (Articles 8.2, 31(k) and 40)</p>	<p>The Act makes provision for these important public health situations where a patent can be exploited in the public interest without the consent of the patent holder, e.g. in the case of a public health emergency to make medicines available at efficient quantities and prices (see Table 2 example below). The Act also makes use of the parallel import process. The Competition Act (2009) unfortunately creates a blanket exclusion against its application to IPR issues. It has to be amended to ensure that anti-competitive uses of IPRs are effectively monitored, and restricted.</p>
<p>ENFORCEMENT: Related to obligations under Part III of the TRIPS Agreement, which sets minimum standards for IPR enforcement.</p>	<p>No border measures for suspected patent infringement (Article 51)</p> <p>No criminalization of patent infringement (Part III, Section 5)</p>	<p>The Act goes beyond the minimum requirements under the TRIPS agreement by criminalising patent infringements. This is a controversial provision that has the effect of stifling innovation and the provision of affordable medicines that can come with such processes as reverse engineering in the context of the creation and procurement of generic medicines. The provision should be repealed.</p>



FORMS OF ENGAGEMENT WITH LEGAL, POLICY, POLITICAL AND OTHER PROCESSES

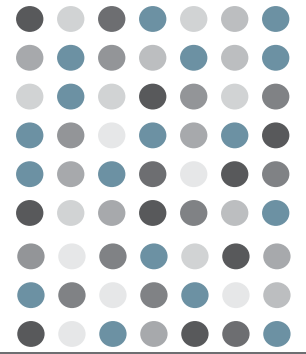
Below is a non-exhaustive list of forms of engagement, in general and for specific processes.

DOMESTIC

General

- Engage with and develop relationships with decision and policy makers and national human rights bodies (Office of the Ombudsman, Members of Parliament, Ministries) identified in this report.
- Share information and encourage the sharing of relevant dates, upcoming activities (law and policy review, other).
- Request a regular meeting space (town hall or other) where stakeholders (Government, CSOs, the community) can come together to discuss HIV, human rights and related issues.
- In meetings of this nature, outline tasks for each person/entity and concrete objectives. Hold everyone accountable for their tasks by reporting back on progress at the next meeting.
- Engage with the Members of Parliament and the Ntlo ya Dikgosi (House of Chiefs).
- Engage with NACA, MOH, Attorney General and other stakeholders on outstanding law and policy reform recommendations.
- Engage with and develop relationships with members of the judiciary and other legal experts including through outreach, sensitisation and information sharing (the Attorney General's Chambers, private and public practitioners, law societies, law schools, and other legal institutions).
- Engage with and develop relationships with police officers, health providers and others, including through outreach, sensitisation and sharing of information. Engage with traditional and religious leaders.
- Remain informed about the legal and policy environment and the situation on the ground.
- Regularly engage with stakeholders, through outreach, knowledge sharing, and other events and activities.
- Regularly engage with the public through outreach and sensitisation, including on human rights and HIV, legal and policy barriers, issues facing KPs and other pertinent issues.
- Research, document and disseminate information on the human rights situation on the ground.
- National and district-specific research to document the impact of laws and policies, including criminal laws and discrimination on the basis of HIV status, sexual orientation, gender identity, gender, age and other status.
- Utilise the evidence to advocate for law and policy changes and programming that addresses gaps.
- Produce pamphlets and other user-friendly materials to distribute for sensitisation and information sharing.
- Facilitate training programmes on HIV and human rights, including relevant laws and policies.
- Facilitate trainings on human rights and issues facing KPs including LGBTI persons, sex workers, as well as other vulnerable and marginalised groups.
- Implement systems to systematically document HIV-related human rights violations.
- Write and publish an annual violations report.
- Share documented violations, including through the media, reports and publications at the domestic, regional and international levels.
- Utilise the evidence to push for law and policy reform and programming to address gaps.





Law Reform, Review

- Engage and foster relationships with Members of Parliament, relevant Ministries, the Executive, the Attorney General’s Chambers, the Office of the Ombudsman and other individuals involved in law and policy reform.
- Submissions to decision and policy-making bodies on barriers in access to HIV-related health services. These can be specific or general, including issues facing particular groups.
- Request meetings to follow up after submissions. Submissions to the Attorney General’s Chambers on how existing laws and policies impact people living with HIV, key populations and other vulnerable groups.
- Request meetings to follow up after submissions. When a pertinent law is under review, collaborate with partner organisations and stakeholders to provide written input on the draft to Members of Parliament, relevant Ministries, the Executive, the Attorney General’s Chambers and other individuals involved in law and policy reform.
- Ensure that you are aware of any public consultations for law review/reform and that there is good attendance and meaningful participation.
- Hold Government accountable for ensuring law reform is consultative in a meaningful way.
- Make formal law reform and review proposals to Members of Parliament, relevant Ministries, the Executive, the Attorney General’s Chambers, including on legal and policy issues identified in this report. When appropriate, publicise the proposal including through the media.
- Request meetings to follow up and discuss the proposal(s).

Elections

- Engage with candidates on legal and policy barriers and gaps in programming for HIV-related services.
- Support and rally additional support for candidates who are responsive and committed to addressing these issues.
- Request/push for manifestos from individuals, parties or others in which candidates outline their priority issues, including on HIV and human rights. Hold candidates accountable to election promises if elected.
- If elected, candidates should be held accountable to promises and pledges to address key population and other HIV issues

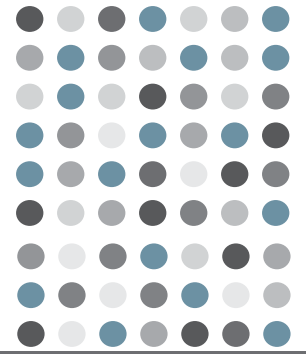
Constitutional Reform

- Engage with and foster relationships with Members of Parliament, relevant Ministries, the Executive, the Attorney General’s Chambers and other individuals involved in constitutional reform.
- Research and submit proposals on relevant constitutional reform, for example proposals to include social, economic and cultural rights in the constitution.
- If relevant constitutional reform is proposed, participate in the process including through public consultations and other engagement.

Litigation

- Systematically document individual violations experienced on the basis of HIV or health status or other grounds of discrimination (for example against men who have sex with men or sex workers) for example, in the context of health, labour and/or education.
- Keep a list of specific laws and policies that result in discrimination, or are otherwise barriers to access.





- This should include specific cases in which individuals have experienced discrimination or access to HIV-related services or have otherwise been impacted.
- For example, if an individual is denied health services because he is thought to be a man who has sex with men, this would be a violation.
- If an individual experiences a breach in confidentiality (for example disclosure of HIV status) this is a violation.
- Identify cases that may be appropriate for litigation.
- These may include cases in which the Government has been notified of and given an opportunity to address discrimination or other issues and has failed to act, adequately or whatsoever.
- If there is a case in which an individual or group identifies as a potential court case which might meet the standing requirements outlined above, a Z lawyer—ideally an individual with experience with human rights and/or HIV rights litigation—should be consulted to discuss the possibility of filing and otherwise pursuing a civil case.

REGIONAL AND INTERNATIONAL

United Nations Treaty Monitoring Bodies

- Research and draft shadow letters to the United Nations Treaty Monitoring bodies when Botswana is under review (Human Rights Committee, CEDAW Committee, CRC Committee, Committee on the Elimination of Racial Discrimination, Committee against Torture, Committee on Economic, Social, Cultural Rights). Conduct advocacy with the relevant Commissioners, Committee or working group.
- Shadow letters should provide information to the UN Committee about the situation on the ground, information on the extent to which Botswana has implemented domestic, regional and international

laws and information on the extent to which Botswana has met their obligations to address HIV/AIDS.

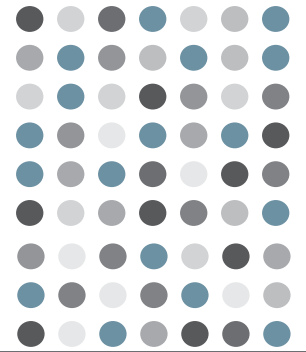
- Letters can also include suggested questions for the Committee to ask the Botswana delegation and suggested recommendations for the Committee to make to the delegation.
- In cases in which domestic remedies have been exhausted (through the Courts or otherwise) consider filing an individual complaint to international treaty monitoring bodies (where Botswana has ratified the relevant treaty). Botswana has only ratified one treaty that allows for individual complaints to go before the CEDAW Committee which oversees implementation of the Convention on the Elimination of All Forms of Discrimination Against Women.

AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS

- Research and draft shadow letters to the African Commission on Human and Peoples' Rights when Botswana is under review. Letters can include information on the situation on the ground, suggested questions for Commissioners to ask the delegation, and proposed recommendations.
- Rule 74 (2) of the Rules of Procedure of the Commission provides, "Institutions, organizations or any interested party wishing to contribute to the examination of a State Report and the human rights situation in the country concerned, shall send their contributions, including shadow reports, to the Secretary of the Commission at least 60 days prior to the examination of the Report."¹²²

¹²² African Commission on Human and Peoples' Rights, available at <http://www.achpr.org/>.





SOUTHERN AFRICAN DEVELOPMENT COMMUNITY (SADC)

The SADC Parliamentary Forum ¹²³ has bi-annual meetings (March/April and November). Some functions of the Plenary Assembly:

- Policy making and deliberative body
- Approve annual budget and audited accounts
- Make recommendations to SADC authorities on any matter
- Advise SADC Summit on matters of overall policy
- Scrutinise and make recommendations on SADC budget and Annual Reports
- Consider and make recommendations on any treaties and draft treaties referred to it by SADC
- Promote objectives and programmes of SADC
- Study, be briefed and make recommendations on all SADC Sectoral Reports
- Observer representation in SADC Summit Meetings
- Consulted by any SADC institution on any major activity
- Exercise power to send for person(s), papers and records of any SADC official or SADC institution

Debate issues

In its strategic plan for 2011-2015 ¹²⁴ (the updated plan is not yet available), the SADC Parliamentary Forum prioritises the following interventions in the context of HIV:

Intervention Areas

1. Facilitation of Legislation review on HIV/AIDS and key public health issues;
2. Capacity development on HIV/AIDS and key Public

health interventions;

3. Oversight on key HIV/AIDS interventions and health systems strengthening;
4. M&E of service delivery on key HIV/AIDS programmes and Public health issues;
5. Strengthening of the institutional capacity of Parliament in mainstreaming HIV/AIDS;
6. Strengthening Constituency interventions as part of representative democracy and political leadership on HIV/AIDS for MARPS (Most at Risk Populations) among others;
7. Demonstrate leadership in holding Government to account for Malaria, tuberculosis and other disease outbreaks;
8. Repackaging of relevant information in the form of tool kits, policy briefs among others; and
9. Facilitation of key Prevention, Treatment care and support interventions, towards zero new HIV infections, zero discrimination, and gender sensitive interventions.

Strategic Outcome

Greater Parliamentary awareness and political leadership on HIV/ AIDS management as well as on other public health related issues.

Opportunity:

Engage with SADC PF including through submissions and dialogue to update about key concerns and push for priority interventions. SADC PF priorities in the context of HIV include review of relevant legislation and health system strengthening. As such, highlighting priority areas of law and policy reform in this forum may be strategic.

¹²³ SADC Parliamentary Forum, available at http://www.sadcpf.org/index.php?option=com_content&view=article&id=74&Itemid=119.

¹²⁴ Available at http://www.sadcpf.org/index.php?option=com_content&view=article&id=83&Itemid=121, at 15-16.



ADVOCACY OPPORTUNITIES TIMELINE

BOTSWANA

2016

MID-TERM UNIVERSAL PERIODIC REVIEW (UPR) REPORTING

JANUARY

Opportunity:

Submit a mid-term shadow report.

WORLD POPULATION DAY

11 JULY

Opportunity:

- Advocate for relevant issues concerning HIV and human rights including in the context of law, policy and programming.

UPR NATIONAL CONSULTATION

JULY 2016-MARCH 2017

Opportunity:

- Participate in the national consultations by attending meetings and making submissions.

AFRICAN COMMISSION 59TH ORDINARY SESSION

21 OCTOBER - 4 NOVEMBER

Information on which countries under review will be available several months prior.

Opportunity:

If Botswana is under review (now or in the future), consider writing a shadow report on barriers to HIV-related services and HIV-related human rights concerns and issues.

SOUTHERN AFRICAN DEVELOPMENT COMMUNITY PARLIAMENTARY FORUM (SADC PF) PLENARY SESSION

NOVEMBER

Opportunity:

Engage with SADC PF including through submissions and dialogue to provide updates about key concerns and push for priority interventions. SADC PF priorities in the context of HIV include review of relevant legislation and health system strengthening. Highlighting priority law and policy reform areas in this forum may be strategic.

SUCCESS IN THE COURTS ON ACCESS TO HIV HEALTH SERVICES FOR INMATES

In August 2015, the Court of Appeals held that the government policy of refusing HIV treatment to non-citizen prisoners was unlawful and ordered the government to provide free testing, assessment and ARV treatment to all foreign prisoners.¹ Given the recent Court decision, 2016 is an opportunity to engage with the government on HIV-related issues for inmates.

Opportunities:

- Engage with National AIDS Coordinating Agency (NACA) and other policy and decision makers to push for release of the 2012 study (which has not yet been released). If appropriate, publicise the refusal to make the study available including through the media.
- To the extent possible, research the HIV situation in prisons including access to testing, treatment and counselling.
- Ensure that the Court decision on provision of HIV treatment for foreign inmates has been fully implemented and document any cases in which foreign inmates have been refused HIV treatment or other HIV-related health services. In such cases, pursue the case with the Botswana Prison Service and the Ministry of Justice.
- Outreach and engagement with the prison service, decision and policy makers to ensure all prisoners have access to comprehensive, high quality HIV-related services.
- Advocate for the provision of preventative services, including condoms in prisons, as well as PEP. Utilise the recent Court case and legal obligations to argue for comprehensive HIV and health services, which are essential to protect human rights and prevent the spread of HIV regardless of the criminal sodomy law.

¹ Attorney General and Others v. Tapela and Others, Botswana Court of Appeal, Civil Case No. CACGB-096-14 (26 August 2015).

2016

AFRICAN UNION ELECTIONS SCHEDULED FOR JULY BUT POSTPONED

6TH BOTSWANA INTERNATIONAL HIV CLINICIANS CONFERENCE 24-27 AUGUST

Since the conference will be held in Gaborone, there are opportunities to engage during and after the conference. The Botswana HIV Clinicians Society also sits on the two national guideline committees (Botswana National HIV Guidelines Committee and Botswana National TB Guidelines Committee)

Opportunity:

Engage with clinicians and participants of the conference during and after the conference. Engage with government and other decision-makers. Engage with the Botswana HIV Clinicians Society on National HIV Guidelines.

JUDICIARY TO BE DETERMINED (TBD)

Opportunity:

Strategic litigation if appropriate.

WORLD AIDS DAY 1 DECEMBER

Opportunity:

- Advocacy for priority issues concerning HIV, AIDS and human rights including in the context of law, policy and programming.
- Disseminate information to the public, stakeholders and decision makers.

HUMAN RIGHTS DAY 10TH DECEMBER

Opportunity:

- Outreach, sensitisation and advocacy on human rights and HIV issues relevant to marginalised groups, including removing legal barriers to HIV-related services for Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) persons and sex workers.

NEW NATIONAL STRATEGIC FRAMEWORK FOR HIV AND AIDS (NSF) TO BE DRAFTED

ONGOING

The current NSF was extended to 2017. It will be up for review. Civil Society Organisations (CSOs) working on KP issues have recently established a coalition aiming to draw focus on KP issues. The coalition has experience implementing the NSF.

Opportunity:

- The Coalition and other CSOs should prioritise contributing to NSF and evaluating the extent to which commitments made in the previous NSF were accomplished.
- Hold government accountable for commitments made in the previous NSF including by outlining successes and shortcomings in a letter or memo. Utilise this information to push for language in the next NSF that will adequately commit the government to meeting programming gaps, address legal and policy barriers, and any other concerns.

SESSIONS OF PARLIAMENT

DATES TBD

Opportunities:

- Advocacy with Members of Parliament (MPs) and Committees on strategic, priority issues including legal and policy barriers identified in the report and additional barriers.

TRIPS Flexibilities

Ongoing, from 2013 Working Group Meeting
Opportunities: Engage with NACA, MOH, members of Parliament, UNDP, SARPAM and other stakeholders on TRIPS flexibly in Botswana.

- Advocate for full domestic use of all TRIPS flexibilities to increase access to cheaper medicines and repeal of unnecessary TRIPS-plus provision.
- Follow up on recommendations from 2013 workshop and any actions taken concerning these recommendations.
- Facilitate a follow-up meeting for set date in the future to hold government accountable for taking steps to implement the recommendations.
- Engage and/or follow-up with individual stakeholders including from NACA, and members of Parliament on the need to fully domesticate TRIPS flexibilities and the need to remove the TRIPS-plus provision.

2016

PROPOSED CONSTITUTIONAL REFORM

ONGOING

Inclusion of economic, social and cultural rights into the constitution, including the right to health.

Opportunity:

Research and advocacy for constitutional reform to include economic, social and cultural rights, including the right to health.

PUBLIC HEALTH ACT

ONGOING

Recommendation:

The Public Health Act should be revised or repealed and replaced with legislation that affirms and protects the rights of people living with HIV and consistent with the recommendations of the Global Commission on HIV and the Law that do not criminalise HIV or people living with HIV, protect against mandatory HIV testing and disclosure, and otherwise protects the rights of people living with HIV.

Opportunities:

- Continue to document the ways in which the HIV-related provisions identified above impact access to HIV-related health services and whether (and if so, to what extent) the provisions increase stigma against people living with HIV.
- Document any rights violations that have occurred on the basis of the Public Health Act including:
 - Instances in which individuals have been required to undergo mandatory HIV testing, services or disclosure of HIV status.
 - Instances of prosecution against people living with HIV, on the basis of non-disclosure or other instances of arrest or prosecution.
 - Any anecdotal evidence confirming whether and to what extent the provisions of the Public Health Act have resulted in further stigma against people living with HIV.

- Where any violations are documented that interfere with constitutional or other rights, utilise existing mechanisms to file a complaint. For example, if a violation occurs in a hospital or place of employment, utilise existing complaint procedures for the hospital or business.
- If the existing mechanism(s) fail to adequately address the rights violations or provide a legal remedy, consider additional legal action, such as in a labour/industrial or other Court.
- Engage with decision and policy makers and communities on the issues of HIV criminalisation and mandatory testing and disclosure, including the human rights implications and the ways in which such laws impede the HIV response by driving people underground.
- Create pamphlets or other materials that explain these issues and conduct outreach activities to sensitise the public, health providers, law enforcement and other relevant stakeholders.
- Make submissions to Parliament, MOH, NACA and other policy and law-making bodies explaining concerns with these issues, the impact on the ground, and the ways in which these laws are inconsistent with Botswana's commitments to addressing HIV/AIDS, human rights obligations and best practices.
- Advocate and lobby for revision or repeal of the Public Health Act and enactment of a law that protects the rights of people living with HIV including through submissions, meetings, media and other appropriate activities.
- Engage with participants during the Legal Environment Assessment process, including relevant government ministries, the executive, the office of the Attorney General and Members of Parliament.

2016

UTILISE EXISTING PROTECTIVE LABOUR LAWS AND POLICIES ONGOING

Since the Employment Act and the Code of Good Practice on HIV/AIDS and Employment prohibit labour discrimination on the basis of health status and sexual orientation, CSOs should continue to utilise these protections.

Opportunities

- Where wrongful dismissals take place on the basis of HIV status, sexual orientation, etc, CSOs should continue to document cases
- All existing mechanisms should be pursued to seek redress including internal mechanisms at a place of employment. If internal mechanisms are inadequate or ineffective, CSOs should consider litigation.

UTILISE EXISTING GENDER EQUALITY LAWS ONGOING

Opportunities:

- Outreach and sensitisation on existing protective laws in the context of gender, including on gender equality and domestic violence.
- Continue to document violations.
- Encourage victims to report cases of gender discrimination and rights violations to relevant authorities (including instances in which rights protected by the Domestic Violence Act, the Marriage Act, and the Abolition of Marital Power Act are violated or infringed upon). Assist with follow up as needed. When appropriate, utilise evidence for advocacy.
- When rights violations occur, accompany victims to the police station, ensure that a statement is taken and assist the victim with continuance of the case where appropriate.
- Advocacy for language specifically prohibiting marital rape, in the Domestic Violence Act or other appropriate law.
- Research, document and analyse customary law issues pertinent to gender. Make recommendations as to how to ensure customary law does not interfere with the rights to non-discrimination and equality.

2017

LAWS CRIMINALISING HIV & KEY POPULATIONS ONGOING

The long term goal should be for the Penal Code to be reviewed and aligned with Botswana's domestic, regional and international obligations including commitments to address HIV and AIDS, for key populations and vulnerable groups, with applicable constitutional rights, as well as regional and international law. Botswana should implement recommendations of the Global Commission on HIV and the Law including to decriminalise HIV, LGBTI persons and sex work.

Opportunities:

- Continue to document rights violations against people living with HIV, LGBTI persons and sex workers.
 - Continue with outreach and sensitisation in communities, and with government and other stakeholders.

2017

UPR NGO REPORT DRAFTING

MARCH - 22 JUNE

Opportunity:

Draft a shadow report that highlights the situation on the ground concerning access to HIV-related services in general and for key and criminalised populations. The report should highlight barriers to access, including legal and policy barriers and recommendations to address gaps.

UPR NGO SUBMISSION

22 JUNE

WORLD POPULATION DAY

11 JULY

Opportunity:

- Advocate for relevant issues concerning HIV and human rights including in the context of law, policy and programming.

UPR NGO LOBBYING

22 JUNE - JANUARY 2018

Opportunity:

Lobby members of the UN working group for the UPR review.

WORLD AIDS DAY

1 DECEMBER

Opportunity:

- Advocacy for priority issues concerning HIV, AIDS and human rights including in the context of law, policy and programming.
- Disseminate information to the public, stakeholders and decision makers

SADC PF PLENARY SESSION²

MARCH/APRIL

PWUD

ONGOING

A baseline study on People who Use Drugs (PWUD) should be conducted to ensure there are targeted programmes to address the needs of PWUD, including harm reduction programmes.

Opportunity:

- Advocate for NACA or another appropriate institution to conduct a baseline study on PWUD and HIV.
- Collect information about the situation on the ground concerning PWUD and HIV in Botswana.

SADC PF PLENARY SESSION

NOVEMBER

SESSIONS OF PARLIAMENT

TBD

Opportunities:

- Advocacy with MPs and Committees on strategic, priority issues including legal, policy and programme barriers identified in the report and other barriers.

HUMAN RIGHTS DAY

10 DECEMBER

Opportunity:

- Outreach, sensitisation and advocacy on human rights and HIV issues relevant to marginalised groups, including removing legal barriers to HIV-related services for LGBTI and sex workers.
- Outreach, sensitisation and advocacy on other pertinent HIV-related issues.

² See supra, SADC PF Plenary Session.

2017

PROPOSED CONSTITUTIONAL REFORM ONGOING

Inclusion of economic, social and cultural rights into the constitution, including the right to health.

Opportunity:

Research and advocacy for constitutional reform to include economic, social and cultural rights, including the right to health.

PUBLIC HEALTH ACT ONGOING

Recommendation:

The Public Health Act should be revised or repealed and replaced with legislation that affirms and protects the rights of people living with HIV and consistent with the recommendations of the Global Commission on HIV and the Law that do not criminalise HIV or people living with HIV, protect against mandatory HIV testing and disclosure, and otherwise protects the rights of people living with HIV.

Opportunities:

- Continue to document the ways in which the HIV-related provisions identified above impact access to HIV-related health services and whether (and if so, to what extent) the provisions increase stigma against people living with HIV.
- Document any rights violations that have occurred on the basis of the Public Health Act including:
 - Instances in which individuals have been required to undergo mandatory HIV testing, services or disclosure of HIV status.
- Instances of prosecution against people living with HIV, on the basis of non-disclosure or other instances of arrest or prosecution.
 - Any anecdotal evidence confirming whether and to what extent the provisions of the Public Health Act have resulted in further stigma against people living with HIV.
 - Where any violations are documented that interfere with constitutional or other rights, utilise existing mechanisms to file a complaint. For example, if a violation occurs in a hospital or place of employment, utilise existing complaint procedures for the hospital or business.
- If the existing mechanism(s) fail to adequately address the rights violations or provide a legal remedy, consider additional legal action, such as in a labour/industrial or other Court.
- Engage with decision and policy makers and communities on the issues of HIV criminalisation and mandatory testing

and disclosure, including the human rights implications and the ways in which such laws impede the HIV response by driving people underground.

- Create pamphlets or other materials that explain these issues and conduct outreach activities to sensitise the public, health providers, law enforcement and other relevant stakeholders.
- Make submissions to Parliament, MOH, NACA and other policy and law-making bodies explaining concerns with these issues, the impact on the ground, and the ways in which these laws are inconsistent with Botswana's commitments to addressing HIV/AIDS, human rights obligations and best practices.
- Advocate and lobby for revision or repeal of the Public Health Act and enactment of a law that protects the rights of people living with HIV including through submissions, meetings, media and other appropriate activities.
- Engage with participants during the Legal Environment Assessment process, including relevant government ministries, the executive, the office of the Attorney General and Members of Parliament.

2017

UTILISE EXISTING PROTECTIVE LABOUR LAWS AND POLICIES ONGOING

Since the Employment Act and the Code of Good Practice on HIV/AIDS and Employment prohibit labour discrimination on the basis of health status and sexual orientation, CSOs should continue to utilise these protections.

Opportunities

- Where wrongful dismissals take place on the basis of HIV status, sexual orientation, etc, CSOs should continue to document cases
- All existing mechanisms should be pursued to seek redress including internal mechanisms at a place of employment. If internal mechanisms are inadequate or ineffective, CSOs should consider litigation.

LAWS CRIMINALISING HIV AND KEY POPULATIONS ONGOING

The long term goal should be for the Penal Code to be reviewed and aligned with Botswana's domestic, regional and international obligations including commitments to address HIV and AIDS, for key populations and vulnerable groups, with applicable constitutional rights, as well as regional and international law. Botswana should implement recommendations of the Global Commission on HIV and the Law including to decriminalise HIV, LGBTI persons and sex work.

Opportunities:

- Continue to document rights violations against people living with HIV, LGBTI persons and sex workers.
- Continue with outreach and sensitisation in communities, and with government and other stakeholders.

UTILISE EXISTING GENDER EQUALITY LAWS ONGOING

Opportunities:

- Outreach and sensitisation on existing protective laws in the context of gender, including on gender equality and domestic violence.
- Continue to document violations.
- Encourage victims to report cases of gender discrimination and rights violations to relevant authorities (including instances in which rights protected by the Domestic Violence Act, the Marriage Act, and the Abolition of Marital Power Act are violated or infringed upon). Assist with follow up as needed. When appropriate, utilise evidence for advocacy.
- When rights violations occur, accompany victims to the police station, ensure that a statement is taken and assist the victim with continuance of the case where appropriate.
- Advocacy for language specifically prohibiting marital rape, in the Domestic Violence Act or other appropriate law.
- Research, document and analyse customary law issues pertinent to gender. Make recommendations as to how to ensure customary law does not interfere with the rights to non-discrimination and equality.

UPR NGO REPORT DRAFTING MARCH - 22 JUNE

Opportunity:

Draft a shadow report that highlights the situation on the ground concerning access to HIV-related services in general and for key and criminalised populations. The report should highlight barriers to access, including legal and policy barriers and recommendations to address gaps.

SADC PF PLENARY SESSION MARCH / APRIL

2017

PEOPLE WHO USE DRUGS (PWUD) BASELINE STUDY

ONGOING

A baseline study on PWUD should be conducted to ensure there are targeted programmes to address the needs of PWUD, including harm reduction programmes.

Opportunity:

- Advocate for NACA or another appropriate institution to conduct a baseline study on PWUD and HIV.
- Collect information about the situation on the ground concerning PWUD and HIV in Botswana.

UPR NGO LOBBYING

22 JUNE - JANUARY 2018

Opportunity:

Lobby members of the UN working group for the UPR review.

SADC PF PLENARY SESSION

NOVEMBER

SESSIONS OF PARLIAMENT

TBD

Opportunities:

- Advocacy with MPs and Committees on strategic, priority issues including legal, policy and programme barriers identified in the report and other barriers.

UPR NGO SUBMISSION

22 JUNE

WORLD POPULATION DAY

11 JULY

Opportunity:

- Advocate for relevant issues concerning HIV and human rights including in the context of law, policy and programming.

WORLD AIDS DAY

1 DECEMBER

Opportunity:

- Advocacy for priority issues concerning HIV, AIDS and human rights including in the context of law, policy and programming.
- Disseminate information to the public, stakeholders and decision makers

HUMAN RIGHTS DAY

10 DECEMBER

Opportunity:

- Outreach, sensitisation and advocacy on human rights and HIV issues relevant to marginalised groups, including removing legal barriers to HIV-related services for LGBTI and sex workers.
- Outreach, sensitisation and advocacy on other pertinent HIV-related issues.

2018

NEXT UPR REVIEW
JANUARY

SADC PF PLENARY SESSION
MARCH / APRIL

WORLD POPULATION DAY
11 JULY

Opportunity:

- Advocate for relevant issues concerning HIV and human rights including in the context of law, policy and programming.

SADC PF PLENARY SESSION
NOVEMBER

SESSIONS OF PARLIAMENT
TBD

Opportunities:

- Advocacy with MPs and Committees on strategic, priority issues including legal, policy and programme barriers identified in the report and additional barriers and challenges.

THE 4TH PAN-AFRICAN INTERNATIONAL LESBIAN, GAY, BISEXUAL, TRANS AND INTERSEX ASSOCIATION (ILGA) REGIONAL CONFERENCE WILL BE HELD IN GABORONE, BOTSWANA³
EXACT DATE TBD

Opportunities:

- Continue to engage with government and the public on LGBTI issues prior to the conference
- Utilise the conference as an opportunity to raise awareness of LGBTI issues and for advocacy.

WORLD AIDS DAY
1 DECEMBER

Opportunity:

- Advocacy for priority issues concerning HIV, AIDS and human rights including in the context of law, policy and programming.
- Disseminate information to the public, stakeholders and decision makers closer to their homes.

HUMAN RIGHTS DAY
10 DECEMBER

Opportunity:

- Outreach, sensitisation and advocacy on human rights and HIV issues relevant to marginalised groups, including removing legal barriers to HIV-related services for LGBTI and sex workers.
- Outreach, sensitisation and advocacy on other pertinent HIV-related issues.

³ Pan Africa ILGA, available at <http://panafricailga.org/pai-extends-their-thanks-to-conference-participants/>.

2019

SADC PF PLENARY SESSION MARCH / APRIL

NEXT NATIONAL ELECTIONS OCTOBER

Opportunities:

- Engage with candidates on legal and policy barriers and gaps in programming for HIV-related services.
- Support and rally additional support for candidates who are responsive and committed to addressing these issues.
 - Request/push for manifestos from individuals, parties or others in which candidates outline their priority issues, including on HIV and human rights. Hold candidates accountable to election promises if elected.
 - If elected, candidates should be held accountable to promises and pledges to address Key Population and other HIV issues.

SESSIONS OF PARLIAMENT TBD

Opportunities:

- Advocacy with MPs and Committees on strategic, priority issues including legal, policy and programme barriers identified in the report and additional barriers and challenges.

WORLD POPULATION DAY 11 JULY

Opportunity:

- Advocate for relevant issues concerning HIV and human rights including in the context of law, policy and programming.

SADC PF PLENARY SESSION NOVEMBER

WORLD AIDS DAY 1 DECEMBER

Opportunity:

- Advocacy for priority issues concerning HIV, AIDS and human rights including in the context of law, policy and programming.
- Disseminate information to the public, stakeholders and decision makers

HUMAN RIGHTS DAY 10 DECEMBER

Opportunity:

- Outreach, sensitisation and advocacy on human rights and HIV issues relevant to marginalised groups, including removing legal barriers to HIV-related services for LGBTI and sex workers.
- Outreach, sensitisation and advocacy on other pertinent HIV-related issues.