

# Immigration and Refugee Board of Canada

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## Responses to Information Requests

Responses to Information Requests (RIR) respond to focused Requests for Information that are submitted to the Research Directorate in the course of the refugee protection determination process. The database contains a seven-year archive of English and French RIRs. Earlier RIRs may be found on the UNHCR's [Refworld](#) website. Please note that some RIRs have attachments which are not electronically accessible. To obtain a PDF copy of an RIR attachment, please email the [Knowledge and Information Management Unit](#).

9 April 2014

### **BWA104810.E**

Botswana: treatment of sexual minorities by society and the government; legal recourse and protection available to sexual minorities who have been subjected to ill-treatment (2006-March 2014)  
Research Directorate, Immigration and Refugee Board of Canada, Ottawa

#### **1. Legislation and Implementation**

Sources indicate that same-sex sexual relations are illegal in Botswana for both male and female same-sex couples (ILGA May 2013, 42; CHRI [2013], para. 10; BOCONGO Oct. 2009, 14). The prescribed punishment is a prison sentence of up to seven years (Freedom House 2013; Identity Kenya 28 Jan. 2013; Pink News 30 Oct. 2013). The legislation pertaining to same-sex sexual activity is incorporated in the 1998 amended *Penal Code* as follows:

Section 164. Unnatural offences

Any person who;

- a. has carnal knowledge of any person against the order of nature;
- b. has carnal knowledge of any animal; or
- c. permits any other person to have carnal knowledge of him or her against the order of nature, is guilty of an offence and is liable to imprisonment for a term not exceeding seven years.

Section 165. Attempts to commit unnatural offences

Any person who attempts to commit any of the offences specified in section 164 is guilty of an offence and is liable to imprisonment for a term not exceeding five years.

Section 167. Indecent practices between persons

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. (ILGA May 2013, 42)

In correspondence with the Research Directorate, a legal officer with the Botswana Network on Ethics, Law and HIV/AIDS (BONELA), a national network that promotes human rights for people affected by HIV/AIDS, said that the 2003 case *Kanane v. the State* has set the precedent on LGBTI cases, and that until the law changes or a new case sets a new precedent, homosexual activity would be viewed as unlawful (BONELA 26 Mar. 2014). The appellant in the case had been charged under sections 164 and 167 of the *Penal Code* for same-sex activity between consenting male adults in 1995 (Botswana 2003). The appellant pleaded not guilty and argued that the law discriminated against males based on their gender and offended rights

protected in the Constitution, such as rights to freedom of conscience, expression, privacy, assembly and association (ibid.). The judgement, which came from the Court of Appeal in Lobatse, found that "[g]ay men and women did not represent a group or class which at this stage had been shown to require protection under the Constitution" and also stated that "[t]here was no evidence that the approach and attitude of society in Botswana to the question of homosexuality and to homosexual practices by gay men and women required a decriminalization of those practices, even to the extent of consensual acts by adult males in private" (ibid.).

According to the BONELA legal officer, there have not been any "major" cases recently in which individuals were prosecuted for same-sex activity (BONELA 26 Mar. 2014). The same source indicated that there were two cases of same-sex activity in which individuals sought assistance from BONELA (ibid.). In one case, a white male in a wheelchair was being charged with "unlawful carnal knowledge with another male" (ibid.). The legal officer said that there was insufficient evidence and the police dismissed the case (ibid.). The other case involved a male who was being charged with rape of another male and was allegedly subject to extortion by the "victim" (ibid.). That case was ongoing as of March 2014 (ibid.). Further information about these cases could not be found among the sources consulted by the Research Directorate within the time constraints of this Response.

According to a 2009 shadow report by the Botswana Council of Non-Governmental Organisations (BOCONGO) about the implementation of the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), laws that criminalize same-sex sexual activity, even if not enforced, "strengthen and reinforce social stigma and homophobia against sexual and gender non-normative behaviour" (BOCONGO Oct. 2009, 14).

According to the report of the UN Human Rights Council's Working Group on the Universal Periodic Review, Botswana's state delegation stated that,

as a predominantly Christian nation, Botswana had not yet reached a stage where it could accept same-sex activities. It would be necessary to engage in educational campaigns on this issue so that when the laws were changed, the people would be carried along. (UN 22 Mar. 2013, para. 91)

Sources indicate that the *Employment Act* was amended in 2010 to forbid employment dismissal based on sexual orientation (Freedom House 2013; ILGA 6 June 2013; LEGABIBO n.d.b).

## 2. Treatment by Society and Government

Sources report that LGBT people are exposed to homophobia in Botswana (*Botswana Gazette* 28 Nov. 2012; Global Gayz 26 Mar. 2011). According to the Lesbians, Gays and Bisexuals of Botswana (LEGABIBO), an organization with the objective of promoting a non-discriminatory legal framework for the LGBT community, homosexuality is viewed by society as "abominable and sinful" (n.d.a). The BONELA legal officer stated that the religious community is not accepting of sexual minorities (BONELA 26 Mar. 2014).

According to the 2009 report by BOCONGO, politicians and religious organisations view homosexuality as "the antithesis of Botswana culture and a reflection of Western influence" (BOCONGO Oct. 2009, 14). The same source notes that many LGBT people keep their sexual orientation hidden for fear of being subjected to discrimination and negative treatment by the religious and political communities, as well as due to the law criminalizing same-sex sexual activity (ibid.). According to Pink News, in 2011, the Deputy Speaker of the National Assembly, when asked whether prisoners should have access to condoms, suggested that gay people should be killed (Pink News 30 Oct. 2013). The same politician also reportedly compared the behaviour of homosexuals to "western dogs" and said he "will never tolerate them" (ILGA n.d.b). In 2013, a pastor of the Evangelical Fellowship of Botswana wrote a newspaper article claiming that homosexuals have "warped and depraved mind[s]," likening homosexuality to bestiality, and comparing the advocacy of gay rights to rights of "rapists, robbers, murderers and alcoholics" as well as "other behavioural deviants and criminals" (*Mmegi* 23 Aug. 2013).

According to a 2011 article by Global Gayz, a travel and culture website about LGBT life in countries around the world, most LGBT people in Botswana are not open about their sexual orientation (26 Mar. 2011). Similarly, the BONELA legal officer said that LGBT people are afraid to reveal their sexual orientation to their family, community and to authorities (26 Mar. 2014).

The author of the Global Gayz article, who met with several LGBT activists, including representatives of BONELA and LEGABIBO, said that while the gay community in Gaborone is "basically 'underground'," that there is "an active not-out/not-in network of friendship circles and a handful of clubs/restaurants/bars that are gay friendly" (Global Gayz 26 Mar. 2011). This information could not be corroborated among the sources consulted by the Research Directorate within the time constraints of this Response.

In an interview with the International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA), a representative of LEGABIBO indicated that the LGBT community in Botswana has held public marches and discussions without attacks (ILGA 11 Feb. 2013).

According to LEGABIBO, LGBT people in Botswana are often subjected to "aggression and abuse" by the community and sometimes by their families (LEGABIBO n.d.a). The *Botswana Gazette* reports a case handled by LEGABIBO in which a lesbian received death threats from her partner's father (28 Nov. 2012). The BONELA legal officer said that their organization has not received any formal reports of violence against LGBT people, but they are aware of "informal or indirect reports of violence of LGBT people amongst themselves" (BONELA 26 Mar. 2014). The US Department of State's *Country Reports on Human Rights Practices for 2013* states that LGBT organizations claimed there were incidents of violence and harassment against sexual minorities in 2013, but also that there were no cases officially reported during that time (US 27 Feb. 2014, 22).

According to a 2012 article posted on the ILGA website, domestic violence in the LGBTI community in Botswana is a "serious issue," but most cases are unreported due to a fear of revealing one's sexual orientation to authorities (ILGA 22 Feb. 2012). Corroborating information could not be found among the sources consulted by the Research Directorate within the time constraints of this Response.

Sources indicate that LGBT issues often go unreported (BONELA 26 Mar. 2014; US 27 Feb. 2014, 22). *Country Reports 2013* states that victims were reluctant to report abuse due to "stigma" rather than "overt intimidation" (ibid.). The BONELA legal officer claimed the reason is the "unfavourable legal environment" (26 Mar. 2014).

Several sources indicate that LGBT people in Botswana are subject to discrimination (LEGABIBO n.d.a; ILGA 6 June 2013; BONELA 26 Mar. 2014). According to the BONELA legal officer, discrimination against LGBT people exists at both the policy and community levels (ibid.). In a statement before the UN Human Rights Council, a representative of LEGABIBO said that LGBT people in Botswana face discrimination in various forms, including in accessing health services (ILGA 6 June 2013).

The *Botswana Gazette* reports that cases of discrimination that have come before LEGABIBO include a case in which a landlord evicted a tenant because he was gay, as well as a case in which a woman was fired from her job because of her sexual orientation (28 Nov. 2012).

In a 2012 stakeholder report submitted to the UN Universal Periodic Review (UPR) by DITSHWANELO - The Botswana Centre for Human Rights, BOCONGO, LEGABIBO and Rainbow Identity [a group advocating for rights regarding gender identity (ILGA n.d.a)], reports that the transgender community in Botswana faces difficulty obtaining documents to reflect a change of gender, due to a lack of legislation, unsystematic and unclear procedures, and ignorance on the part of authorities (DITSHWANELO et al. 9 July 2012, para. 22).

### **3. Recourse to the Law and Protection**

#### **3.1 Treatment by Police**

According to *Country Reports 2013*, the police do not specifically target people suspected of carrying out same-sex sexual activity (US 27 Feb. 2014, 22).

The BONELA legal officer said that the police sometimes pass judgement or discriminate against LGBT people, but that their organization has not received any reports in which the police did not carry out their duties or in which LGBT people were treated "unfairly" (26 Mar. 2014). The 2011 Global Gayz article states that LGBT people in Botswana are not subjected to "aggressive police tactics" (26 Mar. 2011).

#### **3.2 Recourse**

According to the BONELA legal officer, there are several organizations in Botswana that address matters of discrimination against LGBT people, including BONELA, LEGABIBO, DITSHWANELO, and Men for Health and Gender Justice (BONELA 26 Mar. 2014).

Sources report that LEGABIBO has tried to register as an NGO, but the government has refused to register them multiple times, claiming that the organization promotes an illegal act (US 27 Feb. 2014, 22; LEGABIBO n.d.a). LEGABIBO has reportedly filed a lawsuit against the government because it was refused legal status (US 27 Feb. 2014, 22; *Mmegi* 20 Mar. 2014). Sources indicate that the case was awaiting judgement as of March 2014 (BONELA 26 Mar. 2014; APA 19 Mar. 2014).

According to LEGABIBO's spokesperson, the lack of legal recognition of their organization makes it challenging for them to support the LGBT community and raise awareness of human rights abuses faced by sexual minorities (ILGA 6 June 2013). The Commonwealth Human Rights Initiative (CHRI), an NGO with UN Special Consultative Status that promotes adherence to human rights among Commonwealth countries (CHRI n.d.), also noted that, without official recognition as an NGO, LEGABIBO is restricted in their actions and ability

to receive donor funding (ibid. [2013], para. 15). Global Gayz similarly reports that LEGABIBO is unable to arrange organized meetings, support groups or social gatherings (26 Mar. 2011).

Sources report that the Rainbow Identity Association was able to officially register as an organization in 2010 because its focus was on "gender identity" rather than sexual orientation (Global Gayz 26 Mar. 2011; ILGA n.d.a).

This Response was prepared after researching publicly accessible information currently available to the Research Directorate within time constraints. This Response is not, and does not purport to be, conclusive as to the merit of any particular claim for refugee protection. Please find below the list of sources consulted in researching this Information Request.

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## Additional Sources Consulted

**Oral sources:** Attempts to contact the following organizations were unsuccessful within the time constraints of this Response: DITSHWANELO – the Botswana Centre for Human Rights; Lesbians, Gays, and Bisexuals of Botswana (LEGABIBO).

**Internet sites, including:** Amnesty International; DITSHWANELO – the Botswana Centre for Human Rights; ecoi.net; Factiva; Human Rights Watch; International Gay and Lesbian Human Rights Commission; United Nations – Human Rights Council, Refworld.

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