



Stakeholder submission of Commonwealth Human Rights Initiative (CHRI) for the
2013 Universal Periodic Review of Botswana

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Full information can be found at: www.humanrightsinitiative.org.

Commonwealth Human Rights Initiative (CHRI) stakeholder submission for the Universal Periodic Review of Botswana (2013)

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1. This UPR stakeholder submission for Botswana includes information on the right to information, criminalisation of same-sex conduct, national human rights institutions, core international human rights instruments and their monitoring bodies and Botswana's relationship with the Human Rights Council's Special Procedures.
2. **The Right to Information**
3. In 2010, a Private Member's Bill proposed the enactment of a Freedom of Information law. CHRI welcomes the proposed Bill with enthusiasm, but notes that it will require substantial amendment if the Botswana are to operationalise their right to information in accordance with international best practice.
4. In order for the eventual law to properly reflect that it is the government's duty to provide information, the law may be more appropriately named "The Right to Information Act". It should also be clarified that, once made law, the Act will have supremacy over other legislation that contradicts its provisions.
5. The coverage of the law must be expanded to include the office of the President, Commissions of Inquiry sanctioned by the President, the Judiciary, Political Parties and private bodies in which public funds are invested or which perform public functions or provide public services. Access must be provided to information that was created prior to the enactment of the law and to information that is in theory publicly available but in practice sometimes difficult to come by. Requests for cabinet documents must be granted after a Cabinet decision has been made and so should information about whose advice and opinion led to a Cabinet decision, unless some other exemption is applicable. Exemption clauses must be as narrow and specific as possible and tests to determine the harm caused by the disclosure of information must be strict. Language and procedure governing the release of personal information and examination-related information must be tightened.
6. The Bill must put a burden on the government to train the officers in charge of implementing it and the public about how to use it. People requesting information must not be limited to requesting information on only one particular subject matter per request and fees must be reasonable and waived for those unable to pay. The Bill must explicitly state that requesters do not need to provide a reason when making their request and that they may take notes or obtain extracts of the information they are seeking. Requesters must be able to appeal a decision not to grant them access to information at a quasi-judicial body or tribunal, such as an information commission, and must not be forced to appeal at the High Court, which is expensive and out of reach for the common person. Penalty provisions must also be included in the Bill to criminally punish officers who give out false information or destroy information and to fine or otherwise sanction officers who commit milder offenses.
7. **Recommendations**
8. CHRI recommends that Botswana:
 - a. Immediately amend the Freedom of Information Bill, 2010 in accordance with international best practices and pass the Bill at the earliest.
9. **Criminalisation of same-sex conduct**
10. The Penal Code of Botswana criminalises any person who has carnal knowledge of another which is "against the order of nature" (Article 164) with a penalty of up to seven years in

prison.¹ Article 167 also criminalises gross indecency committed in public or in private.² A Court judgment in 2003 affirmed that these provisions effectively prohibit same-sex relations in Botswana and apply to lesbian sexual activity as well.³

11. During its last session of the Universal Periodic Review in 2009, Botswana rejected recommendations to amend its Penal Code and decriminalise consensual adult same-sex conduct.⁴ In 2008 the 92nd the Human Rights Committee also recommended that Botswana repeal the provisions criminalising same-sex conduct.⁵
12. As a state party to the ICCPR Botswana has an obligation under Article 17 to protect individuals against “arbitrary or unlawful interference” with their “privacy, family, home or correspondence” and this renders the above sections incompatible with this obligation.⁶ The criminalisation of same-sex conduct is also incompatible with Botswana’s obligation under Article 26 of the ICCPR which requires Botswana to treat individuals equally before the law.⁷
13. Statements have been made by political leaders that are at odds with the State’s international obligations. At a meeting on HIV prevention in prisons, Member of Parliament and Deputy Speaker of the National Assembly, Pono Moatlhodi, expressed that homosexuals were “demonic and evil” and defended his comments by later remarking that homosexuality was “a culture away from our culture”.⁸
14. Religious leaders also fuel discrimination and homophobia. The Evangelical Fellowship of Botswana published a statement in a national newspaper condemning the actions of civil society that were advocating the decriminalisation of homosexuality, and called on its partners and the public to ensure “that the country does not degenerate any further into ungodliness.”⁹ Church leader, Pastor Emmanuel Owotabi also released a statement that promoted intolerance against homosexuals, stating that “many of them will actually qualify to be sent to psychiatric homes for proper treatment and rehabilitation.”¹⁰ Statements such as these further stigmatise the lesbian, gay, bisexual, transgender and intersex (LGBTI) community and contribute to their ongoing persecution.
15. Organisations that work on LGBTI issues have been denied legal status. LEGABIBO (lesbians, gays and bisexuals of Botswana), for instance, advocates on LGBTI issues. The Registrar of Societies at the Ministry of Labour and Home affairs has repeatedly refused to register LEGABIBO as a non-governmental organisation.¹¹ This lack of legal recognition has restricted their actions and ability to receive funding from donors.

¹ Penal Code of Botswana Chapter 08:01 See Articles 164 and 165 accessed at <http://www.wipo.int/wipolex/en/text.jsp?file_id=238601> Accessed 12 June 2012

² Article 167. Ibid.

³ Kanane v State, Court of Appeal, Botswana (30 July 2003)

⁴ Report of the Working Group on the Universal Periodic Review, Addendum –Botswana, 17 March 2009,, A/HRC/10/69/Add.1 http://lib.ohchr.org/HRBodies/UPR/Documents/Session3/BW/A_HRC_10_69_Add1_Botswana_E.pdf

⁵ Human Rights Committee, Concluding observations of the Human Rights Committee, Botswana, CCPR/C/BWA/CO/1(24 April 2008) < http://www.bayefsky.com/pdf/botswana_t4_ccpr_92.pdf> Accessed 12 June 2012

⁶ The Human Rights Committee in Toonen v Australia held that the criminalisation of same sex conduct was incompatible with a state party’s obligations under Article 17.

⁷ Human Rights Committee, Concluding observations of the Human Rights Committee Barbados, U.N. Doc. CCPR/C/BRB/CO/3, 11 May 2007, para. 13.

⁸ Botswana MP Says he hates gays and lesbians, Pinknews, 11 February 2011 < <http://www.pinknews.co.uk/2011/02/11/botswana-mp-says-he-hates-gays-and-lesbians/>> Accessed 12 June 2012

⁹ EFB aganist legalisation of homosexuality and prostitution, Mmegi online, 2 February 2011 < <http://www.mmegi.bw/index.php?sid=2&aid=616&dir=2011%2FFebruary%2FWednesday2>> Accessed 12 June 2012

¹⁰ God will not allow homosexuality and prostitution in Botswana, Mmegi online, 24 November 2011, < <http://72.167.255.126/index.php?sid=6&aid=28&dir=2011/November/Thursday24>> Accessed 12 June 2012

¹¹ Botswana refuses to register gay advocacy group, Pinknews, 7 December 2007,< <http://www.pinknews.co.uk/2007/12/07/botswana-refuses-to-register-gay-advocacy-group/>> Accessed 12 June 2012 and Botswana: LGBTI organisation appeals for help to fight denied registration, Behind the Mask, 19 April 2012, < <http://www.mask.org.za/botswana-lgbti-organisation-appeals-for-help-to-fight-denied-registration/>> Accessed 12 June 2012

16. This infringes on the right to association guaranteed under national and international law. Freedom of association is protected under the Constitution of Botswana Article 13(1)¹² and enshrined in the ICCPR (Article 22). Any restrictions of this right should only be necessary in a democratic society on the grounds of public order, safety and health. Refusing to grant an organisation working on the human rights of LGBTI persons, formal legal recognition would not be in conformity with international standards.
17. The Constitution of Botswana provides for the fundamental rights and freedoms for every person (Article 3), and prohibits discrimination (Article 15), stating that “no law shall make any provision that is discriminatory either of itself or in its effect.”¹³ These provisions must be applied to all citizens, including LGBTI persons. The State should end the discrimination of those that engage in same-sex conduct by repealing the criminal provisions in the Penal Code.

18. Recommendations

19. CHRI recommends that Botswana:

- a. Repeal Articles 164 and 167 of the Penal Code
- b. Allow organisations working on sexual orientation and gender identity to register and gain formal legal recognition as non-governmental organisations.
- c. Promote and facilitate constructive dialogue on sexual orientation and gender identity with stakeholders, including government ministries, civil society actors and religious leaders.

20. National Human Rights Institution

21. In 2008, Botswana received recommendations to establish a Paris Principles compliant national human rights institution and to continue its efforts to strengthen the national human rights architecture and institutional framework by providing necessary funding and resources.
22. The country accepted all of these recommendations, made to it by five countries. However, currently the Office of the Ombudsman remains as the sole agency that deals with human rights issues. Furthermore, the Ombudsman’s mandate continues to be narrow and restrictive allowing the office to only deal with human rights issues relating to investigating maladministration, and public education.

23. Recommendations:

24. CHRI therefore recommends that Botswana:

- a. Establish a Paris Principles compliant national human rights institution with a broad mandate so that it may be able to effectively protect and promote all human rights
- b. Ensure that resources and funding are made available to further strengthen Botswana’s national human rights architecture and institutional framework.

25. Relationship with the Council’s Special Procedures

26. Botswana received three recommendations regarding its relationship with the Council’s Special Procedures. Three countries asked that it issue a standing invitation to the Special Procedures, which Botswana rejected. Botswana noted that it always accepted visits from Special Procedures and did not intend to depart from the Government’s commitment to cooperate in this regard, making the decision to reject the recommendation odd. A request to visit from the Special Rapporteur on access to safe drinking water and sanitation made in 2010 has been agreed in principle and/or was under consideration by Botswana.
27. Botswana rejected the recommendation from Mexico that it invite the Special Rapporteur on Racism, saying that the Special Rapporteur had not requested a visit, but that Botswana would cooperate if a request was made. Botswana accepted the recommendation that it invite

¹² Constitution of Botswana < http://www.chr.up.ac.za/undp/domestic/docs/c_Botswana.pdf > Accessed 12 June 2012

¹³ Ibid.

the Special Rapporteur on Indigenous Peoples from Mexico and Norway and that visit took place in March 2009, as Botswana said it would.

28. Recommendation

29. In light of the above information, CHRI recommends that Botswana:

- a. Issue a standing invitation to the Human Rights Council's Special Procedures without delay.

30. Core international human rights instruments and their monitoring bodies

31. During its 2008 review, Botswana received a number of recommendations regarding its signature and ratification of core human rights treaties and its reporting to treaty bodies. It rejected nearly all of them.
32. Six countries recommended that Botswana move towards ratifying the International Covenant on Economic, Social and Cultural Rights. Botswana rejected the recommendation, saying that it would accede to the covenant when it was in a position to implement its provisions. The country likewise rejected recommendations that it accede to the Optional Protocol to the Convention Against Torture, saying that accession would occur when resources permitted.
33. Botswana also rejected Mexico's call for it to ratify the Convention on the Rights of Migrant Workers, saying that it supported the spirit and intent of the conventions, but that there were already laws in place to protect migrants in Botswana and so ratification was not a priority. Finally, it outright rejected the recommendation that it ratify the Second Optional Protocol of the ICCPR, saying that there were no plans to abolish the death penalty.
34. The only recommendation accepted by Botswana on international human rights treaties was that made by Cameroon, which asked the country to finalise various outstanding treaty reports, particularly to the CEDAW. In response to the recommendation, Botswana noted that the CEDAW report had been submitted in 2008 and that efforts were underway to bring the country's reporting obligations up to date.
35. These efforts fell short. As of 19 June 2012, Botswana had three reports overdue under CAT, one of which dated back to 2001, a report to ICCPR which became overdue in March 2012, a report to CERD overdue since 2009, a report on the Convention on the Rights of the Child overdue since 2007 and an overdue report for each of the two Optional Protocols to CRC, respectively dating back to 2006 and 2005.

36. Recommendations

37. In light of the above information, CHRI recommends that Botswana:

- a. At minimum, undertake to sign and ratify the four core human rights instruments to which it is not yet a party, namely: the International Covenant on Economic, Social and Cultural Rights, the International Convention for the Protection of All Persons from Enforced Disappearance, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families and the Convention on the Rights of Persons with Disabilities.
- b. Urgently submit the nine reports to treaty bodies that are currently overdue and commit to meeting deadlines for future reports.