

**Universal Periodic Review of Samoa
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Report on Samoa regarding the human rights of LGBTIQ persons



Kaleidoscope

Human Rights Foundation

Email: paula.gerber@monash.edu

Kaleidoscope is a not-for-profit organisation based in Australia that seeks to advance the human rights of lesbian, gay, bisexual, transgender, and intersex people in the Asia Pacific region

and



Sexual Rights Initiative [SRI]

Rue de Monthoux 25, Geneve, 1201

www.sexualrightsinitiative.com

Email: carrie@srigeneva.com

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

1 EXECUTIVE SUMMARY – SAMOA

- 1.1 This Report has been prepared by Kaleidoscope Human Rights Foundation with the support of Sexual Rights Initiative and input from Tuisina Ymania Brown, a trans fa'afafine woman of colour from Samoa who is the co-Secretary General of ILGA World
- 1.2 This Report highlights several areas where Samoa falls short of its obligations under international human rights law in relation to Lesbian, Gay, Bisexual, Trans and gender diverse, Intersex and Queer (LGBTIQ) persons.
- 1.3 At the second universal periodic review (UPR) of Samoa, New Zealand noted at paragraph 61 generally that further work is required in Samoa in the area of lesbian, gay, bisexual and transgender rights.¹ That remains the position in 2021.
- 1.4 Specifically, Samoan criminal law explicitly prohibits consensual sexual acts between men, does not sufficiently recognise same-sex relationships and does not have sound anti-discrimination laws to protect LGBTIQ people in public life.

Social attitudes in Samoa

- 1.5 Positively, in 2013, the *Crime Act 2013 (Crimes Act)* replaced the Crimes Ordinances 1961. The previous law criminalised ‘the impersonation of a female’ by any male in Samoa. The abrogation of this provision was long overdue, as it was used to discriminately persecute *Fa’afafine* with fines or imprisonment. The terms *Fa’afafine* & *Fa’atama* are culturally unique and specific to Samoa’s third gender. *Fa’afafine* people are biological males who are identified as having strong feminine characteristics by their family in early years and who are then raised as a third gender with specific roles separate to men and women.²
- 1.6 However, discriminatory social and political attitudes are still existent in Samoa, as evidence by Prime Minister Tuilaepa Sailele Malielegaoi’s description of same-sex marriage as an abomination and a “Sodom and Gomorrah practice.”³
- 1.7 Further, speaking to the cultural attitude of LGBTIQ people in Samoa, in June 2019, the country’s main censor (Leiataua Niuapu Faau) announced that it had banned the film ‘Rocketman’, a biopic on internationally renowned gay artist Sir Elton John, telling media it was incompatible “with cultural and Christian beliefs here.” Leiataua Niuapu Faau, told the *Samoa Observer* that the film is “not good for public viewing and violates laws against same-sex marriage.” Similarly, in 2009, Samoa banned the film ‘Milk’, about gay rights activist Harvey Milk.⁴

¹ Report of the Working Group on the Universal Periodic Review: Samoa, A/HRC/33/6, 27 June 2016, at 61, see: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/132/73/PDF/G1613273.pdf?OpenElement>.

² For a comprehensive analysis of the experience of LGBTIQ people in Samoa, see Tuisina Ymania Brown ‘Being LGB in Samoa’ Chapter 11 in Vol 3 of Paula Gerber (ed) *Worldwide Perspectives on Lesbians, Gays and Bisexuals*, (2021) Praeger Press, California, USA.

³ Michael Fitzgerald, ‘Samoa Prime Minister: Gay Marriage An ‘Abomination’ For True Christian Countries’, *Towleroad* (13 dec 2017) <<https://www.towleroad.com/2017/12/samoa-gay-marriage/>>.

⁴ ‘Elton John film Rocketman banned in Samoa over gay scenes’, *BBC News* (11 June 2019) <<https://www.bbc.com/news/world-asia-48593691>>.

2 ISSUE 1: THE *CRIMES ACT*

- 2.1 The *Crimes Act* makes it an offence to commit sodomy, punishable by up to 7 years imprisonment.⁵ Consent is not considered a defence under the Act. The *Crimes Act* further criminalises attempts to commit sodomy and keeping place of resort for homosexual acts (which includes ‘indecent acts between males’), both punishable by up to 7 years imprisonment.⁶
- 2.2 In Samoa’s first UPR in 2011, Samoa rejected three recommendations to immediately decriminalise same-sex sexual activity that were made by Canada, France and Norway. In rejecting these recommendations, Samoa noted:

“...the gaps and weaknesses in its legislative framework on upholding equality and non-discrimination based on sexual orientation, and that relevant legislation was being reviewed by the Samoa Law Reform Commission. Samoa indicated that ‘Fa’afafine’, gays and lesbians were integral members of Samoan society and were heirs to family chiefly titles and lands through extended family consensus, as done for all men and women of its society. However, sexual orientation was a sensitive issue in Samoa given the religious and cultural beliefs of mainstream society. Nonetheless, Samoa was confident that education, awareness and sensitisation would pave the way for societal acceptance and prevention of discrimination that might arise out of sexual orientation.”⁷

- 2.3 At Samoa’s second UPR, in 2016, Slovenia noted that same-sex relations between consenting adults continues to be criminalised, and recommended that the provisions of the *Crimes Act* criminalising this conduct be repealed.⁸ The same recommendation was made by Spain, the USA and Canada.
- 2.4 Specifically, Canada recommended that Samoa:

“Repeal laws that criminalize consensual same-sex conduct, and prohibit discrimination on the grounds of sexual orientation or gender identity in all areas of public life, including employment, health and education, bringing the legislation of Samoa into conformity with its commitment to equality.”⁹

- 2.5 Chile recommended that Samoa “[a]dopt measures to prevent violence and discrimination against persons on the basis of their sexual orientation and gender identity”. On this point, it is positively noted that Samoa’s *Sentencing Act 2016* now lists, as an aggravating factor, offences committed partly or wholly because of hostility directed towards the victim’s gender identity or sexual orientation.¹⁰

⁵ *Crimes Act 2013* section 67. Section 68 provides for the inchoate offence of attempted sodomy. See also, *Police v Poi* [2007] WSSC 49.

⁶ *Crimes Act 2013* section 71.

⁷ Report of the Working Group on the Universal Periodic Review: Samoa, A/HRC/18/14, 11 July 2011, at para. 22, see: http://www.upr-info.org/sites/default/files/document/samoa/session_11_-_may_2011/ahrc1814samoe.pdf.

⁸ Report of the Working Group on the Universal Periodic Review: Samoa, A/HRC/33/6, 27 June 2016, at 96.35, see: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/132/73/PDF/G1613273.pdf?OpenElement>.

⁹ Report of the Working Group on the Universal Periodic Review: Samoa, A/HRC/33/6, 27 June 2016, at 96.32, see: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/132/73/PDF/G1613273.pdf?OpenElement>.

¹⁰ *Sentencing Act 2016* section 7(1)(h)

- 2.6 In noting the abovementioned recommendations, Samoa echoed similar sentiment to that espoused at its first UPR, namely, that,

“Decriminalizing sexual activity of sodomy and the repeal of all provisions criminalizing homosexual relations are not possible at this time because of cultural sensitivities and Christian beliefs of the Samoan society. The acceptance of this recommendation will go against the spirit of our Constitution which is founded on Christian principles. Consequently, Samoa notes these recommendations.”¹¹

- 2.7 **Recommendation:** To comply with international human rights law,¹² the State of Samoa should decriminalise consensual sexual conduct between men, by:

2.7.1 Repealing section 67 of the *Crimes Act*;

2.7.2 Repealing section 68 of the *Crimes Act*; and

2.7.3 Repealing section 71 of the *Crimes Act*.

3 ISSUE 2: INTERNATIONAL INSTRUMENTS

- 3.1 Samoa has ratified the following human rights treaties:

3.1.1 Convention on the Elimination of all forms of Discrimination against Women (**CEDAW**);

3.1.2 Convention on the Rights of the Child (**CRC**);

3.1.3 International Covenant on Civil and Political Rights (**ICCPR**); and

3.1.4 International Convention for the Protection of All Persons from Enforced Disappearances (**CED**).

- 3.2 Samoa has yet to ratify:

3.2.1 The International Covenant on Economic, Social and Cultural Rights (**ICESCR**);

3.2.2 The International Convention on the Elimination of All Forms of Racial Discrimination (**ICERD**);

3.2.3 The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (**CAT**); and

3.2.4 The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.

- 3.3 Specifically, the ratification of ICESCR would assist in advancing and protecting the human rights of LGBTIQ persons in Samoa as article 2(2) requires ratifying states to “*undertake to guarantee that the rights enunciated in the [ICESCR] will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*” It is recognised that “Other

¹¹Report of the Working Group on the Universal Periodic Review: Samoa (Appendum – views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review), A/HRC/33/6/Add.1, at para 20, see: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/196/40/PDF/G1619640.pdf?OpenElement>.

¹² See *Tonnen v Australia* Communication No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994).

status” includes sexual orientation and gender identity.¹³

- 3.4 At the second UPR of Samoa, multiple states made recommendations that Samoa ratify all or some of these treaties before its third UPR. Samoa is to be commended for acceding to CAT on 28 March 2019.
- 3.5 Samoa, in relation to both the ICESCR and ICERD, responded to these recommendations by noting that “*the Government will continue its assessment of the implications of membership to make sure it is able to deliver on prescribed obligation upon becoming a state party*”.¹⁴
- 3.6 **Recommendation:** The State of Samoa should:
- 3.6.1 Sign and ratify ICERD;
 - 3.6.2 Sign and ratify ICESCR; and
 - 3.6.3 Sign and ratify CMW.

4 ISSUE 4: ANTI-DISCRIMINATION LAWS

- 4.1 The *Labour and Employment Relations Act 2013* prohibits direct and indirect discrimination on the basis of sexual orientation against an employee or applicant for employment in any employment policies, procedure or practices.¹⁵ While this provides some protection, and was noted as a positive step at Samoa’s second UPR, there remains an absence of comprehensive anti-discrimination laws or policies in place.
- 4.2 Samoa does not have any laws or policies which prohibit discrimination against LGBTIQ persons in other areas of public life, such as education, health care or access to goods and services. This lack of protection creates an environment that facilitates discrimination against LGBTIQ persons, including Samoa’s traditional *Fa’afafine* and *Fa’atama* community.
- 4.3 Under the Fundamental Rights in Part II of the Samoan Constitution, Article 15(1) provides that “[a]ll persons are equal before the law and entitled to equal protection under the law”. Further to this, Article 15(2) specifically requires that no law or other government action be applied so as to discriminate solely on the basis of certain enumerated grounds.
- 4.4 The grounds set out in Article 15 include sex, but do not include sexual orientation, gender identity or intersex status. However, due to changes made via the *Constitution Amendment Act 2020*, it appears that the rights that LGBTIQ people do enjoy pursuant to Article 15, may not be enforceable at all to the extent that their individual dispute falls within the jurisdiction of the new Part IX Land and Titles Court.¹⁶

¹³ Committee on Economic, Social and Cultural Rights, General Comment No. 20, Non-Discrimination in Economic, Social and Cultural Rights (Art. 2 para. 2), 42nd sess, Geneva, 4-22 May 2009, UN Doc E/C.12/GC/20, 10 June 2009, at para 32 .

¹⁴ Report of the Working Group on the Universal Periodic Review: Samoa (Appendum – views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review), A/HRC/33/6/Add.1, at para 13, see: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/196/40/PDF/G1619640.pdf?OpenElement>.

¹⁵ *Labour and Employment Relations Act 2013*, section 20(2).

¹⁶ See eg., *Constitution Amendment Act 2020* section 2, which amends Art 4(1) to exclude the right to apply to the Supreme Court for enforcement of Part II fundamental rights in matters arising from proceedings subject to the jurisdiction of the Part IX Land and Titles Court; See also, section 7, which inserts a new Article 104A(6) directing the Part IX Court to apply Samoan custom as a source of law. However, the exact scope and substance of Samoan custom is not readily identifiable, and the prospective application of these amendments therefore unclear: The Interpreter, ‘Culture, Constitution and Controversy in Samoa’, *the Lowy Institute* (23 June 2020) <<https://www.loyyinstitute.org/the-interpreter/culture-constitution-and-controversy-samoa>>. See also, National Human Rights Institution Samoa, *Submission to the Parliamentary Social Committee on the Land & Titles Bill 2020, Constitution Amendment Bill 2020 and Judicature Ordinance Bill 2020* (14 May 2020) <<https://ombudsman.gov.ws/wp-content/uploads/2020/05/Submission-final.pdf>>.

4.5 **Recommendation:** The State of Samoa should:

- 4.5.1 Implement anti-discrimination laws that protect all persons from discrimination on the basis of sexual orientation, gender identity and intersex status in all areas of public life;¹⁷ and
- 4.5.2 Amend Article 15 of the Constitution to include sexual orientation, gender identity and intersex status as prohibited grounds of discrimination.



¹⁷ Protected characteristics under the Australian *Sex Discrimination Act (Cth)* 1984 include sex, sexual orientation, gender identity and intersex status.