

Transgender Rights in Namibia

Rights under the Constitution of Namibia

Chapter 3 of the Constitution protects the fundamental human rights and freedoms of all people. Article 10 does not include gender identity or sexual orientation as prohibited grounds of discrimination. The United Nation’s Human Rights Committee has stated that the phrase “other status”, should be interpreted to include protection from discrimination based on gender identity and sexual orientation.

Fundamental Human Right	Where is it in the Constitution?
Right to Life	Article 6
Personal liberty	Article 7
Human dignity	Article 8(1)
Protection from torture, cruel, inhuman or degrading treatment	Article 8(2)(b)
Right to equality	Article 10
Freedom from arbitrary arrest or detention	Article 11
Right to a fair trial	Article 12
Right to privacy	Article 13
Family	Article 14
Administrative justice	Article 18
Freedom of expression, assembly and association	Article 21
Right to education	Article 20

Changing your Gender Marker

Transgender persons in Namibia can apply to change their sex description in the birth register in terms of **section 7B** of the **Births, Marriages and Deaths Registration Act 81 of 1963**, which states that:

“The Secretary may on the recommendation of the Secretary of Health, alter in the birth register of any person who has undergone a change of sex, the description of the sex of such person and may for this purpose call for such medical reports and institute such investigations as he may deem necessary.”

The **Births, Marriages and Deaths Registration Act** does not define “change of sex”.

- The Legal Assistance Centre in Namibia (LAC) reported in 2015 that applications in terms of section 7B are done on a case-by-case basis and are not problematic – as long as a person can provide medical reports of their sex change.
- Once the application is granted, a transgender person can apply for a new identity document and passport.
- If the application is refused, a person is entitled to written reasons in terms of article 18 of the Constitution, which sets out the right to administrative justice.

Section 8 of the **Births, Marriages and Deaths Registration Act** provides that a person can alter his/her forename in the birth register. **Section 8B** provides for the alteration of a person’s surname in the birth register.

In the Government Gazette of 11 April 2014, the Ministry of Home Affairs and Immigration published forms and certificates for the Births, Marriages and Deaths Registration Act 81 of 1963.²² Annexure F is for an application to alter a first name in the birth register. Annexure G and H relate to an intention to change a surname. Annexure H is in the form of an affidavit in which the applicant states that among other things, their “gender description” was erroneously recorded in the birth certificate.

A transgender person who has not had a “change of sex” could use **section 12(1)(a)** of the **Identification Act 2 of 1996**:

- It states that “if an identity document does not reflect correctly the particulars of the person to whom it was issued, or contains a photograph which is no longer a recognizable image of that person” – the person shall hand over the identity document to the Minister.
- **Section 12(3)** states that the Minister shall cancel it and replace it with an improved identity document.

The LAC reports that some transgender people who have made applications to update their photographs have not been successful.

Applicants could also rely on their fundamental human rights that are guaranteed under the Constitution.

²² Legal Assistance Centre (2015) Namibian Law Issues on LGBT, available at: <http://www.lac.org.na/laws/2014/5444.pdf>

Your Rights in the Workplace

- **Section 5** of the **Labour Act 11 of 2007** is titled “prohibition of discrimination and sexual harassment in employment”.
- **Section 5(2)(b)** states that a person must not discriminate in any employment decision against any individual on a number of listed grounds which includes “sex”. The section does not include discrimination based on gender or sexual orientation.
- An employer who dismisses an employee because of their sex, can be charged with unfair dismissal in terms of **section 33(3)**. The section also does not include dismissal based on gender or sexual orientation.
- **Section 5(2)(f)** forbids discrimination based on a person’s HIV status.
- **Section 5(8)** prohibits direct or indirect sexual harassment of an employee.
- **Section 5(9)** states that when an employee resigns because of sexual harassment by the employer it would amount to constructive dismissal.
- The **National Code on HIV/AIDS in Employment of 2000**, prohibits discrimination and pre-employment HIV testing.

Criminalisation and Harassment

Transgender people in Namibia face harassment and discrimination by officials for “immoral practices” or through the use of loitering laws. Sodomy remains a common law crime in Namibia and is listed as a Schedule 1 offence in the **Criminal Procedure Act 25 of 2004**:

- **Sections 42 and 44** of the Criminal Procedure Act permit the arrest of a person for sodomy, without a warrant.
- **Section 44** allows a private person to make such an arrest without a warrant.

Transgender persons also face harassment under the **Combating of Immoral Practices Act 21 of 1980**.

- **Section 7(b)** makes it an offence for a person to “wilfully and openly exhibits himself in an indecent dress or manner at any door or window within view of any public street or place or in any place to which the public have access.”
- A person can be liable on conviction to a fine not exceeding R2 000 or to imprisonment for a period not exceeding two years – or to both such fine and such imprisonment.
- **Section 8** prohibits the “committing of immoral acts”.
- **Section 9** is a vague and broad section. It states that:

“Any person who is the owner or occupier of any house or place or has or acts or assists in the management or control thereof knowingly permits the use of such house or place for the purpose of committing any offence in terms of any provision of this Act, shall be guilty of an offence and liable on conviction to imprisonment for a period not exceeding two years or to such imprisonment and to a fine not exceeding one thousand rand.”

Transgender people who work as sex workers are a target for harassment:

- Some municipalities have adopted **loitering by-laws** that allow the arrest of sex workers.
- Transgender sex workers have reported that the police do not take them seriously or assist them when they report rape or other violent crimes.
- Some transwomen have reported being raped when they were placed in male cells after being arrested. Rape increases the risk of contracting HIV or STIs.

The government must be able to justify, in terms of the law, any discriminatory treatment of transgender people otherwise acts by its officials will be arbitrary and illegal.

Transgender people who face physical abuse and harassment from their families can get protection under the **Combating of Domestic Violence Act 4 of 2003**. The Act, however, does not offer protection from abuse in a same-sex relationship, since it specifically states that where it applies to persons in a relationship they should be of different sexes.

Access to Sexual and Reproductive Health

- **Section 40 of the National Health Act 2 of 2015** states that every person in Namibia has access to a State hospital or a State health service and is entitled to receive treatment or other medical care and benefit from any of the health services established by the Act.
- **Section 40(2)**, however, gives the superintendent of a state hospital wide powers to deny a person access to a State hospital “for any other reason whatsoever considered sufficient by the superintendent.”
- In terms of **section 40(3)**, any person denied access to a state hospital may appeal, within 14 days, to the Minister of Health.

Namibia also has a **Patient Charter** that was developed by the Ministry of Health in 1998. The rights of patients set out in the Charter include the rights to:

- Access health services without any discrimination;
- Be treated with respect and politeness;
- Privacy and confidentiality;
- Access information about the health and social services that are available.

Despite the rights set out in the National Health Act and the Patient Charter, many transgender people report stigma and discrimination at the hands of medical practitioners and staff when they try to access health services.

Section 51(2) of the **National Health Act** allows State patients to access a Special Fund for “special medical treatment”. This would include “any other medical treatment that requires treatment in an intensive or high care unit in a hospital due to post-surgery complications; or ... any prescribed medical treatment. Transgender persons who want to undergo gender reassignment surgery could possibly access the Special Fund. However, the surgery is not available in Namibia, and it is not clear if the Fund can be used to undergo the procedure in South Africa. Hormone treatment is not available at State health services and can only be accessed privately which can be expensive.

MSM are included in the definition of most-at-risk populations in the **National Strategic Framework for HIV and AIDS Response 2010/11-2015/16**. WSW, lesbians, transgender or intersex individuals were not referenced in the framework.