

“They See Us As How We Have Sex, Not As Who We Are”

The experiences of lesbian, gay, bisexual, transgender, intersex and queer persons interacting with the justice system in Lesotho

A Briefing Paper
November 2024

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® **“They See Us As How We Have Sex, Not As Who We Are”**: The experiences of lesbian, gay, bisexual, transgender, intersex and queer persons interacting with the justice system in Lesotho

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EXECUTIVE SUMMARY

Background

Access to justice is a fundamental right as well as a prerequisite for the protection and promotion of all other human rights. It encompasses the right to a fair trial, including equal access to and equality before competent, independent and impartial courts, and the right to seek and obtain just, timely and effective remedies for human rights violations. In the Kingdom of Lesotho, marginalized persons, such as lesbian, gay, bisexual, transgender, intersex and queer (LGBTIQ+) individuals often struggle to access justice on an equal basis with other people in the country for a wide range of reasons.

Lesotho is a party to several international human rights instruments that guarantee the rights to equality, non-discrimination and access to justice and effective remedies for all persons without discrimination, including:

- The International Covenant on Civil and Political Rights (ICCPR);
- The International Covenant on Economic, Social and Cultural Rights (ICESCR);
- The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW);
- The African Charter on Human and Peoples' Rights (ACHPR);
- The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (the Maputo Protocol).

Notwithstanding the country's international human rights law obligations and commitments, LGBTIQ+ persons in Lesotho face many different forms of prohibited discrimination, including structural barriers to exercising their human rights, as well as harassment and abuse because of their real or imputed sexual orientation, gender identity, gender expression and/or sex characteristics (SOGIE-SC). The stigmatization, shame, social and economic exclusion, violence and abuse to which LGBTIQ+ persons are subjected stem from discriminatory, heteronormative and patriarchal societal norms that are pervasive in Lesotho.

Despite some efforts by the government of Lesotho to protect the human rights of LGBTIQ+ persons and combat discrimination – including through amendments to domestic violence legislation in 2022 and the decriminalization of consensual same-sex sexual relations in 2012 – LGBTIQ+ individuals in Lesotho report that they continue to experience significant predicaments when interacting with and attempting to access the justice system. They complain that the situation hinders their ability to seek effective protection from and redress for violations of their human rights, especially their right to lead a life free from discrimination and violence.

Key Findings:

Based primarily on a series of online and in-person interviews with lawyers and human rights advocates; focus group discussions co-organized by the People's Matrix Association; previous engagements with Lesotho judiciary on the human rights of LGBTIQ+ persons; as well as desktop research, the International Commission of Jurists (ICJ) reports the following findings:

Violations of the human rights of LGBTIQ+ persons are not reported to the police and other authorities: Many LGBTIQ+ persons in Lesotho do not report discrimination or violence committed against them due to fear of exposure as an LGBTIQ+ person, retaliation and further victimization. Bias against LGBTIQ+ persons on the part of police officers and their lack of sensitization to the human rights of LGBTIQ+ persons often exacerbate their plight, with police officers reportedly responding to LGBTIQ+ individuals with a general attitude of being biased and, at times, downright homophobic or transphobic. As a result, many LGBTIQ+ people feel that reporting is futile, and many cases never reach the courts.

Cases are not identified as LGBTIQ-related cases or are registered inaccurately: The lack of proper identification, recording and classification of cases as LGBTIQ-related on the part of law enforcement agencies hinders the gathering of accurate data on the extent of violence and discrimination against LGBTIQ+ individuals in Lesotho. The absence of adequate data collection systems makes matters worse. Moreover, the absence of legal gender recognition for transgender and intersex persons can lead to denial of appropriate medical and support services or result in incorrect identification in police reports and court proceedings.

Inadequate laws and policies protecting LGBTIQ+ persons from discrimination and violence: While the Lesotho Constitution and a number of domestic legislative provisions and policies guarantee the right to equality before the law and prohibit discrimination generally, there remain significant legislative and policy gaps that leave LGBTIQ+ individuals exposed to an increased risk of violence and discrimination.

Discrimination perpetuated by confusing laws regarding consensual same-sex sexual activity: Lesotho decriminalized consensual same-sex sexual activity but there is still some ambiguity and confusion around the common law offence of sodomy, which may perpetuate discrimination against LGBTIQ+ persons. The Sexual Offences Act of 2003 does not explicitly criminalize consensual same-sex sexual activity, but it does not specifically repeal the common law offence of sodomy either. Moreover, Schedule 1, Part II of the Criminal Procedure and Evidence Act of 1981 still lists sodomy as an offence for which people may be arrested without a warrant. In the context of social stigma and continued discrimination against LGBTIQ+ persons, the existence of such laws may lead to their discriminatory application and reinforce harmful stereotypes, even if, in recent times, they have not led to criminal convictions.

Many LGBTIQ+ persons are not accessing legal services: LGBTIQ+ persons in Lesotho struggle with accessing legal services due to financial barriers, fear of being outed as LGBTIQ+, and their own limited knowledge of where and how to seek redress for human rights violations. The legal aid system also has a large backlog of cases and remains centralized in the capital city of Maseru to the detriment of the rest of the country. The Legal Aid Office in Maseru, the capital, lacks the human and financial resources to expand beyond the city, which further limits access to legal aid services for marginalized communities, especially in rural areas.

Cases are not investigated and prosecuted properly or may not reach the courts due to dysfunction in police departments or in the court system:

inefficiencies at police station level – such as lost case files, slow investigations, and administrative mismanagement – prevent many cases from reaching the courts. Focus group participants emphasized that these dysfunctions also carry over to the court system sometimes, highlighting that without NGO intervention, deserving cases may not be investigated.

Bias or perceptions of bias in the judicial system: With respect to the few instances in which some cases made it to courts, LGBTIQ+ individuals reported facing bias from court staff, such as security guards, manifesting, for example, as unwarranted scrutiny of their outward appearance, including their manner of dressing. Some focus group participants also complained that they had experienced invasive questioning about their sexual orientation, gender identity and gender expression in court settings, especially in courts located in rural areas.

Recommendations:

Lesotho is failing to comply with its international and regional human rights obligations, requiring the authorities to take measures to ensure that LGBTIQ+ individuals enjoy and may exercise their human rights without prohibited discrimination, including their rights to equality and non-discrimination, dignity, privacy, legal representation and legal aid and freedom of expression. Based on the findings detailed above, and Lesotho's international and domestic legal obligations, the ICJ recommends that the Lesotho authorities take the following measures:

To the Ministry of Law and Justice:

- Implement more effective awareness-raising initiatives about the human rights of LGBTIQ+ persons, addressing in particular access to justice barriers.

To address widespread stigma and discriminatory attitudes towards LGBTIQ+ persons, it is imperative that the authorities, primarily through the Ministry of Law and Justice, fulfil their obligations to conduct awareness-raising activities and ongoing public education to foster acceptance of such persons. Awareness-raising initiatives should generally cover human rights and issues related to sexual orientation, gender identity, gender expression and sex characteristics and the obstacles preventing LGBTIQ+ persons from accessing courts and effective remedies for violations of their human rights.

In this regard, the relevant government departments should work with civil society organizations, such as the People's Matrix, the local media and development partners to carry out ongoing awareness-raising activities within community settings that are aimed at changing the general public's attitudes towards LGBTIQ+ persons.

- Provide access to information to all persons on where to obtain legal aid services and the procedures for accessing judicial services.

It is imperative to provide clear, comprehensive and accessible information to all individuals regarding the availability of legal aid services and the procedures for accessing judicial services to ensure that LGBTIQ+ persons may access legal representation, including through legal aid, and engage in court proceedings. In this context, information should be disseminated in various formats and should be readily available to all persons at key locations frequented by the general public, as well as at police stations and within court buildings, including courts in rural areas, as well as at hospitals and clinics.

The Ministry of Law and Justice, alongside the judiciary, and in partnership with legally-focused non-governmental organizations and civil society organizations advocating for the rights of LGBTIQ+ persons, should carry out information campaigns.

- Implement ongoing training for law enforcement officials on the human rights of LGBTIQ+ persons and violations of human rights on the basis of SOGIE-SC.

Continual training programs for law enforcement officials, including police officers and police station staff, on the human rights of LGBTIQ+ persons and on human rights violations based on SOGIE-SC are essential to ensuring that LGBTIQ+ persons feel comfortable to report violations of their human rights or approach the police to resolve a dispute. These training sessions should emphasize sensitivity towards LGBTIQ+ individuals and respect for their human rights. Delivering these training sessions on a regular basis and incorporating such sessions as part of the main police training programs will also ensure that newly appointed police officers are not left out.

The State should also support current ongoing trainings for police officers carried out by civil society organizations and collaborate with these organizations to reach a wider range of police officers in districts across the country.

- Conduct sensitization workshops and training for chiefs, traditional leaders and adjudicators of local courts.

To address the systemic barriers faced by LGBTIQ+ individuals in accessing justice at the community level, the government, through the Ministry of Law and Justice and other relevant ministries, should conduct sensitization workshops and training sessions for chiefs, traditional leaders and adjudicators of local courts. These workshops should aim to enhance awareness and understanding of the human rights of LGBTIQ+ individuals and the challenges they encounter within the justice system and should cover: the right to a fair trial; understanding diverse sexual orientations and gender identities; the human rights of LGBTIQ+ persons; and the interpretation of laws in a manner consistent with international laws and standards.

- Decentralize legal aid services provided by the Legal Aid Office beyond the capital city to rural areas to ensure a wider range of individuals can access lawyers.

The government of Lesotho must fully implement the Legal Aid Act by devising and implementing a plan, as well as allocating resources from the national budget

towards establishing multiple legal aid offices in all 10 districts across the country to ensure wider accessibility to such services beyond the urban centres. There should also be an increase in resources provided to the legal aid office to employ additional lawyers to enhance capacity to take on cases.

To the Ministry of Health and the Ministry of Gender, Youth, and Social Development

- Strengthen support services for victims of gender-based violence, particularly LGBTIQ+ individuals

It is critical that victims of violence have equal access to comprehensive support mechanisms and services, regardless of SOGIE-SC. Such support mechanisms would include reporting to the Children and Gender Protection Units within the Lesotho Mounted Police Service. To address the needs of LGBTIQ+ persons who are survivors of violence, harassment and abuse, the government should establish or allocate more resources to specialized support mechanisms tailored to the unique needs and experiences of LGBTIQ+ survivors.

Such comprehensive support services should include various forms of psychosocial support, medical assistance and safe housing for survivors of violence, harassment and abuse, where necessary. The government should also collaborate with relevant stakeholders, including civil society organizations, police officers, social workers, counsellors and health professionals, to further develop and implement these support services in line with international human rights laws and standards.

To the judiciary:

- In a similar manner to the rules created in 2023 for enhancing access to justice for persons with disabilities, the relevant authority within the judiciary could develop judicial rules and guidelines for enhancing the ability of LGBTIQ+ individuals to navigate courts and ensuring sensitivity in court proceedings. These rules should be created in collaboration with NGOs advocating for the rights of LGBTIQ+ persons, legal experts, the Ministry of Law and Justice, and relevant judicial bodies. These guidelines should address issues, such as sexual orientation, gender identity, gender expression, sex characteristics, gender markers, attire at courts, and sensitivity to the needs of LGBTIQ+ persons in court proceedings.
- Continue sensitization of public prosecutors, court administration staff, court security staff, court researchers and judicial officers on the rights of LGBTIQ+ persons with respect to a range of issues. Given the success of previous engagements with the Lesotho judiciary on the rights of LGBTIQ+ persons that have been led by non-governmental and civil society organizations, such as the ICJ and People's Matrix Association, the judiciary should aim to conduct, or collaborate with these organizations, human rights experts and the relevant government ministries, to conduct sensitization workshops targeting not only judges and magistrates, but also court administrators and prosecutors. The workshops should cover, in detail:
 - The obstacles impeding access to judicial services for LGBTIQ+ persons.

- Sensitivity to issues of sexual orientation, gender identity, gender expression and sex characteristics of LGBTIQ+ individuals, including through manner of dressing.
- Impartiality and the independence of judges in judicial proceedings.
- Respectful treatment of LGBTIQ+ individuals by adjudicators and court administration staff throughout judicial proceedings and providing equal access to justice without discrimination.
- Identifying cases that may have a SOGIE-SC-bias element.
- The implementation and use of the potential rules and guidelines to ensure that judges and court staff are not only knowledgeable about LGBTIQ+ issues but can promote fair and respectful treatment in the justice system.

To the legislature:

- Explicitly include SOGIE-SC as prohibited grounds for discrimination under section 18 of the Constitution.
- Amend the Sexual Offences Act to expressly repeal the common law offence of sodomy and repeal the provision in Schedule I, Part II of the Criminal Procedure and Evidence Act 1981, listing sodomy as an offence.
- Amend section 22 of the Registration of Births and Deaths Act, which provides for “change of sex of child,” to include a provision that allows adults specifically to change their assigned sex at birth to their self-determined gender in the births register.
- Amend section 12 of the National Identity Cards Act to include “gender of the bearer” in the list of information that identity documents will bear and provide for other gender marker options beyond the binary gender framework of “male” and “female”.
- Provide clear guidelines for the implementation of the Registration of Births and Deaths Act and National Identity Cards Act to ensure that gender markers in identification documents accurately reflect the bearer’s self-determined gender identity.
- Conduct a comprehensive review of all laws and policies in the country to ensure that they explicitly affirm and protect the human rights of LGBTIQ+ persons, including the right to equality and equal protection before the law. The legislature and relevant government departments, such as the Ministry of Law and Justice, should conduct this review in consultation with civil society organizations, lawyers, LGBTIQ+ persons and other stakeholders advocating for the human rights of LGBTIQ+ persons.

“Here in Lesotho, people see us as how we [have] sex, not as who we are. It’s basically that when they see me, they align me with sodomy. They think of sex and nothing else”

– focus group participant.

1. INTRODUCTION

Equal access to justice for all is fundamental to ensuring the full enjoyment of human rights and is a crucial component of a fair, effective and inclusive justice system.¹ In the Kingdom of Lesotho, marginalized persons, such as lesbian, gay, bisexual, transgender, intersex and queer (LGBTIQ+) individuals often struggle to access justice on an equal basis with other people in the country for a wide range of reasons.²

Access to justice is a fundamental right as well as a prerequisite for the protection and promotion of all other human rights.³ It encompasses the right to a fair trial, including equal access to and equality before the courts, and the right to seek and obtain just and timely remedies for violations of human rights.⁴ Guaranteeing access to justice is indispensable to democratic governance and the rule of law, as well as to combat social and economic marginalization.⁵

In both civil and criminal law contexts, access to justice encompasses much more than the availability of procedural mechanisms for resolving disputes or receiving a remedy for human rights violations.⁶ It also entails:

- the physical conditions of the premises where justice is dispensed;
- the quality of the human and material resources available at said premises and an individual’s ability to access such premises;⁷
- the quality of justice dispensed;
- the length of time it takes for justice to be dispensed;
- the expertise and impartiality of the adjudicator or dispenser of justice;

¹ UN Human Rights Committee, General comment no. 32, Article 14: The right to equality before courts and tribunals and to fair trial, UN Doc. CCPR/C/GC/32, 23 August 2007, paras. 2 and 8.

² See, for example, International Commission of Jurists (ICJ), The People’s Matrix Association (People’s Matrix), Seinoli Legal Centre (SLC) and the Lesotho National Federation of Organizations of the Disabled (LNFOD), *Joint Submission to the UN Human Rights Committee in view of the Committee’s examination of Lesotho’s Second Periodic Report under Article 40 of the International Covenant on Civil and Political Rights* (19 June 2023) paras. 12-14, <https://icj2.wpenginepowered.com/wp-content/uploads/2023/06/Joint-Submission-to-HRC-on-Lesotho-FINAL-AS-SUBMITTED-19-JUNE-2023-1.pdf> (accessed 7 August 2023).

³ See Articles 2, 3, 14 and 26 of the International Covenant on Civil and Political Rights (ICCPR); UN Human Rights Committee, General comment no. 32.

⁴ Articles 2(3) and 14 of the ICCPR; UN Human Rights Committee, General comment no. 32; See also, for example, ICJ, *The Right to a Remedy and Reparation for Gross Human Rights Violations* (2018), pp. 56-60 & 69-70, <https://www.icj.org/wp-content/uploads/2018/11/Universal-Right-to-a-Remedy-Publications-Reports-Practitioners-Guides-2018-ENG.pdf> (accessed 1 March 2024).

⁵ General Assembly, *Transforming our world: the 2030 Agenda for Sustainable Development*, A/RES/70/1, 25 September 2015.

⁶ Committee on the Elimination of Discrimination Against Women (CEDAW Committee), General Recommendation No. 33, UN Doc. CEDAW/C/GC/33, (23 July 2015), paras. 1; 13-20, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N15/241/90/PDF/N1524190.pdf?OpenElement> (accessed 20 February 2024); See also, Stella Vettori “Mandatory mediation: An obstacle to access to justice” (2015) 15 *African Human Rights Law Journal* 355-377; Nlerum S. Okogbule, “Access to Justice and Human Rights Protection in Nigeria: Problems and Prospects” (2005) *International Journal on Human Rights* 3(2), 95-114.

⁷ See, for example, Principle 2 of the International Principles and Guidelines on Access to Justice for Persons with Disabilities, https://www.ohchr.org/sites/default/files/Documents/Issues/Disability/SR_Disability/GoodPractices/Access-to-Justice-EN.pdf (accessed 13 February 2024).

- the observance of the general principles of the rule of law;
- the affordability of seeking justice; the quality of the legal services available to litigants; and
- the incorruptibility and impartiality of actors that run the justice sector at all levels.⁸

LGBTIQ+ persons in Lesotho continue to face many different forms of discrimination, structural barriers to exercising their human rights, as well as harassment and abuse because of their real or imputed sexual orientation, gender identity and/or expression (SOGIE).⁹ The stigmatization, shame, social and economic exclusion, violence and abuse to which such persons are subjected stems from heteronormative and patriarchal societal norms that are pervasive in Lesotho society.¹⁰ Violence and abuse against LGBTIQ+ persons takes many forms in Lesotho and occurs in both public and domestic settings.¹¹ Examples include killings; rape, such as “corrective rape”,¹² and other forms of sexual assault; intimidation; verbal abuse; humiliation; harassment; and harmful discriminatory practices, such as forcing children to attend initiation schools,¹³ that are purportedly aimed at “curing” or “correcting” a person to “regain their presumed heterosexual, cisgender identities.”¹⁴

⁸ NS Okogbule “Access to Justice and Human Rights Protection in Nigeria: Problems and Prospects” (2005) *International Journal on Human Rights* 3(2), 95-114, pp. 96 & 97; See also UN General Assembly, *Transforming our world: the 2030 Agenda for Sustainable Development*, A/RES/70/1, 25 September 2015, para. 35.

⁹ Alex Müller, Kristen Daskilewicz and the Southern and East African Research Collective on Health, *Are we doing alright? Realities of violence, mental health, and access to healthcare related to sexual orientation and gender identity and expression in East and Southern Africa: Research report based on a community-led study in nine countries* (2019); Southern Africa Litigation Centre, The People’s Matrix Association & Women and Law Southern Africa *Legal Gender Recognition in Lesotho - An analysis of law and policy in the context of international best practice* (2020) pp. 7-9, <https://www.southernafricalitigationcentre.org/wp-content/uploads/2020/11/Lesotho-Gender-Marker-report.pdf> (accessed 4 August 2023); Southern Africa Litigation Centre “Transgender Rights in Lesotho” in *Laws and Policies Affecting Transgender Persons in Southern Africa* (2016) pp. 23 – 25.

¹⁰ See “Findings in Lesotho” in Alex Müller, Kristen Daskilewicz and the Southern and East African Research Collective on Health at note 9 *supra*.

¹¹ Focus group discussants and interviewees for this study shared specific examples of the kinds of violence, abuse and discrimination LGBTIQ+ persons may experience ranging from domestic violence at the hands of intimate partners and family members; to workplace discrimination on the basis of real or imputed sexual orientation or gender expression; to bullying in schools; to harassment on public transport; to online harassment on social media; to being forced into marriages to purportedly to “correct” their sexual orientations and gender identities.

¹² “Corrective rape” also called “curative rape”, “punitive rape” or “homophobic rape” is the use of rape against lesbian women or transgender men because of their real or perceived sexual orientation or gender identity, supposedly to “cure” them of this sexual orientation or gender identity. According to UNAIDS, the terms “homophobic violence” or “transphobic violence” are preferred: https://www.unaids.org/en/resources/documents/2024/terminology_guidelines; Centre for Investigative Journalism, “Misery of being gay in Lesotho and the fight against HIV”, 15 November 2019, <https://lescij.org/2019/11/15/misery-of-being-gay-in-lesotho-and-the-fight-against-hiv/> (accessed 8 August 2024).

¹³ Focus group participants explained that some LGBTIQ+ children are forced by their families to attend initiation schools particularly as a means of “curing” their sexual orientation or gender identity to conform with cultural norms and standards of “womanhood” or “manhood”. For more information on initiation schools, see The New Humanitarian, “Boys quit school to become men”, 17 November 2011, <https://www.thenewhumanitarian.org/report/94228/lesotho-boys-quit-school-become-men> (accessed 8 August 2024).

¹⁴ So-called “conversion therapy” is a prevalent form of discrimination and violence that has a deep negative psychological impact on LGBTIQ+ persons, violating a range of human rights. See, ICJ, *Invisible, Isolated, and Ignored Human Rights Abuses Based on Sexual Orientation and Gender Identity/Expression in Colombia, South Africa and Malaysia*, pp. 2, 26 and 45, <https://ici2.wpenginepowered.com/wp-content/uploads/2021/03/Colombia-SouthAfrica-Malaysia-SOGIE-Publications-Reports-Thematic-reports-2021-ENG.pdf> (accessed 23 February 2023); See also, OutRight Action International, *Harmful Treatment: The Global Reach of So-Called Conversion Therapy* (2019) p. 3, https://outrightinternational.org/sites/default/files/2022-09/ConversionFINAL_Web_0.pdf (accessed 23 February 2023); UN Human Rights Council, *Practices of so-call*

Lesotho is a party to several international human rights instruments that guarantee the rights to equality, non-discrimination and access to justice and effective remedies for all persons without discrimination, including:

- The International Covenant on Civil and Political Rights (ICCPR);¹⁵
- The International Covenant on Economic, Social and Cultural Rights (ICESCR);¹⁶
- The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW);¹⁷
- The African Charter on Human and Peoples' Rights (ACHPR);¹⁸
- The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol).¹⁹

While the Lesotho Constitution²⁰ and a number of domestic legislative provisions and policies also guarantee the right to equality before the law and prohibit discrimination generally, they do not explicitly do so with respect to equality before the law and discrimination on the basis of sexual orientation, gender identity and/or gender expression and sex characteristics (SOGIE-SC).²¹ Moreover, there are also laws in force that continue to perpetuate discrimination on the basis of SOGIE-SC and further impede the ability LGBTIQ+ persons to exercise and enforce their human rights.²²

Despite some efforts by the government of Lesotho to protect the human rights of LGBTIQ+ persons and combat discrimination – including through amendments to domestic violence legislation in 2022 and the decriminalization of consensual same-sex sexual relations in 2012 – LGBTIQ+ individuals in Lesotho report that they continue to encounter significant obstacles when interacting with and attempting to access the justice system. They complain that this hinders their ability to seek protection and redress for violations of their human rights, especially their rights to lead a life free from discrimination and violence. A dearth of explicit legal provisions prohibiting discrimination on the grounds of people's real or imputed SOGIE-SC, gaps within existing legislation, difficult interactions with the police and correctional services personnel are some of the many legal, societal and other hindrances to accessing justice and effective remedies for human rights violations that LGBTIQ+ individuals have reported experiencing.²³

"conversion therapy": Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, A/HRC/44/53, 1 May 2020, paras. 55-73.

¹⁵ ICCPR, Articles 2, 3, 14 and 26.

¹⁶ ICESCR, Articles 2 and 3.

¹⁷ CEDAW, Articles 2, 5, 15 and 16.

¹⁸ ACHPR, Articles 2, 3, 4, 5 and 7.

¹⁹ Maputo Protocol, Articles 2, 3, 4, 5, 8, 9, 17 and 25.

²⁰ Section 4(1) of the Constitution of Lesotho, 1993, states that every person in Lesotho is entitled to the human rights and freedoms contained in the Constitution. It does not explicitly mention sexual orientation or gender identity and expression as prohibited grounds of discrimination but refers to "sex" and "other status". Section 18 also provides for the right to freedom from discrimination based on the same grounds as section 4, including "sex" and "other status".

²¹ ICJ, The People's Matrix, SLC and the LNFOD, *Joint Submission to the UN Human Rights Committee* (19 June 2023), paras. 3-5.

²² *Ibid.*

²³ *Ibid.*, paras. 2-5 and 7. In their joint submission to the UN Human Rights Committee in 2023, the organizations also highlight that, despite commendable legislation providing for the broad provision of legal aid by the State, the reality faced by litigants in accessing legal aid and other such assistance remains challenging for various reasons.

In a judicial workshop, hosted by the International Commission of Jurists (ICJ) and Outright International in October 2022,²⁴ the Chief Justice of Lesotho, the Hon. Chief Justice Sakoane Peter Sakoane, gave an opening address in which he called for the “cultivation of an LGBTIQ+ sensitive culture” in Lesotho.²⁵ In his remarks, he also underscored the importance of ensuring access to justice for marginalized groups in Africa, including LGBTIQ+ persons.

Based on the ICJ’s previous engagements with the Lesotho judiciary and subsequent discussions with the People’s Matrix Association (People’s Matrix),²⁶ ICJ, with support from the People’s Matrix, embarked on a research project to understand the experiences of LGBTIQ+ persons interacting with the justice system in Lesotho.

This briefing paper outlines these experiences and analyzes the range of barriers impeding access to justice and effective remedies for LGBTIQ+ persons in Lesotho. The ICJ has assessed the country’s record in ensuring effective access to justice without discrimination for this population in light of Lesotho’s human rights obligations - under both international human rights law and domestic law. Under international human rights law, effective access to justice requires non-discriminatory access to courts and effective judicial remedies.

This briefing paper is aimed at:

1. Raising awareness about the predicaments LGBTIQ+ persons in Lesotho may experience when engaging the justice system;
2. Providing important contextual information to judicial officers, parliamentarians and justice sector actors generally, to understand the obstacles that may impede LGBTIQ+ persons in Lesotho from accessing justice and effective remedies when they are victims of human rights violations;
3. Detailing the role that various stakeholders play in ensuring access to justice for LGBTIQ+ persons and other marginalized groups and the responsibilities of these stakeholders in making such access for this population possible; and
4. Providing recommendations to all three branches of the State in Lesotho on how to overcome these challenges and ensure the rights of all persons, regardless of SOGIE-SC, to access justice.

The briefing paper is divided into six sections, including this introduction. Sections two and three briefly provide information on the research methodology and the present study’s limitations, respectively. Sections four and five briefly unpack the applicable international and regional human rights law standards on the rights to equality and non-discrimination and analyze Lesotho’s domestic legal framework

²⁴ Outright International is a human rights organization that works to strengthen the capacity of the LGBTIQ+ human rights movement, document and amplify human rights violations, and advocate for inclusion and equality. Learn more about the organization at <https://outrightinternational.org/>, (accessed 10 June 2024).

²⁵ See ICJ, “Lesotho: Chief Justice Sakoane Sakoane calls for the “cultivation of an LGBTIQ sensitive culture” in Lesotho”, 18 October 2022, <https://www.icj.org/lesotho-chief-justice-sakoane-sakoane-calls-for-the-cultivation-of-an-lgbtiq-sensitive-culture-in-lesotho/>.

²⁶ The People’s Matrix Association is dedicated to advancing human rights in Lesotho, with a particular focus on sex, sexual orientation, gender identity and gender expression. Its vision is to ensure that Lesotho is a country where there is justice and freedom for all regardless of sexual orientations, gender identities and gender expressions.

pertaining to the right of everyone to access to justice and effective remedies without discrimination. The sections do so through the lens of the specific experiences of LGBTIQ+ persons in: interacting with police; engaging with courts, including local courts;²⁷ and attempting to access and obtain legal services. It assesses these experiences in light of Lesotho's international and domestic human rights obligations. The final section, section six, provides a set of conclusions and recommendations addressed to all three branches of the State in Lesotho to overcome the challenges faced by LGBTIQ+ individuals interacting with the justice system.

2. METHODOLOGY

The findings in this briefing paper are based on:

- interviews with advocates for the human rights of LGBTIQ+ persons;
- interviews with lawyers;
- ongoing engagements and discussions with the People's Matrix Association regarding the human rights of LGBTIQ+ persons in Lesotho (this includes the workshops the two organizations have co-organized);
- two focus group discussions conducted with LGBTIQ+ persons based in Maseru and Leribe;²⁸ and
- previous ICJ engagements with the Lesotho judiciary on the human rights of LGBTIQ+ persons in Lesotho.

On 9 and 10 October 2023, the ICJ, with support from the People's Matrix, conducted two focus group discussions (FGDs) in person at community halls in the Maseru and Leribe districts of Lesotho, respectively. The participants took part in the discussions after responding to a call for participation put out by the People's Matrix. There was a total of 24 adult persons participating in the discussions, including lesbian women, gay men, transgender persons, one intersex person, one gender-nonconforming person and a small minority of participants who did not wish to disclose their sexual orientation and gender identity. The participants were brought together by the People's Matrix and were split into two groups consisting of 12 participants each.

Participants were informed of the purpose of the FGDs, that their participation was entirely voluntary, that they would be quoted anonymously, and that they were free to leave the FGDs at any point.

Information drawn from the focus group discussions and engagements has been supplemented by ICJ's own desktop research, online interviews which took place between January 2024 and June 2024, and a second round of in-person interviews conducted in Maseru in July 2024.

3. LIMITATIONS

²⁷ "Local courts" in this context refer primarily to customary courts. See I Shale "UPDATE: The Law and Legal Research in Lesotho" (2019)

https://www.nyulawglobal.org/globalex/Lesotho1.html#_Customary_Courts.

²⁸ Maseru and Leribe are districts in Lesotho. See Lesotho National Bureau of Statistics, *2023 Gender Report* (2024): <https://www.bos.gov.ls/Publications.htm>; (accessed 5 September 2024) see also Lesotho Bureau of Statistics, *Lesotho District Profiles*, <https://www.undp.org/sites/g/files/zskgqe326/files/migration/ls/District-Profiles-Final-Print-3.pdf> (accessed 5 September 2024).

Two main limitations of the research carried out to develop this briefing paper ought to be acknowledged to ensure a more accurate understanding of its findings. First, the scope of the study is limited by the sample size and geographical coverage of the focus group discussions. The experiences of LGBTIQ+ persons engaging with the justice system in Lesotho may differ significantly across the country's 10 districts. The research undertaken may not have fully captured the diversity of these experiences as the key informant interviews and focus group discussions took place in two locations within two districts. Second, the research's scope was limited by a lack of comprehensive and disaggregated data on LGBTIQ+ cases within the justice system, the absence of which might limit the paper's ability to definitively capture the prevalence and nature of discrimination and violence against LGBTIQ+ persons in Lesotho.

Nevertheless, the briefing paper highlights and analyzes certain personal experiences in light of Lesotho's international and domestic human rights obligations with a view to identifying and addressing areas of concern.

4. BRIEF OVERVIEW OF INTERNATIONAL AND DOMESTIC LEGAL FRAMEWORK

Everyone, regardless of their real or imputed sexual orientation, gender identity, gender expression or sex characteristics, has the right to access to justice, which is a basic principle and key tenet of the rule of law and good governance.²⁹ According to the Committee on the Elimination of Discrimination Against Women (the CEDAW Committee), "[j]usticiability, availability, accessibility, good quality, the provision of remedies for victims and the accountability" are important components of a justice system that is accessible to all.³⁰ Ensuring that LGBTIQ+ persons can enjoy access to justice on an equal basis with others essentially necessitates that the justice system:

- be inclusive;
- be accessible to LGBTIQ+ persons to ensure that their rights are protected;
- allow the vindication and enforcement of their rights when human rights violations occur; and
- provide for effective remedies in the case of human rights violations.

Before delving into the issues affecting access of LGBTIQ+ persons to Lesotho's justice system, it is necessary to outline Lesotho's general obligations to respect, protect, promote and fulfil the human rights of LGBTIQ+ persons to equality before the law and equal protection of the law without discrimination, and to freedom from prohibited discrimination more generally.

Universal human rights obligations

As a party to the International Covenant on Civil and Political Rights (ICCPR) since 9 September 1992, Lesotho has undertaken to adopt effective legislative, administrative, judicial or other measures as may be necessary to give effect to

²⁹ United Nations, "Access to Justice": <https://www.un.org/ruleoflaw/thematic-areas/access-to-justice-and-rule-of-law-institutions/access-to-justice/>; see also Principles 5, 8, 9 and 10 of the Yogyakarta Principles.

³⁰ CEDAW Committee, General Recommendation No. 33, UN Doc. CEDAW/C/GC/33, (23 July 2015), para. 1, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N15/241/90/PDF/N1524190.pdf?OpenElement>. (accessed 1 October 2023).

the rights guaranteed in the ICCPR. Article 26³¹ of the ICCPR guarantees the right to equality before the law and prohibits discrimination on a range of grounds. As iterated in article 2(1),³² this provision and all others in the ICCPR, including those related to access to justice, are applicable to all individuals, regardless of their SOGIE-SC.

The United Nations (UN) Human Rights Committee has stated that article 26 prohibits discrimination on the basis of sexual orientation, interpreting the word "sex" in articles 2(1) and 26 of the ICCPR to include sexual orientation.³³

Article 2(2) of the International Covenant on Economic, Social and Cultural Rights (ICESCR), to which Lesotho became a party on 9 September 1992, prohibits discrimination in the exercise of the rights guaranteed by the Covenant.

In its General Comment 14 on the right to the highest attainable standard of health and its General Comment 20 on non-discrimination in economic, social and cultural rights, the Committee on Economic, Social and Cultural Rights has also held that the prohibition of discrimination under the International Covenant on Economic, Social and Cultural Rights extends to discrimination against someone based on their real or imputed sexual orientation.³⁴

The CEDAW Committee recognizes that discrimination against women, which is based on gender and sex, is inextricably connected with other prohibited grounds of discrimination, including "sexual orientation and gender identity".³⁵ This approach is rooted in the concept of "intersectionality" which recognizes the multiple and intersecting forms of discrimination to which individual may be subjected based on characteristics so fundamental to one's identity that one cannot be expected to renounce or conceal.³⁶

³¹ Article 26 of the ICCPR provides: "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

³² Article 2(1) of the ICCPR provides: "Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

³³ See the landmark decision: Human Rights Committee, *Toonen v. Australia*, Communication No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992, 31 March 1994, para. 8.7: "The State party has sought the Committee's guidance as to whether sexual orientation may be considered an "other status" for the purposes of article 26. The same issue could arise under article 2, paragraph 1, of the Covenant. The Committee confines itself to noting, however, that in its view the reference to "sex" in articles 2, paragraph 1, and 26 is to be taken as including sexual orientation."

³⁴ Committee on Economic, Social and Cultural Rights, General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12), E/C.12/2000/4, 11 August 2000, para. 18; Committee on Economic, Social and Cultural Rights, General Comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2 of the International Covenant on Economic, Social and Cultural Rights), E/C.12/GC/20, 2 July 2009, para. 32. In General Comment 20, the Committee specifically states that: "'Other status' as recognized in article 2, paragraph 2, includes sexual orientation. States parties should ensure that a person's sexual orientation is not a barrier to realizing Covenant rights [...] In addition, gender identity is recognized as among the prohibited grounds of discrimination."

³⁵ CEDAW Committee, General Recommendation No. 27 on older women and protection of their human rights, CEDAW/C/GC/27, 16 December 2010, para 13.

³⁶ CEDAW Committee, General Recommendation No. 28: on the state's core obligations' (2010) CEDAW/GC/C/28; Meghan Campbell, "CEDAW and Women's Intersecting Identities: A Pioneering Approach to Intersectional Discrimination" (2016): <https://globalnaps.org/wp-content/uploads/2018/08/cedaw-and-women-s-intersecting-identities-a-pioneering-approach-to-intersectional-discrimination.pdf> (accessed 22 February 2024).

Other UN human rights treaty bodies, including the Committee on the Rights of the Child³⁷ and the Committee Against Torture,³⁸ have similarly held that sexual orientation and gender identity are both prohibited grounds of discrimination under international human rights law.

As far as access to justice and effective remedies for victims of violations of economic, social and cultural rights are concerned, the Committee on Economic, Social and Cultural Rights has reiterated on several occasions that States parties to the ICESCR must make remedies available to rights-holders.³⁹ The Committee has also indicated that it considers the provision of domestic legal remedies for violations of ESC rights as being part and parcel of States parties' obligations under article 2(1) of the ICESCR, which requires States parties to take all "appropriate means" for the realization of the rights under the Covenant. In this context, the Committee has also held that, "other means used could be rendered ineffective if they are not reinforced or complemented by judicial remedies".⁴⁰

In terms of article 15(2) of the CEDAW Convention, which Lesotho ratified on 22 August 1995, Lesotho must "accord to women, in civil matters, a legal capacity identical to that of men and the same opportunities to exercise that capacity. In particular, they shall give women equal rights to conclude contracts and to administer property and **shall treat them equally in all stages of procedure in courts and tribunals**" (emphasis added). Women includes lesbian, bisexual and transgender women. In its General Recommendation No. 33 on Women's Access to Justice, the CEDAW Committee recommended that States Parties take necessary measures to fully realize the rights in the Convention. In relation to access to justice, such measures would include establishing and regularly maintaining courts and administrative bodies in accessible locations; eliminating economic barriers to justice systems through the provision of legal aid; and improving the gender responsiveness of justice system, among other measures.⁴¹

Other international human rights instruments to which Lesotho is a State Party also set out the State's obligations to realize the right of access to justice and effective remedies for all persons without discrimination.⁴²

The Yogyakarta Principles

³⁷ Committee on the Rights of the Child, General Comments No. 4: Adolescent Health and Development in the Context of the Convention on the rights of the Child (CRC/GC/2003/4), 21 July 2003, para. 6, and General Comment No. 9: The Rights of Children with Disabilities (CRC/C/ GC/9), 27 February 2007, para 8.

³⁸ The Committee against Torture, General Comment No. 2: Implementation of article 2 by States parties, CAT/C/GC/2, 24 January 2008, para 21.

³⁹ Committee on Economic, Social and Cultural Rights, General Comment No. 9, UN Doc. E/C.12/1998/24 (1998), paras 2 and 3. See also Committee on Economic, Social and Cultural Rights, General Comments No. 12, UN Doc. E/C.12/1999/5 (1999), paras. 32-35; No. 14, UN Doc. E/C.12/2000/4 (2000), paras 59-62; No. 15, UN Doc. E/C.12/2002/11 (2002), paras. 55-59; No. 18, E/C.12/GC/18 (2006), paras. 48-51; and No. 19, UN Doc. E/C.12/GC/19 (2008), paras. 77-81.

⁴⁰ Committee on Economic, Social and Cultural Rights, General Comment No. 9, UN Doc. E/C.12/1998/24 (1998), paras 2 and 3. Article 2(1) of the ICESCR, to which Lesotho became a party on 9 September 1992, provides that: "Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and cooperation, especially economic and technical to the maximum of its available resources with a view to achieving progressively the full realization in the present Covenant by all appropriate means including particularly the adoption of legislative measures."

⁴¹ CEDAW Committee, General Recommendation No. 33, paras. 13-17.

⁴² See, for example, articles 12 and 13 of the Convention on the Rights of Persons with Disabilities which obliges State Parties to ensure equal access to justice for all persons with disabilities by providing the necessary substantive, procedural, gender and age-appropriate accommodation and supports.

The Yogyakarta Principles and the Yogyakarta Principles Plus 10 – Additional Principles and State Obligation on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Identity, Gender Expression and Sex Characteristics to Complement the Yogyakarta Principles – which have been invoked by courts around the world,⁴³ provide an authoritative interpretation of the human rights of LGBTIQ+ persons and clarify the legal obligations of States as regards the application of international human rights law in relation to SOGIE and sex characteristics.⁴⁴

Principles 1 and 2 provide that States shall ensure universal enjoyment of human rights and equality of the law for all persons through, among other measures, the enactment and repeal of legislation to eliminate discrimination in public and private spheres.⁴⁵ Principles 3, 6, 7 and 8 uphold the rights of LGBTIQ+ persons to recognition before the law, privacy, the freedom from arbitrary detention and the right to a fair trial.

Regional human rights obligations: the African human rights system

Lesotho is a member of the African Union and a party to the African Charter on Human and Peoples' Rights ("African Charter"),⁴⁶ which guarantees civil and political, economic social and cultural rights and the rights of peoples in Africa. These rights are applicable to all persons. Like other human rights instruments, this treaty enshrines the principle of non-discrimination and the equality of all individuals under its articles 2 and 3, among other provisions. The African Charter prohibits discrimination based on "other status", which would include discrimination based on sexual orientation, age or disability. [L]
[SEP]

Other binding human rights instruments relevant to the protection of the human rights of LGBTIQ+ persons in Africa to which Lesotho is party include the African Youth Charter⁴⁷ and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa,⁴⁸ which place a duty on States to

⁴³ ICJ, *Invisible, Isolated, and Ignored Human Rights Abuses Based on Sexual Orientation and Gender Identity/Expression in Colombia, South Africa and Malaysia*, 2021 p. 9.

⁴⁴ ICJ, *Yogyakarta Principles - Principles on the application of international human rights law in relation to sexual orientation and gender identity*, March 2007, <https://www.refworld.org/docid/48244e602.html>; International Commission of Jurists, *The Yogyakarta Principles Plus 10 - Additional Principles and State Obligation on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Identity, Gender Expression and Sex Characteristics to Complement the Yogyakarta Principles*, 10 November 2017, <https://www.refworld.org/docid/5c5d4e2e4.html>.

⁴⁵ The obligations of States under these principles set out that "States shall [e]mbody the principles of equality and non-discrimination on the basis of sexual orientation and gender identity in their national constitutions or other appropriate legislation, if not yet incorporated therein, including by means of amendment and interpretation, and ensure the effective realisation of these principles; Adopt appropriate legislative and other measures to prohibit and eliminate discrimination in the public and private spheres on the basis of sexual orientation and gender identity; Take appropriate measures to secure adequate advancement of persons of diverse sexual orientations and gender identities as may be necessary to ensure such groups or individuals equal enjoyment or exercise of human rights. Such measures shall not be deemed to be discriminatory;"

⁴⁶ Lesotho ratified this treaty on 10 February 1992.

⁴⁷ Article 2 of the African Youth Charter: "Every young person shall be entitled to the enjoyments of the rights and freedoms recognised and guaranteed in this charter irrespective of their race, ethnic group, colour, sex, language, religion, political or other opinion, national and social origin, fortune, birth or other status" and Article 16: Health "Every young person shall have the right to enjoy the best attainable state of physical, mental and spiritual health." African Union Commission, *African Youth Charter*, 2 July 2006, https://www.un.org/en/africa/osaa/pdf/au/african_youth_charter_2006.pdf.

⁴⁸ African Union Commission, *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa*, 11 July 2003, https://www.un.org/en/africa/osaa/pdf/au/protocol_rights_women_africa_2003.pdf; See also Maputo Plan of Action 2016-2030 which provides for investment in vulnerable populations and in efforts to ensure that no

eliminate gender-based discrimination and abuse against all women in Africa, including LBT women.⁴⁹

Despite these guarantees of equality and non-discrimination and legal protections, LGBTIQ+ persons in Africa, including in Lesotho, continue to be subjected to violations of their human rights on a regular basis.⁵⁰

The African Commission on Human and Peoples' Rights has noted, with alarm, these violations in its landmark Resolution 275 on Protection against Violence and other Human Rights violations against Persons on the basis of their real or imputed sexual orientation or gender identity.⁵¹ In this resolution, which was adopted in 2014,⁵² the African Commission draws attention to and explicitly condemns pervasive discrimination and violence on the basis of SOGIE and reaffirms that the African Charter on Human and Peoples' Rights protects the rights of all persons to non-discrimination, equality, life, dignity and freedom from torture.⁵³

On 7 March 2023, the African Commission adopted Resolution 552 on the Promotion and Protection of the Rights of Intersex Persons in Africa,⁵⁴ which calls on States to promote and protect the human rights of intersex persons on the African continent, including their rights to equality, non-discrimination and dignity. In this resolution, the Commission calls on States Parties to the African Charter to, among other things:

“Ensure that human rights violations against intersex people are investigated, perpetrators are prosecuted, and victims have access to effective remedies, including redress and compensation; [e]nsure that members of the judiciary, immigration officials, law enforcement officers, health, education and other officials and personnel are sensitized to the respect and equal treatment of intersex persons.”

In its Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, the African Commission also lays out the general principles applicable to legal proceedings, including equality of all persons before any judicial body and “respect for the inherent dignity of the human persons, especially of women who participate in legal proceedings as complainants, witnesses, victims or accused” as two of the essential elements of a fair hearing.⁵⁵

groups or vulnerable populations are left behind. African Union Commission, Maputo Plan of Action 2016-2030, para 17(v), https://au.int/sites/default/files/documents/30358-doc-mpoa_7-revised_au_stc_inputs_may_se-rob-director_002.pdf; Lesotho ratified the Maputo Protocol on 26 October 2004.

⁴⁹ See Article 2: Elimination of Discrimination Against Women (1) “States Parties shall combat all forms of discrimination against women through appropriate legislative, institutional and other measures.”

⁵⁰ Chimaraoke Izugbara, Seun Bakare, Meroji Seban, Boniface Ushie, Frederick Wekesah & Joan Njagi (2020) *Regional legal and policy instruments for addressing LGBT exclusion in Africa, Sexual and Reproductive Health Matters*, 28:1, <https://www.tandfonline.com/doi/pdf/10.1080/26410397.2019.1698905?needAccess=true>.

⁵¹ African Commission on Human and Peoples' Rights, *Resolution 275 on Protection against Violence and other Human Rights violations against Persons on the basis of their real or imputed sexual orientation or gender identity*, ACHPR/Res.275(LV) 2014, <https://achpr.au.int/en/adopted-resolutions/275-resolution-protection-against-violence-and-other-human-rights-violations>.

⁵² The Resolution was adopted during the 55th Ordinary Session of the African Commission on Human and Peoples' Rights in Luanda, Angola, which was held between 28 April 2014 and 12 May 2014.

⁵³ Articles 2,3, 4 and 5 of the African Charter.

⁵⁴ African Commission on Human and Peoples' Rights, *Resolution on the Promotion and Protection of the Rights of Intersex Persons in Africa* - ACHPR/Res.552 (LXXIV) 2023.

⁵⁵ African Commission on Human and Peoples' Rights, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, (2003), <http://hrlibrary.umn.edu/research/ZIM%20Principles%20And%20G.pdf>.

Lesotho's Constitution and domestic legislative provisions

Section 4(1) of Lesotho's Constitution states that every person in Lesotho is entitled to the human rights and freedoms contained in the Constitution.⁵⁶ Section 18 of the Constitution prohibits discrimination based on a range of grounds listed in subsection (3) which include "sex" and "other status". Section 18(1) provides that subject to limitations set out in subsections (4) and (5), "no law shall make any provision that is discriminatory either of itself or in its effect." Section 18(2) similarly provides that "[s]ubject to the provisions of subsection (6), no person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority."

Section 18(3) reads, in full, as follows:

"In this section, the expression "discriminatory" means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description."

The Lesotho High Court analyzed Section 18(3) in the case of *Thabo Fuma v Commander Lesotho Defence Force and Others*.⁵⁷ In that case, the Court considered the grounds upon which "discrimination" can occur, noting that the specified grounds under section 18(3) are "not exhaustive." It held that there could be more prohibited grounds of discrimination beyond those expressly listed. The Court went on to hold that "[t]his is attributable to the fact that [the section] contemplates rather endless categories of people who might be discriminated against."⁵⁸ The High Court also references article 26 of the ICCPR, finding that the grounds laid out in the article are a "reverberation of the grounds which are in the contemplation of Sec 18 (3) in the Constitution."⁵⁹

Furthermore, in *Ralekoala v Minister of Human Rights, Justice and Constitution Affairs*,⁶⁰ the Lesotho High Court, also underscored that, "every person in Lesotho is entitled to fundamental human rights which include freedom from discrimination", and that Section 18(3) does not contain an exhaustive list of grounds for discrimination.⁶¹

On this basis, while Section 18(3) does not explicitly mention sexual orientation, gender identity, gender expression or sex characteristics as prohibited grounds of discrimination, it does refer to both "sex" and "other status", both of which may

⁵⁶ Constitution of Lesotho, 1993.

⁵⁷ *Thabo Fuma v The Commander, Lesotho Defence Force and Others* (CONST/8/2011) [2013] LSHC 68 (10 October 2013), <https://lesotholii.org/akn/ls/judgment/lshc/2013/68/eng@2013-10-10> (accessed 3 August 2022).

⁵⁸ *Ibid*, para 10.

⁵⁹ *Ibid*, para. 56.

⁶⁰ *Ralekoala v Minister of Human Rights, Justice and Constitution Affairs and Others* [2012] LSHC 8 (30 March 2012), <https://lesotholii.org/akn/ls/judgment/lshc/2012/8/eng@2012-03-30> (accessed 3 August 2022).

⁶¹ *Ibid*, paras. 52, 53 and 55.

be interpreted to include “sexual orientation” and “gender identity”, consistent with international human rights law binding on Lesotho and with the High Court’s case law analysis of Section 18(3).

Section 19 of the Lesotho Constitution provides that “[e]very person shall be entitled to equality before the law and to the equal protection of the law.” Section 26 of the Constitution on “equality and justice” provides an obligation for the State to enact laws and policies that promote equality and non-discrimination. The section specifically provides that:

- (1) Lesotho shall adopt policies aimed at promoting a society based on equality and justice for all its citizens regardless of race, colour, **sex**, language, religion, political or other opinion, national or social origin, property, birth or **other status**.
- (2) In particular, the State shall take appropriate measures in order to promote equality of opportunity for the **disadvantaged groups** in the society to enable them to participate fully in all spheres of public life (**emphasis added**)

Ensuring that Lesotho’s justice system conforms with the principles of equality and non-discrimination and adheres to these legal obligations is crucial for protecting the rights of all individuals in the country, particularly LGBTIQ+ persons. Failure to do so undermines their right to access to justice and effective remedies on an equal basis with others.

5. EXPERIENCES OF LGBTIQ+ PERSONS WHEN INTERACTING WITH THE JUSTICE SYSTEM IN LESOTHO

Based on information shared by focus group discussants and interviewees, this section of the briefing paper outlines how LGBTIQ+ persons have engaged with the justice system and the obstacles that have prevented them from seeking redress for human rights violations.

5.1. Violations of the human rights of LGBTIQ+ persons are not reported

Stigmatization as a barrier to reporting human rights violations

Many LGBTIQ+ persons do not report incidents of discrimination and violence committed against them due to fear of being exposed as an LGBTIQ+ person, fear of retaliation for reporting a crime, potentially experiencing further victimization and violence, and a feeling on the part of survivors that it is futile to report such incidents because perpetrators will not be brought to justice.⁶² This, in turn, means that many of these cases will not reach courts in the first place.

⁶² See Carmen Logie, Amaya Perez-Brumer, Tampose Mothopeng, Maya Latif, Amelia Ranotsi and Stefan D. Baral, “Conceptualizing LGBT Stigma and Associated HIV Vulnerabilities Among LGBT Persons in Lesotho” in *AIDS Behav* 24 (2020) 3462–3472 . <https://doi.org/10.1007/s10461-020-02917-y> (accessed 19 February 2024), p. 3467.

"The majority of our members are afraid to report cases because of fear of being judged and stigmatized. We still have a lot of cases. I remember we had a case of a transman who was raped and then he killed himself because the perpetrator impregnated [him]," – People's Matrix staff member.

"When seeking help, we are being judged, instead of being treated like everyone else," – Madondo Jane, community organizer and LGBTIQ+ rights advocate.

"I think there are a lot of cases but [LGBTIQ+] people are afraid to come out and report because now they're afraid of being put out there [...] we have a small country. People know people here. If someone goes to report a rape case to the police, well, of course, people are bound to know that he went to the police to report the matter. You're going to have comments like: 'what do you mean? A boy raped a boy? What does that mean?' It's rather deterring to go report." – Nhlapo Katiso, lawyer in private practice.

Fear and apathy around seeking justice for violations of human rights stems from the stigmatization of LGBTIQ+ individuals and has been a major hurdle to exposing and eliminating the discrimination and violence that LGBTIQ+ persons experience in Lesotho.

"Many [LGBTIQ+] people take [abuse and stigmatization] as something they just have to get used to." – Lieketso Kokome, Project Coordinator at the People's Matrix.

Most of the focus group participants characterized their day-to-day experience as a LGBTIQ+ person in Lesotho as being incredibly challenging or, in some instances, traumatizing. This, they explained, is due to a general lack of acceptance of LGBTIQ+ persons in their communities.

"Here in Lesotho, [people], when they see us, they see us as how we [have] sex, not who we are. It's basically that when they see me, they align me with sodomy. They think of sex and nothing else" – focus group participant.

"People think that we have evil spirits, satanic spirits. That you are at odds with how God made you. There are some communities where it is still tough for them to grapple with the LGBTIQ issue. That is why most of the members [of the LGBTIQ+ community] congregate to the urban centers as [there is more] acceptance." – focus group participant.

"I believe the other thing is that we struggle as a community to attend churches. Because churches have a mandated, gendered dress code based on biological appearance. What they don't understand is that the way I feel about myself makes me want to express myself through how I dress. So, you will find that a lot of LGBTI persons miss out on church because of these mandated dress codes" – focus group participant.

"The other new issue is forced initiations into manhood or womanhood to "correct" [your sexual orientation or gender identity]. I think about three or four people I

know have been abducted and forced to attend initiation schools.⁶³ The problem is that once you are enrolled, there is no way of coming back. You are forced to finish off the [rituals] of the school.” – focus group participant.

LGBTIQ+ persons in Lesotho are often stigmatized and marginalized due to misguided and prejudicial beliefs about their real or imputed SOGIE-SC that are typically rooted in patriarchal norms, heteronormative norms and religious beliefs commonly held in the country.⁶⁴ Not only have prejudicial and discriminatory attitudes towards LGBTIQ+ persons in Lesotho caused isolation, humiliation and fear, but they have also created barriers in their access to the services offered by health care professionals and law enforcement officials when LGBTIQ+ persons are victims of human rights abuses. The predicament of LGBTIQ+ people is further compounded by a lack of familial and community support in reporting human rights abuses, which is particularly the case when family members are themselves the actual perpetrators of such violence and abuse.

So even [when you go to] hospitals or other services and since you are part of the LGBTI community you find that you will be discriminated against...Instead of the nurse [helping] you, they are just going to insult you about sodomy or whatever.” – focus group participant.

“It is not easy to sue a parent. This is your mother. This is your father. It is not going to be an easy thing to take them to court, even if they violate you.” – Mamofuta Kale, human rights lawyer

Bias among law enforcement officials prevent reporting of human rights violations

Police are generally the first point of contact for most individuals interacting with the justice system in both civil and criminal matters. Most of the focus group participants identified negative interactions with the Lesotho Mounted Police Service (LMPS) as posing another big hurdle to reporting violations of their human rights. The reported general attitude of police officers towards members of the LGBTIQ+ community was of being biased and, at times, downright homophobic or transphobic, unless they had undergone some sensitization on SOGIE and the human rights of LGBTIQ+ persons or had interacted regularly with LGBTIQ+ persons.⁶⁵

Focus group participants and interviewees shared varied experiences of their interactions with law enforcement, with many describing more negative than positive accounts of attempts to report a crime, attempts to resolve a dispute or conducting community engagements involving the police.

⁶³ In Lesotho, initiation schools, known as “*lebollo*,” serve as rites of passage into adulthood for boys and girls. These schools are cultural institutions where boys, in particular, undergo rituals to develop qualities associated with masculinity; See Sonke Gender Justice, “Family acceptance: a story of hope for LGBTQI+ in Semonkong, Lesotho,” 4 July 2024, <https://genderjustice.org.za/news-item/family-acceptance-a-story-of-hope-for-lgbtqi-in-semonkong-lesotho/> (accessed 30 August 2024); See also Thope Matobo, M Makatsa and Emeka Obioha, “Continuity of Traditional Initiation Practice of Boys and Girls in Contemporary Southern Africa Society” in *Studies of Tribes and Tribals* 7 (2009)105-113.

⁶⁴ K Matsúmunyane & D Hlaele, “Culture, Religion and Sexual Diversity in Lesotho” (January 2019) in *Journal of Asian and African Studies*, 5-7; p. 9.

⁶⁵ The Other Foundation, *Canaries in the Coal Mine: An analysis of spaces for LGBTI activism in Lesotho*, Country Report (2017), https://theotherfoundation.org/wp-content/uploads/2017/03/Canaries_Lesotho.pdf, p. 4.

One FGD participant shared that “if [an] LGBTIQ+ [person] has been sexually assaulted, it’s not going to be easy for them to go [to the police] to report such cases because of their reception itself.” Another focus group discussant, who is intersex, added that:

“I am afraid of the police and I have reasons why. I always ask myself: ‘what will happen if I am to be arrested?’, ‘which prison will they throw me in? Men or women?’ It makes me wonder and think otherwise to be arrested. It makes me feel like even if [I want] a police stamp, to [rather] talk to someone else or help than to go straight to the police station to certify. So, I honestly am afraid to go to police station.” – focus group participant.

Another focus group discussant who uses “he” and “him” gender pronouns, disclosed that his girlfriend reported him to the police because he had spent her money without her consent. The police arrested and detained him and threatened that they would teach him “to differentiate between a girl and a boy”.

According to some of the FGD participants, the focus of the police remains on a person’s sexual orientation or gender identity, instead of on addressing the matter that has been reported. This is despite the fact that police are under a legislative duty, pursuant to the Police Service Act, to carry out their work “diligently, impartially and, with due regard to the Constitution”.⁶⁶

“...[the police] would be asking nasty questions like: ‘are you a girl? Are you a boy?’ but the only thing that you’re doing is you’re taking a copy of your [identity document] to be certified,” – community organizer and youth leader.

“...I recall one of [the police officers] judging us and me saying that they would be the ones to go to hell first because they have failed at their job which is protecting the most vulnerable. I did get support from the other policemen present who told me that I was right to have pointed that out.” – focus group participant

Sharing her experiences as an advocate for the rights of LGBTIQ+ persons and a REActor,⁶⁷ Madondo Jane, who works with the People’s Matrix to identify and document cases of gender-based violence, stated that when cases are reported to the police:

“[The police] seem to be hostile which is very disappointing because we are expecting a positive or a good reception from them. I have recognized that they stigmatize [LGBTIQ+ persons] due to African cultural norms and [beliefs].”

A further case in point regarding bias on the part of law enforcement officials was shared by one of the focus group discussants who also engages in the People’s Matrix Association’s REAct programme and provides support to LGBTIQ+ persons

⁶⁶ See Section 24(1) of the Police Service Act No. 7 of 1998, https://www.policinglaw.info/assets/downloads/1998_Police_Service_Act.pdf.

⁶⁷ REAct is an abbreviation for “Rights, Evidence, Action”. This refers to a community-based human rights monitoring and response programme developed by Frontline AIDS. Although the REAct guide focuses on REAct in the context of HIV, it can be adapted to document and respond to human rights-related barriers to accessing HIV-related health services; See Frontline AIDS *REAct User Guide* (2019), https://frontlineaids.org/wp-content/uploads/2021/09/REAct-Guide_FINAL_updatedSep2021.pdf.

in Leribe district who have to report cases. She recounted a sexual offence case involving two men who were arrested and charged with rape after having a sexual encounter with a third man they met at a bar. A police officer had witnessed the encounter – not the prior conversations – and advised the man that he should report that he was raped:

“I had an [alleged] rape case in 2022 where a man participated in a threesome with [two other] men after meeting them at a bar. I got a call telling me that two [gay men] from our community had been arrested by the police. I went to Maputsoe to see what was happening. They told me this guy met them at a bar and insisted that they have sex. They went home together. The case went to the magistrate’s court here in Leribe.”

According to the focus group participant, the prosecutor dismissed the case and no charges were brought against the accused because of the testimony indicating that the encounter was consensual. Through this experience the FGD participant said that she found out that 2010 Penal Code Act,⁶⁸ had actually decriminalized consensual same-sex sexual activity. This FGD participant stated that she also later learned that the police officer had pressured the third man into accusing the other two of rape because he wanted to “get promoted” and believed that this arrest would help him achieve that.

“Each side told their story and the guy who accused them said: ‘no, I have been coerced to say this was rape. We had an agreement to have sex’. There were no charges and I learned that according to that 2010 law, anal sex is no longer consider rape or sodomy if it is consensual. It was my first time to hear that this law was revised. The prosecutor assessed the case and stated that there is no case here because they all agreed have sex.”

Further victimization and abuse of LGBTIQ+ persons by police officers dissuades them from reporting human rights abuses

In some instances, police officers were said to verbally abuse LGBTIQ+ persons or even be physically violent against them, which, in turn, makes LGBTIQ+ persons fearful of being taken into police custody as a crime suspect or experiencing further victimization and abuse when reporting violations. As some focus group participants emphasized:

“We’ve had very bad experiences with the police in Butha-Buthe. There have been brutal beatings by police [...] I remember that [some] LGBTQ people in Butha-Buthe who had committed minor infractions, like driving without a seat belt fastened...we’d find out that some of those people were transgender and were held in cells, where they were not feeling comfortable because of who they were placed with.” – community organizer and youth leader.

“What I have realized is that there are so many cases that are not being reported at the police that are happening within the LGBTIQ+ community because they fear

⁶⁸ Penal Code Act of 2010 (Act No. 6 of 2012), <https://dullahomarinstitute.org.za/acjr/resource-centre/lesotho-penal-code-act-2010/@@download/file/Lesotho%20Penal%20Code%20Act%202010.pdf>

that police will also turn out to be further perpetrators [of violence].” – Lieketso Kokome, Project Coordinator at the People’s Matrix Association.

“I have a gay friend who was raped by police at night during his arrest, because he was gay.” – focus group participant.

Police brutality in Lesotho is a pervasive issue which exacerbates the vulnerability of already marginalized and at-risk communities,⁶⁹ including LGBTIQ+ individuals. The inadequacy of the Police Complaints Authority⁷⁰ in addressing impunity for police abuse further compounds the challenges faced by victims of violence at the hands of law enforcement officers.⁷¹ The Authority’s mandate restricts its ability to receive complaints directly from victims, and it is not empowered to prosecute offenders. Currently, its jurisdiction solely extends to complaints referred by the Minister of Police and the Commissioner of Police,⁷² leaving victims of police violence, including LGBTIQ+ persons, without much recourse to hold police accountable for discrimination, violence, harassment and abuse.

The impact of sensitization in enabling reporting of violations

Where police had been sensitized on SOGIE-SC and human rights generally, FGD participants shared that their experiences with the police and the services rendered to them by police officers were much more efficient, supportive and even pleasant. Programme coordinators at the People’s Matrix explained that they do a lot of work “sensitizing police so that when our communities are reporting cases, it's not [going] be about their identities, but to get justice, just like everyone else.”⁷³

There was also an awareness among most focus group participants of the many engagements and workshops that the People’s Matrix and other non-governmental organizations have had with police officers, religious leaders and traditional leaders aimed at ensuring that they remain sensitized to the needs of LGBTIQ+ persons. Interview respondents also shared the impact of sensitization campaigns for police, in which they have had some involvement, and the gaps that remain in this regard:

“Now [the police] are even calling us to say: ‘we have we have newcomers, come and sensitize them, let's talk the same language.’ The response [with police officers] is very positive. In general, we are progressing, which is not to say that everything is fine.” – People’s Matrix staff member.

⁶⁹ Carmel Rickard, “Lesotho’s CJ bemoans police impunity & its effect on rule of law”, 17 March 2023, <https://africanlii.org/articles/2023-03-17/carmel-rickard/lesothos-cj-bemoans-police-impunity-its-effect-on-rule-of-law> (accessed 10 June 2024); US Department of State, *2021 Country Reports on Human Rights Practices: Lesotho*, <https://www.state.gov/reports/2023-country-reports-on-human-rights-practices/lesotho/> (accessed 10 June 2024); Amnesty International, “Authorities must tackle police brutality, torture and unlawful killings before and after election” 28 September 2022, <https://www.amnesty.org/en/latest/news/2022/09/lesotho-authorities-must-tackle-police-brutality/> (accessed 10 June 2024).

⁷⁰ Section 22 of the Police Service Act.

⁷¹ Rickard, *supra* note 69 above.

⁷² Section 22(3) of the Police Service Act.

⁷³ See also The People’s Matrix “What We Do”, <https://thematrix.org.ls/what-we-do/#>.

“Through the REAct program,⁷⁴ [the People’s Matrix] has its own REActors within the 10 districts of Lesotho [whose] work is to identify the [gender-based violence] cases and see how the organization can fill loopholes, such as lack of data and sensitization of police officers on SOGIE-SC. We haven’t engaged with correctional services. Their management team denied us a visit, stating that we would be ‘promoting sodomy or homosexuality’ in the prison.” – Lieketso Kokome, Project Coordinator at the People’s Matrix.

Nevertheless, many participants expressed concern about a lack of ongoing sensitization for police officials. Police were said to have undergone training on SOGIE-SC at the central police station in Maseru and were thus more receptive when providing assistance to all persons, regardless of gender identity and sexual orientation. However, such sensitization has been limited to police stations in a few towns and districts and has not been consistent, often resulting in newly appointed police officers not receiving this training.

“Let’s say you have sensitized [officers] at the Hlotse⁷⁵ police station. After two or three years, new recruits, who have not been sensitized, come in. I think we should [have sensitization for] the staff at police stations each and every year and maybe even every six months so that we reach every police officer.” – focus group participant

As was explained by current and former People’s Matrix staff, one of the main reasons as to why this training has been inconsistent or does not reach police officers across the country is due to resource constraints.

“Our workshops have gone really well because we’ve done SOGGIE (sexual orientation and gender identity and gender expression) [training] for them. It’s just that the problem that we’ve encountered is that SOGGIE [training] doesn’t happen as often because there’s so much circulation of officers within [police] departments. SOGGIE training also [costs] money and a lot of human resources. So, the People’s Matrix is not able to keep offering this programming to new recruits,” – Giselle Ratalane, consultant and former People’s Matrix staff member who identifies as a transgender woman.

“The places we can’t reach to carry out sensitization are where the problem[s] are the most rampant. A point we made [to the police departments] was to have the sensitization be part of the Police Training Academy curriculum [so that] even if people are reassigned after training, they have already been trained through the Academy.” – People’s Matrix staff member

5.2. Cases are not identified as LGBTIQ-related cases or are registered inaccurately

5.2.1. Failure to identify and classify cases as LGBTIQ-related

⁷⁴ Frontline AIDS, *supra* note 67.

⁷⁵ Hlotse is a town in the Leribe district of Lesotho: <https://www.citypopulation.de/en/lesotho/>.

Another phenomenon or practice that hinders access to justice is the failure to properly identify, record and classify cases, when reported to the police, as LGBTIQ-related, motivated by bias based on real or imputed SOGIE and/or as crimes targeting people based on SOGIE specifically. The lack of proper identification, recording and classification of these cases hinders the gathering of accurate data on the true extent of violence and discrimination against LGBTIQ+ individuals in the country.

“You can't get clear statistics on whether or not gay and lesbian people are in danger because [the police] don't categorize those cases as such. When the police get a report of a case of GBV [gender-based violence], ideally, it should be clearly classified but our police treat these simply as cases of assault or murder.” – Mohau Tsilo, lawyer in private practice.

“Let's say somebody has been sexually violated, the police are not specific when they record these matters. The docket or the charge sheet would simply be general and would not specify the motive, the kind of relationship the parties had to each other or the details of the circumstances that led to this specific kind of [human rights] violation. So even the courts are not able to pick up on those details if reporting at the police station is not clear. - Mohau Tsilo, lawyer in private practice.

Inadequate registration of cases at police stations may prevent magistrates from properly identifying the nature of the human rights violations that occurred.

“...because [the matter] only appears before us after the police have dealt with it we don't know what happened before it came to court. So, I think there's nothing we can do in that regard from our side.” – judicial officer

This failure in properly identifying, classifying and recording cases is exacerbated by the absence of adequate data collection systems, including by the police more broadly and within the police's Children and Gender Protection Units (CGPUs), who are primarily tasked with recording and reporting cases of violence against women and children.⁷⁶ This leaves NGOs, such as the People's Matrix, as the main and often sole actors carrying out the documentation of cases of gender-based violence against LGBTIQ+ persons. While they may share this data with the authorities, including the police, prosecution services and other relevant actors in the criminal justice system, these NGOs are also limited by resource constraints, as explained in the previous section, and cannot carry this out on a country-wide scale.

⁷⁶ For more information on the CGPUs, see African Committee of Experts on the Rights and Welfare of the Child, *Concluding Observations and Recommendations of the African Committee of Experts on the Rights and Welfare of the Child to the Kingdom of Lesotho on its First Periodic Report on the implementation of the African Charter on the Rights and Welfare of the Child*, November 2023, https://www.acerwc.africa/sites/default/files/2024-03/640.23_Concluding%20Observations%20and%20Recommendations%20Lesotho%20ACERWC.pdf para. 21; See also “Guidance - Lesotho: information for victims of rape and sexual assault”, 14 June 2023, <https://www.gov.uk/government/publications/lesotho-information-for-victims-of-rape-and-sexual-assault/lesotho-information-for-victims-of-rape-and-sexual-assault>.

"We share the data we gather with the relevant stakeholders we work with, including the Child and Gender Protection Units [of the police], other NGOs and donors. With the government, we don't get the data but we share with them. We don't share the specific details - those are left with Matrix - but we share the numbers of GBV cases." – Lieketso Kokome, Project Coordinator at the People's Matrix.

"Our government is trying to shy away from these things. They are not deliberately doing something to make the public aware these issues affecting LGBTIQ+ persons. They have left it to organizations like the People's Matrix Association to deal with this." – Mohau Tsilo, lawyer in private practice.

5.2.2. Lack of legal gender recognition as a hindrance to accurate documentation of human rights violations

A further impediment to accurate documentation of cases – as discussed in interviews and at a workshop that the ICJ held with magistrates and High Court judges in October 2023 – is the lack of legal provisions for transgender and intersex persons in Lesotho to legally change their gender marker in their identity documents.

One focus group participant, who is intersex, and other transgender FGD participants, shared their frustration about being assigned the incorrect gender, as well as being mocked, ridiculed or made to feel uncomfortable when trying to access a variety of public services, including when reporting cases to the police.

"As an intersex person, the challenge I often face is about the gender marker. I always explain myself to everyone before I receive the services." – focus group participant

"If you are not [legally] recognized, no one is going to know you. No one is going to know your needs. There are not going to be any services available for you. Basically, you don't exist. I think a lot of laws in Lesotho do not include specifics about LGBTIQ issues." – People's Matrix staff member.

In the absence of legal avenues to change gender markers on identity documents, transgender and intersex persons may encounter problems with verifying their identities when reporting incidents to police or when attempting to access healthcare and social services when they are survivors of gender-based violence.⁷⁷

The right to legal gender recognition, including the right to legally change one's gender marker in one's identity documents, is instrumental to one's identity, to the right to self-determination, to the right to be free from discrimination, to the right to equality before the law and equal protection of the law without discrimination, to the right to privacy, to live one's life with dignity, to the right to freely express oneself, to the right to identity and self-defined gender identity, among other human rights, and to choose one's destiny. Article 16 of the ICCPR,

⁷⁷ The Other Foundation, *supra* note 65 above, p. 9.

which guarantees everyone's right to recognition as a person before the law, has been linked, by the UN Independent Expert on Sexual Orientation and Gender Identity, to legal gender recognition. The Independent Expert has affirmed that:

"self-determined gender is a fundamental part of a person's free and autonomous choice in relation to roles, feelings, forms of expression and behaviours, and a cornerstone of the person's identity".⁷⁸

In light of its international human rights law obligations, Lesotho is obliged to provide pathways to ensuring legal gender recognition,⁷⁹ including legal change of one's gender marker in one's identity documents. The failure to ensure legal gender recognition results in many gender-diverse persons existing "in a legal vacuum", leading to further stigmatization, isolation, and marginalization. The lack of legal gender recognition perpetuates impunity for acts of discrimination and violence, as incorrect legal gender markers make accurate reporting and adjudication of cases more difficult if the identities of accused, witnesses or litigants cannot be properly verified.⁸⁰ This also perpetuates impunity for acts of discrimination and violence because it may pose difficulties in reporting a case correctly.

"Capturing of the data is still a problem and needs to improve. A transgender man, for example, might still be captured in a police report as a woman." – Lieketso Kokome, People's Matrix Programme Coordinator.

Currently, the domestic legal framework in Lesotho is restrictive and does not provide a clear system for intersex and transgender persons to make changes to their identity documents – including passports and national identity cards – to reflect their self-defined gender identity.⁸¹

The Registration of Births and Deaths Act makes provision to change the sex of any unmarried person under the age of 21 years of age – who is considered a child under this law.⁸² Section 22 of the Act reads as follows:

"In the event of a child, after being registered, either by operation or otherwise, changing from a female to male or male to female and such change is certified by a registered medical practitioner, the district registrar

⁷⁸ United Nations General Assembly, Protection Against Violence and discrimination based on sexual orientation and gender identity: Note by the Secretariat, A/73/152, 12 July 2018, paras. 8, 20 and 25.

⁷⁹ In terms of Principles 3 and 32 of the Yogyakarta Principles, States are under an obligation to "take all necessary legislative, administrative and other measures to fully respect and legally recognise each person's self-defined gender identity" and "take all necessary legislative, administrative and other measures to ensure that procedures exist whereby all State-issued identity papers which indicate a person's gender/sex – including birth certificates, passports, electoral records and other documents – reflect the person's profound self-defined gender identity." In its Resolution on Intersex Persons, the African Commission also noted concerns about the "human rights violations against intersex persons which include, but are not limited to, rejection in society; infanticide and abandonment of children; **lack of proper legal recognition and administrative processes that prevent intersex persons from acquiring or altering identity documents**; unfair discrimination in schools, health facilities, competitive sports, work; access to public services; and detention." (emphasis added).

⁸⁰ United Nations General Assembly, *supra* note 78, paras. 25 and 36.

⁸¹ See Southern Africa Litigation Centre (SALC), The People's Matrix & Women and Law Southern Africa (WLSA), *Legal Recognition in Lesotho: An analysis of law and policy in the context of international best practice*, October 2020, <https://www.southernafricalitigationcentre.org/wp-content/uploads/2020/11/Lesotho-Gender-Marker-report.pdf> (accessed 23 June 2022) pp. 22-23.

⁸² Registration of Births and Deaths Act No. 22 of 1973, : <http://citizenshiprightsafrika.org/wp-content/uploads/2020/05/Lesotho-Births-and-Deaths-Registration-Act-1973.pdf>.

of the district in which the birth is registered shall, with the approval of the registrar and on the application of the parent or guardian of that child, alter the particulars of such child which appear in the births register”.

Section 4 of the National Identity Cards Act⁸³ sets out the particulars for citizens and permanent residents that are to be included in the Lesotho National Identity Register, including information on “gender” of individuals, as stated under section 4(6)(f). Section 12(1)(d) provides that an identity card should carry information on the “sex of bearer” of such a card. There is no definition provided for either “sex” or “gender” and it is not clear whether they are terms that are used interchangeably under the Act or not.⁸⁴ While section 8(1) provides that the Director responsible for national identity cards “shall take reasonable practicable steps to ensure that personal information entered in the Register is complete, accurate and updated where necessary,” and section 6(5) provides that a person “who has been given access to his or her information may request that the Director correct inaccurate or outdated information”, “credible evidence of the updated information” must be provided which has to be verified by the Director.⁸⁵

These provisions create procedural obstacles and burdens on LGBTIQ+ persons looking to change a legal gender marker. For instance, the lack of clear definitions for “sex” and “gender” may lead to inconsistent interpretations of how these terms should be applied. In addition, requiring an applicant to provide “credible information,” which must be verified by the Director, to change their gender marker may leave applicants at the mercy of the officials issuing their documentation who may impose additional cumbersome requirements to process applications. The burden of proof rests entirely on the applicant to produce so-called “credible evidence” - a term that is also not defined in the Act - without any clear standards on what is deemed credible.

Under section 9(1)(i) of the Lesotho Passports and Travel Documents Act of 2018,⁸⁶ a person’s passport must contain information relating to a person’s “gender”. Significantly, it makes no mention of “sex”, unlike the previous 1998 Act.⁸⁷ When applying for an e-passport, a person above the age of 16 years must produce an identity document,⁸⁸ whereas a person under the age of 16 years must produce a birth certificate in support of their application for this passport.⁸⁹ While this may indicate a recognition that a national identity card may more accurately reflect a person’s gender and might not correspond with the person’s “sex” on the Births Register,⁹⁰ the procedural hurdles a person would have to overcome to reflect their gender in their identity card may equally make the process of obtaining a passport burdensome.⁹¹

Such procedural hurdles may include having to undergo medical procedures, such as gender-affirming surgery, as a requirement for gender markers to be altered.

⁸³ Act No. 9 of 2011.

⁸⁴ See SALC, People’s Matrix and WLSA, *supra* note 81, pp. 5-11,

⁸⁵ See section 6(6).

⁸⁶ The Lesotho Passports and Travel Documents Act No. 5 of 2018,

<https://media.lesotholii.org/files/legislation/akn-ls-act-2018-5-eng-2018-06-08.pdf>.

⁸⁷ SALC, People’s Matrix and WLSA, *supra* note 81, p. 23.

⁸⁸ Section 10(2)(c)(i).

⁸⁹ Section 10(2)(c)(ii).

⁹⁰ SALC, People’s Matrix and WLSA, *supra* note 81, p. 23.

⁹¹ SALC, People’s Matrix and WLSA, *supra* note 81, p. 23.

Some transgender or intersex individuals may be unable or unwilling to undergo such procedures due to financial constraints or personal choice. Moreover, such requirements may limit the recognition of other gender identities beyond male and female.

"Most of our laws, [refer] to persons in terms of their gender - male or female. I think there are only few laws here that may recognize gender [beyond] the traditional way. There's a need for reform of laws in that regard." – judicial officer.

"The government should have the laws that will recognize members of the LGBTIQ+ community to fully enjoy their rights and change of gender marker to reduce stigma and discrimination." – focus group discussion participant.

A misalignment between a transgender or intersex person's gender identity or gender expression and the gender markers in their legal identification documents can lead to denial of appropriate medical and support services or result in incorrect identification in police reports and court proceedings. This, in turn, may also hinder the ability of transgender or intersex persons to seek redress for violations of their human rights.

5.3. Inadequate laws and policies protecting LGBTIQ+ persons from discrimination and violence

Most of the interviewees who are practising lawyers expressed concern that a lack of adequate laws and policies protecting LGBTIQ+ persons from both discrimination and sexual and gender-based violence contributes significantly to their LGBTIQ+ clients' inability to access justice and effective remedies. These interviewees stated that legislative and policy gaps hinder the effective prosecution of perpetrators and deny victims adequate redress, thereby exacerbating systemic inequality and undermining their human rights.

"...I think Parliament should also make more laws that prohibit discrimination." – Nhlapo Katiso, lawyer in private practice.

"One thing that is very critical is that we don't have laws [that protect the rights of LGBTIQ+ persons.] When you are not protected, you cannot fight for your rights. Even if a case is reported, the police officer or prosecutor may wonder: 'what law can we use here?'" – Mamofuta Kale, human rights lawyer

With respect to employment, the 2024 Labour Code includes "sexual orientation" and "gender" as one of several grounds for "unfair discrimination."⁹² In the context of combatting gender-based violence, the Lesotho Gender & Development Policy 2018-2030 acknowledges the disproportionate impact of gender-based violence on marginalized groups, including LGBTIQ+ individuals, and outlines the

⁹² Labour Code (Act No. 3 of 2024), section 6(1), <https://lesotholii.org/akn/ls/act/2024/3/eng@2024-04-02>: "A person who makes an application of any distinction, exclusion or preference on the following basis, constitutes an act of unfair discrimination: (a) race; (b) colour; (c) gender; (d) disability; (e) sexual orientation; (f) pregnancy; (g) marital status; (h) HIV and AIDS status; (i) religion; (j) political affiliation or opinion; (k) national extraction; (l) social origin; (m) age; or (n) on any other ground which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation."

government's policy commitment to "promote an environment of zero tolerance to all forms of gender based violence at all levels, in order for women, men, the elderly, girls, boys, LGBTI, and people with disabilities to live a life free from violence."⁹³ This would include enacting and enforcing laws and policies aimed at ensuring LGBTIQ+ persons are protected from GBV.

In this regard, it is commendable that the Counter Domestic Violence Act includes within its definition of domestic violence: "abuse perpetrated by virtue of age of a victim, disability, **sexual orientation, gender identity, gender expression**, race or ethnicity, level of education or other status of a victim." (emphasis added).⁹⁴ Moreover, section 28(2)(s)(iii) provides that "a person who abuses another person by virtue of their sexual orientation, gender identity or gender expression or any other status, commits an offence and is liable for a conviction not exceeding M10 000 or imprisonment not exceeding 7 years." The Sexual Offences Act also criminalize all forms of non-consensual sexual penetration – by penis, objects and other body parts – of all orifices.⁹⁵ Sexual assault crimes within the Act are also gender-neutral.⁹⁶

That said, it is concerning that there are still no specific laws explicitly prohibiting homophobic and transphobic discrimination and forced initiations⁹⁷ against LGBTIQ+ individuals.⁹⁸ The lack of clear and specific legislative prohibitions on discrimination and violence on the grounds of SOGIE may enable perpetrators to target LGBTIQ+ individuals with impunity, perpetuate a culture of violence and fear, as well as exacerbate challenges in prosecuting perpetrators.

"I think that the government should enforce laws that will be against homophobic officials, so that if the official was discriminatory towards a person, there are consequences for that person." – focus group participant.

5.4. Discrimination perpetuated by confusing laws regarding consensual same-sex sexual activity

In 2012, Lesotho decriminalized consensual same-sex sexual activity,⁹⁹ but there is still some ambiguity and confusion around the common law offence of sodomy,¹⁰⁰ which may perpetuate discrimination against LGBTIQ+ persons. The Sexual Offences Act of 2003 does not criminalize consensual same-sex sexual activity, but it does not specifically repeal the common law offence of sodomy

⁹³ Gender & Development Policy 2018-2030, pp. 56 and 59.

⁹⁴ Act No. 14 of 2022, https://lesotho.unfpa.org/sites/default/files/pub-pdf/act_no_14_of_2022_counter_domestic_violence_act.pdf, Section 3(j).

⁹⁵ Section 3; see also Section 51 of the Penal Code Act 2010 (No. 6 of 2012).

⁹⁶ The Human Dignity Trust, *Next Steps Towards Reform: Assessing good practice and gaps in Commonwealth sexual offences legislation*, (2020), pp. 69-71, <https://www.humandignitytrust.org/wp-content/uploads/resources/2020-Next-Steps-Africa.pdf> (accessed

⁹⁷ See Sonke Gender Justice, "Family acceptance: a story of hope for LGBTIQ+ in Semonkong, Lesotho," 4 July 2024, <https://genderjustice.org.za/news-item/family-acceptance-a-story-of-hope-for-lgbtqi-in-semonkong-lesotho/> (accessed 30 August 2024).

⁹⁸ ILGA World Database, "Lesotho", <https://database.ilga.org/lesotho-lgbti#:~:text=Hate%20crime%20law,-Go%20to%20world&text=to%20world%20data,-To%20the%20best%20of%20ILGA%20World's%20knowledge%2C%20laws%20in%20force,crimes%20as%20%E2%80%9Chate%20crimes%E2%80%9D>.

⁹⁹ The Penal Code Act 6 of 2012 decriminalized homosexuality

¹⁰⁰ See ICJ, The People's Matrix, SLC and the LNFD, *Joint Submission to the UN Human Rights Committee* (19 June 2023), paras. 10-11.

either.¹⁰¹ Schedule 1, Part II of the Criminal Procedure and Evidence Act of 1981 still lists sodomy as an offence under which an arrest may be made without a warrant.¹⁰²

On the basis of the right to equality and non-discrimination, the criminalization of sexual practices between consenting people, whether they be of the same or opposite sex, as well as the criminalization of certain gender identities and forms of gender expression that are perceived as not conforming with societal expectations is a violation of international human rights law and standards.¹⁰³

The ICJ's Practitioners' Guide on Refugee Status Claims Based on Sexual Orientation and Gender Identity also highlights that even where laws criminalizing consensual same-sex sexual conduct have not been recently enforced, their mere existence can lead to persecution and there exists potential for them to be enforced in the future.¹⁰⁴ In the context of social stigma and continued discrimination against LGBTIQ+ persons, the existence of such laws may lead to their discriminatory application and reinforce harmful stereotypes.¹⁰⁵ Merely omitting references to sodomy in newer legislation, as is the case with the Sexual Offences Act, is insufficient since the common law retains sodomy as an offence.

"Certain laws are still discriminatory and exacerbate systemic inequality particularly against LGBTIQ+ communities and other minority groups. For instance, in Lesotho, the Criminal Procedure & Evidence Act still proscribes same-sex sexual relationships, particularly between gay men (dubbed sodomy)– Mosa Letsie, project lawyer at Seinoli Legal Centre.

5.5. Many LGBTIQ+ persons are not accessing legal services

LGBTIQ+ persons may not obtain legal representation due to a lack of financial resources or out of fear of being outed

In accordance with the international human rights treaties by which it is bound, and its Constitution, Lesotho is obliged to ensure that all persons can access legal aid and assistance where they cannot afford legal representation. Article 14(3)(d) of the ICCPR, for example, requires that an accused person is entitled "to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any case if he does not have sufficient means to pay for it".¹⁰⁶

¹⁰¹ UN Human Rights Committee, Second periodic report submitted by Lesotho under Article 40 of the Covenant pursuant to the optional reporting procedure, *UN Doc. CCPR/C/LSO/2, 22 April 2020*, para. 52.

¹⁰² See section 187(5).

¹⁰³ See Principles 16 and 18 of the *8 March Principles for a Human Rights-Based Approach to Criminal Law Proscribing Conduct Associated with Sex, Reproduction, Drug Use, HIV, Homelessness and Poverty*, International Commission of Jurists, 8 March 2023, https://ici2.wpeninepowered.com/wp-content/uploads/2023/03/8-March-Principles-Report_final_print-version.pdf.

¹⁰⁴ ICJ, *Practitioner's Guide No. 11: Refugee Status Claims Based on Sexual Orientation and Gender Identity* (2016), pp. 144-148, <https://www.ici.org/wp-content/uploads/2016/10/Universal-PG-11-Asylum-Claims-SOGI-Publications-Practitioners-Guide-Series-2016-ENG.pdf> (accessed 30 August 2024); See also, *Dudgeon v the United Kingdom*, no. 7525/76, judgment, 22 October 1981, paras. 40 to 46.

¹⁰⁵ ICJ, *The People's Matrix, SLC and the LNFOD, Joint Submission to the UN Human Rights Committee* (19 June 2023), para. 10

¹⁰⁶ UN Human Rights Committee, General comment no. 32, Article 14: The right to equality before courts and tribunals and to fair trial, *UN Doc. CCPR/C/GC/32, 23 August 2007*, para. 10. In General Comment No. 32, the Committee underscored the importance of providing legal aid: "the availability or absence of legal assistance

The African Charter on Human and People’s Rights also provides that every individual has the right to have his cause heard. In this regard, the African Commission on Human and People’s Rights, in its Principles and Guidelines on the Right to a Fair Trial mirrors the language of the ICCPR under article 14, specifically stating that:

“The accused or a party to a civil case has a right to have legal assistance assigned to him or her in any case where the interest of justice so require, and without payment by the accused or party to a civil case if he or she does not have sufficient means to pay for it.”¹⁰⁷

These Principles and Guidelines further stipulate that: “paralegals could provide essential legal assistance to indigent persons, especially in rural communities...” and that “non-governmental organizations should be encouraged to establish legal assistance programmes and to train paralegals.”

Article 8 of the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (the Maputo Protocol)¹⁰⁸ provides the right of women to “access to justice and equal protection before the law”. The provision specifically mentions that State Parties are mandated to, among other things, ensure “effective access by women to judicial and legal services, including legal aid; and that law enforcement organs at all levels are equipped to effectively interpret and enforce gender equality rights.”¹⁰⁹

Lastly, under section 12 of the Lesotho Constitution, every person charged with a criminal offence has the right to a fair trial which includes a right to legal representation, and every person charged with a criminal offence “shall be permitted to defend himself before the court in person or by a legal representative of his own choice”.¹¹⁰

The focus group discussions and interviews revealed that poverty, or limited financial resources, could be another major barrier to accessing justice, particularly through the services of a lawyer. This scenario arises also in cases where LGBTIQ+ seek legal recourse for human rights violations or when they are themselves accused in a criminal case. As one focus group participant and a few individual interview respondents pointed out, access to legal counsel hinges on financial capacity:

“It depends on how much money you have in your pocket. If you are sorted, you can access [a lawyer] at any time.” – focus group participant.

often determines whether or not a person can access the relevant proceedings or participate in them in a meaningful way”. Therefore, States are encouraged, and in some cases may be obliged to provide legal aid in either civil or criminal cases, where the interests of justice so require.

¹⁰⁷ Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, p. 7.

¹⁰⁸ Lesotho ratified the Maputo Protocol on 26 October 2004.

¹⁰⁹ Articles 8(a)(d) of the Maputo Protocol.

¹¹⁰ Section 12(2)(d): “Every person who is charged with a criminal offence shall be permitted to defend himself before the court in person or by a legal representative of his own choice”. Subsection further outlines that “nothing contained in subsection (2)(d) shall be construed as entitling a person to legal representation at public expense.”

"I think lawyers are easily accessible, but people can't afford them. I mean, I have plenty of friends who are lawyers. There are so many people who are lawyers but are unemployed. The ones that are employed are running their own practices. That is quite expensive and people can't afford them," – Ts'epo Madolo, Bacha Re Bacha Youth Forum employee who identifies as a gay man.

Another focus group participant shared that in addition to financial barriers, some people are unsure of how or when to secure the services of a lawyer.

"It's an issue of not knowing where we are supposed to go. We have a mentality that to get a lawyer, it is only if my case is at the police station, and the police will assign me one. But if there is any legal advice I need, the question would be how to approach [a lawyer]. And there is a fee that I have to pay." – focus group participant.

"Many LGBTIQ+ people say that they don't engage [the services of a lawyer] out of fear [of being outed] and due to a lack of information on where to seek help, except maybe through reporting a case to Matrix. They don't know what to do. They don't know who they should consult when seeking help for violations." – Lieketso Kokome, Project Coordinator at the People's Matrix Association.

Social exclusion and fears about facing judgement or ridicule were also put forward, by two of the lawyers interviewed, as additional barriers to engaging the services of a lawyer or seeking legal advice.

For Advocate Nhlapo Katiso, a lawyer in private practice, this is apparent from consultations with clients who may be gay, lesbian or transgender and who may not want to share the full details of a matter if it relates to their sexual orientation or gender identity, for fear of such judgement:

"There's still stigma [in Lesotho] and when you look at marginalized people such as LGBTIQ+ [people] are, for lack of a better word, afraid to come out for so many reasons, of course, because people are going to judge them."

Problems with the legal aid system further prevent LGBTIQ+ people from engaging legal services

Under article 14 of the ICCPR, the right to legal representation encompasses the right to legal aid provided by the State and other free legal services provided in both civil or criminal proceedings. Lesotho is obliged to provide legal aid, in both civil and criminal law proceedings, to indigent and marginalized individuals to ensure they have access to justice.

To provide "legal aid to poor persons; and for connected purposes," the State enacted the Legal Aid Act in 1978.¹¹¹ Under the Act, which calls for the appointment of a Chief Aid Legal Counsel, and "many legal aid counsel as may from time to time ... be required for the purposes of this Act", legal aid may be provided in the context of criminal matters in circumstances in which "it is interest

¹¹¹ Legal Aid Act No. 10 of 1978, https://drive.google.com/drive/folders/1UarvDmO40oiUmkFemWq_XWAz63RH1qLR?usp=sharing.

of justice” and “such person has insufficient means”.¹¹² Under section 7(1) and 7(2) of the Act, a person may apply for the provision of legal aid in the context of civil matters where on that person’s application for legal aid, it is determined that: there are “reasonable grounds” for the position the applicant wishes to take; it is “in the interests of justice” to provide legal aid; and the applicant is of “insufficient means”.

Lesotho and other States bear the responsibility of providing legal aid to those unable to afford representation by also addressing economic disparities. In the case of LGBTIQ+ persons, procedural fairness further requires that they be able to obtain legal representation and assistance that may be inaccessible to them due to social exclusion, unaffordability or stigma. However, the ICJ is concerned that Lesotho may be failing in its obligation to provide access to legal services to the majority of people in the country.

Notwithstanding the fact that Lesotho established a legal aid system as far back as 1978 and that its National Strategic Development Plan 2022/2023¹¹³ underscored the importance of bolstering the legal aid system and decentralizing the provision of such aid beyond the capital city and urban areas, many enduring challenges have slowed such efforts significantly.¹¹⁴

“The Legal Aid Office in Lesotho is centralized, and its offices are situated only in the capital city, Maseru. This leaves a vast majority of LGBTIQ+ communities and other marginalized groups, particularly in rural areas, who may need to access legal services through legal aid, in particular, without access to justice.” – Mosa Letsie, project lawyer at Seinoli Legal Centre.

In the focus group discussions, participants stated that they were aware of where to obtain legal aid services and had also made use of these services, but a few expressed reservations about the quality of such services and a lack of availability of such services beyond the district office in Maseru.

“You have to go to the Legal Aid office for a lawyer. The problem we face as a community is that we do not know where to find them. Where [are] their offices located? The only office people know is the Maseru office.” – focus group participant.

The Legal Aid Office lacks the resources to appoint staff or decentralize the office to service rural areas, which has also hindered the provision of legal aid services beyond the capital city.¹¹⁵

“Lack of human and financial resources within Legal Aid Office, due to inadequate support from the government, further exacerbates its ability to execute its mandate. There is lack of human resources or adequate staff to provide legal aid

¹¹² See Section 4 of the Act which states that where a magistrate believes it is the interests of justice and the person has insufficient means, such magistrate shall call upon the Chief Legal Aid Counsel to provide this.

¹¹³ The justice system and justice institutions remain key investment areas under the National Strategic Development Plan II Strategic Focus for 2023/24 -2027/28, pp. 6 and 16

¹¹⁴ UN Human Rights Committee, Second periodic report submitted by Lesotho under Article 40 of the Covenant pursuant to the optional reporting procedure, UN Doc. CCPR/C/LSO/2, 22 April 2020, para. 155.

¹¹⁵ YLab “Strengthening the Rule of Law in Lesotho,” <https://ylab.wales/resource/strengthening-the-rule-of-law-in-lesotho/>.

services to disadvantaged marginalized groups that may need to access legal services.” – Mosa Letsie, Project lawyer at Seinoli Legal Centre.

Another frequently cited challenge in both the focus group discussions and one-on-one interviews is the significant backlog of cases within the legal aid system due to this limited capacity. This is a further hindrance to many poor and marginalized individuals in Lesotho procuring legal services.¹¹⁶ Unfortunately, this also means that very few accused persons are able to access legal representation, notwithstanding the fact that they may have a right to it.¹¹⁷

“Since [the legal aid system] is a public platform, it's very much congested. It takes a while to access a lawyer through that platform given that, there isn't, I would say, particular lawyers that deal with human rights cases....” – Giselle Ratalane, consultant who identifies as a transgender woman.

While some NGOs in Lesotho provide legal aid to indigent individuals, their capacity to provide such services is also restricted due to the limited scope of the cases they can take on within their mandates.¹¹⁸ Moreover, even though the State can support non-governmental organizations and legal clinics to provide support and legal aid services, the government is primarily under an obligation to provide such services to all persons and eliminate the barriers that would hinder access to justice.

5.6. Cases are not investigated and prosecuted properly, or may not reach courts due to dysfunction in police departments or in the court system

At times, the police and court system do not function effectively and efficiently, which reportedly prevents cases involving LGBTIQ+ individuals from reaching the courts. Focus group participants and individual stakeholders interviewed for this report highlighted administrative problems within police departments, including poor management of case files, misplacement of case files, slow investigations, and other internal dysfunctions.

Lesotho is obligated under international human rights law and standards to investigate serious human rights violations and, when the evidence so warrants, bring alleged perpetrators to justice.¹¹⁹ However, the focus group discussions and one-on-one interviews underscored how internal administrative problems prevent thorough investigations and hinder subsequent prosecutions of alleged perpetrators.

¹¹⁶ U.S. Department of State, Bureau of Democracy, Human Rights and Labor, *2022 Country Reports on Human Rights Practices: Lesotho*, p. 7, https://www.state.gov/wp-content/uploads/2022/02/313615_LESOTHO-2021-HUMAN-RIGHTS-REPORT.pdf.

¹¹⁷ *Ibid.*

¹¹⁸ See ICJ, The People's Matrix, SLC and the LNFOD, *Joint Submission to the UN Human Rights Committee in view of the Committee's examination of Lesotho's Second Periodic Report under Article 40 of the International Covenant on Civil and Political Rights* (19 June 2023), paras. 31-38.

¹¹⁹ For example, in its Resolution 275 on Protection against Violence and other Human Rights Violations against Persons on the basis of their real or imputed Sexual Orientation or Gender Identity, the African Commission strongly urges “States to end all acts of violence and abuse, whether committed by State or non-state actors, by **ensuring proper investigation and diligent prosecution of perpetrators**, and **establishing judicial procedures** responsive to the needs of victim” (emphasis added).

These problems may persist due to a lack of training or resources allocated to police departments.¹²⁰ As one interviewee recounted:

“...you go from one office to another office not knowing who exactly needs to help you out with your case...It’s really depressing because working with the police, you have to explain the same story from one person to another until you get to the one who is supposed to help you out.” – community organizer and youth leader.

One FGD participant shared a negative experience of reporting her rape to the police’s Child and Gender Protection Unit, stating that she and other women she knows “have not been provided with adequate support” by the unit. Another participant pointed to the need to find ways to incentivize the police to begin or continue work on LGBTIQ+ cases.

“In my case I was assaulted so I took the matter to the police station but I had to lie to get the best treatment. I said, ‘no, guys I got assaulted but I am a nurse’ and I just jumped the queue. I lied about being a nurse and the perpetrator was arrested within 24 hours.” – focus group participant.

Some focus group participants pointed out that the intervention of various NGOs had helped them surmount some of these problems:

“A lot of [case files] are missing in the police stations. If you go [to report a crime] by yourself, it can even take a year for the police to work on a case [unless] someone takes the initiative to get support from an organization like [The People’s] Matrix or Women and Law in Southern Africa. This is when you will see police working hard to try to investigate a case.” – focus group participant.

The police are said to mishandle case files or not to work on them unless pushed to do so, leading to significant delays in resolving disputes or having cases investigated and prosecuted. One focus group discussant, for example, expressed concern that, after several months had passed without any movement on her rape case, she eventually found out that the police had lost the case file.

Without interventions from NGOs like the People’s Matrix, many FGD participants felt that the incidents of violence they report would not be investigated further, let alone prosecuted or heard by the courts. One interview respondent’s case illustrates this point: she had filed a police report after her friend’s brother attempted to rape her, specifically targeting her because she is a lesbian. A month after reporting the case, she sought advice and support from the People’s Matrix because there were delays in the investigation. After the organization intervened by following up on the case with the police, the alleged perpetrator was swiftly arrested, prosecuted and a trial ensued thereafter.

Others similarly shared:

¹²⁰ US Department of State, *2023 Country Reports on Human Rights Practices: Lesotho*, <https://www.state.gov/reports/2023-country-reports-on-human-rights-practices/lesotho/>.

“The challenges start from the police. Many people can’t pursue a case alone with only the police’s assistance. Case files just vanish. For example, there was an assault that happened in 2014. It was only [investigated] by the police recently. It proceeded to court within two weeks once Matrix had followed up.” – focus group participant.

“In our community, access to justice is sometimes limited to just the police. A lot of our cases are not processed properly to reach the courts.” – Giselle Ratalane, consultant and human rights advocate.

Often, the difficulties experienced at the police station level carry over to the court system. These problems include backlogs in the court system that delay judicial proceedings or make them inaccessible. One participant pointed out that some people resorted to using bribes to expedite slow proceedings before the courts, since cases often remain on dockets for lengthy periods of time. Another agreed, sharing that:

“When it comes to justice, especially if you identify as a member of LGBTIQ+ community, you will have to bribe someone in order to get most services especially from the government institutions. If you don’t have money or power, you will hardly get any help.” – focus group participant.

5.7. Bias or perceptions of bias in the judicial system

Lesotho is obliged to ensure that all judicial and administrative bodies are independent and impartial. This is critical in order for LGBTIQ+ persons to engage with justice system without being subjected to discrimination on the basis of SOGIE-SC and thus have an opportunity to obtain access to justice and an effective remedy for violations of their human rights.

References to courts in this paper include the courts that form part of Lesotho’s judicial system, which consists of the Court of Appeal (the apex court), the High Court, and the subordinate courts, as established under section 118 of the Constitution.¹²¹ Section 118(2) provides that the courts “shall, in the performance of their functions under this Constitution or any other law, be independent and free from interference and **subject only to this Constitution and any other law**” (emphasis added). Subordinate courts include local courts, or “customary” courts, which apply customary law and are a type of specialist court in Lesotho.¹²² These courts were initially created by the British colonial regime in Lesotho to deal specifically with Basotho people. Local courts were established by the Local Courts Proclamation of 1938. They have jurisdiction over matters concerning customary law and only those “involving members of the Basotho nation.”¹²³ Lawyers could initially represent clients before these courts until the government issued a directive in 2004 to the effect that they should no longer be allowed to appear in

¹²¹ See also, Itumeleng Shale “The Law and Legal Research in Lesotho” (2019) <https://www.nyulawglobal.org/globalex/Lesotho1.html>. It is also important to note that Lesotho has a dual legal system consisting of both customary law and general law, which operate side by side. See <https://jud.gov.ls/judicial-commissioners-court/>.

¹²² *Ibid.*

¹²³ *Ibid.*

the local courts.¹²⁴ However, the directive was successfully challenged by the Law Society of Lesotho.¹²⁵

Pursuant to Article 2(3) of the ICCPR, Lesotho is obliged to ensure that where there has been a violation of the rights and freedoms guaranteed under the ICCPR, the aggrieved individual would be able to vindicate these rights through an effective remedy.¹²⁶ This remedy would have to be determined by competent judicial, administrative, or legislative authorities.

Article 14(1) of the ICCPR also mandates that States must ensure equality before the courts and tribunals for all persons, as well as a fair and public hearing by a competent, independent and impartial tribunal, established by law.¹²⁷ Article 14(3) of the ICCPR enshrines minimum guarantees for a person charged with a criminal offence, including "to be tried without undue delay".¹²⁸

Article 7 of the African Charter on Human and People's Rights guarantees:

- "a) The right to an appeal to competent national organs against acts violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force;
- b) The right to be presumed innocent until proved guilty by a competent court or tribunal;
- c) The right to defence, including the right to be defended by counsel of his choice;
- d) The right to be tried within a reasonable time by an impartial court or tribunal."

To realize the right to a fair trial, the Principles and Guidelines on the Right to a Fair Trial by the African Commission on Human and People's Rights, provide that States shall ensure that judicial bodies, including traditional courts where they exist,¹²⁹ must "be accessible to everyone within their territory and jurisdiction, without distinction of any kind" and must take special measures to ensure that rural communities and women have access to judicial services. The Principles further states that:

¹²⁴ *Ibid.*

¹²⁵ In *Law Society of Lesotho v Right Honourable Prime Minister Pakalitha Mosisili N O and Others* (Constitutional Case No. 2/04) [2004] LSHC 82 (17 June 2004), the Court held that the directive was contrary to section 12(2)(d) of the Constitution on the right to legal representation and section 20 of the Local and Central Courts Proclamation 62 of 1938.

¹²⁶ The provision reads, in full, as follows: "Each State Party to the present Covenant undertakes: (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity; (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy; (c) To ensure that the competent authorities shall enforce such remedies when granted."

¹²⁷ See also Principle 8 of the Yogyakarta Principles, which reiterates and underscores the entitlement of everyone to a fair and public hearing by a competent, independent, and impartial tribunal. States are obliged, under Principles 7 and 8, to enact measures that prohibit and eliminate prejudicial treatment based on sexual orientation or gender identity throughout the judicial process, in both civil and criminal proceedings.

¹²⁸ Article 14(3)(c) of the ICCPR.

¹²⁹ In terms of the Principles and Guidelines, traditional courts must also adhere to international human rights standards on the right to a fair trial.

“In countries where there exist **groups, communities or regions** whose needs for judicial services are not met, particularly where such groups have distinct cultures, traditions or languages or have been the **victims of past discrimination**, States shall take special measures to ensure that adequate judicial services are accessible to them.

In Resolution 275 on Protection against Violence and other Human Rights Violations against Persons on the basis of their real or imputed Sexual Orientation or Gender Identity, the African Commission has also strongly urged States to establish “judicial procedures that are responsive to the needs of victims” of violence.¹³⁰

In addition, in its Resolution 552 on the Promotion and Protection of the Rights of Intersex Persons in Africa, the African Commission calls on States to “[e]nsure that human rights violations against intersex people are investigated, perpetrators are prosecuted, and victims have access to effective remedies, including redress and compensation”.¹³¹

LGBTIQ+ persons may face prejudice in court settings

With respect to the few instances in which some cases made it to courts, FGD participants expressed concern that LGBTIQ+ persons are sometimes subjected to intrusive questions about their sexual orientation, gender identities and gender expressions in court settings.

Respondents in the focus group discussions and one-on-one interviews underscored that, often, the manner of dressing and outward appearance of LGBTIQ+ individuals in Lesotho are scrutinized by the general public, law enforcement officials, as well as court staff. FGD participants highlighted, in particular, how purported expressions of gender identity, including clothing choices, are frequently subject to judgment and control in both public and domestic settings. This occurs despite the fact that, section 14(1) of the Constitution¹³² upholds the right to freedom of expression which encompasses personal appearance and manner of dressing.¹³³

¹³⁰ African Commission on Human and Peoples’ Rights, *Resolution 275 on Protection against Violence and other Human Rights violations against Persons on the basis of their real or imputed sexual orientation or gender identity*, ACHPR/Res.275(LV) 2014.

¹³¹ African Commission on Human and Peoples’ Rights, *Resolution on the Promotion and Protection of the Rights of Intersex Persons in Africa - ACHPR/Res.552 (LXXIV) 2023*.

¹³² Section 14

- (1) Every person shall be entitled to, and (except with his own consent) shall not be hindered in his enjoyment of, freedom of expression, including freedom to hold opinions without interference, freedom to receive ideas and information without interference, freedom to communicate ideas and information without interference (whether the communication be to the public generally or to any person or class of persons) and freedom from interference with his correspondence.
- (2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision—
 - a. in the interests of defence, public safety, public order, public morality or public health; or
 - b. for the purpose of protecting the reputations, rights and freedoms of other persons or the private lives of persons concerned in legal proceedings, preventing the disclosure of information received in confidence, maintaining the authority and independence of the courts, or regulating the technical administration or the technical operation of telephony, telegraphy, posts, wireless broadcasting or television; or
 - c. for the purpose of imposing restrictions upon public officers.

¹³³ See Principle 19 of the Yogyakarta Principles: “This includes the expression of identity or personhood through speech, deportment, **dress, bodily characteristics, choice of name**, or any other means, as well as the freedom to seek, receive and impart information and ideas of all kinds, including with regard to human

"The police officers arrived at my village during the local elections [...] They were looking for people to be police assistants so I was [in] the queue to register my name but this one police officer took one look at me and singled me out to leave the queue. She told me to go home and 'dress properly' because I am a woman. But I was dressed properly as I had on tracksuit pants. I changed into some other tracksuit pants and [joined] the queue again. I was singled out again by the same officer until another officer asked her to let me register my name. I went back the next day and had a conversation with the police officer that had defended me and I explained that I identify as part of the LGBTI community and they understood."
– focus group participant

"I don't know how many times I have been applying for a job at Lesotho Mounted Police and I missed so many interviews because we [transgender men] are forced to wear dresses." – focus group participant.

"The court system does not recognize gender identities beyond the binary categories of man and woman. This poses problems for persons of other diversity to access the court, according to their chosen identities. This is not something a lawyer might have control over." – Mosa Letsie, project lawyer at Seinoli Legal Centre.

One interviewee, who is a lesbian, detailed her experience of preparing for a court appearance as a potential witness in a rape case that she had initially reported. The prosecutor seemed to be confused by her gender identity and thus advised her to present herself "as a female" when appearing before the presiding judge:

"There was a time when I was speaking to [the prosecutor] and she told me that it would help to address myself as a female. She didn't know if I was a lesbian or a transgender woman, or transgender man. She just assumed. She told me that I would actually have to address [my sexual orientation and gender identity] in court."

Some respondents shared that they have also been admonished by security staff for not adhering to court dress codes. The Lesotho judiciary website provides little information about dress codes, besides mentioning "men" and "women" and stipulating that women should wear dresses and skirts.¹³⁴

"I was accompanying some [assault] victims to court, and I remember I was asked by the security staff at the court: 'Why are you wearing trousers? You are a woman and you are supposed to wear a dress'. I did not even answer that question because a police officer there said it is ok." – People's Matrix staff member.

rights, sexual orientation and gender identity, through any medium and regardless of frontiers." (emphasis added).

¹³⁴ See <https://jud.gov.ls/>. On the Lesotho judiciary's website, under Frequently Asked Questions, the answer to the question, "What can I wear to court" reads: "It is always advisable to maintain the dignity of the Court, the Court requests that the following list of minimum standards regarding appropriate dress be met before entering the courtroom. 1) **Men should wear a shirt with a collar and long pants. (Jeans are acceptable).** 2) **Women should wear a dress, or a blouse and skirt or long pants.**" It does not stipulate any other gender identities.

"I have learned that the problem starts with the police because when I get there at the police station with my small, tiny voice, they are going to ask whether I am a 'he' or a 'she', and when I am in court, I fear that the prosecutor might be homophobic or transphobic and judge me according to my gender identity." – focus group participant

One focus group discussant, who is a youth leader in her community, stated that at the courts in the Butha-Buthe district, some LGBTIQ+ individuals she knows have had to attend court proceedings in attire that does not align with their gender expression because of the dress codes implemented by those courts.

Another focus group participant who uses the "he" and "him" pronouns shared an experience of being informed by the police that he was required to wear a dress to supposedly adhere to the dress code while appearing at a magistrate's court in Maseru. He told the police that he did not have a dress which they understood and later explained to the magistrate. Thereafter, the proceedings were able to continue without any further incident.

The prejudice, stigma and questions about their gender expression that LGBTIQ+ persons may face in court settings impair their ability to navigate court proceedings as witnesses, accused persons or litigants without fear of bias or undue influence. This amounts to an infringement of their right to freedom of expression, their right to privacy, right to fairness in such proceedings and the right to be heard by a competent, independent, and impartial tribunal. It may also amount to a violation of the right to access to justice and effective remedies when LGBTIQ+ persons are victims of human rights violations seeking remedies and redress.

A significant number of focus group participants, particularly those residing in rural areas, shared experiences of taking matters to their local chiefs to resolve or seeking justice from their local courts due to their accessibility. They shared that much like with magistrate's courts and high courts, they may be subjected to invasive questions about their sexual orientation and gender identity or scrutiny over their gender expression. This, they felt, is especially the case for transgender men and lesbian women.

"The other challenge occurs when we seek services from our village chiefs. Where I live in Abia, the Chief has a huge problem with [lesbians] wearing trousers. Even if we cover ourselves with a [cloth] it is still a problem and he won't help us." – focus group participant.

"For me, my experience was with the local court at my village. With the chief. My girlfriend and I had a disagreement. I had to explain my relationship with my girlfriend. One of the counsellors stood up and suggested we get expelled from the village...but my chief and I have a lovely relationship, and I keep telling him that the homophobia in the village has led me to fight for our rights." – focus group participant.

"I had sex with my partner and my mother caught us. She took us to the chief at 12 midnight. When we got there, we were asked, 'who was the man and who was the woman'." – focus group participant

All persons have the right to privacy in terms of section 11 of the Lesotho Constitution. This would extend to information regarding a person's sexual orientation or gender identity; and choices regarding a person's sexual partners or personal relationships.¹³⁵ As such, LGBTIQ+ individuals should only have to disclose such information if and when they choose, without fear of discrimination.

"You can't go see a chief [unless] you're dressed a certain way. A 'woman' is supposed to wear a dress if they want to see the chief [...] It just goes to show how patriarchal, very heteronormative that system is [...] you're very much [judged] through a lens of how you identify, perception [of how you identify] and societal expectations around that. It's very difficult to get recourse of any sort if you've brought a very sensitive sexuality or gender case before a [traditional leader]. So, I don't think people seek out justice from those kinds of courts often because they already have a preset understanding of how men and women behave in society" – Giselle Ratalane, consultant who identifies as a transgender woman.

"[T]he local court is not administrating law, it's only administrating custom. And, of course, there is a lot of stigma there. For example, a woman is supposed to go into the local court wearing a dress. Now we're looking at a person who is saying they don't feel comfortable wearing a dress, they feel comfortable in [trousers]. They're not going to go into that court," – Nhlapo Katiso, lawyer in private practice.

As with the police, the sensitization of all key stakeholders in the justice system on the human rights of LGBTIQ+ persons is critical to ensuring access to justice for all.¹³⁶ Such stakeholders include judges and magistrates. Principle 8 of the Yogyakarta Principles calls on States to "undertake programmes of training and awareness-raising for judges, court personnel, prosecutors, lawyers and others regarding international human rights standards and principles of equality and non-discrimination, including in relation to sexual orientation and gender identity."

"How should this unique community be understood? I think this is a very pivotal point, because people do not understand the [LGBTIQ+] community because of ignorance. It is not because they don't like them. I've noticed that they just don't understand LGBTIQ+ persons. They don't understand how they are. The first thing is to understand them, then [judicial officers] can appreciate their predicament." – judicial officer.

The need for increased sensitization of all stakeholders within the judicial system

¹³⁵ See Principle 6 of the Yogyakarta Principles: "Everyone, regardless of sexual orientation or gender identity, is entitled to the enjoyment of privacy without arbitrary or unlawful interference, including with regard to their family, home or correspondence as well as to protection from unlawful attacks on their honour and reputation. The right to privacy ordinarily **includes the choice to disclose or not to disclose information relating to one's sexual orientation or gender identity**, as well as **decisions and choices regarding both one's own body and consensual sexual and other relations with others**." (emphasis added).

¹³⁶ ICJ "Lesotho: activists call for increased sensitization of key stakeholders on human rights of LGBTIQ+ people", 21 April 2023, <https://www.icj.org/lesotho-activists-call-for-increased-sensitization-of-key-stakeholders-on-human-rights-of-lgbtq-people/>; see also Sam Kisika "New guidebook seeks to sensitize Kenyan judges on LGBTQ rights" in *Washington Blade*, 19 October 2023, <https://www.washingtonblade.com/2023/10/19/new-guidebook-seeks-to-sensitize-kenyan-judges-on-lgbtq-rights/>.

In his concluding remarks at an April 2023 judges' workshop hosted by the ICJ and the People's Matrix Association, the Acting Chief Justice of Lesotho, Tšeliso Monapathi, emphasized that, in his opinion, there was a significant need for judicial officers and Lesotho's society generally to be sensitized on the human rights of LGBTIQ+ persons.¹³⁷ He echoed the sentiments of the Chief Justice, Sakoane Sakoane, who, in October 2022, called for the "cultivation of an LGBTIQ sensitive culture", noting that "there is no local jurisprudence yet on what these rights mean for the LGBTIQ community", despite the fact that the Constitution "guarantees two important rights: the right to respect for private and family life (in section 11) and freedom from discrimination (in section 18)".¹³⁸ This appears to confirm remarks made by participants in FGDs that many cases involving LGBTIQ+ persons seemingly do not make it to – or through – the court system for the reasons outlined above.

"The clerks of court, court managers, court support staff, the law enforcement agencies and the prosecution – need a lot of sensitization. It needs to be a continuous process." – judicial officer

In ICJ's previous engagements with the Lesotho judiciary on the human rights of marginalized groups in October 2022,¹³⁹ April 2023,¹⁴⁰ and October 2023,¹⁴¹ magistrates and judges expressed interest in understanding the plight of LGBTIQ+ persons and unpacked the unique role that judicial officers play in ensuring that such marginalized persons can access judicial processes. This may include: interpreting the law in a manner that is consistent with Lesotho's international human rights obligations; being sensitive to the needs of LGBTIQ+ persons appearing before them so as to better enable them to participate in court proceedings; and continuing to deepen their knowledge about the personal experiences of LGBTIQ+ persons in Lesotho in accessing justice through the courts.¹⁴²

"The workshop we had with the ICJ and [judiciary] of Lesotho showed that there is a lack of information. [Judges] are aware of some of the problems LGBTIQ+ persons face but they don't have a lot of information." – People's Matrix staff member

As one judicial officer stated in an interview for this report:

"It helps a lot for the judiciary, as the interpreters of the law, to know where they can fill gaps because [their mandate] is to interpret, not to make laws, and preferably [...] with a purposive interpretation."

¹³⁷ *Ibid*, ICJ.

¹³⁸ See ICJ, "Lesotho: Chief Justice Sakoane Sakoane calls for the "cultivation of an LGBTIQ sensitive culture" in Lesotho", 18 October 2022, <https://www.icj.org/lesotho-chief-justice-sakoane-sakoane-calls-for-the-cultivation-of-an-lgbtq-sensitive-culture-in-lesotho/>.

¹³⁹ *Ibid*.

¹⁴⁰ ICJ "Lesotho: activists call for increased sensitization of key stakeholders on human rights of LGBTIQ+ people", 21 April 2023, <https://www.icj.org/lesotho-activists-call-for-increased-sensitization-of-key-stakeholders-on-human-rights-of-lgbtq-people/>

¹⁴¹ ICJ, "Lesotho: Magistrates and judges unpack their role in protecting and promoting the human rights of marginalized individuals and groups", 23 October 2023, <https://www.icj.org/lesotho-magistrates-and-judges-unpack-their-role-in-protecting-and-promoting-the-human-rights-of-marginalized-individuals-and-groups/>.

¹⁴² ICJ, *supra* note 140.

A focus group participant also shared that representation of LGBTIQ+ individuals within different State institutions may help police, prosecutors and court staff better ensure that the needs of LGBTIQ+ persons are adequately considered when engaging in judicial processes.

"I wish we could have representatives, at the police, in courts, someone who can represent the LGBTIQ+ communities." – focus group participant.

One interview respondent also suggested that resources be allocated by government to mechanisms and processes that may encourage LGBTIQ+ persons to engage with courts, particularly if fear around being publicly outed or scrutinized about sexual orientations, gender identities and gender expressions is a major hindrance to this.

"The issue of resources has to be addressed first. Of course, it is the responsibility of the government to capacitate relevant stakeholders with resources allocated to trainings and [technology] so that even people in the most remote areas can access justice. Technology can play a pivotal role in accelerating and enabling access to justice for marginalized communities who maybe be afraid to come out and be known. So, we can help them access justice by enabling them to [give testimony] where they can even hide their faces but we can only hear their words." – judicial officer.

Another interviewee highlighted that the court system is not yet responsive to the needs of LGBTIQ+ persons because it lacks directives on how to respond to the barriers that may impede LGBTIQ+ persons' full participation in court proceedings.

"Our court system does not have deliberate interventions for effectively dealing with cases of abuse or discrimination against LGBTIQ persons. If we're going to be subjecting [LGBTIQ+ persons] to normal court rules, procedures etc. we are almost ignoring the complexities around cases that involve the LGBTIQ+ community. Our court rules are silent about this community which has been marginalized and discriminated against. The rules need to be inclusive so that when the court has LGBTIQ-related cases, it will know how to speedily dispose of them." – Mohau Tsilo, lawyer in private practice

6. CONCLUSIONS AND RECOMMENDATIONS

The ICJ considers that Lesotho is failing to fully comply with its international human rights obligations to ensure access to justice and effective remedies for all without discrimination. Access to justice should be available to all individuals regardless of sexual orientation, gender identity, gender expression or sex characteristics. LGBTIQ+ persons should be able to freely report violations of their human rights violations without fear of retaliation, vindicate their human rights when violated, have access to legal representation in both civil and criminal proceedings and be able to access remedies for violations of their rights from courts.

Lesotho's international, regional and domestic human rights obligations require the State to take measures to ensure that LGBTIQ+ individuals enjoy their human rights without discrimination, including their rights to equality and non-discrimination, dignity, privacy, legal representation and legal aid and freedom of expression. In light of its human rights obligations, Lesotho should adopt and implement laws and policies that protect these rights, that combat discrimination and violence, and that provide access to legal remedies for those whose rights have been violated. Furthermore, raising awareness and promoting acceptance and understanding, in society and among justice sector actors, about the human rights of LGBTIQ+ persons are essential steps toward fulfilling these obligations.

In light of the experiences detailed above, and Lesotho's international and domestic legal obligations, the International Commission of Jurists recommends that the authorities of Lesotho take the following measures:

To the Ministry of Law and Justice:

- Implement more effective awareness-raising initiatives about the human rights of LGBTIQ+ persons, addressing in particular access to justice barriers.

To address widespread stigma and discriminatory attitudes towards LGBTIQ+ persons, it is imperative that the authorities, primarily through the Ministry of Law and Justice, fulfil their obligations to conduct awareness-raising activities and ongoing public education to foster acceptance of such persons. Awareness-raising initiatives should generally cover human rights and issues related to sexual orientation, gender identity, gender expression and sex characteristics and the obstacles preventing LGBTIQ+ persons from accessing courts and effective remedies for violations of their human rights.

In this regard, the relevant government departments should work with civil society organizations, the local media and development partners to carry out ongoing awareness-raising activities within community settings that are aimed at changing the general public's attitudes towards LGBTIQ+ persons.

- Provide access to information to all persons on where to obtain legal aid services and the procedures for accessing judicial services

It is imperative to provide clear, comprehensive and accessible information to all individuals regarding the availability of legal aid services and the procedures for accessing judicial services to ensure that LGBTIQ+ persons may access legal representation, including through legal aid, and engage in court proceedings. In this context, information should be disseminated in various formats and should be readily available to all persons at key locations frequented by the general public, as well as at police stations and within court buildings, including courts in rural areas, as well as at hospitals and clinics.

The Ministry of Law and Justice, alongside the judiciary, and in partnership with legally-focused non-governmental organizations and civil society organizations advocating for the rights of LGBTIQ+ persons, should carry out information campaigns.

- Implement ongoing training for law enforcement officials on the human rights of LGBTIQ+ persons and violations of human rights on the basis of SOGIE-SC.

Continual training programs for law enforcement officials, including police officers and police station staff, on the human rights of LGBTIQ+ persons and on human rights violations based on SOGIE-SC are essential to ensuring that LGBTIQ+ persons feel comfortable to report violations of their human rights or approach the police to resolve a dispute. These training sessions should emphasize sensitivity towards LGBTIQ+ individuals and respect for their human rights. Delivering these training sessions on a regular basis and incorporating such sessions as part of the main police training programs will also ensure that newly appointed police officers are not left out.

The State should also support current ongoing trainings for police officers carried out by civil society organizations, such as the People's Matrix, and collaborate with these organization to reach a wider range of police officers in districts across the country.

- Conduct sensitization workshops and training for chiefs, traditional leaders and adjudicators of local courts

To address the systemic barriers faced by LGBTIQ+ individuals in accessing justice at the community level, the government, through the Ministry of Law and Justice and other relevant ministries, should conduct sensitization workshops and training sessions for chiefs, traditional leaders, and adjudicators of local courts. These workshops should aim to enhance awareness and understanding of the human rights of LGBTIQ+ individuals and the challenges they encounter within the justice system and should cover: the right to a fair trial; understanding diverse sexual orientations and gender identities; the human rights of LGBTIQ+ persons; and the interpretation of laws in a manner consistent with international laws and standards.

- Decentralize legal aid services provided by the Legal Aid Office beyond the capital city to rural areas to ensure a wider range of individuals can access lawyers.

The government of Lesotho must fully implement the Legal Aid Act by devising and implementing a plan, as well as allocating resources from the national budget towards establishing multiple legal aid offices in all 10 districts across the country to ensure wider accessibility to such services beyond the urban centres. There should also be an increase in resources provided to the legal aid office to employ additional lawyers to enhance capacity to take on cases.

To the Ministry of Health and the Ministry of Gender, Youth, and Social Development

- Strengthen support services for victims of gender-based violence, particularly LGBTIQ+ individuals

It is critical that victims of violence have equal access to comprehensive support mechanisms and services, regardless of SOGIE-SC. Such support mechanisms

would include reporting to the Children and Gender Protection Units, the Victims of Crime Support Office which was set up within the Maseru Magistrates Court and the Lapeng Care Centre which was also established under the Ministry of Gender to provide psychosocial support to victims of violence.¹⁴³ To address the needs of LGBTIQ+ persons who are survivors of violence, harassment and abuse, the government should establish or allocate more resources to these specialized support mechanisms tailored to the unique needs and experiences of LGBTIQ+ survivors.

Such comprehensive support services should include various forms of psychosocial support, medical assistance and safe housing for survivors of violence, harassment and abuse, where necessary. The government should also collaborate with relevant stakeholders, including civil society organizations, police officers, social workers, counsellors and health professionals, to further develop and implement these support services in line with international human rights laws and standards.

To the judiciary:

- In a similar manner to the rules created in 2023 for enhancing access to justice for persons with disabilities,¹⁴⁴ the relevant authority within the judiciary could develop judicial rules and guidelines for enhancing the ability of LGBTIQ+ individuals to navigate courts and ensuring sensitivity in court proceedings. These rules should be created in collaboration with NGOs advocating for the rights of LGBTIQ+ persons, legal experts, the Ministry of Law and Justice, and relevant judicial bodies. These guidelines should address issues such as sexual orientation, gender identity, gender expression, sex characteristics, gender markers, attire at courts, and sensitivity to the needs of LGBTIQ+ persons in court proceedings.
- Continue sensitization of public prosecutors, court administration staff, court security staff, court researchers and judicial officers on the rights of LGBTIQ+ persons with respect to a range of issues. Given the success of previous engagements with the Lesotho judiciary on the rights of LGBTIQ+ persons that have been led by non-governmental and civil society organisations, such as the ICJ and People's Matrix, the judiciary should aim to conduct, or collaborate with these organizations, human rights experts and the relevant government ministries, to conduct sensitization workshops targeting not only judges and magistrates, but also court administrators and prosecutors. The workshops should cover, in detail:
 - The obstacles impeding access to judicial services for LGBTIQ+ persons.

¹⁴³ Office of the High Commissioner for Human Rights, "In Dialogue with Lesotho, Experts of the Human Rights Committee Commend Measures to Combat Domestic and Gender-Based Violence, Raise Issues Concerning the Death Penalty and Attacks on Journalists,"

12 July 2023, <https://www.ohchr.org/en/news/2023/07/dialogue-lesotho-experts-human-rights-committee-commend-measures-combat-domestic-and>.

¹⁴⁴ The Reporter, "Govt improves access to justice for disabled persons" 22 June 2023, <https://www.thereporter.co.ls/2023/06/22/govt-improves-access-to-justice-for-disabled-persons/>; See also Centre for Human Rights, "Centre collaborates with ICJ to host judicial workshop on access to justice for persons with disabilities in Lesotho", 19 October 2022, <https://www.chr.up.ac.za/latest-news/3150-centre-collaborates-with-icj-to-host-judicial-workshop-on-access-to-justice-for-persons-with-disabilities-in-lesotho>

- Sensitivity to issues of sexual orientation, gender identity, gender expression and sex characteristics of LGBTIQ+ individuals, including through manner of dressing.
- Impartiality and the independence of judges in judicial proceedings.
- Respectful treatment of LGBTIQ+ individuals by adjudicators and court administration staff throughout judicial proceedings and providing equal access to justice without discrimination.
- Identifying cases that may have a SOGIE-SC-bias element.
- The implementation and use of the potential rules and guidelines to ensure that judges and court staff are not only knowledgeable about LGBTIQ+ issues but can promote fair and respectful treatment in the justice system.

To the legislature:

- Explicitly include SOGIE-SC as prohibited grounds for discrimination under section 18 of the Constitution.
- Amend the Sexual Offences Act to expressly repeal the common law offence of sodomy and repeal the provision in Schedule I, Part II of the Criminal Procedure and Evidence Act 1981 listing sodomy as an offence.
- Amend section 22 of the Registration of Births and Deaths Act, which provides for “change of sex of child,” to include a provision that allows adults specifically to change their assigned sex at birth to their self-determined gender in the births register.
- Amend section 12 of the National Identity Cards Act to include “gender of the bearer” in the list of information that identity documents will bear and provide for other gender marker options beyond the binary gender framework of “male” and “female”.
- Provide clear guidelines for the implementation of the Registration of Births and Deaths Act and National Identity Cards Act to ensure that gender markers in identification documents accurately reflect the bearer’s self-determined gender identity.
- Conduct a comprehensive review of all laws and policies in the country to ensure that they explicitly affirm and protect the human rights of LGBTIQ+ persons, including the right to equality and equal protection before the law. The legislature and relevant government departments such as the Ministry of Law and Justice should conduct this review in consultation with civil society organizations, lawyers, LGBTIQ+ persons and other stakeholders advocating for the human rights of LGBTIQ+ persons.

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