

# Current Issues In Gender And The Law: Report Summary

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## 1 Introduction

The current public and political debates on LGBT+ issues have recently been colouring the discussion of broader family law issues and contributing to incidents of gender-based violence (GBV). Moreover, Parliament's refusal to accept the recent Supreme Court ruling on the recognition of foreign same-sex marriages could lead to a damaging showdown between the legislature and the judiciary.



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## 2 LGBT+ issues in Namibian law

**2.1 Permanent residence for a partner in a lesbian relationship with a Namibian citizen-Chairperson of the Immigration Selection Board v Frank (2001):** The Frank case was a review of an unsuccessful application for permanent residence by a German citizen who was in a long-standing lesbian relationship with a Namibian citizen. The Supreme Court's decision in this case primarily concerned administrative law, but the Court made statements about the lesbian relationship that went far beyond the issues that were necessary to decide the case. The Court's majority opinion found Article 14 of the Constitution inapplicable to a lesbian relationship on the grounds that the reference to "family" protects only relationships between males and females that are intended for procreation. It also stated that the constitutional protection against sex discrimination does not encompass "sexual orientation" and found that discrimination on the basis of sexual orientation is not "unfair discrimination" because equality before the law "does not mean equality before the law for each person's sexual relationships". This decision over-emphasised the role of public opinion as a guide to constitutional interpretation, overlooking the fact that one of the functions of constitutional rights is to protect minorities.



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Embassy  
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Windhoek



## 2.2 Citizenship of children born to same-sex partners via surrogacy-Luehl v Minister of Home Affairs and Immigration (2021 and 2023):

Multiple court cases were brought against the Ministry of Home Affairs, Immigration, and Safety and Security (MHAISS) in recent years by a gay couple comprising a Mexican citizen and a Namibian citizen. The two men married in 2014 in South Africa, where same-sex marriage is legal, and had three children via surrogacy in South Africa since Namibia has no clear legal framework for surrogacy. The most significant of these cases concerned the children's right to Namibian citizenship. The government's position was that their right to Namibian citizenship required proof of a genetic link between the children and their Namibian citizen parent. The High Court disagreed, on the grounds that there is no reference in the Constitution to biology or genetics in respect of citizenship by descent. The Court also noted that no such requirement is applied to heterosexual parents who make use of surrogacy procedures in other countries, conceive children by means of assisted fertility techniques using donor eggs or sperm or adopt children in Namibia or abroad. The High Court considered the best interests of the children, finding that it would be "grossly unfair" to deny children citizenship "because of the nature and circumstances of their birth, or the sexual preference of their parents". However, on appeal, the Supreme Court sidestepped the substantive issues, finding that the family had not satisfied the requirement that the birth of a child to a Namibian citizen outside Namibia must be properly notified to Namibian authorities as a precondition for citizenship by descent – thus leaving the legal position on citizenship in these circumstances without a final resolution.

## 2.3 Recognition of foreign same-sex marriages for immigration purposes-Digashu/Seiler-Lilles v Government of the Republic of Namibia (2023):

In 2023, the Supreme Court found that it was unconstitutional for Namibia to refuse to recognise spouses in same-sex marriages concluded outside Namibia for immigration purposes. The case involved two couples where Namibian citizens had married non-Namibian citizens of the same sex while living in countries that allow same-sex marriage. The Namibian citizens were seeking to live in Namibia with their spouses. The Supreme Court ruled that the foreign same-sex spouses must be treated like any other foreign spouses regarding permission to reside in Namibia in order to comply with the constitutional rights to dignity and equality. In reaching this finding, the Court expressly disapproved of some of the reasoning in the 2001 *Frank* case without actually overruling it, drawing a distinction between its binding holding and other points that were simply discussed along the way. **The Court also noted that constitutional rights are not dependent on public opinion as expressed by the people's elected representatives in Parliament, since the constitutional doctrine of separation of powers gives the courts the mandate to determine the content and impact of the fundamental rights protected by the Constitution in order to protect the rights of minorities who cannot protect their rights adequately through the democratic process.**

Despite the Court's clear discussion of the relationship between Parliament and the courts on constitutional interpretation, there was an immediate attempt on the part of Parliament to negate the Supreme Court's decision.

SWAPO MP Jerry Ekandjo quickly tabled two private member's bills. One was the "Marriage Amendment Bill", which limits civil marriages solemnised in Namibia to members of the opposite sex – a pointless exercise since this is already the legal position in Namibia in terms of the common law (the law developed over time through court decisions). This Bill includes a definition of spouse aimed at preventing any loopholes that would allow a transgender person to marry a person of the same sex as their sex was at birth. This Bill would also make it a criminal offence for anyone to "promote or propagate" same-sex marriage in Namibia – which would be a clear violation of the constitutional right to freedom of speech and expression. The other "Definition of Spouses Bill" explicitly attempts to "overrule" the Supreme Court decision in the *Digashu* case, with a provision entitled "Contradiction of decision of the Supreme Court" which states that "No marriage between persons of the same sex shall be recognised as a valid marriage in the Republic of Namibia". This Bill also asserts that Parliament is the principal legislative authority of Namibia and can essentially do whatever it likes. Both of these "Ekandjo Bills" were passed unanimously by Parliament in July 2023, but have not yet been signed by the President.

The President has a constitutional duty to withhold assent to a bill approved by the National Assembly by any majority if the President believes that it is in conflict with the Constitution.

**"If Parliament can 'overrule' the Supreme Court's interpretation and application of the Constitution, this would put the basic structure of Namibia's constitutional system into jeopardy."**

The procedure in such a case is to refer the bill to a "competent Court" for a decision on its constitutionality. If the bill is ruled unconstitutional, then the President has no power to assent to it and it lapses without becoming law. However, it seems as if this step has not been taken as of late November 2024, leaving the two controversial bills in legal limbo.

The conflict between Parliament and the courts has ramifications that go far beyond LGBT+ issues, by threatening the separation of powers between the three branches of government – the legislature, the executive and the judiciary. This division of functions amongst three different branches helps to prevent abuses of power. If Parliament can "overrule" the Supreme Court's interpretation and application of the Constitution, this would put the basic structure of Namibia's constitutional system into jeopardy. Article 81 of the Constitution says that a decision of the Supreme Court is binding "unless it is reversed by the Supreme Court itself, or is contradicted by an Act of Parliament lawfully enacted."

But the key word here is “lawfully”, which means “subject to the Constitution”; read in context with the rest of the Constitution, Article 81 cannot mean that Parliament is allowed to “overrule” the Supreme Court’s decisions on the application of the Constitution and the fundamental rights and freedoms it protects. **As the Preamble to the Constitution states, the rights which are the cornerstone of Namibia’s system of government are “most effectively maintained and protected in a democratic society, where the government is responsible to freely elected representatives of the people, operating under a sovereign constitution and a free and independent judiciary”.**

**2.4 Sodomy between consenting adult men decriminalised-Dausab v The Minister of Justice (2024):** In June 2024, the Namibian High Court ruled that criminalising consensual sexual contact between adult men in private is unconstitutional and invalid, striking down the crimes of sodomy and unnatural sexual offences which applied only to sexual contact between men and not between a man and a woman or between two women. As in the *Digashu* case, the Court’s ruling relied on the constitutional rights to equality and dignity. The Court found that the crimes in question demean gay men and could expose them to blackmail, entrapment, discrimination in access to services and even violence. The High Court held that these laws thus constituted a severe limitation of gay men’s rights to privacy, dignity and freedom – harms that far outweigh requiring members of the public who disapprove of homosexuality to show tolerance.

The Government has filed an appeal against this High Court decision, arguing amongst other things that the drafters of the Constitution deliberately excluded “sexual orientation” from the listed grounds on which discrimination is prohibited in Article 10(2) of the Constitution, which means that the Article 10 guarantee that all persons are equal before the law cannot be understood to apply to discrimination on the basis of sexual orientation. The Government is also asserting that the High Court failed to give sufficient consideration to the “societal norms” of the Namibian people. This appeal has not yet been heard by the Supreme Court, but it seems likely to test and possibly strain the relationship between the legislature and the courts when it comes to constitutional interpretation.

**2.5 Public attitudes:** Public opinion is repeatedly cited as a touchstone by Members of Parliament. Some have suggested that there should be a national referendum on the issue of recognising same-sex marriage – or on attitudes about LGBT+ issues more generally. However, this proposal seems to stem from mistaken ideas about the potential impact of such a referendum. Even if public opinion were totally negative on LGBT+ rights, this could not be a basis for overturning any court judgments or weakening any of the constitutional rights which those judgments relied upon. **The entire chapter of the Namibian Constitution on fundamental rights and freedoms is protected against any amendment that would diminish or detract from those rights. The courts have also made it clear in both the *Digashu* and *Dausab* cases that public opinion is not the decisive factor in constitutional interpretation, since the Constitution must protect the rights of minorities.**

In any event, the widely-respected Afrobarometer surveys have already collected information from nationally-representative samples of respondents on attitudes toward LGBT+ issues in Namibia and a host of other African countries. Since 2014, all the Afrobarometer country surveys have asked respondents how they would feel about having as neighbours people of a different religion, people from other ethnic groups, homosexuals, people who have HIV/AIDS and immigrants or foreign workers. In Namibia, the percentage of respondents who were tolerant of homosexuality by this measure has been consistently over, or almost at, half – although tolerance decreased somewhat in the most recent survey.

Afrobarometer survey data TOLERANCE TOWARD HOMOSEXUALITY				
SURVEY YEAR	2014/15	2017/18	2019/21	2021/23
Namibia	55%	54%	64%	49%

These findings place Namibia amongst the African countries most tolerant of homosexuality, ranking third most tolerant out of 34 countries surveyed in 2019/2021 and fifth most tolerant out of the 37 African countries surveyed in 2021/2023.

**The most recent Afrobarometer survey included more detailed and extensive questions on attitudes about homosexuality as part of Namibia’s country-specific questions. While the answers do not indicate the level of tolerance one might hope for, the data indicate that roughly one-third of the Namibian population is neutral or accepting of various dimensions of homosexuality – not a majority, but not an insignificant proportion by any means.**



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## OVERVIEW OF ATTITUDES ABOUT HOMOSEXUALITY

### Afrobarometer Round 10

For each of the following statements, please tell me whether you disagree or agree.

	Strongly Disagree	Disagree	Neither agree nor disagree	Agree	Strongly Agree	Aggregate of neutral, agree or strongly agree
<b>A.</b> Individuals who are attracted to people of the same gender should have the same legal rights as everyone else in Namibia.	38%	26%	9%	20%	6%	<b>35%</b>
<b>B.</b> It is important for Namibians to be tolerant of those who are attracted to people of the same gender, even if they feel it is against their own morals.	35%	27%	12%	20%	5%	<b>37%</b>
<b>C.</b> People should have the right to marry whoever they choose no matter the gender of their partners.	43%	25%	9%	16%	7%	<b>32%</b>
<b>D.</b> It is possible to follow my religion and accept people who are who are in same sex relationships	41%	27%	10%	14%	7%	<b>31%</b>
<b>E.</b> People who are in same sex relationships have the right to be parents just like anyone else.	44%	24%	9%	15%	6%	<b>30%</b>

The percentages do not total 100% because "don't know" is excluded.

### How accepting or rejecting would you be if you found out that a friend or family member is attracted to people of the same gender?

Completely rejecting	38%
Somewhat rejecting	20%
Neither accepting nor rejecting	18%
Somewhat accepting	11%
Completely accepting	11%
<b>Aggregate of neutral, somewhat accepting or completely accepting</b>	<b>40%</b>

The percentages do not total 100% because "don't know" is excluded.

**"Those who are tolerant of homosexuality are also generally tolerant of ethnic, religious, political and national diversity – with such general tolerance of differences being a factor that may well contribute to the political stability."**

Women are slightly more supportive of LGBT+ rights than men, particularly in areas such as same-sex marriage. Older adults and those with lower educational backgrounds are most likely to be opposed to same-sex marriage and same-sex couples' parenting rights, while younger respondents and those with higher education levels are more tolerant. Urban dwellers also tend to be more accepting of LGBT+ rights than those in rural areas, probably due to their greater exposure to diverse cultures and lifestyles. Those who are tolerant of homosexuality are also generally tolerant of ethnic, religious, political and national diversity – with such general tolerance of differences being a factor that may well contribute to the political stability Namibia has enjoyed since independence.

## 3 Family law reforms in progress

LGBT+ issues raised by Parliamentarians have been dominant in discussions of family law reforms that raise a much wider range of significant issues.



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**3.1 Marriage:** The Parliamentary discussions around the Marriage Bill focused on efforts to exclude same-sex marriages. Civil marriages concluded in Namibia have always been limited to marriages between one man and one woman, in line with the common law rule that underpins the current *Marriage Act 25 of 1961*. (Common law refers to the legal rules developed through court cases over time.) The Marriage Bill makes this more explicit, but putting this rule into a statute does not really change anything – if the courts find that the rule is contrary to Article 14 of the Namibian Constitution, which says that “men and women” have the right to marry and to found a family, it does not matter if the rule is in a statute or in the common law. The Bill also includes a definition of “customary marriage” that excludes same-sex marriage, included according to the Minister of Home Affairs “so we comply with our cultures and traditions”. Even more concerning is that the Bill would generally prohibit the recognition of foreign same-sex marriages, thus contradicting the Supreme Court ruling in the *Digashu* case on the recognition of foreign same-sex marriages for immigration purposes. Although this contradiction of the Supreme Court’s ruling is more subtle than that in the “Ekandjo Bills”, it is nonetheless almost certain to put Parliament and the Namibian judicial system on a collision course.

**3.2 Divorce:** The very first issue raised in Parliament during the 2024 debate on the Divorce Bill was the need to limit divorces to marriages involving opposite-sex spouses. The current law gives Namibian courts jurisdiction to grant a divorce in any case where either party to the marriage is domiciled in Namibia or has been ordinarily resident in Namibia for at least one year before instituting the divorce – no matter where the marriage was solemnised. The purpose of this provision is to prevent hardship to couples who are settled in Namibia and might not be easily able to return to the country where the marriage was concluded to obtain a divorce. This approach could, in theory, make it possible for a couple to seek a divorce in a same-sex marriage concluded in a foreign jurisdiction. But, even before the Parliamentary concerns about same-sex marriage were aired, the tabled version of the Divorce Bill already limited divorces by a restrictive definition of “marriage” that appears to generally prevent Namibian courts from granting divorces in respect of foreign marriages – thus going far beyond just the exclusion of same-sex marriages.

**3.3 Civil registration:** The Civil Registration and Identification Bill comprehensively overhauls the current law on the registration of births, deaths, marriages and divorces, as well as the law on identification documents. This Bill was introduced into the National Assembly in 2023, but was immediately caught up in the furore about definitions of spouse and marriage. It was withdrawn by the Ministry and revised to ensure that the registration system would exclude marriages between persons of the same sex as well as joint adoptions by persons of the same sex concluded in another country. The Bill would even prevent persons who have changed their name due to a same-sex marriage concluded in another country from having that name officially recognised in Namibia.

Moreover, the revised Bill would eliminate most options for sex change. Under the current law, a change of sex can be made in the birth register on a case-by-case basis. The application to alter a sex designation in a birth record requires a sworn declaration setting out the reasons for the request, supporting evidence including documentation of medical steps undertaken and certified copies of a government ID. But the Bill will in future make the possibility of a sex change available only to persons who are born intersex.

**3.4 Other law reforms:** Parliament’s concerns about same-sex marriage seem to be arising in virtually any law that mentions the words “marriage” or “spouse” – in some cases leading to delays of significant laws while this issue is examined. For instance, to cite just one example, this issue delayed the progress of the Regularisation of Status of Certain Residents of Namibia, their Spouses and Descendants Bill intended to assist persons residing in Namibia who have no official documentation other than South West African IDs to prevent these persons, along with their spouses and children, from remaining undocumented and in many cases stateless.

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## 4 Gender-based violence (GBV)

**4.1 GBV based on sexual orientation or gender identity:** The current political climate has intensified danger and insecurity for the LGBT+ community. It was reported in May 2024 that six members of the LGBT+ community were murdered in hate crimes in the preceding year – with assertions that such crimes have been spurred by the virulent Parliamentary opposition to the *Digashu* ruling. The victim of one recent murder was a trans woman who was discovered naked, with 32 stab wounds and her mutilated genitals placed on her chest. In January 2024, it was reported that a transgender woman was brutally attacked by two men at a truck stop near Walvis Bay when one of the men realized that she was a trans woman after sexually assaulting her - in an illustration of the intertwining of gender-based violence and transphobia. Even before the recent political controversies, in November 2021, well-known trans woman Mercedes Von Cloete won civil damages of N\$50 000 from the government for a 2017 assault by members of the Namibian Police during an unlawful arrest accompanied by transphobic slurs, marking the first time that discrimination and hatred on the basis of transgender status have been addressed by the Namibian courts.

Interestingly, Namibia's National Safe Schools Framework, launched by the Minister of Education, Arts and Culture in September 2018, identifies a number of acts based on sexual orientation and gender identity as manifestations of verbal, psychological or physical GBV – including homophobic name-calling; shaming, teasing or humiliating related to gender or sexuality; and excluding or physically harassing those who do not conform to gender or sexuality norms. This policy also explicitly encourages non-discrimination and tolerance. But laudable goals such as these are currently being undermined by the hate speech coming from persons who are in positions of political leadership.

At the same time, a draft law on hate speech initially proposed in 2019 seems to be stalled. The last version of this Bill that was shared publicly would prohibit discrimination and hate speech on the grounds of sex, including gender, sexual orientation and transgender or intersex status – but, even if the Bill were to move forward now, it is doubtful that these grounds would remain in the final law.



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**4.2 Recent law reforms:** There have been recent amendments to both the *Combating of Rape Act 8 of 2000* and the *Combating of Domestic Violence Act 4 of 2003* to fine-tune these laws. Although Parliament had no trouble with including a variety of forms of sexual contact in the definition of rape, regardless of the sex of the persons involved, the exclusion of same-sex couples from the protection of the domestic violence law has not been addressed – even though civil society groups lobbied to remedy this issue. In light of the recent court decisions, it seems unlikely that the exclusion would withstand a future constitutional challenge.

## 5 Intolerance versus inclusivity



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**Imposing specific moral views:** Legal developments on LGBT+ issues, family law and gender-based violence all implicate to some extent Parliament's apparent drive to impose specific moral views on society. Recent Parliamentary debates provide evidence of a willingness to curb both rights and freedoms on hot-button issues, as well as an absence of tolerance for diverse personal choices and views. This is also likely to arise in respect of proposed law reforms on reproductive rights, and on abortion in particular. On the other hand, it must be noted that the government has consistently supported formal equality between men and women since independence – even though it is not clear that this approach finds favour with a majority of the Namibian population. Government has also been steadfast in the face of opposition from some religious groups and communities on a few controversial issues that involve sexuality – such as comprehensive sexuality education in schools and a policy on learner pregnancy aimed at allowing young mothers to continue their education. **While there is an overall tendency towards social conservatism on the part of Namibian policy-makers when it comes to matters involving sexuality, it is sometimes difficult to predict which issues will inspire tolerance and which issues will trigger impulses for moral control. When it comes to law and policy on such difficult questions, the Namibian Constitution should be the foremost guiding light.**

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**Families and children:** Parliament's narrow approach to the concept of “family” is worrying. When it comes to constitutional protection for the “family”, Namibia's Supreme Court has specifically rejected the view of the *Frank* case that this protection is limited to formal relationships between males and females for the purpose of procreation - without attempting a definition of what the term “family” encompasses. In a nation where the extended family has long been recognised as an important institution in society, it seems strained to promote a limited notion of what constitutes a “family”. In fact, Namibia's *Child Care and Protection Act 3 of 2015* takes an intentionally broad approach to this issue, defining a “family member” in relation to a child as including a parent, grandparent, step-parent, brother, sister, uncle, aunt or cousin of the child or any other person with whom the child has developed a significant psychological or emotional attachment.

Moreover, none of the court cases on LGBT+ issues involving children have given sufficient attention to the best interests of the child, which Namibia is obligated to treat as the “the paramount consideration” by the *Child Care and Protection Act* as well as the African Charter on the Rights and Welfare of the Child and the UN Convention on the Rights of the Child. The government's current policies would deprive a family comprising a Namibian citizen married to a foreign national of the same sex, and any children that they adopted jointly or conceived via surrogacy, of the chance to live in Namibia as part of a family and experience the Namibian heritage which is a component of the family's make-up. It remains to be seen what practical problems may arise if such “non-traditional” families are not recognised in Namibia - could this affect the rights of same-sex parents to consent to medical treatment on their children if they find themselves in Namibia? Will the attitudes of government about families that include same-sex couples inspire violence against the adult partners or bullying of their children?

**“Will the attitudes of government about families that include same-sex couples inspire violence against the adult partners or bullying of their children?”**

**The constitutional protection afforded to the “family” should extend to the full variety of families that make up Namibian society.**

**Tolerance and stability:** The themes “One Namibia, One Nation” and “Unity in Diversity” have been prominent in Namibian political discourse, and many credit the emphasis on inclusivity as being a key element in Namibia’s political stability. The Namibian Constitution itself pledges that the people of Namibia “will strive to achieve national reconciliation and to foster peace, unity and a common loyalty to a single state” and “constitute the Republic of Namibia as a sovereign, secular, democratic and unitary State securing to all our citizens justice, liberty, equality and fraternity”. As the late President Hage Geingob famously stated in his inaugural address on 21 March 2015, “Let us stand together in building this new ‘Namibian House’ in which no Namibian will feel left out.”

And yet, even now, a generation since independence, overcoming discrimination on various grounds in order to forge a common sense of nationhood remains a challenge. The Office of the Ombudsman has consistently looked at discrimination against persons on the basis of sexual orientation and gender identity in the same vein as discrimination on the grounds of race, ethnicity, disability and other personal attributes. **As the Afrobarometer surveys indicate, intolerance on one dimension of difference tends to go hand-in-hand with other forms of intolerance. Encouraging discrimination against members of the LGBT+ community is likely to undermine Namibia’s overarching goals of a national identity based on the acceptance of differences alongside respect for all Namibians.**

Such concerns highlight the importance of giving more urgency to the finalisation of a carefully-crafted law prohibiting hate speech and the importance of having a political leadership which respects and demonstrates the values enshrined in the Constitution.

**Threats to the rule of law and Namibia’s constitutional system:** Namibia has long and rightfully boasted about its respect for the rule of law and its independent judiciary. These are indeed important factors that make Namibia a leader in Africa and an attractive destination for foreign funding and investment – which may now be more important than ever to help Namibia overcome the challenges of widespread unemployment and financial inequality. But the current state of play around LGBT+ issues is in danger of straining Namibia’s constitutional system to the breaking point. It tests the issue of protection for minority rights against the belief of some that it is acceptable for majority views to control the exercise of rights and freedoms in private life. The current debates may rock the stability that has characterised Namibian democracy from the outset and undermine the independent role of the judicial system. This could be a turning point for Namibia.

**“The current debates may rock the stability that has characterised Namibian democracy from the outset and undermine the independent role of the judicial system.”**

This issue is not only about LGBT+ rights. If Parliament can override the courts’ interpretation of the Namibian Constitution on how equality and dignity apply to the issue of same-sex marriage or the crime of sodomy, this could happen in connection with any of the fundamental constitutional rights – freedom of religion, freedom of speech, freedom of assembly, property rights or any of the other basic human rights protected by the Constitution. **If Parliament is all-powerful, then the bedrock of Namibia’s political structure of three separate branches of government is no longer sound. This could eventually harm Namibia’s international standing as a stable state and thus undermine future economic development. This may sound alarmist, but respect for the rule of law and the role of the judiciary is meaningless if it is not consistent. The importance of the rule of law and respect for the Namibian Constitution as the country’s Supreme Law needs to be renewed, taught as part of school curricula and emphasised in the orientation of new Members of Parliament.**

Some politicians may be strongly opposed to LGBT+ rights. But if they abuse their positions to impose these personal views on others in defiance of the Namibian Constitution, the country is in trouble. As one LGBT+ activist recently warned, we need to be careful not to “burn down the Namibian house”.

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## About the Institute for Public Policy Research (IPPR)

The Institute for Public Policy Research was established in 2001 as a not-for-profit organisation with a mission to deliver independent, analytical, critical yet constructive research on social, political and economic issues that affect development in Namibia.

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