

## Introduction

Samoa is a signatory to the following UN treaties and instruments: *Universal Declaration of Human Rights (UDHR) 1992*; *Convention on Elimination of All Forms of Discrimination Against Women (CEDAW) 1971*; *Convention on the Rights of the Child (CRC) 1989*; *International Convention on Civil and Political Rights (ICCPR) 1966*; *International Covenant on Economic Social and Cultural Rights (ICESCR) 1966*

The terms Fa'afafine & Fa'afatama are culturally unique and specific to Samoa's 3<sup>rd</sup> gender. It is a social and communal gender fluid based status given to effeminate males and butch females within the Samoan cultural context. We go on record that we, Fa'afafines and Fa'afatamas, are NOT all transgender. Some of us are, but they are exceptions to the rule.

Boxing our issues together with Transgender issues under the LGBTIQ framework ignores our cultural connection or "fa'asinomaga" which is the essence and at the heart of every Samoan. The Samoa Faafafine Association is challenging this perception that Fa'afafines and Fa'afatamas are Transgender for the sake of convenience in the LGBTIQ framework.

Samoa has in the past co-sponsored the joint statement on ending acts of violence and related human rights violations based on sexual orientation and gender identity adopted by the Human Rights Council. We hope to work with the Government of Samoa to pave the way here in the Pacific in raising awareness of our issues and sensitising our communities to continue on our path of societal acceptance and elimination of all discrimination based on sexual orientation and gender identity (SOGIE).

## Executive Summary

We call for the recognition of our customs and traditional practices unique to Samoa to be harnessed and recognised within the United Nations framework and that our lived experiences as Faafafine and Faafatama in Samoa must be reflected in the legal framework of key performance indicators that Samoa prescribes to under its current commitments to its UN Treaty Bodies.

We need to see firmer commitments in regards to funding to support our human rights efforts on the ground in Samoa and to lift the socio-economic rights of Faafafine and Faafatama<sup>1</sup>, and sustainable support to bring Faafafine and Faafatama's healths and freedoms into the mainstream.

We report on the legislative framework of our human rights specifically around the core issues of sexual freedom or same sex relations, marriage equality and recognition and discrimination of Faafafine and Faafatama in a gender binary framework.

We support the ending all forms of discrimination against Women, Children & Persons with Disabilities, and we request the inclusion of Faafafine and Faafatama in that list as omitted in the NHRI Report<sup>2</sup>.

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<sup>1</sup> *International Covenant on Economic Social and Cultural Rights (ICESCR) 1966*

<sup>2</sup> Office of the Ombudsman and National Human Rights Institution Publication - "For Samoa, By Samoa", State of Human Rights Report 2015

We raise concerns about Intersex<sup>3</sup> recognition in Samoa and ask the government of Samoa for a commitment to pursuing Intersex recognition, training of staff, statistics collection, and case studies.

## **Key Issue 1.0 - We Are Not Transgender - We Need Recognition of Our Lived Experiences**

### **Issue At Stake**

#### **1.1 We are Not Transgender**

If you accept that gender is a result of social conditioning, then you must accept that as the 3<sup>rd</sup> gender of Samoa, that the expectations of our cultural acceptance forms the fabric of who we are as a gender. We're extending that definition because we struggle with being identified under the LGBTI framework with inherent limitations that do not account for recognition of 3<sup>rd</sup> gender identities from different cultures.

Despite very little research acknowledging ethnic or Pacific cultural issues as they relate to sexual identity development, sexual orientation, gender identity, it is our experience and we want to highlight as a positive:

**“that in Samoa, for Fa’afafine & Fa’afatama individuals, they do not need to choose between the safety of their family and cultural environment and their Fa’afafine & Fa’afatama identity.”**

This is not a characteristic of the current LGBTI framework we are grouped under.

### **Suggested advance questions/questions to ask during the UPR dialogue**

How can we account for the lived experiences of Fa'afafine and Fa'afatama in Samoa in the UPR process?  
How can they be a part of the UPR process without being made to fit into the one-box-fits-all regime of the LGBTI framework within human rights?

### **Suggested recommendations**

We recommend that the UPR process determines a pathway in which the lived experience of Samoan Fa'afafine & Fa'afatama is noted, embraced and factored in the reporting mechanism of the UPR. We need to be find a way to account for our Fa'afafine & Fa'afatama lived experiences, our histories, our relationships and our communities, and to this end, we recommend that the United Nations Office of the Commissioner for Human Rights mandates the acceptance of cultural identities unique to other populations of the world, including Samoa and the Pacific and to find meaningful ways of introducing these identities in the Human Rights discourse.

## **Key Issue 2.0 – What We Need! Funding Opportunities**

### **Issue at Stake**

#### **2.1 Poverty**

We are in a crises of poverty of opportunity. Samoa’s rates of economic growth and inflation 2013-2016 are as follows<sup>4</sup>:

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<sup>3</sup> **Intersex**, is a variation in sex characteristics including chromosomes, gonads, or genitals that do not allow an individual to be distinctly identified as male or female.

<sup>4</sup> Economic and Social Survey of Asia and the Pacific 2015 0 Making Growth for More Inclusive for Sustainable Development – UNESCAP - United Nations publication Sales No. E.15.II.F.7

		Real GDP growth				Inflation			
	Average pre-crisis growth 2005-2007	2013	2014	2015	2016	2013	2014	2015	2016
Samoa	3.7	-1.1	1.9	2.5	2.2	0.6	-0.4	2.5	2.0

Our vulnerability poverty is seen through stagnant real GDP growth in 2013 as a result of TC Evan which devastated Samoa and how it's bounced back to 1.9% in 2014.

And we are bouncing back, see World Bank's Doing Business database<sup>5</sup>, which ranked economies in terms of ease of doing business, placed Samoa, the best performer among Pacific island developing countries covered in the study, at 67th out of 189 economies. With that confidence should come opportunities for Samoa Faafafine Association to be included in the Government of Samoa's Core Funding Priorities.

### Suggested Advance Questions/Questions to ask During the UPR Dialogue

Does the Samoan Government provide any core funding in its annual budgets and estimates for Fa'afafine and Fa'afatama Civil Society? If not why not?

Can the Samoa Fa'afafine Association be included in the next core funding budget estimations?

### Suggested Recommendations

We recommend that the Samoan Government provide the Samoa Faafafine Association with Core Funding under the budget of the Ministry of Women Community and Social Development budget for its strategic gender discrimination initiatives and Ministry of Health for its core strategic health objectives.

We recommend the inclusion of Fa'afafine and Fa'afatama in the development of microfinance programmes, economic and social justice programmes. technological and marketing assistance for small business, business and vocational skills training,

## Key Issue 3.0 - The Laws of Our Land – The Effect on Our Freedoms

### Issue At Stake

#### 3.1 Legalisation of Homosexuality

We commend the Samoa Law Reform Commission's work on the review of the *Crimes Ordinance* 1961 and we celebrate the effective legalisation of homosexuality in Samoa in 2013 for same sex relations between consenting adults<sup>6</sup>.

#### 3.2 Criminalisation of Sodomy<sup>7</sup>

Although legalised in an earlier part of the *Crimes Act 2013*, the insertion of Section 67 criminalises the act of sodomy between consenting adults. Irrespective of the reasons, the Samoa Faafafine Association considers this bad law and needs repealing with immediate effect.

In a cultural context, Samoan men have special relationships to the females in their families and communities. If there is a concern that removing sodomy as an offence will impact that "va tapuia" relationship, there are other ways which this can be addressed under the auspices of the *Crimes Act 2013*.

#### 3.3 Marriage Equality in Samoa

We report that recognition of marriage equality has been part of the laws of Samoa since 2002<sup>8</sup>. Fa'afafine

<sup>5</sup> <http://www.doingbusiness.org/>

<sup>6</sup> See Section 50 of the *Crimes Act 2013*

<sup>7</sup> See Section 67 *Crimes Act 2013*

<sup>8</sup> See Section 65 *Births, Deaths and Marriages Registration Act 2002*

and Fa'afatama can marry overseas in a jurisdiction in which their same sex union is allowed e.g. New Zealand, and can have their union recognised in Samoa. As a first step to full marriage equality, that is acceptable to the Samoa Faafafine Association.

#### 3.4 Discrimination in the Workplace

The Samoan Constitution<sup>9</sup> grants all citizens the right to freedom from discriminatory legislation. We welcome the addition of sexual orientation as one of the grounds for discrimination that is now not allowed under Act<sup>10</sup>.

### **Suggested Advance Questions/Questions to ask During the UPR Dialogue**

Is Sodomy legal or illegal in Samoa?

Do you agree with our finding on recognition of marriage equality in Samoa?

Will Samoa cement its commitments to SOGIE principles by adding gender identity expression as barred grounds for discrimination in employment?

### **Suggested Recommendations**

3.2.1 We recommend that if the argument for Section 67 is about the concept of "feavaa'ai"<sup>11</sup> or "fepuiuia'i"<sup>12</sup>, there are much more relevant ways to include sodomy as an offence through minor edits to the definition sexual violation<sup>13</sup> or indecent assault<sup>14</sup> under the *Crimes Act 2013*, and therefore the removal of Section 67.

3.3.1 We recommend that in future iterations of the *Births, Deaths and Marriages Registration Act 2002*, true marriage equality for all Fa'afafine and Fa'afatama be achieved, but for now, let us begin with the confirmation of the registration of our unions solemnised in a jurisdiction that legalises such unions, and accept that they can be registered in Samoa.

We recommend the Ministry of Justice develop workable policies to ensure this pathway to recognition.

3.4.1 We recommend that in future iterations of the *Labour and Employment Relations Act 2013*, that gender identity expression be added as barred grounds for discrimination within the meaning of the Act.

## **Key Issue 4.0 - The Fight for Discrimination & Exclusion Begins At Home Issue at Stake**

### 4.1 Membership of Samoa National Human Rights Institution

We note our disappointment with the Samoa Office of the Ombudsman in that it's "Samoa mo Samoa" report, Fa'afafine and Fa'afatama are not included as a marginalised sector of the community.

During the formation of the National Human Rights Institution, we were invited to be a member. We are hopeful of meaningful re-engagement with the Office of the Ombudsman and the National Human Rights Institution of Samoa and that the original invitation submitted for the Samoa Faafafine Association to join is extended.

There is no meaningful discussion of Human Rights in Samoa without the participation, and or the involvement of the Samoa Faafafine Association as the representative body for all Fa'afafine and Fa'afatama of Samoa.

### **Suggested Advance Questions/Questions to ask During the UPR Dialogue**

Does the Samoa Faafafine Association have membership of the Samoa NHRI? If not why not?

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9 *Constitution of the Independent State of Samoa 1960 Clause 15*

10 See Section 20 *Labour and Employment Relations Act 2013*

11 "For Samoa, By Samoa", State of Human Rights Report 2015, p17

12 *ibid*

13 See Section 49 *Crimes Act 2013*

14 See Section 60 *Crimes Act 2013*

Why are Samoan Fa'afafine and Fa'afatama not covered under your report<sup>15</sup>?

### **Suggested Recommendations**

We recommend membership of the National Human Rights Institution of Samoa be confirmed for the Samoa Faafafine Association immediately.

## **Key Issue 5.0 - Let's Talk About Sex – Specifically About Intersex Issue at Stake**

### 5.1 Binary Gender Recognition in Samoa

Section 10 of the *Births, Deaths and Marriages Registration Act 2002* requires a child's gender to be recorded, and currently in Samoa, the only manifestations of gender are the primary sexual characteristics - a penis for a boy or male, and a vagina for a girl or female. A child's late developmental stages may have some regard to the surfacing of faafafine traits but they are definitely not evident at birth. In this regard, Samoa's legal stance is the correct one.

### 5.2 Intersex

As a simple working definition of intersex<sup>16</sup> “Intersex people are born with physical, hormonal or genetic features that are neither wholly female nor wholly male; or a combination of female and male; or neither female nor male.”<sup>17</sup>

Conservative numbers of births for Intersex according to the Intersex Society of America = 1 in 100 births for the total number of people whose bodies differ from standard male or female.

This means that somewhere in Samoa, there are Intersex babies born and we either do not know about it or are not recorded on our records.

The UN Office of the United Nations High Commissioner for Human Rights states, in the May 2015 Report A/HRC/29/23 on “Discrimination and violence against individuals based on their sexual orientation and gender identity”:

**“Many intersex children, born with atypical sex characteristics, are subjected to medically unnecessary surgery and treatment in an attempt to force their physical appearance to align with binary sex stereotypes...”**<sup>18</sup>

Hawai'i<sup>19</sup> is the only Pacific state to do some work on the rights of Intersex individuals and Samoa is in a unique place to push forward for the recognition of Intersex citizens.

But first, we need a solid base of research in order to determine the numbers if any of Intersex citizens.

### **Suggested Advance Questions/Questions to ask During the UPR Dialogue**

Does Samoa have an Intersex Policy? If so what is it and where is it found?

Does Samoa have any statistics on Intersex births?

Does Samoa provide any form of support for Intersex citizens? If not why not?

### **Suggested Recommendations**

We recommend that the Samoan government takes the lead in the Pacific on Intersex issues and makes policies to address:

Data collection on intersex, sexual orientation and gender in Samoa; Disclosure issues; Inclusive language; Body diversity issues; Services and resources; Legislative review of all gender laws to ensure conformity with internationally recognised standards.

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15 Office of the Ombudsman and National Human Rights Institution Publication - “For Samoa, By Samoa”, State of Human Rights Report 2015

16 OII Australia - <https://oii.org.au/18106/what-is-intersex/>

17 <http://www.isna.org/faq/frequency>

18 <http://www.ohchr.org/EN/Issues/Discrimination/Pages/LGBTUNReports.aspx>

19 <http://www.hawaii.edu/PCSS/biblio/articles/2010to2014/2010-intersexuality.html>