



Samoa Fa'afafine Association Inc. (SFA)

Submitted for consideration at the
39th Session 1 November 2021 - 12 November 2021
of the Office of the High Commissioner of Human Rights (OHCHR)
for Samoa's Universal Periodic Review.

Stakeholder Report submitted to the OHCHR by
Samoa Faafafine Association Inc

The Protection of the Rights
of Fa'afafine/Fa'atama/ LGBTIQ /SOGIESC persons
in Samoa

Submitted 25 March 2021

Abbreviations

MFAT	Ministry of Foreign Affairs and Trade
MOH	Ministry of Health
MWCSD	Ministry of Women Community & Social Development
NHRI	National Human Rights Institute
NOLA	Nuanua o le Alofa National Advocacy Group for Persons with Disabilities
SAF	Samoa AIDS Foundation
SAMPOD	Samoa Alliance of Media Practitioners for Development
SFA	Samoa Fa’afafine Association
SFHA	Samoa Family Health Association
SPNM	Society of Private Nurses & Midwives
SRC	Samoa Red Cross Society
SVSG	Samoa Victim Support Group
YWCA	Young Women Christian Association

1.0 Acknowledgement

The Samoa Fa’afafine Association (SFA) acknowledges the work of the Samoa National Human Rights Institute in ensuring the voice of marginalized communities are validated in the UPR Process. By facilitating technical and financial support to promote the meaningful engagement of CSOs in having an input to the status of human rights in Samoa.

In addition, the valuable and brave contribution of the SFA community in exposing the struggles of their lived experiences with the hope it will establish sufficient grounds to instigate non-discriminatory policy and legislation that eliminates all forms of human rights violations based on gender identity or sexual orientation in Samoa.

2.0 About Fa’afafine / Fa’atama

The terms Fa’afafine & Fa’atama are culturally unique and specific to Samoa’s 3rd 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’atamas, are NOT all transgender. Some of us are, but 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. SFA is challenging this perception that Fa’afafines and Fa’atamas are Transgender for the sake of convenience in the LGBTIQ framework.

If you accept that gender is a result of social conditioning, then you must accept that as the 3rd and 4th genders of Samoa, that the expectations of our cultural acceptance forms the fabric of who we are as those genders.

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

“in Samoa, for Fa’afafine & Fa’atama individuals, they do not need to choose between the safety of their family and cultural environment, and their Fa’afafine & Fa’atama identity” and this is not a characteristic of the current LGBTIQ framework we are grouped under.

SFA calls for the recognition of our customs and traditional practices unique to Samoa to be harnessed and recognised within the United Nations framework. Our lived experiences as Faafafine and Fa’atama 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.

Samoa has 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 also hope to continue 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).

Samoa, in particular the Government, has always in previous UPR cycles, relied on Religion, “Samoa is founded on God” (Christian) and Culture “It’s against our way of life or Fa’aSamoa” in order to either reject or note SOGIE recommendations from UN member states.

The principles of equality and non-discrimination must prevail over cultural or traditional practices that adversely affect ALL citizen’s lives, and Samoa must be engaged in the process of combating negative practices and social attitudes.

Samoa must address cultural obstacles to equitable treatment of citizens rather than relying on culture as an excuse for lack of progress. We respect our Fa’aSamoa. We are shielded by our Fa’aSamoa. But when our Fa’aSamoa is used to discriminate against us, then we must rely on the international community to intervene on our behalf.

2.1 Samoa Fa’afafine Association

The Samoa Fa’afafine Association Inc. was informally established in 1987 as an advocacy platform for the fa’afafine community in response to the inherited stigma and discrimination of the HIV/AIDS epidemic ignorantly imposed upon the community in the late 1980s. Since then, the SFA core mandate has expanded to advocate, elevate, voice and safeguard the cultural identity, social protection and human rights of all Samoans with diverse SOGIESC. Driven by the tenacity and passion of the fa’afafine community, SFA was legally registered as an incorporated society in 2006 and has been the leaders for the advancement of fa’afafine/ fa’atama /LGBTQI/ Diverse SOGIESC persons in Samoa.

3.0 Samoa’s Human Rights on Fa’afafine / Fa’atama (SOGIESC) Community Progress Since Last UPR

Samoa continues to make efforts to ensure all citizens’ rights regardless of their gender are safeguarded. The Government has taken key steps to protect rights of all citizens including fa’afafine, fa’atama / LGBTIQ / SOGIESC. The Constitution of Samoa declares the protection of fundamental rights and individual freedoms, regardless of gender with notable progress in the:

Crimes Act 2013 which repealed the criminalization of males ‘impersonating’ females in a public place. An irrelevant law which could be used to target fa’afafine, transgender women and sex- and gender-diverse persons. The same with the technical removal of homosexual acts among consenting adults except sodomy which remains a criminal offending to date.

The Labour and Employment Relations Act 2013 prohibits direct and indirect discrimination on the basis of sexual orientation against an employee or applicant for employment in any employment policies, procedure or practices.

The removal of sexual orientation and sexual preference as a mental illness pursuant to Mental Health Act 2007 which repealed the Mental Health Ordinance 1961.

A Seat at the Table - National Human Rights Institute Representation.

The inclusion of a representative from SFA and the SOGIESC community in the Human Rights Council of the National Human Rights Office has been a clear sign of the Samoan government wanting to do better by its Fa’afafine, Fa’atama and SOCIESC population.

Being counted where it matters, in the National Inquiry Report into Family Violence 2018 reference to violence toward gender diverse individuals has facilitated the need for further research and dedicated studies for marginalized communities. Building the accurate evidence-based data on the violations faced by gender diverse people will only inform impactful interventions that are relevant, sufficiently resourced and sustainable.

National Policies have made progress in adopting gender neutral language with an inclusive approach in theory to development priorities for Samoa. In particular the Community Development Sector Plan 2016 - 2021, National Policy for Gender Equality 2016 – 2020 highlighting *‘everyone, regardless of gender, disability, race, status, sexual orientation and age; has the right to work of equal pay and value, the right to support themselves, and to live in peace without the fear of abuse or violence’*.

The Fa’afafine Week (1st December (World AIDS Day) – 10th December (Human Rights Day) annual event has gained national recognition and continues to grow every year as the main advocacy platform for the SFA community since 2016, presenting an opportunity for SFA to lobby, advocate and build durable partnerships with public and private stakeholders in priority development areas of Health, Environment, Economic empowerment and social development.

Meaningful intersectional partnerships such as the SFA Coalition for Development, which comprises of loyal and affirming CSO partners who have stood side by side with SFA in its advocacy efforts from the beginning. The coalition is a demonstration of an intersectional approach and coalition building to achieve gender equality, social justice and social protection for all. The SFA Coalition is made up of the following CSOs – SVSG, NOLA, SFHA, SRC, SAF, YWCA, SAMPOD, SPNM, NHRI, & Soul Talk

Despite our progress, we caution that SFA maintains **the greatest barriers** to achieving human rights and equality for all is **not only about legislative review or inclusive policy development** but in the **de-sensitisation** of the knowledge, attitudes, and practice of all citizens towards sex- and gender-diverse persons. This is the focus of this submission to push forward commitments at all levels for the genuine inclusion of sex- and gender-diverse persons in all aspects of life.

4.0 Samoa and UN Treaties / Mechanisms / Instruments

Samoa became a member of the United Nations (UN) in 1976 and is a signatory to the Universal Declaration of Human Rights (UDHR), and to date, it has ratified the following six of the nine core human rights instruments¹, as well as two of the Optional protocols to the Convention on the Rights of the Child.

Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment (CAT);
International Convention on Civil and Political Rights (ICCPR);
Convention for the Protection of All Persons from Enforced Disappearance (CED);
Convention on Elimination of All Forms of Discrimination Against Women (CEDAW);
Convention on the Rights of the Child + Optional Protocols (CRC);
Convention on the Rights of Persons with Disabilities (CRPD).

SFA Recommendation:

That Samoa works with the United Nations to immediately ratify the remaining core human rights instruments:

International Convention on the Elimination of All Forms of Racial Discrimination (CERD);

International Covenant on Economic, Social and Cultural Rights (CESCR);

International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW).

That Samoa extends an open invitation to the United Nations Special Procedures of the Human Rights Council to conduct an assessment visit of Samoa's progress under its UN core human rights obligations.

5.0 Legislative Reforms for Fa'afafine / Fa'atama (SOGIESC) Community

5.1 General Legislative Reforms

SFA accepts that while sexual orientation and gender identity are new concepts in the contexts of legal reform in Samoa, its advocacy programs had observed how it is generally viewed with so much confusion and misunderstanding. To an extent, it is viewed as western oriented concepts that undermines the assigned roles and duties of men and women in the context of fa'asamoa or Samoan culture.

It is not uncommon that these concepts immediately draw insinuations that it relates to or intends to promote same sex marriage or sodomy, which is generally frowned upon in the fa'asamoa context. The bible is always and deliberately cited as the source reference immediately imposing disapproval which halts progressive discussion or dialogue that should have enhanced understanding and clarity.

This remains a growing concern for SFA and its fa'afafine/fa'atama members who are the most visible individuals from the SOGIESC communities. SFA accepts this is stemming from the attitudes of people

¹ [United Nations Treaty Body Database](#)

that is inspired by unfounded fear that is mostly religious (Christianity) based, of which is inseparably a part of fa'asamoa.

SFA accepts that progressive changes do not happen overnight, therefore legal and policy reforms are only a starting point that practically places order and security on everyone particularly emphasising equality and non-discrimination on the grounds of sexual orientation and gender identity.

SFA Recommendation:

That the Samoan Government through the Samoa Law Reform Commission, work with SFA to include the correct UN references / language of 'sexual orientation and gender identity' in any future repealed and / or amended legislation, and any future legal review and reforms for any legislation where relevant.

5.2 Specific Legislative Reforms

Constitution of Samoa²

Equality of everyone before the law is a legal concept that justifies a non-discrimination approach inclusive of sexual orientation and gender identity. However, this may only be from an arguable legal jurisprudence point of view given the absence of clear references in the Constitution towards 'sexual orientation' and 'gender identity.'

With the most recent constitutional amendment of which declared Samoa as a Christian State in its Constitution preamble, this is already subjecting the Constitutional concept of 'equality before the law' to an interpretation that permits discrimination towards SOGIESC on religious, particularly Christianity grounds.

Current Article 15 of the Constitution of Samoa:

15. Freedom from discriminatory legislation -

(1) All persons are equal before the law and entitled to equal protection under the law.

(2) *Except as expressly authorised under the provisions of this Constitution, no law and no executive or administrative action of the State shall, either expressly or in its practical application, subject any person or persons to any disability or restriction or confer on any person or persons any privilege or advantage on grounds only of descent, **sex**, language, religion, political or other opinion, social origin, place of birth, family status, or any of them.*

(3) Nothing in this Article shall:

(a) prevent the prescription of qualifications for the service of Samoa or the service of a body corporate directly established under the law; or

(b) prevent the making of any provision for the protection or advancement of women or children or of any socially or educationally retarded class of persons.

SFA Recommendation:

² Constitution of the Independent State of Samoa 1960 (as amended 2017), Office of the Attorney-General, Apia Samoa

That the Government update the definition of classes in Article 15 (2) of the Constitution of Samoa to include references to 'sexual orientation' and 'gender identity'.

Crimes Act 2013

In the Crimes Act 2013, consensual homosexual relations including sodomy by definition of the act of sodomy but not the word sodomy, were repealed through s50 under the definition of a legal sexual connection using gender neutral language, and even in the language of s49 which details and defines what unlawful sexual connections (sexual violations) are including rape, and non-consensual connections.

However, under the same Crimes Act 2013, s67 criminalises the act of sodomy on (a) females, (b) males under 16yo and (c) anyone else thereby rendering it contrary to the earlier s50 definition.

The Crimes Act 2013 also includes s68 which is about attempting to commit sodomy, and s71 for keeping a place of resort for homosexual acts.

SFA Recommendation:

That the Government repeal s67 of the Crimes Act, and allow the existing provisions of s50 to cover consensual same sex acts including sodomy by definition of the act;

That the Government repeal s68 of the Crimes Act as attempts to commit sodomy are covered under the rape or unlawful provisions of the existing provisions of s49;

That the Government repeal s71 of the Crimes Act as keeping a place of resort for homosexual acts is impossible to police and monitor given that the current hotel / motel operators have no legal way of monitoring the actions of their guests in the privacy of their rooms, and furthermore, homosexuality is now legal under the definition and provisions of s50.

Births Deaths and Marriages Registration Act 2002

While it is not discriminatory of defining parents which may include same sex parents, the process with the Registry Office has generally only accepted a male and a female as parents according to registered birth certificate content including adopted children. The same with change of gender or sex of which the same legislation is silent on.

SFA Recommendation:

The Government include references to 'sexual orientation' and 'gender identity' where relevant in the Births Deaths and Marriages Registration Act 2002.

Film Control Act 1978 / Indecent Publications Ordinance 1960

While it is not specifically SOGIESC discriminatory, the absence or silence of its content on SOGIESC issues had been open to acute discriminatory decisions of the administrative bodies and individuals

empowered to decide on that under those legislations.

SFA Recommendation:

That the Government include references to 'sexual orientation' and 'gender identity' where relevant in both the Film Control Act 1978 and the Indecent Publications Ordinance 1960.

Marriage Ordinance 1961

While it is not discriminatory of marriage equality, it leaves legal interpretation to an approach and administrative decisions that are acutely SOGIESC discriminatory.

SFA Recommendation:

That the Government include references to 'sexual orientation' and 'gender identity' where relevant in both the Marriage Ordinance 1961.

Labour and Employment Relations Act

Maternity leave and Paternity leave whilst covered in the Act, are not extended to adoptive parents, only to natural birth parents who conceive and give birth to a child, this makes the provisions of s43, s44, s45, and s46 of the Act discriminatory to adoptive parents.

SFA Recommendation:

That the Government repeal sections 43, 44, 45 and 46 of the Labour and Employment Relations Act 2013 so that adoptive parents can be covered in its maternity / paternity leave provisions.

6.0 Policy Reforms

While SFA is noticeably involved in consultation processes mainly coordinated by the Ministry of Women Community and Social Development, Ministry of Health and Ombudsman Office on policy reforms, there is still so much more than needs to be done to ensure that national policies are SOGIESC inclusive.

The Ministry of Health by its most recently approved Ministry of Health Sector and Implementation Plans 2021 – 2030 have not only missed SFA from its consultation as a stakeholder, it is also not SOGIESC inclusive. Besides, there is no framework that guides a trans-health approach towards the transgender community particularly on hormonal therapy and treatments, and Samoa has no position, policy, or data on Intersex births in Samoa, nor does it have a priority pathway to recognition of Intersex citizens in Samoa.

This is a concern given the portfolio for Sex workers previously under the Ministry of Health has been given to SFA since 2018. A highly sensitive undertaking SFA has taken onboard in the context of sexual reproductive health and rights (SRHR) and in its national advocacy on eliminating Gender Based Violence aligned to the commitments under CEDAW.

The Second-Generation Surveillance Survey (SGSS) 2008 results corroborated by Samoa's Demographic Health Survey (SDHS) 2009 revealed high prevalence of Chlamydia, particularly amongst youth under 25 at 71 percent. SFA also elevated the reach and scope of STD/STI & HIV/AIDS testing nationally which contributes to the Ministry of Health national reporting

The Ministry of Women Community and Social Development as the focal point for vulnerable groups should expand its definition of “vulnerable groups” in policy and in practice with the relevant technical and funding support for community efforts for a free and equal Samoa.

The same with the National Building Code which is created by the Ministry of Works Act 2002 which while it focuses on the safety and security of the building including being people-with- disability-friendly, it is not SOGIESC friendly particularly on unisex friendly bathrooms and toilets for transgender individuals who do not see to comfortably fit in either male or female labelled public bathrooms and toilets.

Finally, the issue of incidences of child vendors particularly after school hours and during school holidays needs to be addressed.

SFA Recommendations:

That the Government particularly the Ministry of Health to be SOGIESC inclusive with its approach according to its Sector and Implementation Plans 2021 – 2030;

That the Government particularly the Ministry of Health establish trans-health approach particularly on hormonal therapy and treatments that is most relevant to transgender communities;

That the Government particularly the Ministry of Works and its Building Division to be SOGIESC inclusive with a review or reform of its National Building Code particularly towards mandatorily stipulating in the Code unisex friendly public bathrooms and toilets for transgender communities;

That Samoa should align its laws on political representation to its obligations under CEDAW and other conventions it has ratified and along with recent amendments to Part V, Article 44 of the Constitution of the Independent State of Samoa which guarantees 10% of the seats in Parliament to women, that Samoa give due consideration to allowing constitutionally guaranteed percentage of the seats in Parliament to fa’afafine and fa’afatama of Samoa representation;

7.0 Funding for SOGIESC

SFA does not receive direct funding from the Samoa Government for its operations despite it being the only SOGIESC organisation in Samoa. It receives some minimal international funding that is project specific at the control of the funder, and some limited financial support through the Ministry of Health, Ministry of Women Community and Social Development and Office of the Ombudsman on particular small projects and activities but there is no allocated funding provided in Samoa’s annual estimates and budgets.

For the quality and the level of the work and advocacy SFA is engaged in, as registered NGO in Samoa, it is woefully under-resourced with one paid staff and an Executive Council / Governance made up entirely volunteers with no monetary allowances yet are forced to take time off from their paid employment to pitch in the work of SFA during national, regional and international human rights campaigns.

SFA is punching way above its weight in its advocacy outputs with both hands tied behind its back and its eye's covered and with the rise in national and international work, the issue of funding is untenable and requires a full commitment particularly on consultation processes with Government.

SFA Recommendations:

That in order to strengthen the advisory role of SFA throughout consultation processes in relation to constitutional, legal and policy reforms consistently across the board for all relevant authorities in Samoa, the Government to assign a below-the-line budget financial assistance to enhance and strengthens the resourceful support from SFA as Samoa's local expert on SOGIESC issues.

-END-