

**Universal Periodic Review of Samoa  
39th Working Group Session**

**Joint Stakeholder Submission**

Report submitted by:

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Samoa Fa'afafine Association Inc is a Non Government Organisation that advocates and address SOGIESC human rights in Samoa.

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Asia Pacific Transgender Network (APTN) is a regional organisation that is working towards the advancement of human rights and bodily autonomy of transgender and gender diverse people in the Asia Pacific region.

This report has been prepared by Samoa Fa'afafine Association (SFA), My Girls Club and the Asia Pacific Transgender Network (APTN). This report draws data from a peer-led study on the rights and social experiences of trans and gender diverse communities, led by APTN and its country partners in Samoa.<sup>1</sup> The peer-led study interviewed a total of fifty two (52) trans and gender diverse individuals.

This joint civil society stakeholder submission highlights the discrimination faced by the transgender and gender diverse populations in the healthcare settings as well as in the education and employment sectors. The research also highlights the specific experiences of trans and gender diverse people in Samoa in relation to gender-based violence. Further, we outlined the legal and administrative barriers experienced by trans and gender diverse people in relation to gender recognition. The submission also provides key recommendations to accelerate progress on the implementation of constitutional and international human rights obligations with respect to legal gender recognition, right to health, and right to non-discrimination and equality.

**Key words: legal gender recognition; access to health for transgender and gender diverse people; non-discrimination and equality for transgender and gender diverse people; transgender rights**

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<sup>1</sup> Asia Pacific Transgender Network and My Girls Club. Peer-led study on the rights and social experiences of trans and gender diverse people in Samoa. Bangkok: APTN, 2020.

### General Context:

1. Samoa is a Polynesian country northeast of Fiji, comprising two main islands, Upolu and Savai'i and a collection of smaller inhabited islands and with a population of approximately 200,000.<sup>2</sup> Christianity is considered the main religion, and its impact can be seen vastly in the religious as well as political landscape of the country.
2. Samoa has four cultural genders – female, male, fa'afafine, fa'atama, and Samoa is considered one of the countries with a highly culturally recognised and pronounced trans and gender diverse population. Fa'afafine and Fa'atama are indigenous LGBTI citizens of Samoa. Fa'afafine are male at birth and explicitly embody feminine gender traits. Some identify as gay males, and some identify as transgender. Fa'atama are female at birth and explicitly embody masculine gender traits. Most identify as lesbian, and very few as transgender. Local groups have raised concerns about boxing fa'afafine under transgender issues or the common acronym LGBTIQ+ stating that it ignores their cultural connection and fa'asinomaga (cultural duty and positioning), which is the essence of every Samoan. Hence, fa'afafine do not see their gender diverse position as the central marker of their identity, rather, they view it as part of being Samoan.
3. Yet, despite being a culturally highly recognised identity, fa'afafine and fa'atama do not get recognition in the local policies and legal instruments. Fa'afafine and fa'atama still face discrimination and obstacles to their social and legal recognition within Samoa. There are no official national statistics collected on fa'afafine in Samoa, however some estimates place fa'afafine at five percent of Samoa's total population. However, due to the more fluid nature of gender and sexuality in Samoa, these figures can be misleading.
4. Samoa is a deeply religious country and changed its constitution to officially become a Christian country in 2017.<sup>3</sup> There is a lack of awareness about sexual orientation and gender identity issues in the wider public and it is generally viewed as western oriented concepts that could undermine or threaten the assigned roles and duties of men and women within the context of fa'asamoa or Samoan culture. To an extent, in the collective social understanding, same sex relations and gender diverse people are linked with sodomy. Often religious arguments are invoked and bible is cited as the source reference that disapproves of and halts any progressive discussion or dialogue about diverse sexual orientations and gender identities.
5. This remains a growing concern for the fa'afafine/fa'atama citizens of Samoa who are the most visible individuals from the SOGIESC communities and remain at the forefront of receiving social ostracisation and stigmatisation. Respondents of our research survey report being singled out for discrimination due to their gender identity, with 61.5% (32) saying this occurs at least sometimes, with sexuality rather than gender as a cause ('because being fa'afafine automatically means homosexual which is often frowned upon', 'many people have homophobic ideas but friends who know me well accepts me') or specifically in villages and through traditional culture ('because of family pride, and living under village rules and strong culture, therefore people of our identity is not appreciated', 'especially in rural areas where culture is very strong', or singling out appearance ('I think gender identity is not the issue, it is how a fa'afafine would express themselves which is why some society deny the idea').
6. Police harassment was also reported by some of our survey respondents in Samoa, with 2 people reporting harassment, an example being 'forced to lie on the ground facing the dust without reason'. One person had been given a fine, and none had been convicted in court, although 5

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<sup>2</sup> Asia Pacific Transgender Network and My Girls Club. Peer-led study on the rights and social experiences of trans and gender diverse people in Samoa. Bangkok: APTN, 2020.

<sup>3</sup> <https://www.loc.gov/law/foreign-news/article/samoa-constitutional-amendment-makes-christianity-the-national-religion/>

had been in prison previously, reporting experiences in the prison cell of being ‘put in a cell not matching my self-identified gender’ and being ‘put in solitary confinement (single lock-up)’. Those who were in prison also reported discrimination and verbal harassment by police, one example being ‘the officer interviewing me, he would eagerly wanting to punch me in the face and chest, his face was red of hatred’. Discrimination from inmates included sexual harassment (‘once or twice when they want sex pleasure’), though one reported being treated ‘like a girl/sister to them’. In terms of general experiences with police, one participant said ‘since they see and think of me as a fa’afafine, their assumption is that having sexual intercourse is all I want’.

7. The rise of marriage equality legislation in countries across the Western world most notably New Zealand, Australia and the US, has resulted in heated debates around the appropriateness of such legislative changes in Samoa. The patron of SFA, the Prime Minister of Samoa has called it a “Sodom and Gomorrah practice” and would never pass as long as his party governed Samoa.<sup>4</sup> As a compromise, local advocacy groups like SFA have stated that fa’afafine are free to marry their partners in countries overseas like Australia, New Zealand and the US, and that their union can be recognized in Samoa. This was called a necessary compromise by the association to ensure that Samoa’s progression toward marriage equality followed a cautious and steady path.<sup>5</sup>
8. The Samoan government has implemented several policy and legal amendments that positively promote the human rights of the country’s trans and gender diverse communities, including the decriminalisation of the offence of female impersonation of a female in the *Crimes Act 2013* and 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*. Further, inclusion of SOGIESC in the Government’s most recently approved *National Gender Policy 2021 – 2025* through the Ministry of Women Community and Social Development is also commended by local advocates.
9. The Samoan government also established the National Human Rights Office pursuant to the *Ombudsman Act 2018* and a representative of the SOGIESC community was also included in the Human Rights Council of the National Human Rights Office. Further, sexual orientation and sexual preference was removed as a mental illness with the enactment of the *Mental Health Act 2007*, which repealed the *Mental Health Ordinance 1961*.
10. But despite these legal and policy progresses, several gaps remain in the legislative protections for the trans and gender diverse citizens of Samoa in the social, employment, education and health contexts.

### ***Equality and Non-discrimination on the Grounds of Sexual Orientation and Gender Identity***

11. Equality of everyone before the law is a legal concept that justifies a non-discrimination approach inclusive of sexual orientation and gender identity. While the country’s Constitution of Samoa includes non-discriminatory clauses for all citizens, there is an absence of clear references in the Constitution towards ‘sexual orientation’ and ‘gender identity.’ Besides, with the most recent constitutional amendment, which was passed in 2016, declared Samoa as a Christian State in the preamble,<sup>6</sup> this is already subjecting the Constitutional concept of ‘equality before the law’ to an interpretation that permits discrimination towards SOGIESC on religious, particularly Christianity and biblical arguments.

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<sup>4</sup> <https://www.humandignitytrust.org/country-profile/samoa/>

<sup>5</sup> Asia Pacific Transgender Network and My Girls Club. Peer-led study on the rights and social experiences of trans and gender diverse people in Samoa. Bangkok: APTN, 2020.

<sup>6</sup> <https://www.loc.gov/law/foreign-news/article/samoa-constitutional-amendment-makes-christianity-the-national-religion/>

12. Furthermore, while some recent legislative amendments have included references to 'sexual orientation' or 'sexual preference', explicit references to 'gender identity' remain missing in the repealed or amended legislation. Similarly, some legislations remain open to interpretation of the administrative bodies that govern the implementation of the respective laws. For example, *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. The *Film Control Act 1978* and *Indecent Publications Ordinance 1960* while it is not 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<sup>7</sup>. Finally, *Marriage Ordinance 1961* while it is not discriminatory of same sex marriages, it leaves legal interpretation to an approach and administrative decisions that are acutely SOGIESC discriminatory.
13. 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. Therefore, it is pertinent for the Samoan government to review and amend the existing legislation and policies to ensure the human rights and right to equality and non-discrimination is extended to all Samoan citizens, including the fa'afafine/fa'atama citizens.

#### ***Discrimination Experienced by Fa'afafine/fa'atama, Trans and Gender Diverse People in the Healthcare Contexts***

14. The Ministry of Health has recently approved the *Ministry of Health Sector and Implementation Plans 2021 – 2030* that does not include any references to citizens with diverse SOGIESC. Furthermore, there is no framework that guides a trans-health approach towards the transgender community particularly on hormonal therapy and treatments due to systemic barriers such as lack of legal gender recognition.
15. Other research has shown that Samoa's fa'afafine are quite well-informed about STIs especially HIV. Although knowledge of HIV was generally high, condom use was low (43.9% never used a condom) and only 16.3% had an HIV test in the last month. Despite Samoa's HIV infections rate being relatively low (cumulative 24 reported cases),<sup>8</sup> the low rate of testing means that there is a danger that this figure could be misleading. At present SFA offers the only trans/fa'afafine specific HIV screening program supported by the Ministry of Health. They are active across the country in promoting HIV and STI prevention throughout the urban and rural Samoa, including through health promotion and voluntary HIV and Syphilis testing activities during the Annual Fa'afafine Forum, as part of Miss Fa'afafine Pageant Week.<sup>9</sup>
16. Similarly, the *National Building Code* which is created by the *Ministry of Works Act 2002* which 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

<sup>7</sup> <https://www.samoobserver.ws/category/samoa/43436>

<sup>8</sup> Worth et al. (2016) *Pacific Multi-Country Mapping and Behavioural Study: HIV and STI Risk Vulnerability among Key Populations – Samoa*. p8. UNDP, Global Fund. Retrieved from: [https://sphcm.med.unsw.edu.au/sites/default/files/sphcm/Centres\\_and\\_Units/Samoa-HIV-STI-Risk-Report.pdf](https://sphcm.med.unsw.edu.au/sites/default/files/sphcm/Centres_and_Units/Samoa-HIV-STI-Risk-Report.pdf)

<sup>9</sup> Ministry of Health. Samoa (2018) *Global Aids Monitoring Report 2018*. p25 Retrieved from: [https://www.unaids.org/sites/default/files/country/documents/WSM\\_2018\\_countryreport.pdf](https://www.unaids.org/sites/default/files/country/documents/WSM_2018_countryreport.pdf)

and toilets.

17. Positively, in our research, gender-based discriminations in the healthcare settings were reported by very few respondents. Only one individual reported having their health services impacted by the gender identity, reporting refusal of health care at least once. Seven individuals (13.5%) had visited a health care professional for transition/trans-related services. The majority who had not sought transition/related health care (86.5%), had not done so either because they didn't need or want the services, or because the services are not available in Samoa. Due to the absence of gender-affirming care services in Samoa, there is very little information available about it and wide misconceptions about gender affirming hormonal therapy were reported by our survey participants.
18. In terms of mental health, only 2 of our survey respondents had experience with psychotherapy or mental health support, though 10 people had had experienced suicidal thoughts and 2 had attempted suicide. Sources of support in these circumstances were largely family ('parents', 'grandparents', 'aunty', 'mother', and 'my two fa'afafine best friends'. These findings point to the clear absence of trans-affirmative mental health services.

### ***Discrimination Experienced by Trans and Gender Diverse People in the Education & Employment Settings***

19. Samoa is one of the few countries in the Pacific region with specific clauses in the labour rights protection laws, for example the *Labour and Employment Relations Act 2013*, that provide protection against discrimination on the basis of sexual orientation and HIV status. However there is no mention of gender identity in the law.
20. The country's education policies do not have any clear provisions around protection from gender-based discriminations or recognition of diverse gender identities.
21. Our survey respondents shared varied experiences with regards to discriminations experienced in education settings, with 25% reporting at least some difficulty with changes in educational environment due to gender identity, with older children at school being mentioned repeatedly in qualitative responses as sources of bullying and abuse. Further, 13.5% of participants (7 people) reported at least one example of their achievements being less acknowledged due to their gender identity (61.5% said never), with examples including similar themes of extraordinary achievement not acknowledged: 'I had great grades in school, top of the class, but the school did not acknowledge'; 'one time I knew I topped my class but then it didn't come through with my school report'; along with being misgendered by teachers: 'the principle always address me with my birth gender (male) when calling out my prizes/awards during graduation'.
22. Survey respondents also shared experiences of gender-based discrimination in the employment sector. Of those who answered, 11.5% had experienced discrimination in the labour market, ranging from refusal of employment (11.5% or 6 people) to being fired (2 reported at least once). Four reported they had not tried to reveal their gender identity at work. One example related to being unable to express their gender identity as the cause of refusal or dismissal: 'Because I have long hair and the job requires people with short hair', whereas other reported a perception of employer discomfort with their gender identity: 'I can sense at times of interviews that the panel is not vulnerable of my identity', 'I know I'm good and been to many interviews and I know I did extremely well they won't pick me, my identity expression is the only reason, based on my assumption', 'This one job I applied for shut me with un acceptance of fa'afafine in their workplace', 'through shown behaviours towards me, sensed their ignorance of me at work'. Only 1 person reported having legally challenged the refusal.

### ***Violence Against Trans and Gender Diverse People***

23. Generally, the legal framework of Samoa does not have specific protection from violence on trans and gender diverse people.
24. Statistics around gender-based violence (GBV) against trans and fa'afafine Samoans are limited to mostly anecdotal reports. Although it is widely accepted that Samoan society publicly recognizes the transgender Fa'afafine community, members of the community still report instances of social discrimination.<sup>10</sup> One particularly abhorrent case was of the suicide of Janine Tuivaiki, a fa'afafine woman, in 2016. The Samoa Observer, Samoa's premier daily newspaper published a picture of Janine's dead body on the front page of the newspaper deliberately misgendering her.<sup>11</sup> According to the National Public Inquiry into Family Violence Report, conducted and published by Samoa's Office of the Ombudsman, 87% of respondents reported experiencing family violence in the form of harsh verbal violence, followed by another 86% of respondents reporting they experienced physical violence in a family setting.<sup>12</sup> In terms of intimate partner violence, 86% of women reported being subjected to kicking, punching, slapping and bodily harm by an intimate partner.<sup>13</sup> Therefore, family violence in Samoa also displays a strong gendered dimension. In relation to fa'afafine, the SFA highlighted that young boys showing feminine traits at a young age are often subjected to severe violence at the hands of their own families and that this is not reported due to intimidation of the victims, fear of reprisals and being disowned, lack of effective redress and a belief that no crime has been committed.<sup>14</sup> The report identified fa'afafine as an at-risk marginalized group likely to be exposed to violence at higher rates than non-fa'afafine. As such, they recommended that further studies be conducted into fa'afafine experiences of violence. As transgender women are often found to be at high risk of sexual assault and sexual violence in other societies,<sup>15</sup> this is an area of immediate attention that needs greater documentation and analysis in Samoa.

### ***Implementation of Previous UPR Recommendations***

25. During the second cycle of UPR of Samoa, the state received recommendations on improving the situation around human rights of transgender people as well as repeal laws that criminalise same sex acts. Further, Samoa received recommendations to take legislative and policy steps to ensure protections from discrimination on the basis of sexual orientation and gender identity. While the Samoan government has made several efforts to ensure legislative and policy instruments are put in place to protect the human rights of people with diverse sexual orientations and gender identities, several legal instruments continue to marginalise these people, including the criminalisation of sodomy.

### ***Recommendations for Actions***

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<sup>10</sup> US Department of State (2018) *Country Reports on Human Rights Practices – Samoa*. p.12 retrieved from: <https://www.state.gov/wp-content/uploads/2019/03/SAMOA-2018.pdf>

<sup>11</sup> Walters, L. (2016, June 20) *Samoa Reporting on Trans Woman's Death 'Disgusting,' 'Degrading.'* Stuff NZ. Retrieved from: <https://www.stuff.co.nz/world/south-pacific/81256086/samoan-reporting-on-trans-womans-death-disgusting-degrading>

<sup>12</sup> Samoa Office of the Ombudsman/National Human Rights Institution (2018) *National Public Inquiry into Family Violence in Samoa*. p4. Retrieved from: [https://ombudsman.gov.ws/wp-content/uploads/2018/09/National-Inquiry-Report-into-Family-Violence\\_State-of-Human-Rights-Report-2018-SUMMARY\\_English.pdf](https://ombudsman.gov.ws/wp-content/uploads/2018/09/National-Inquiry-Report-into-Family-Violence_State-of-Human-Rights-Report-2018-SUMMARY_English.pdf)

<sup>13</sup> Ibid.

<sup>14</sup> Ibid.

<sup>15</sup> Stotzer, R. L. (2008). *Gender Identity and hate crimes: Violence against transgender people in Los Angeles County*. *Sexuality Research & Social Policy*, 5(1), 43.

26. The Government should include references to 'sexual orientation' and 'gender identity' in *article 15 (2) of the Constitution of Samoa 1961*.
27. Remove "sodomy" from the criminal code and annul legal and policy provisions that are used to arrest, punish or discriminate on the basis of sexual orientation, gender identity, gender expression or sex characteristics (SOGIESC), including laws that directly or indirectly criminalise LGBTI+ people.
28. Repeal all laws and provisions in civil and criminal codes that discriminate on the basis of SOGIESC, and establish special mechanisms to address violence against *fa'afafine/fa'atama and trans and gender diverse people*.
29. Take legal, policy and administrative measures to combat prejudice, social stigma, violence and stereotyping of *fa'afafine/fa'atama* citizens of Samoa.
30. Reinforce and expand social protection systems to ensure that LGBT people and *fa'afafine/fa'atama* have access to a universal basic income, paid leave, food, safe shelters and caregiving services. Such social protection systems should be expanded to include informal employment sector and sex work.
31. In partnership with the NHRI and relevant stakeholders, rollout the implementation of the Law Enforcement Guidelines and Standards to ensure police and prison officers are sensitised to the *fa'afafine* and *fa'atama* community and promote non-discriminatory practices.
32. For 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.
33. Provide awareness programs for public officials and local representatives on sexual orientation and identity issues to address stigma.
34. Ensure meaningful and effective participation of LGBT communities in the legal and policy reform processes, including by allocating below the line budget financial assistance to enhance and strengthen the resourceful support from local groups like SFA.

#### ***Access to Trans-sensitive and Trans-competent Healthcare Services***

35. Ministry of Health to be SOGIESC inclusive with its approach according to its *Sector and Implementation Plans 2021 – 2030* by conducting a special consultation with SFA and other local groups as stakeholder at least once every year.
36. Ensure an enabling legal and policy environment that prioritises the health needs of trans persons as part of health service provision, including for HIV and STIs prevention and treatment and gender-affirmative care, and includes strengthening capacities of service providers to ensure confidentiality, empathy, and respect in healthcare settings.
37. Integrate rights-based service provision into health service provider curricula, and train and sensitize health care providers to ensure trans-friendly health services at primary, secondary and tertiary level health care facilities.
38. Ensure a trans-sensitive and trans-competent approach in the implementation of health services provision programmes particularly on hormonal therapy and treatments that are most relevant to transgender communities.
39. Given the lack of research and understanding of the health needs of *fa'atama*, conduct a community consultation to increase knowledge of experiences, needs and priorities especially including access to SRHR Services with Samoa Family Health Association.



### ***Non-discrimination in Education and Employment Sectors***

40. Develop and roll out sensitisation trainings with education institutions (primary, secondary and tertiary) for both students and teachers to raise awareness and acceptance of gender diverse students.
41. Prioritize the inclusion of rights-based, evidence-based and scientifically accurate comprehensive sexuality education in school curricula and out-of-school education programs that urgently address stigma, stereotyping and discrimination on the basis of sexual orientation and gender identity and expression.
42. Ensure that trans identities are recognised in administrative documents in education settings to eliminate administrative barriers.
43. Adopt laws and regulations that respect, protect, fulfil and promote the right to decent work and rights at work of LGBT people in Samoa and ensure that these legislative and regulatory measures extend to informal and digital economies as well.
44. Institute monitoring and redress mechanisms to address and effectively remedy the various forms of discriminations faced by LGBT people at formal and informal and offline and digital workplaces.

### ***Protection from Violence***

45. For the Government by the Ministry of Police to conduct a SOGIESC review of its policies and procedural manuals that combat and address domestic violence complaints. The same is extended to general policing policies and guidelines that deal with general complaints with the Ministry.
46. For the Government to provide funding assistance to SFA in enhancing and strengthening its SOGIESC technical advisory role on policy and legal reforms for all Government Ministries in addressing violence against LGBT communities.