



Kaleidoscope
Australia
Human Rights Foundation

**Submission to the UN Universal Periodic
Review regarding the protection of the
rights of LGBTI persons in the
Republic of the Marshall Islands**

22nd session of the Universal Periodic Review

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1. Executive Summary

- 1.1 Kaleidoscope Australia Human Rights Foundation (**Kaleidoscope**) is a non-governmental organisation that works to protect and promote the rights of lesbian, gay, bisexual, transgender and intersex (**LGBTI**) persons in the Asia-Pacific Region. Kaleidoscope has prepared this report for the United Nations Human Rights Council (**UNHRC**) in respect of the Republic of the Marshall Islands (**Marshall Islands**). This report highlights instances where the legal framework of the Marshall Islands is failing to adequately protect the human rights of LGBTI persons and where the Marshall Islands may not be meeting its obligations under international human rights law.
- 1.2 The Marshall Islands has de-criminalised consensual same-sex activity and has supported the efforts of the international community to address the issue of discrimination against LGBTI persons.
- 1.3 Despite the significant human rights protections under the Constitution of the Marshall Islands (**Constitution**), there are no laws which prohibit discrimination against a person based on their sexual orientation or gender identity.
- 1.4 Moreover, the *Adoptions Act 2002 [26 MIRC Ch 8]* (**Adoptions Act**) which governs the adoption of all resident children in the Marshall Islands, explicitly prohibits same-sex couples, or an individual living as a member of a same-sex couple from being eligible to petition for adoption.¹
- 1.5 Coupled with the deficiencies under its local law to prevent discrimination, the Marshall Islands' lack of international treaty ratification means that the human rights of LGBTI persons remain vulnerable.
- 1.6 We urge the UNHRC to recommend that the Marshall Islands:
 - (a) amend the *Adoptions Act* to remove discrimination against same-sex couples and LGBTI people;
 - (b) ratify the ICCPR and ICESCR, along with the Optional Protocols;
 - (c) enact comprehensive anti-discrimination legislation that prohibits discrimination on the grounds of sexual orientation and gender identity/expression; and
 - (d) Amend Article 2 of the Constitution to include sexual orientation and gender identity among the grounds upon which a person cannot be discriminated against.

2. Positive steps taken by the Marshall Islands

- 2.1 The Marshall Islands de-criminalised consensual same sex activity in 2005.² The law prohibiting "sodomy" was a legacy of the Marshall Islands' colonial past and its repeal represents significant progress by the Marshall Islands in promoting and protecting human rights.
- 2.2 More recently, the Marshall Islands signalled its support for the protection and maintenance of the human rights of LGBTI persons by becoming a signatory to a joint statement entitled "*Ending Acts of Violence and Related Human Rights Violations Based on Sexual Orientation and Gender Identity*" (**Joint Statement**) which was issued during the general

¹ 811 *Adoptions Act 2002 [26 MIRC Ch 8]*.

² Section 2 *Criminal Code (Amendment) Act 2005*, amending *Criminal Code [31 MIRC Ch 1]*.

debate of the UNHRC in November 2011.³ The Joint Statement called on states to end violence, criminal sanctions and related human rights violations based on sexual orientation and gender identity and implored the UNHRC to address these important human rights issues.⁴ The significance of the Joint Statement cannot be underestimated. It remains the most unequivocal and endorsed piece of state sanctioned multilateral action which has implicitly endorsed the notion that LGBTI rights and human rights are one and the same, they are not distinct and separate ideas which can be fragmented.⁵

- 2.3 By signing the Joint Statement, the Marshall Islands, together with the other signatory states, acknowledged its responsibility to end human rights violations against all those who are vilified and to prevent discrimination in all forms.⁶ Furthermore, the Joint Statement placed an obligation on all states to end human rights abuses committed against persons because of their sexual orientation or gender identity. By signing the Joint Statement, the Marshall Islands has made a statement to the international community that it recognises the particular challenges faced by LGBTI persons when examined through a human rights lens.
- 2.4 We urge the UNHRC to recommend that the Marshall Islands acts in accordance with the Joint Statement, and take the legal and practical measures necessary to meet the aspirations espoused in the Joint Statement.

3. Obligations under international law to protect LGBTI persons from discrimination

- 3.1 Despite its absence from the ratification of many significant human rights treaties which form the foundation of international human rights law, the Marshall Islands has ratified both the *Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)* and the *Convention on the Rights of the Child (CRC)*. Neither treaty explicitly prohibits discrimination against a person based on sexual orientation or gender identity. However, both treaties do oblige State Parties to prevent discrimination against a person on the grounds of sexual orientation or gender identity.⁷
- 3.2 Article 2 of the CEDAW requires State Parties to condemn discrimination against women in all forms.⁸ The Committee on the Elimination of All Forms of Discrimination Against Women issued a general recommendation stating that the discrimination of women based on sex

³ United Nations High Commissioner for Human Rights, *Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity*, 19th sess, UN Doc A/HRC/19/41 (17 November 2011).

⁴ United Nations Human Rights Council, *Joint Statement on Ending Acts of Violence Related Human Rights Violations Based on Sexual Orientation and Gender Identity* (22 March 2011) accessed at <<http://www.state.gov/r/pa/prs/ps/2011/03/158847.htm>>.

⁵ International Gay and Lesbian Human Rights Commission, *UN Human Rights Council: A stunning Development Against Violence* (23 March 2011).

⁶ United Nations Human Rights Council, *Joint Statement on Ending Acts of Violence Related Human Rights Violations Based on Sexual Orientation and Gender Identity* (22 March 2011) accessed at <<http://www.state.gov/r/pa/prs/ps/2011/03/158847.htm>> [9].

⁷ United Nations Human Rights Council, *Joint Statement on Ending Acts of Violence Related Human Rights Violations Based on Sexual Orientation and Gender Identity* (22 March 2011), accessed at <<http://www.state.gov/r/pa/prs/ps/2011/03/158847.htm>> [10].

⁸ Article 2, *Convention on the Elimination of All Forms of Discrimination Against Women*, United Nations, *Treaty Series* vol. 1249, p 13.

and gender is inextricably linked with sexual orientation and gender identity.⁹ Similarly, article 2 of the CRC requires State Parties to take all appropriate measures to ensure that children are protected against all forms of discrimination, including on the ground of sex.¹⁰ Significantly, the obligations on State Parties in article 2 of the CRC extends to a child's parent or legal guardian. A State Party cannot discriminate against a child on the basis of their parent's or legal guardian's sex. Under international law, discrimination based on sex is deemed to include discrimination on the grounds of sexual orientation and gender identity.¹¹

3.3 Accordingly, the Marshall Islands has obligations under its existing international law commitments to prevent and prohibit discrimination of women and children, and a child's parent or legal guardian, based on sexual orientation and gender identity.

4. **Discrimination against LGBTI persons**

4.1 The laws of the Marshall Islands do not comply with the Marshall Islands' obligations under international law in respect of the human rights of LGBTI persons. The *Adoption Act* states "[s]ame sex couples are, or an individual living as a member of a same sex couple is, not eligible to petition the court for the adoption of any children".¹² This law specifically prevents adoption by a LGBTI person. Only persons identifying as heterosexual are able to adopt children in the Marshall Islands.

4.2 By limiting adoption to heterosexual persons, the Marshall Islands is expressly discriminating against LGBTI persons. This law is not in compliance with the Marshall Islands' obligations under international law, including the CRC and CEDAW, as it distinguishes a person's eligibility to adopt a child based on their sexual orientation and gender identity.

4.3 We urge the UNHRC to recommend that the Marshall Islands repeal section 811 of the *Adoptions Act* in its entirety.

5. **Lack of anti-discrimination laws protecting LGBTI persons**

5.1 The Marshall Islands does not currently have any laws or policies which prohibit discrimination of a person based on sexual orientation or gender identity.

5.2 Although there is no evidence that the discrimination of LGBTI persons is pervasive within Marshallese society, we draw the UNHRC's attention to the recent Board of Immigration Appeals decision in the 9th Circuit of the United States, *Konous v Holder 2014 U.S App. Lexis 8757, 2014 WL 1855660* (May 9, 2014). In that case the defendant sought relief from deportation from the United States by arguing that that if he returned to the Marshall Islands he would suffer torture and abuse on account of his homosexuality.¹³ His grounds for making such an argument included that he suffered violence and abuse before fleeing the

⁹ Committee on the Elimination of Discrimination against Women, *General Recommendation No. 28 on the core obligations of State parties under article 2 of the Convention on the Elimination of All Forms of Discrimination Against Women*, UN Doc CEDAW/C/GC/28 (16 December 2010) [18].

¹⁰ Article 2, *Convention on the Rights of the Child*, United Nations, *Treaty Series*, vol. 1577, p. 3.

¹¹ Human Rights Committee, *Views: Communication No 488/1992*, 50th sess, UN Doc CCPR/C/50/D/488/1992 (31 March 1994) [8.7] (*Toonen v Australia*).

¹² *Adoptions Act* (2002) [26 MIRC Ch 8]

¹³ *Lesbian / Gay Law Notes*, (June 2014) pp. 246 – 247.

Marshall Islands as a teenager.¹⁴ Cases such as this underpin the need for adequate legal protections of the human rights of LGBTI persons in the Marshall Islands.

- 5.3 A framework of legal reform needs to be implemented that will actively prevent and prohibit discrimination of LGBTI persons in all facets of life and society including employment, health and education in the Marshall Islands. Such a framework should include legislation that specifically prohibits discrimination based on sexual orientation and gender identity in all aspects of Marshallese society, including, but not limited to, employment, education, and housing.
- 5.4 We urge the UNHRC to recommend that the Marshall Islands undertakes a program of law reform which includes the implementation of anti-discrimination legislation which will prohibit discrimination based on sexual orientation and gender identity.

6. Amend the Constitution

- 6.1 The most fundamental protections and freedoms of the people of the Marshall Islands are enshrined in the Constitution. Article 2 of the Constitution contains a "Bill of Rights".¹⁵ The Bill of Rights is the definitive collection of legal freedoms and protections of the people of the Marshall Islands. Article 2 section 12 specifically deals with the equality of persons and freedom from discrimination.¹⁶ Article 2 section 12(2) states that "[n]o law and no executive or judicial action shall, either expressly, or in its practical application, discriminate against any person on the basis of gender, race, color, language, religion, political or other opinion, national or social origin, place of birth, family status or descent".¹⁷ Notably absent from this list, however, is the sexual orientation and the gender identity of a person.
- 6.2 Article 12 of the Constitution provides for the amendment of article 2 by constitutional convention and referendum. In accordance with previous recommendations made to the Marshall Islands,¹⁸ article 12 of the Constitution should be invoked to amend article 2 to explicitly prohibit discrimination on the grounds of sexual orientation and gender identity.
- 6.3 The Marshall Islands has previously acknowledged that constitutional amendments may be required to ensure anti-discrimination measures are appropriately addressed in the Constitution.¹⁹ However, to date, no such amendments have been initiated by the Marshall Islands.
- 6.4 We urge the UNHRC recommend that constitutional amendments are made to include sexual orientation and gender identity as prohibited grounds for discrimination.

¹⁴ *Lesbian / Gay Law Notes*, (June 2014) pp. 246 – 247.

¹⁵ Article 2 *Constitution of the Republic of the Marshall Islands* (2005).

¹⁶ Article 2 section 12 *Constitution of the Republic of the Marshall Islands* (2005).

¹⁷ Article 2 section 12(2) *Constitution of the Republic of the Marshall Islands* (2005).

¹⁸ United Nations Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Republic of the Marshall Islands*, 16th sess, UN Doc A/HR/16/12 (4 January 2011) [56.24].

¹⁹ United Nations Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Republic of the Marshall Islands*, 16th sess, UN Doc A/HR/16/12 (4 January 2011) [49].

7. Ratification of key human rights treaties

- 7.1 The Marshall Islands has not ratified the majority of key human rights treaties, including, but not limited to, the ICCPR and the ICESCR. Both of these Covenants form the cornerstone of the international legal framework for the protection of human rights. The ratification of these Covenants will assist in strengthening the Marshall Islands' obligations under international law, particularly the anti-discrimination provisions, in respect of the protection of the human rights of LGBTI persons.
- 7.2 The Marshall Islands has previously acknowledged that its ratification of international treaties in respect of human rights is insufficient.²⁰ However, since the last Universal Periodic Review, it appears no further progress has been made to rectify this issue.
- 7.3 We urge the UNHRC to recommend that the Marshall Islands ratifies all significant human rights treaties (and their Optional Protocols) to reinforce the implementation of, and compliance with, international human rights law in the Marshall Islands.

8. Conclusion and recommendation

- 8.1 The decriminalisation of consensual same-sex activity was a crucial step by the Marshall Islands to end human rights violations of LGBTI persons. However, despite the limited treaties of which it is a party, the Marshall Islands is still under a duty to prevent the discrimination of LGBTI persons under international law. The *Adoptions Act* is discriminatory legislation that does not comply with international human rights standards.
- 8.2 We encourage the UNHRC to make the following recommendations to the Marshall Islands:
 - (a) amend the *Adoptions Act* to remove discrimination against same-sex couples and LGBTI people;
 - (b) ratify the ICCPR and ICESCR, along with their Optional Protocols;
 - (c) enact comprehensive anti-discrimination that prohibits discrimination on the grounds of sexual orientation and gender identity/expression; and
 - (d) Amend Article 2 of the Constitution to include sexual orientation and gender identity among the grounds upon which a person cannot be discriminated against.

For further information or clarification regarding any matter in this report, please contact Dr Paula Gerber, President of the Kaleidoscope Australia Human Rights Foundation via paula.gerber@monash.edu

²⁰ United Nations Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Republic of the Marshall Islands*, 16th sess, UN Doc A/HR/16/12 (4 January 2011) [52].