



Kaleidoscope
Australia

Human Rights Foundation

**Submission to the UN Universal Periodic
Review regarding the protection of the
rights of LGBTI persons in the Federated
States of Micronesia**

21st session of the Universal Periodic Review

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1. Executive Summary

- 1.1 Kaleidoscope Human Rights Foundation (**Kaleidoscope**) is a non-governmental organisation that works with local activists 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 Federated States of Micronesia (**Micronesia**).
- 1.2 Micronesia has in recent years given several indications of its support for human rights, including those of LGBTI persons. Despite this, Micronesia is yet to introduce legislative change or take other meaningful steps to recognise these rights. In particular, Micronesia has not yet introduced any laws prohibiting discrimination against persons based on their sexual orientation or gender identity.
- 1.3 Further, Micronesia currently has in place laws which discriminate against LGBTI individuals. Under the *Code of the Federated States of Micronesia (1999)* joint adoption by same-sex couples is not permitted.¹ In addition, the law does not permit the marriage of same-sex couples.²
- 1.4 In the interests of giving further recognition and protection to the human rights of LGBTI individuals in Micronesia, we urge the UNHRC to recommend that Micronesia:
- (a) enact comprehensive anti-discrimination legislation that prohibits discrimination on the grounds of sexual orientation and gender identity/expression;
 - (b) amend the *Code of the Federated States of Micronesia (1999)* to allow adoption of children by same-sex couples;
 - (c) recognise same-sex marriage;
 - (d) ratify the ICCPR and ICESCR, along with the Optional Protocols;
 - (e) amend Section 4, Article IV of the Constitution to include sexual orientation and gender identity among the grounds upon which a person must not be discriminated against; and
 - (f) take positive steps to counter stigma, stereotypes and prejudice against LGBTI people.

2. Positive steps taken by Micronesia

- 2.1 In recent years, Micronesia has signalled its support for several initiatives directed at the rights of LGBTI people. While these indications of support are positive first steps, Micronesia is yet to implement practical measures to recognise these rights.
- 2.2 In November 2011, Micronesia 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 general

¹ Section 1632, Title 6, Chapter 16, *Code of the Federated States of Micronesia (1997)*.

² Oceania from a Lesbian and Gay Human Rights Perspective (May 2013) accessed at <http://old.ilga.org/statehomophobia/charts/ILGA_LGBTI_Human_rights_Oceania_2013.pdf>; Part 1 Family, Chapter 1 Marriage, Section 16.101., *State of Kosrae Code (1997)*.

debate of the UNHRC.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 piece of state sanctioned multilateral action which has implicitly accepted the notion that LGBTI rights and human rights are one and the same, and that they are not distinct and separate ideas which can be fragmented.⁵

- 2.3 By signing the Joint Statement, Micronesia, 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. 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, Micronesia 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 Further, at Micronesia's first Universal Periodic Review in 2011, it was recommended that Micronesia include sexual orientation and gender identity as prohibited grounds for discrimination in legislation and equality initiatives,⁶ a recommendation that was accepted by Micronesia.⁷ Despite Micronesia having accepted this recommendation, no steps have been taken to implement such initiatives.
- 2.5 More recently, in November 2013, Micronesia voted in favour of the Asian and Pacific Ministerial Declaration on Population and Development (**Declaration**).⁸ Significantly, the Declaration:
- (a) expressed concerns about acts of violence and discrimination committed against individuals on the grounds of their sexual orientation and gender identity;⁹
 - (b) included policy directions to work to reduce vulnerability and eliminate discrimination based on (amongst other things) sexual orientation and gender identity;¹⁰ and

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 Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Federated States of Micronesia*, 16th sess, UN Doc A/HRC/16/16 (4 January 2011) [61.52].

⁷ Human Rights Council, Addendum to the *Report of the Working Group on the Universal Periodic Review: Federated States of Micronesia*, 16th sess, UN Doc A/HRC/16/16/Add.1 (14 March 2011) [61.52].

⁸ Economic and Social Council, *Report of the sixth Asian and Pacific Population Conference*, UN Doc E/ESCAP/APPC(6)/3 (18 November 2013).

⁹ Ibid [8].

¹⁰ Ibid [84].

(c) noted that despite progress, challenges from multiple forms of inequality, disempowerment and discrimination need to be addressed, through commitment to equality before the law and non-discrimination for all persons, without distinction of any kind.¹¹

2.6 While the Joint Statement and Declaration provide a positive indication that Micronesia is generally supportive of the human rights of LGBTI individuals, it is crucial that Micronesia legislatively implements these rights and protections. No such implementation has occurred to date. We strongly urge the UNHRC to recommend that Micronesia acts in accordance with the Joint Statement and Declaration.

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

3.1 Although Micronesia has not ratified many significant human rights treaties which form the foundation of international human rights law, it 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**). While neither treaty expressly prohibits discrimination against a person based on sexual orientation or gender identity, the terms of each treaty do oblige State Parties to prevent such discrimination.

3.2 Article 2 of the CEDAW requires State Parties to condemn discrimination against women in all forms.¹² 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 and gender is inextricably linked with sexual orientation and gender identity and that State Parties must legally recognize such intersecting forms of discrimination and prohibit them.¹³ 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.¹⁴ 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.¹⁵ Further, the Committee on the Rights of the Child has implicitly recognised that sex includes gender identity in its expression of concern that both homosexual and transsexual young people do not have access to appropriate information, support and other necessary protections to enable them to live their sexual orientation.¹⁶

3.3 Accordingly, Micronesia has obligations under its existing international law commitments to prevent and prohibit discrimination against women and children, and a child's parents or legal guardians, based on sexual orientation and gender identity.

¹¹ Ibid [24].

¹² Article 2, *Convention on the Elimination of All Forms of Discrimination Against Women*, United Nations, *Treaty Series* vol. 1249, p 13.

¹³ 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].

¹⁴ Article 2, *Convention on the Rights of the Child*, United Nations, *Treaty Series*, vol. 1577, p. 3.

¹⁵ 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*).

¹⁶ Concluding observations of the Committee on the Rights of the Child re. the United Kingdom, 9 October 2002, document CRC/C/15/Add. 188.

- 3.4 It is significant that in Micronesia's previous Universal Periodic Review, Micronesia indicated it would review its international commitments under various conventions and take appropriate actions where necessary.¹⁷ In addition, Micronesia has previously indicated that it would, through its Constitution and existing legislation, ensure that the fundamental rights associated with conventions it had not yet ratified were protected.¹⁸ As set out in paragraph 7, the key international human rights treaties that have not yet been ratified by Micronesia contain express obligations upon parties to provide effective legal protection against discrimination to LGBTI persons.
- 3.5 Despite Micronesia's obligations and commitments as set out above, Micronesia has not taken any practical or legislative steps to recognise the human rights of LGBTI persons. Our recommendations for legislative and constitutional amendments to promote compliance by Micronesia with its obligations under the CEDAW, CRC and with other commitments made at its previous Universal Periodic Review are set out in paragraphs 4 to 6 below.

4. Discrimination against LGBTI persons

- 4.1 The laws of Micronesia do not comply with Micronesia's obligations under international law in respect of the human rights of LGBTI persons.
- 4.2 Marriage between same-sex couples is not permitted in Micronesia.¹⁹ The marriage laws in the State of Kosrae for example state that a marriage performed in the state will only be valid if the male at the time of marriage is at least eighteen years of age and the female at least 16 years of age.²⁰ As such, marriage is conceptualised and permitted between a man and a woman only.
- 4.3 Despite the decision in *Joslin v New Zealand*²¹, there is growing support in the international community that international human rights law can and should be interpreted to include a right for same-sex couples to marry.²² If viewed from this perspective, Micronesia would be in breach of its obligations under international law by prohibiting marriage between same-sex couples.
- 4.4 Same-sex couples are also not permitted to adopt in Micronesia. The *Code of the Federated States of Micronesia (1999)* states that any suitable person who is not married, or is married to the father or mother of a minor child, or a husband and wife may adopt a child not theirs by birth.²³ While any "suitable person who is not married" may adopt, this would only allow one member of a same-sex couple to adopt as a single person. Joint adoption by a same-sex couple is not permitted.

¹⁷ Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Federated States of Micronesia*, 16th sess, UN Doc A/HRC/16/16 (4 January 2011) [59].

¹⁸ Ibid [36].

¹⁹ Oceania from a Lesbian and Gay Human Rights Perspective (May 2013) accessed at <http://old.ilga.org/statehomophobia/charts/ILGA_LGBTI_Human_rights_Oceania_2013.pdf>.

²⁰ Part 1 Family, Chapter 1 Marriage, Section 16.101., *State of Kosrae Code (1997)*.

²¹ Human Rights Committee, Views: Communication No 902/1999, 75th sess, UN Doc CCPR/C/75/D/902/1999 (17 July 2002) ('*Joslin v New Zealand*').

²² Paula Gerber, Kristine Tay and Adiva Sifris, *Marriage: A Human Right*, Sydney Law Review (Vol. 36:643)

²³ Section 1632, Title 6, Chapter 16, *Code of the Federated States of Micronesia (1997)*.

- 4.5 By limiting marriage and adoption to heterosexual relationships, Micronesia is discriminating against the rights of LGBTI persons. This is in contravention of Micronesia's obligations under international law, including the CEDAW and CRC, as it distinguishes a person's eligibility to adopt a child based on their sexual orientation.
- 4.6 We urge the UNHRC to recommend that Micronesia enact legislation permitting same-sex marriage or civil unions, as well as same-sex adoption.

5. Lack of anti-discrimination laws protecting LGBTI persons

- 5.1 Micronesia does not currently have any laws or policies which prohibit discrimination against a person based on sexual orientation or gender identity.
- 5.2 In 2013, there were no known reports of violence, official societal discrimination or workplace discrimination against LGBTI people. However, the culture stigmatizes public acknowledgement or discussion of certain sexual matters, and it is rare for individuals to identify themselves publically as LGBTI people.²⁴
- 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 Micronesia. Such a framework should include legislation that specifically prohibits discrimination based on sexual orientation and gender identity in all aspects of Micronesian society, including, but not limited to, employment, education, and housing.
- 5.4 Consistently with the recommendation made at Micronesia's last periodic review,²⁵ and with Micronesia's own commitment to ensuring the protection of fundamental rights in existing legislation,²⁶ we urge the UNHRC to recommend that Micronesia 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.
- 5.5 Further, to reduce the societal stigma toward LGBTI individuals, we urge the UNHRC to recommend that Micronesia take other positive steps to counter stigma, stereotypes and prejudice against LGBTI people, including appropriate policy or educational initiatives.

6. Amend the Constitution

- 6.1 The most fundamental protections and freedoms of the people of Micronesia are enshrined in the *Constitution of the Federated States of Micronesia (Constitution)*. Article IV of the Constitution is titled "Declaration of Rights" and it sets out the definitive collection of legal freedoms and protections of the people of Micronesia. Article IV section 4 specifically deals with the equality of persons before the law and states "equal protection of laws may not be denied or impaired on account of sex, race, ancestry, national origin, language or social status." Notably absent from this list, however, is the sexual orientation and gender identity of a person.
- 6.2 Article XIV of the Constitution provides for the amendment of the Constitution by referendum. Amending the Declaration of Rights to provide for the equal protection of

²⁴ US Department of State, Micronesia 2013 Human Rights Report, accessed at <<http://www.state.gov/documents/organization/220423.pdf>>, pg 11.

²⁵ Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Federated States of Micronesia*, 16th sess, UN Doc A/HRC/16/16 (4 January 2011) [61.52].

²⁶ refer paragraph 3.5 above.

LGBTI individuals before the law is an appropriate action to meet Micronesia's obligations under the CRC and CEDAW as well as the commitments made by Micronesia at its previous Universal Periodic Review.²⁷

- 6.3 We urge the UNHRC to recommend that constitutional amendments are made to include sexual orientation and gender identity as prohibited grounds of discrimination in Article IV.

7. Ratification of key human rights treaties

7.1 Micronesia has not ratified the majority of key human rights treaties, including the International Covenant on Civil and Political Rights (**ICCPR**) and the International Covenant on Economic, Social and Cultural Rights (**ICESCR**). The ICCPR and ICESCR form the cornerstone of the international legal framework for the protection of human rights. The ratification of these Covenants would assist in strengthening Micronesia's obligations under international law, particularly the anti-discrimination provisions, in respect of the protection of the human rights of LGBTI persons.

7.2 Article 2(1) of the ICCPR sets out a principle of equal rights without distinction of any kind and Article 26 sets out a principle where discrimination on any ground is to be prohibited. The ICCPR does not expressly refer to sexual orientation, however the UNHRC has held that the treaty includes an obligation to prevent discrimination on the grounds of sexual orientation.²⁸ It is also likely that these principles would extend to gender identity. The Human Rights Committee has for example, emphasised the importance of protecting transsexual communities from violence, torture and harassment²⁹ and has recognised the right of transsexuals to change their gender through allowing the issue of new birth certificates.³⁰

7.3 In respect to the ICESCR, the Committee on Economic, Social and Cultural Rights has specifically stated that gender identity is recognised as a prohibited ground of discrimination.³¹

7.4 At its previous Universal Periodic Review, it was recommended that Micronesia accede to the ICCPR and ICESCR.³² Micronesia supported this recommendation³³ and indicated that

²⁷ Ibid.

²⁸ 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*').

²⁹ See, for example, *Human Rights Committee, Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Concluding Observations of the Human Rights Committee, Columbia* (4 August 2010) UN Doc CCPR/C/CO/6.

³⁰ See, for example, *Human Rights Committee, Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Concluding Observations of the Human Rights Committee, Ireland* (30 July 2008) UN Doc CCPR/C/IRL/CO/3.

³¹ As noted by the Law Council of Australia, Law Council of Australia, Comment 132.

³² Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Federated States of Micronesia*, 16th sess, UN Doc A/HRC/16/16 (4 January 2011) [61.4].

³³ Human Rights Council, Addendum to the *Report of the Working Group on the Universal Periodic Review: Federated States of Micronesia*, 16th sess, UN Doc A/HRC/16/16/Add.1 (14 March 2011) [61.4].

it would strive to accede to the core conventions on human rights.³⁴ However, it does not appear that Micronesia has made progress toward achieving this.

7.5 We urge the UNHRC to recommend that Micronesia ratifies all significant human rights treaties (and their Optional Protocols) to reinforce the implementation of, and compliance with, international human rights law for the benefit of the LGBTI community in Micronesia.

8. Conclusion and recommendation

8.1 We strongly encourage the UNHRC to make the following recommendations:

- (a) enact comprehensive anti-discrimination legislation that prohibits discrimination on the grounds of sexual orientation and gender identity/expression;
- (b) amend the *Code of the Federated States of Micronesia (1999)* to allow adoption of children by same-sex couples;
- (c) recognise same-sex marriage;
- (d) ratify the ICCPR and ICESCR, along with the Optional Protocols;
- (e) Amend Section 4, Article IV of the Constitution to include sexual orientation and gender identity among the grounds upon which a person must not be discriminated against; and
- (f) take positive steps to counter stigma, stereotypes and prejudice against LGBTI people.

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³⁴ Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Federated States of Micronesia*, 16th sess, UN Doc A/HRC/16/16 (4 January 2011) [59].