



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 Palau**

24th session of the Universal Periodic Review

January–February 2016

1. Background

- 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 Republic of Palau (**Palau**) after consulting with members of the Palauan LGBTI communities.
- 1.2 This report outlines the progress Palau has made to date, highlights the work to be done in order to ensure that the human rights of LGBTI persons in Palau are fully realised, and makes five recommendations for steps Palau should take to better promote and protect the rights of LGBTI persons.

2. Positive steps taken by Palau

- 2.1 Since its previous Universal Periodic Review (**UPR**) in 2011, Palau has decriminalised consensual same-sex activity, considered legislation punishing hate crimes on the basis of sexual orientation and gender identity, and supported the efforts of the international community to address discrimination against LGBTI persons.

Decriminalisation of consensual same-sex sexual activity

- 2.2 During its first UPR in 2011, Palau accepted recommendations to repeal all provisions in its domestic legislation criminalising consensual sexual activity between same sex adults and to combat discrimination against LGBT people through political, legislative and administrative measures.¹ More broadly, Palau expressed the view that it was “truly committed to fulfilling its human rights obligations”.²
- 2.3 In 2014, Palau acted on these recommendations by repealing its legislative provisions which criminalised consensual sexual activity between persons of the same sex. Palau did this through the introduction of a new *Penal Code* that does not contain any prohibitions on consensual same-sex sexual activity.³

Proposed hate crime legislation inclusive of sexual orientation and gender identity

- 2.4 In January 2015, the Senate of Palau passed Senate Bill 9-125 in its second reading. This bill punishes hate crimes on the basis of sexual orientation and gender identity (among other grounds).⁴
- 2.5 The bill provides for increased sentences where certain crimes are motivated by the victim’s actual or perceived sexual orientation or gender identity. The bill also states in its preamble that Palau has “become more diverse and will only continue to grow in diversity” and recognises that this diversity “includes differences on the basis of several categories including ... sexual orientation”.⁵

¹ United Nations Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Palau*, 18th sess, UN Doc A/HRC/18/5 (11 July 2011) [62.38]–[62.40].

² United Nations Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Palau*, 18th sess, UN Doc A/HRC/18/5 (11 July 2011) [5].

³ Penal Code of the Republic of Palau, RPPL No. 9-21 2013.

⁴ Jose Rodriguez T Senase, ‘Hate crimes bill okayed in 2nd reading’, *Island Times*, 15 January 2015 <http://www.islandtimes.us/index.php?option=com_content&view=article&id=54%3Aphs-wins-junior-title&catid=9%3Alocalsports&Itemid=15>.

⁵ Senate Bill SB 9-125, *A Bill for an Act to punish hate crimes, to allow civil actions against perpetrators, and for other related purposes* <<http://www.palauoek.com/wp-content/uploads/2014/07/SB-9-125.pdf>>.

- 2.6 In February 2015, the House of Delegates (the lower house of the National Congress) passed Senate Bill 9-125 in its first reading.⁶ However, the bill must still go through several further steps in order to become law, including being passed by the Senate in a third reading, passed by the House of Delegates in a second and third reading, and signed by the President.

Recommendation 1

Palau should ensure that proposed legislation punishing hate crimes on the basis of sexual orientation and gender identity is enacted as soon as possible.

Commitment to reviewing obligations under international law

- 2.7 During its 2011 UPR, Palau accepted recommendations that it ratify the core human rights treaties.⁷ Palau stated that it was undergoing consultation and working towards public awareness about these instruments and determining its capacity and resources to fulfil its international obligations regarding the ratification of treaties to which Palau was not yet a party.⁸ Palau ratified the Convention on the Rights of Persons with Disabilities on 11 June 2013.⁹

Becoming a signatory to the Joint Statement on Sexual Orientation and Gender Identity

- 2.8 Palau has signalled its support for the protection and maintenance of the human rights of LGBTI persons by becoming a signatory to the joint statement on “*Ending Acts of Violence and Related Human Rights Violations Based on Sexual Orientation and Gender Identity*”, which was adopted during the general debate of the UNHRC in November 2011 (**Joint Statement on Sexual Orientation and Gender Identity**).¹⁰
- 2.9 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.¹¹ The significance of the Joint Statement cannot be underestimated. It remains the most unequivocal piece of state-sanctioned multilateral action that endorses the notion that the rights of LGBTI people are included within the international human rights framework.¹²
- 2.10 By signing the Joint Statement on Sexual Orientation and Gender Identity, Palau, together with the other signatory states, acknowledged its responsibility to end human rights violations

⁶ Peter Erick L Magbanua, ‘HOD passes bill on hate crimes’, *Island Times*, 5 February 2015 <http://www.islandtimes.us/index.php?option=com_content&view=article&id=206%3Ahod-passes-bill-on-hate-crimes&Itemid=5>.

⁷ United Nations Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Palau: Addendum*, UN Doc A/HRC/18/5/Add.1 (28 July 2011).

⁸ United Nations Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Palau: Addendum*, UN Doc A/HRC/18/5/Add.1 (28 July 2011).

⁹ United Nations Office of the High Commissioner for Human Rights, *Ratification Status for Palau* <http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?CountryID=132&Lang=EN>.

¹⁰ United States Department of State, *Diplomacy in Action: Joint Statement on the Rights of LGBT Persons at the Human Rights Council* (22 March 2011) <<http://www.state.gov/r/pa/prs/ps/2011/03/158847.htm>>.

¹¹ 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>>.

¹² International Gay and Lesbian Human Rights Commission, *UN Human Rights Council: A Stunning Development Against Violence* (23 March 2011).

against all those who are vilified and to prevent discrimination in all forms.¹³ 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.

3. Palau's existing obligations under international law to protect LGBTI persons from discrimination

- 3.1 Palau acceded to the Convention on the Rights of the Child (**CRC**) in 1995.¹⁴ Article 2 of the CRC requires State Parties to ensure that children are able to enjoy all of the rights set out in the CRC without discrimination. The Committee on the Rights of the Child has stated that sexual orientation and gender identity are included within the non-discrimination grounds in Article 2.¹⁵ Significantly, the obligations on State Parties in Article 2 of the CRC extend to a child's parent or legal guardian, and accordingly a State Party cannot discriminate against a child on the basis of their parent's or legal guardian's sexual orientation or gender identity.
- 3.2 Accordingly, Palau has obligations under its existing international law commitments to prevent and prohibit discrimination of children, and a child's parent or legal guardian, on the basis of sexual orientation and gender identity.

4. Failure to protect LGBTI people against discrimination

- 4.1 During its 2011 UPR, Palau accepted a recommendation that it "combat discrimination against LGBTI people through political, legislative and administrative measures".¹⁶ However, Palau has not implemented any measures to give effect to this recommendation.

Anti-discrimination laws

- 4.2 In addition to lacking any constitutional protections for LGBTI persons, Palau does not currently have any explicit laws or policies that prohibit discrimination of a person based on sexual orientation, gender identity or gender expression.
- 4.3 There is no reliable data on patterns of discrimination of LGBTI persons within Palauan society. However, the fact that **83.55%** of Palauan voters specifically voted to define marriage as being only between a man and a woman in a 2008 constitutional referendum suggests that attitudes towards LGBTI equality are not particularly favourable.¹⁷
- 4.4 While a bill punishing hate crimes on the basis of sexual orientation and gender identity is currently going through the legislative process (see paragraphs 2.4–2.6 above), broader measures are needed to prohibit discrimination against LGBTI persons in all areas of public life, including in the employment, the provision of goods and services, education and health care.

¹³ 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) [9] <<http://www.state.gov/r/pa/prs/ps/2011/03/158847.htm>>.

¹⁴ United Nations Office of the High Commissioner for Human Rights, *Ratification Status for Palau* <http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?CountryID=121&Lang=EN>.

¹⁵ United Nations Committee on the Rights of the Child, *General Recommendation No. 4 on adolescent health and development in the context of the Convention of the Rights of the Child*, UN Doc CRC/GC/2003/4 (1 July 2003) [6]; United Nations Committee on the Rights of the Child, *General Recommendation No. 15 on the right of the child to the enjoyment of the highest attainable standard of health (Art. 24)*, UN Doc CRC/C/GC/15 (17 April 2013) [8].

¹⁶ United Nations Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Palau*, 18th sess, UN Doc A/HRC/18/5 (11 July 2011) [62.40].

¹⁷ Database and Search Engine for Direct Democracy, "Palau, 4 November 2008, Marriage Between a Man and a Woman" <<http://www.sudd.ch/event.php?lang=en&id=pw182008>>.

Recommendation 2

Palau should implement a framework of legislative reform that actively prevents and prohibits discrimination of LGBTI persons in all facets of life and society, including but not limited to employment, the provision of goods and services, education and health care.

Constitution

- 4.5 The protection of fundamental rights and freedoms of the people of Palau is enshrined in Article IV of the Constitution, titled “Fundamental Rights”. Section 5 of Article IV provides that:

*Every person shall be equal under the law and shall be entitled to equal protection. The government shall take no action to discriminate against any person on the basis of sex, race, place of origin, language, religion or belief, social status or clan affiliation except for the preferential treatment of citizens, for the protection of minors, elderly, indigent, physically or mentally handicapped, and other similar groups, and in matters concerning intestate succession and domestic relations.*¹⁸

- 4.6 Sexual orientation and gender identity are notably absent from the list of non-discrimination grounds in this provision. As the Constitution is the fundamental law of Palau, including sexual orientation and gender identity within the Constitution would play a significant role in combating discrimination against LGBTI people within Palauan society by entrenching the norm of non-discrimination within the legal and political system.

Recommendation 3

Palau should take steps to amend Section 5 of Article IV of the Constitution to include sexual orientation and gender identity as non-discrimination grounds.

5. Lack of legal recognition of same-sex couples

- 5.1 Despite accepting a recommendation at its 2011 UPR to “combat discrimination against LGBTI people through political, legislative and administrative measures”, Palau has not taken any steps to remove discrimination against same-sex couples in its laws.¹⁹
- 5.2 Palau currently recognises marriage only between two people of the opposite sex. Section 13 of Article IV of the Constitution states that, “All marriages contracted within the Republic of Palau shall be between a man and a woman”. This phrase was proposed by the 2005 Constitutional Convention and approved by the public in a November 2008 referendum (alongside a wide range of other amendments to the Constitution).²⁰

¹⁸ *Constitution of the Republic of Palau* (1979), Article IV, section 5.

¹⁹ United Nations Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Palau*, 18th sess, UN Doc A/HRC/18/5 (11 July 2011) [62.40].

²⁰ CP No. 2-274 *Constitution of Republic of Palau (Second Constitutional Convention) (2005)*; Database and Search Engine for Direct Democracy, “Palau, 4 November 2008, Marriage Between a Man and a Woman” <<http://www.sudd.ch/event.php?lang=en&id=pw182008>>.

- 5.3 In February 2014, a bill was introduced in the Senate stipulating that marriage can only be between a man and a woman.²¹ The intention of this bill is to give statutory effect to the new constitutional definition of marriage. The bill passed its first reading in May 2014,²² and if enacted, would further entrench discrimination against same-sex couples in Palauan law.
- 5.4 Furthermore, Palau does not provide any legal rights to same-sex couples, even though the constitutional definition of marriage in Section 13 of Article IV does not hinder the ability of the National Congress to legislate for other forms of relationship recognition, such as civil unions or registered partnerships.
- 5.5 In the absence of any legal recognition, same-sex couples are unable to access a number of rights, including hospital visitation, inheritance and social security benefits (e.g. survivor pensions).
- 5.6 In addition, section 402 of Title 21 (Domestic Relations) of the Palau National Code (**Code**) only permits adoption of children by “a suitable person who is not married, or is married to the father or mother of a child, or a husband and wife jointly”. Palau's Supreme Court has the power to make adoption orders in favour of joint applicants where the applicants are “husband and wife”, although the Court is permitted to depart from this position if it is of the opinion that the interests of the child will be best promoted by doing so.²³
- 5.7 While section 402 of Title 21 of the Code appears to allow adoption by a single LGBTI person (as “a suitable person who is not married”), the gender-specific reference to “husband and wife” represents a barrier against same-sex couples adopting children jointly. This law is not in compliance with Palau's obligations under international law, including under the CRC (which Palau has ratified), as it distinguishes a person's eligibility to adopt a child based on their sexual orientation or gender identity.

Recommendation 4

Palau should extend the same legal rights to same-sex couples as to opposite-sex married couples.

6. Ratification of international human rights treaties

- 6.1 Palau has not yet ratified several key international human rights treaties, including the International Covenant on Civil and Political Rights (**ICCPR**), the International Covenant on Economic, Social and Cultural Rights (**ICESCR**) and the Convention on the Elimination of All Forms of Discrimination against Women (**CEDAW**).²⁴
- 6.2 The ICCPR and ICESCR form the cornerstone of the international legal framework for the protection of human rights. The ratification of these covenants will assist in strengthening Palau's obligations under international law, particularly in respect of the protection of the human rights of LGBTI persons.

²¹ Senate Bill 9-100 <<http://www.palauoek.com/wp-content/uploads/2014/09/SB-9-100.pdf>>.

²² Ibid.

²³ *Adoption of Children Act 1965*, section 6.

²⁴ United Nations Office of the High Commissioner for Human Rights, *Ratification Status for Palau* <http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?CountryID=132&Lang=EN>.

- 6.3 On 20 September 2011, Palau became a signatory to the ICCPR, ICESCR and CEDAW.²⁵ During its 2011 UPR, Palau also noted the recommendations that it ratify the ICCPR, the ICESCR and CEDAW and their Optional Protocols and noted that it was working towards building public awareness of these instruments and on determining its capacity and resources to fulfil the obligations required by those instruments.²⁶

Recommendation 5

Palau should ratify all significant international human rights treaties (and their Optional Protocols) to reinforce its implementation of, and compliance with, international human rights law.

7. Summary of recommendations

Recommendation 1: Palau should ensure that proposed legislation punishing hate crimes on the basis of sexual orientation and gender identity is enacted as soon as possible.

Recommendation 2: Palau should implement a framework of legislative reform that actively prevents and prohibits discrimination of LGBTI persons in all facets of life and society, including but not limited to employment, the provision of goods and services, education and health care.

Recommendation 3: Palau should take steps to amend Section 5 of Article IV of the Constitution to include sexual orientation and gender identity as non-discrimination grounds.

Recommendation 4: Palau should extend the same legal rights to same-sex couples as to opposite-sex married couples.

Recommendation 5: Palau should ratify all significant international human rights treaties (and their Optional Protocols) to reinforce its implementation of, and compliance with, international human rights law.

For further information or clarification regarding any matter in this report, please contact Dr Paula Gerber, President of Kaleidoscope Australia Human Rights Foundation via president@kaleidoscopeaustralia.com

²⁵ United Nations Office of the High Commissioner for Human Rights, *Ratification Status for Palau* <http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?CountryID=132&Lang=EN>.

²⁶ United Nations Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Palau: Addendum*, A/HRC/18/5/Add.1 (28 July 2011).