



Kaleidoscope
Australia
Human Rights Foundation

Submission to the UN Universal Periodic Review regarding the protection of the rights of LGBTI persons in Japan

28th session of the Universal Periodic Review

March 2017

1. Executive Summary

1.1 Kaleidoscope has prepared this report for the United Nations Human Rights Council (UNHRC) in respect of Japan.¹

2. Terminology

2.1 **LGBTI**, in this report, is an abbreviation for lesbian women, gay men, bisexual people, transgender people and people with intersex variations.

2.2 **bisexual men** are men who are physically, romantically and/or emotionally attracted to both men and women.

2.3 **bisexual women** are women who are physically, romantically and/or emotionally attracted to both men and women.

2.4 **cisgender** denotes a person whose sense of gender identity corresponds with the physical sex assigned to them at birth.

2.5 **gay men** are men who are physically, romantically and/or emotionally attracted to men.

2.6 **gender identity** refers to an individual's own internal feelings and experiences of gender, which may or may not correspond to the sex that individual was assigned at birth.

2.7 **intersex** people have physical sex characteristics that do not fit typical notions of male or female bodies. Like everyone else, all intersex people have a gender identity, which may be male, female or another identity. Like everyone else, intersex people also have a sexual orientation, which may be straight, gay/lesbian, bisexual, asexual, etc. This reflects that intersex is not, in itself, a gender identity or sexual orientation, but rather a physical variation in sex characteristics.

2.8 **lesbian women** are women who experience emotional, romantic and physical attraction to other women.

2.9 **non-binary people** are people who were assigned either male or female sex at birth but identify and live as neither male nor female.

2.10 **sexual orientation** refers to a person's emotional, physical and/or sexual attraction to persons of the opposite sex or gender, the same sex or gender, to both sexes and/or to more than one gender.

2.11 **transgender people** are people whose gender identity and/or expression is different from the physical sex they were assigned at birth. This is a gender identity, not a sexual orientation.

2.12 **transgender women** are people who were assigned male sex at birth but identify and live as women.

2.13 **transgender men** are people who were assigned female sex at birth but identify and live as men.

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.

3. Positive steps taken by Japan

- 3.1 Japan has taken a limited number of positive steps in recent years. Notably, it has not fulfilled the recommendations that it accepted in its previous Universal Periodic Reviews. It has not enacted comprehensive anti-discrimination legislation which prohibits discrimination on the basis of sexual orientation, gender identity or intersex status. The Ministry of Justice put forward a Draft Bill of Human Rights Protection that included sexual orientation (but not gender identity or intersex status) in 2002, but the National Diet failed to pass this bill in 2002, 2003 and 2005 and it has not been reintroduced since.² Japan has also not established a national human rights commission that meets the standards of the Paris Principles.³
- 3.2 In 2012 Japan repealed Article 23(1) of the *Basic Act for Housing*, which previously excluded LGBTI couples from public housing rental. However, the amended law gives municipalities discretion in relation to public housing, resulting in the continued discrimination against LGBTI persons.⁴
- 3.3 In May 2016, the education ministry issued guidelines for teachers regarding treatment of LGBTI children.⁵
- 3.4 In June 2016, the labour ministry modified guidelines under its Equal Employment Opportunity Law for employers to state that prohibitions on sexual harassment apply to all victims "regardless of their sexual orientation and identity" from January 2017.⁶
- 3.5 We also note that individual wards and cities within Japan have instituted various measures:
- (a) In November 2015, Shibuya Ward and Setagaya Ward in Tokyo began to issue partnership certificates recognising same-sex partnerships. These have no legal effect, and are only available to residents of (and only valid within) the relevant wards.⁷

² "Japanese National Human Rights Commission", Asia-Pacific Human Rights Information Centre, <http://www.hurights.or.jp/archives/focus/section2/2002/06/japanese-national-human-rights-commission.html>; "The violations of the rights of lesbian, gay, bisexual and transgender persons in Japan: A shadow report" submitted to the Human Rights Committee by GayJapanNews, Global Rights, International Gay and Lesbian Human Rights Commission and International Human Rights Clinic, Human Rights Program, Harvard Law School, October 2008, p6.

³ Japan News to the Committee on Economic, Social and Cultural Rights for consideration at the 50th session, 2013, p3; Human Rights Violations on the Basis of Sexual Orientation and Gender Identity in Japan, Joint Civil Society Submission to the Human Rights Committee for State Compliance with the International Covenant on Civil and Political Rights, submitted by Gay Japan News, International Gay and Lesbian Human Rights Commission, Kyosei Net and Rainbow Action, July 2014

⁴ JAPAN: Discrimination on the Basis of Sexual Orientation and Gender Identity, Shadow Report, March 2013 submitted by Gay Japan News to the Committee on Economic, Social and Cultural Rights for consideration at the 50th session, 2013, p3; Human Rights Violations on the Basis of Sexual Orientation and Gender Identity in Japan, Joint Civil Society Submission to the Human Rights Committee for State Compliance with the International Covenant on Civil and Political Rights, submitted by Gay Japan News, International Gay and Lesbian Human Rights Commission, Kyosei Net and Rainbow Action, July 2014

⁵ Takahama, Yukihiro, "Ministry issues guidelines for teachers on sexual minorities", *The Asahi Shimbun*, May 2 2016, <http://www.asahi.com/ajw/articles/AJ201605020008.html>

⁶ Kyodo News, "Japan to define workplace LGBT discrimination as sexual harassment", *The Japan Times*, June 28, 2016 <http://www.japantimes.co.jp/news/2016/06/28/national/social-issues/japan-define-workplace-lgbt-discrimination-sexual-harassment/>; Salandra, Adam, "Japan Declares Anti-Gay Discrimination is a Form of Sexual Harassment", *New Now Next*, 7 February 2016, <http://www.newnownext.com/japan-declares-anti-gay-discrimination-is-a-form-of-sexual-harassment/07/2016/>

⁷ Murai, Shusuke, "Shibuya Ward to accept applications for certificates to recognize same-sex partnerships", *The Japan Times*, 23 October 2015, <http://www.japantimes.co.jp/news/2015/10/23/national/social-issues/shibuya-ward-accept-applications-certificates-recognize-sex-partnerships/>; McCurry, Justin, "Tokyo's Shibuya ward is first in Japan to recognise same-sex marriage", *The Guardian*, 31 March 2015, <http://www.theguardian.com/world/2015/mar/31/tokyos-shibuya->

In 2016, Iga city in Mie prefecture,⁸ Takarazuka city in Hyogo prefecture⁹ and Naha city in Okinawa¹⁰ also instituted partnership certificates.

- (b) In November 2016, the city of Chiba granted LGBT employees the same holiday entitlements as married heterosexual couples (including holidays given to newlyweds and leave to look after sick partners). LGBT employees must submit documents to gain access to these benefits, which is not required by heterosexual employees.¹¹

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

- 4.1 Japan has significant obligations under international law to protect LGBTI persons from discrimination, having ratified the *International Covenant on Civil and Political Rights*¹² (ICCPR), the *International Covenant on Economic, Social and Cultural Rights*¹³ (ICESCR), the *Convention on the Elimination of All Forms of Discrimination Against Women*¹⁴ (CEDAW) and the *Convention on the Rights of the Child*¹⁵ (CRC).
- 4.2 In the Japanese legal hierarchy, ratified international treaty law has the same legal status as domestic law, and takes precedence over all related laws excluding the Constitution.¹⁶ Japan's obligations under ratified treaty law are enshrined in the Japanese Constitution, which states in Article 98 that "the treaties concluded by Japan and established laws of nations shall be faithfully observed."¹⁷
- 4.3 As a consequence of Japan's domestic legal framework, Japan's ratification of the key human rights treaties identified above confers upon them domestic legal force.
- 4.4 While the ICCPR and ICESCR do not refer explicitly to protections extended on the basis of sexual orientation, the United Nations Human Rights Committee (UNHRC) has recognised

[ward-same-sex-marriage](https://www.amnesty.org/en/countries/asia-and-the-pacific/japan/report-japan); Amnesty International, "Japan 2015/2016" Annual Report, date unknown, <https://www.amnesty.org/en/countries/asia-and-the-pacific/japan/report-japan>

⁸ Kyodo News, "Iga to become third municipality to recognize same-sex partnerships", *The Japan Times*, 13 March 2016, <http://www.japantimes.co.jp/news/2016/03/13/national/iga-become-third-municipality-recognize-sex-partnerships/#.WJJ2N2qa2Uk>

⁹ Kyodo News, "Takarazuka becomes fourth municipality in Japan to recognize same-sex unions", *The Japan Times*, 31 May 2016, <http://www.japantimes.co.jp/news/2016/05/31/national/takarazuka-becomes-fourth-municipality-japan-recognize-sex-unions/#.WJJ2O2qa2Uk>

¹⁰ Ryukyu Shimpō, "Naha recognizes same-sex partnerships", *Ryukyu Shimpō*, 8 July 2016, <http://english.ryukyushimpo.jp/2016/07/14/25449/>

¹¹ Kyodo News, "Chiba Municipal Government grants equal holiday benefits to LGBT employees", *The Japan Times*, 10 November 2016, <http://www.japantimes.co.jp/news/2016/11/10/national/chiba-municipal-government-grants-equal-holiday-benefits-lgbt-employees/>

¹² UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p171

¹³ UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p3

¹⁴ UN General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, United Nations, Treaty Series, vol. 1249, p13

¹⁵ UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p3

¹⁶ Webster, Timothy, "International Human Rights Law in Japan: The View at Thirty" (2010), *Faculty Publications*, paper 579

¹⁷ Article 98, *The Constitution of Japan 1946*

that both treaties confer the right to non-discrimination on the basis of sexual orientation.¹⁸ The UNHRC has also recognised that Article 26 of the ICCPR prohibits discrimination between same sex and opposite sex couples.¹⁹ The Committee on Economic, Social and Cultural Rights has also stated that gender identity is recognised as a prohibited ground of discrimination under the ICESCR.²⁰ Accordingly, Japan is obliged to ensure that the rights to self-determination, access to health care, education, family and inheritance rights and cultural participation conferred by the ICESCR are not circumscribed on the grounds of sexual orientation or gender identity.

- 4.5 Japan's ratification of the CEDAW obligates Japan to "pursue by all appropriate means and without delay a policy of eliminating discrimination against women," as stated in Article 2.²¹ Article 5(a) of the CEDAW includes an obligation to pursue the elimination of discrimination against women through the modification of social and cultural patterns grounded in prejudicial norms, including stereotyping. The Committee on the Elimination of Discrimination against Women has also recognised that discrimination against women based on sex and gender is "inextricably linked" with sexual orientation and gender identity.²²
- 4.6 Similarly, Article 2 of the CRC obliges Japan to take all appropriate measures to protect children against all forms of discrimination, including on the basis of sex.²³ Discrimination on the basis of sex in international law has been recognised as including discrimination on the grounds of sexual orientation, gender identity and intersex status.²⁴ Importantly, the protection against discrimination in Article 2 of the CRC extends to a child's parent or legal guardian and accordingly bars the discrimination against a child on the basis of their parent or legal guardian's sexual orientation, gender identity or intersex status.

5. Discrimination against LGBTI persons

Exclusion from anti-discrimination legislation

Japanese anti-discrimination law does not prohibit discrimination based on sexual orientation, gender identity or intersex status.²⁵ Article 14 of the Japanese Constitution guarantees fundamental human rights and prohibits discrimination on the basis of race, sex, social status or family origin. This has been interpreted to exclude discrimination on the basis of sexual orientation, gender identity or intersex status.²⁶

¹⁸ Human Rights Committee, *Toonen v Australia*, Communication No. 488/1992, UN Doc CCPR/C/50/D/488/92 (1992)

¹⁹ Human Rights Committee, *Young v Australia*, Communication No. 941/2000, UN Doc CCPR/C/78/D/941/2000 (2003)

²⁰ Committee on Economic, Social and Cultural Rights, *General Comment No. 20 – Non-Discrimination in Economic, Social and Cultural Rights*, UN Doc E/C.12/GC/20 (2009)

²¹ UN General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, United Nations, Treaty Series, vol. 1249, p13

²² 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*, 19 October 2010, UN Doc CEDAW/C/2010/47/GC.2

²³ UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p3

²⁴ Human Rights Committee, *Views: Communication No 488/1992*, 50th sess, UN Doc CCPR/C/50/D/488/1992 (31 March 1994) [8.7]

²⁵ United States Department of State Bureau of Democracy, Human Rights and Labour, *Country Reports on Human Rights Practices for 2013*, p7

²⁶ Kaleidoscope Human Rights Foundation, "The Rights of Lesbian, Bisexual, Transgender and Intersex (LBTI) Women in Japan – Shadow Report for the 63rd Session of the Committee on the Elimination of Discrimination Against Women", June 2015, p3

- 5.1 There are no protections for LGBTI people under employment law.²⁷ This lack of anti-discrimination law generally, has resulted in LGBTI people facing high levels of discrimination and inequality in education and employment.²⁸

Recommendations

The State of Japan should:

- (a) enact anti-discrimination legislation which prohibits discrimination on the basis of sexual orientation, gender identity and intersex status; and
- (b) establish a human rights commission or similar body to enforce anti-discrimination legislation.

Transgender rights

- 5.2 Transgender individuals are able to change their legal gender in the family registry (which provides legal recognition for their gender).²⁹ Article 3 of the Act on Special Cases in Handling Gender Status for Persons with Gender Identity Disorder provides that a family court may change the registered gender of someone if the person is:

- (a) over 20 years old;
- (b) not married;
- (c) has no child who is a minor;
- (d) has no reproductive glands or whose reproductive glands have permanently lost function;
- (e) has undergone sex affirmation surgery; and
- (f) has a medical certificate specifying that the person has been diagnosed with "Gender Identity Disorder" by two or more medical practitioners.

- 5.3 These requirements are onerous and discriminatory and may act to prevent transgender people from remaining in their marriages or having children.³⁰

- 5.4 Further, the requirements may force transgender people to have medically unnecessary surgery and to be sterilised in order to be legally recognised as their gender. Few medical institutions in Japan provide sex affirmation surgery and it is not covered by public health

²⁷ Hayes, Darell, "Moving Towards Equality: a Strategy for Getting Queer Japanese Citizens Protection and Increased Visibility", *Law School International Immersion Program Papers*, No 7 (2016), p11

²⁸ Kaleidoscope Human Rights Foundation, "The Rights of Lesbian, Bisexual, Transgender and Intersex (LBTI) Women in Japan – Shadow Report for the 63rd Session of the Committee on the Elimination of Discrimination Against Women", June 2015, p1

²⁹ Gay Japan News, "Striving For Dignity and Respect – Experiences of Violence and Discrimination as told by LBT Persons in Japan", *In the Lens of Lesbians, Bisexual Women and Transgender People in Asia*

³⁰ "Human Rights Violations on the Basis of Sexual Orientation and Gender Identity in Japan, Joint Civil Society Submission to the Human Rights Committee for State Compliance with the International Covenant on Civil and Political Rights", submitted by Gay Japan News, International Gay and Lesbian Human Rights Commission, Kyosei Net and Rainbow Action, July 2014

insurance,³¹ so these requirements also create practical obstacles for transgender individuals who want their gender recognised. These requirements violate the Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity.³²

- 5.5 The requirement that transgender people must be diagnosed with "Gender Identity Disorder" pathologises and stigmatises transgender people by suggesting that transgender status is an illness. According to the Yogyakarta Principles, a person's gender identity is not in itself a medical condition.³³
- 5.6 While transgender people who fulfil the requirements may have their legal gender changed on household registration and identity cards, they are unable to update their gender on other important documents such as academic records. This causes many employers to discriminate against job applicants who are transgender.³⁴
- 5.7 We also note that the Act does not provide any option for people with non-binary genders to have their gender recognised, as the Act specifies that "Gender Identity Disorder" refers to a person who has the "opposite gender" to the gender assigned to them at birth.

Recommendations

- 5.8 The State of Japan should:
- (a) amend the Act on Special Cases in Handling Gender Status for Persons with Gender Identity Disorder to remove restrictions on individuals seeking to change their legal gender, including:
 - (i) provide options for individuals under the age of majority to have their gender recognised on important documents;
 - (ii) permit individuals seeking to change their legal gender even if they have a child who is a minor;
 - (iii) permit married individuals seeking to change their legal gender to remain married; and
 - (iv) remove the requirement that individuals seeking to change their legal gender are sterile and undergo sex affirmation surgery;
 - (b) amend the Act on Special Cases in Handling Gender Status for Persons with Gender Identity Disorder to remove references to transgender status as a "disorder";

³¹ Taniguchi, Hiroyuki, "Japan's 2003 Gender Identity Disorder Act: The Sex Reassignment Surgery, No Marriage, and No Child Requirements as Perpetuations of Gender Norms in Japan", *Asian-Pacific Law & Policy Journal*, Vol 14:2 (2013), pp 108-117, p111

³² *Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity*, Principle 3 (March 2007)

³³ *Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity*, Principle 18 (March 2007)

³⁴ Kaleidoscope Human Rights Foundation, "The Rights of Lesbian, Bisexual, Transgender and Intersex (LBTI) Women in Japan – Shadow Report for the 63rd Session of the Committee on the Elimination of Discrimination Against Women", June 2015, p6

- (c) enable transgender people to change their gender on all official documents, including academic records; and
- (d) enable non-binary individuals to change their legal gender to recognise their non-binary status.

Lack of legal recognition for LGBTI couples

5.9 Japan does not have any form of legal recognition for LGBTI couples, including civil unions, registered partnerships or marriage equality.³⁵ This has resulted in discrimination against individuals in LGBTI relationships in a number of areas, including public housing, tax benefits, in-vitro fertilisation and spousal visas.³⁶ The fact that Japan does not have marriage equality also means that married transgender individuals cannot change their legal gender.

5.10 Specifically, there is discrimination in the following areas:

- (e) Access to public housing

Even though it is no longer a requirement that applicants for public housing are married or otherwise related, each local government has the discretion to exclude people from publicly operated housing and many municipal governments do not permit LGBTI couples to apply for public housing.³⁷

- (f) Tax benefits

Under the *Income Tax Act* a spousal allowance is given to individuals with spouses who meet certain requirements. "Spouse" is interpreted in line with the Civil Code and as a result is restricted to heterosexual couples.³⁸

- (g) In-vitro fertilisation

The Japan Society of Obstetrics and Gynaecology restricts IVF to heterosexual married or de facto couples.³⁹

- (h) Spousal visas

The spouse and children of a Japanese national may obtain a visa as a "dependent" under the Immigration Control and Refugee Recognition Act. This only applies to

³⁵ Kaleidoscope Human Rights Foundation, "The Rights of Lesbian, Bisexual, Transgender and Intersex (LBTI) Women in Japan – Shadow Report for the 63rd Session of the Committee on the Elimination of Discrimination Against Women", June 2015, p1; Tamagawa, Masami, "Same-Sex Marriage in Japan", *Journal of GLBT Family Studies*, 12:2, 160-187, p165

³⁶ Kaleidoscope Human Rights Foundation, "The Rights of Lesbian, Bisexual, Transgender and Intersex (LBTI) Women in Japan – Shadow Report for the 63rd Session of the Committee on the Elimination of Discrimination Against Women", June 2015, p1

³⁷ Kaleidoscope Human Rights Foundation, "The Rights of Lesbian, Bisexual, Transgender and Intersex (LBTI) Women in Japan – Shadow Report for the 63rd Session of the Committee on the Elimination of Discrimination Against Women", June 2015, p7

³⁸ Kaleidoscope Human Rights Foundation, "The Rights of Lesbian, Bisexual, Transgender and Intersex (LBTI) Women in Japan – Shadow Report for the 63rd Session of the Committee on the Elimination of Discrimination Against Women", June 2015, p8

³⁹ Kaleidoscope Human Rights Foundation, "The Rights of Lesbian, Bisexual, Transgender and Intersex (LBTI) Women in Japan – Shadow Report for the 63rd Session of the Committee on the Elimination of Discrimination Against Women", June 2015, p8

legally recognised relationships such as marriage, and as such LGBTI partners or their child cannot be granted this visa.⁴⁰

(i) Adoption and parenting

While the Civil Code does not prohibit adoption of a minor by an unmarried individual or couple, usually the courts do not process adoption applications by unmarried people.⁴¹ This effectively excludes LGBTI couples from adopting children as they are unable to get married.

Japan's Civil Code provides that a mother's husband is presumed to be her child's father. This means that while transgender people in heterosexual marriages are recognised as the parents of their children,⁴² both cisgender and transgender LGBTI people in LGBTI relationships are not. There have been reports that lesbian mothers whose children are not biologically related to them (ie, mothers who are not on their child's birth certificate) face substantial difficulties as the family legal system does not recognise their existence. Further, all children born to unmarried parents are officially registered as "child out of wedlock" with the family registration system and typically face discrimination. This means that the children of LGBTI couples are likely to be discriminated against.⁴³

- 5.11 We note that while there is some contention as to whether the right to marry includes LGBTI marriage under Article 23 of the *International Covenant on Civil and Political Rights*, the covenant should be interpreted in a non-discriminatory manner, and as such the lack of marriage equality violates the Covenant.⁴⁴

Recommendations

5.12 The State of Japan should:

- (a) legislate for marriage equality;
- (b) create a legally-recognised form of LGBTI partnership, such as civil unions or registered partnerships, with the same legal benefits as marriage;
- (c) amend the Basic Act for Housing to specify that LGBTI couples may not be excluded from public housing, and individuals may not be excluded from public housing on the basis of the sexual orientation, gender identity or intersex status;
- (d) provide spousal tax benefits to de facto couples, specifically including LGBTI de facto couples;

⁴⁰ Kaleidoscope Human Rights Foundation, "The Rights of Lesbian, Bisexual, Transgender and Intersex (LBTI) Women in Japan – Shadow Report for the 63rd Session of the Committee on the Elimination of Discrimination Against Women", June 2015, p8

⁴¹ Tamagawa, Masami, "Same-Sex Marriage in Japan", *Journal of GLBT Family Studies*, 12:2, 160-187, p167

⁴² Potts, Andrew, "First Japanese transgender man recognized as father of child conceived with donor sperm", *Gay Star News*, 14 December 2013

⁴³ Tamagawa, Masami, "Same-Sex Marriage in Japan", *Journal of GLBT Family Studies*, 12:2, 160-187, p 167

⁴⁴ Gerber, Paula, Tay, Kristine and Sifris, Adiva, "Marriage: A Human Right for All?", *Sydney Law Review*, Vol 36:643 (2014), pp643-667

- (e) remove the restriction on IVF so that LGBTI individuals can access IVF treatment;
- (f) amend the Immigration Control and Refugee Recognition Act so that spousal visas are available to the unmarried partners of Japanese nationals, specifically including their LGBTI partners;
- (g) amend the Civil Code so as to specify that unmarried couples and individuals, specifically including LGBTI couples and individuals, may adopt children;
- (h) amend the Civil Code to enable LGBTI parents to be listed on a child's birth certificate; and
- (i) remove the requirement that children of unmarried couples be registered as a "child out of wedlock".

Intersex issues

5.13 The rights of intersex people in Japan are unclear and are not specifically protected by law.⁴⁵

Recommendations

The State of Japan should ensure that anti-discrimination legislation specifically prohibits discrimination on the basis of intersex status.

Discriminatory protection against domestic violence

5.14 In January 2014, the *Act on the Prevention of Spousal Violence and the Protection of Victims* was expanded to include protections in violent cohabiting and dating relationships (rather than just marriage). However, judges who grant protection orders rarely allow the law to be used by lesbians experiencing partner-related domestic violence as they consider that this law should be limited to de facto heterosexual couples.⁴⁶ There have been very few domestic violence protection orders granted to LGBTI couples.⁴⁷

Recommendations

The State of Japan should amend the *Act on the Protection of Spousal Violence and the Protection of Victims* to specify that it applies to all relationships, regardless of the sexual orientation, gender identity or intersex status of the victim or the perpetrator.

Inadequate protections against sexual violence

5.15 Article 177 and Article 178 of the Japanese Penal Code effectively only criminalises sexual assault which involves the penetration of a vagina by a penis.⁴⁸ The Penal Code therefore

⁴⁵ APCOM Special Brief, "A Snapshot of the Legal Environment on Same-Sex Sexual Acts and the Rights of Transgender and Intersex Persons in Asia and the Pacific", 2016, p 3: https://apcom.org/wp-content/uploads/2016/11/Legal-Environment-Snapshot_Final-Web.pdf

⁴⁶ *JAPAN: Discrimination and Violence Against Lesbians, Bisexual Women and Transgender Persons on the Basis of Sexual Orientation and Gender Identity Shadow Report*, Presented to the 63rd Session of The Committee on the Elimination of All Forms of Discrimination Against Women, February 2016, p2

⁴⁷ Kaleidoscope Human Rights Foundation, "The Rights of Lesbian, Bisexual, Transgender and Intersex (LBTI) Women in Japan – Shadow Report for the 63rd Session of the Committee on the Elimination of Discrimination Against Women", June 2015, p9

⁴⁸ *Country Reports on Human Rights Practices for 2013*, United States Department of State Bureau of Democracy, Human Rights and Labour, p7

fails to protect cisgender LGBTI men, certain intersex people and post-operative transgender men against sexual violence, as well as transgender women who have not undergone sex affirmation surgery.⁴⁹ It also does not protect against the significant number of types of non-consensual sexual activity that do not involve vaginal penetration.

Recommendations

The State of Japan should amend the Japanese Penal Code to expand the definition of sexual assault so that it includes all forms of non-consensual sexual activity, regardless of whether it involves the penetration of a vagina. The amendments should ensure that people of all genders and sexual orientations are protected.

6. Measures to protect the human rights of LGBTI persons

6.1 In order to prevent discrimination against LGBTI people, Japan should:

- (a) enact comprehensive anti-discrimination legislation which prohibits discrimination based on sexual orientation, gender identity and intersex status;
- (b) establish an independent human rights commission or similar human rights body with the explicit purpose of enforcing the prohibitions on discrimination;
- (c) enact extensive reforms to the Act on Special Cases in Handling Gender Status for Persons with Gender Identity Disorder, removing the restrictions on individuals seeking to change their legal gender. Most importantly, Japan should allow married individuals, those with minor children and those who have not undergone sex affirmation surgery to change their legal gender, and should not require sterilisation as a condition of the recognition of their correct gender;
- (j) enact marriage equality, so that LGBTI people may marry who they choose, and create a legally-recognised form of LGBTI partnership, such as civil unions or registered partnerships, with the same legal benefits as marriage;
- (k) amend the Basic Act for Housing to specify that couples and individuals cannot be excluded from public housing on the basis of the sexual orientation, gender identity or intersex status;
- (l) provide spousal tax benefits to LGBTI de facto couples;
- (m) remove the restriction on IVF so that unmarried and LGBTI individuals can access IVF treatment;
- (n) amend the Immigration Control and Refugee Recognition Act so that spousal visas are available to the de facto and LGBTI partners of Japanese nationals;
- (o) amend the Civil Code so as to specify that unmarried and LGBTI couples may adopt children and be noted on their child's birth certificate;

⁴⁹ Article 177 and Article 178 of the Penal Code; *JAPAN: Discrimination and Violence Against Lesbians, Bisexual Women and Transgender Persons on the Basis of Sexual Orientation and Gender Identity Shadow Report*, Presented to the 63rd Session of The Committee on the Elimination of All Forms of Discrimination Against Women, February 2016, p2, <http://www.japantimes.co.jp/news/2016/09/12/national/crime-legal/key-justice-ministry-panel-backs-changes-meiji-era-sex-crime-laws/>

- (p) amend the Act on the Protection of Spousal Violence and the Protection of Victims to specify that it applies to all relationships, regardless of the sexual orientation, gender identity or intersex status of the victim or the perpetrator; and
- (q) amend the Japanese Penal Code to expand the definition of sexual assault so that it includes all forms of non-consensual sexual activity. The amendments should ensure that people of all sexes, genders and sexual orientations are protected.