



ASIA PACIFIC FORUM
ADVANCING HUMAN RIGHTS IN OUR REGION

ACJ Report: Human Rights, Sexual Orientation and Gender Identity

APF 15

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The Asia Pacific Forum of National Human Rights Institutions

The Asia Pacific Forum of National Human Rights Institutions (APF) is a regional membership based organisation. It supports, through cooperation, the establishment and strengthening of national human rights institutions (NHRIs) that protect and promote the human rights of the peoples of the region. The APF plays a unique role in developing a regional human rights dialogue, networks and practical programmes of support. Through its member NHRIs it is well positioned to directly influence the development of human rights law and practice in the Asia Pacific.

The Advisory Council of Jurists

The Advisory Council of Jurists (ACJ) advises the APF on the interpretation and application of international human rights standards. The establishment of the ACJ reflects the APF Council's recognition of (i) the need for independent, authoritative advice on international human rights questions and (ii) the value in developing regional jurisprudence relating to the interpretation and application of international human rights standards.

The ACJ has considered eight references: human rights and transnational corporations (2008) environment (2007), education (2006); torture (2005); anti-terrorism legislation and the rule of law (2004); trafficking of women and children (2002); death penalty (2000); and the regulation of child pornography on the internet (2000).

The ACJ is comprised of eminent jurists who have held high judicial office or senior academic or human rights appointments.

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“The acceptance of difference celebrates diversity. The affirmation of individual dignity offers respect to the whole of society . . . The State that embraces difference, dignity and equality does not encourage citizens without a sense of good or evil but rather creates a strong society built on tolerant relationships with a healthy regard for the rule of law.”

Dhirendra Nadan and another v. State, High Court of Fiji, HAA 85 & 86 Of 2005

“All human beings are born free and equal in dignity and rights.”

Article 1, Universal Declaration of Human Rights

“Each State Party . . . undertakes to respect and ensure to all individuals the rights recognised in the present Covenant . . . without distinction.”

Article 1, UDHR, Article 2, ICCPR, Article 2, ICESCR

“Each person’s self-defined sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom.”

Principle 3, Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity

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Introduction

Background

Discrimination and violence against people of diverse sexual orientation and gender identity is a serious problem in many countries across the Asia Pacific. People of diverse sexual orientation and gender identity, whether actual or perceived, face execution or extra-judicial killing, torture, rape, arbitrary detention, unfair trials and, in the case of women this may also include forced pregnancy, forced marriage and so-called 'corrective' rape.

These human rights violations may occur at the hands of State officials and authorities or at the hands of non-State actors, often with the actual or implied complicity of State actors and often with impunity.

In 2006, in response to well-documented patterns of abuse, a distinguished group of international human rights experts outlined a set of international standards relating to sexual orientation and gender identity. Addressing a broad range of human rights issues, the experts adopted 29 '*Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity*', (the Yogyakarta Principles), which sought to clarify the existing international human rights standards with which all States must comply, while proposing a series of actions that States might undertake to assist in promoting their compliance.

In highlighting that all members of society and of the international community have responsibilities regarding the realisation of human rights, the Expert Group requested national human rights institutions (NHRIs) to promote respect for the Yogyakarta Principles, and to integrate into their work the promotion and protection of the human rights of persons of diverse sexual orientations or gender identities.¹

ACJ Reference

In May 2009, in response to the Expert Group's recommendation, the Asia Pacific Forum of National Human Rights Institutions (APF) brought together member NHRIs to a workshop in Indonesia to discuss their role in promoting the implementation of the Yogyakarta Principles. They recommended practical ways that NHRIs could use their functions and powers – including investigating complaints, reviewing laws and policies, holding national inquiries and public education – to better protect and promote the rights of gay, lesbian, bisexual and transgender people. The workshop also recommended that the APF request its Advisory Council of Jurists (ACJ) to provide advice and recommendations on the question of the consistency or inconsistency with international human rights law of certain laws in the Asia Pacific region in relation to sexual orientation and gender identity. The APF Annual Meeting in 2009 agreed to this recommendation.

Specifically, in relation to each State of a member institution of the APF, the ACJ was asked to comment on the following terms of reference:

¹ Additional Recommendations. The Yogyakarta Principles. Available at: www.yogyakartaprinciples.org/ Last accessed 14 June 2010.

- (i) *Whether, and in what respects, that State's criminal law is consistent with international human rights law in its application to and effect on persons on the basis of sexual orientation and gender identity;*
- (ii) *Whether, and in what respects, that State's anti-discrimination law applies to protect the human rights of persons on the basis of sexual orientation and gender identity and the adequacy of that protection;*
- (iii) *Whether, and in what respects, that State's laws enable the official recognition of changes of gender identity from that assigned to a person at birth and the consistency of those laws with international human rights law;*
- (iv) *Whether, in the course of undertaking the reference, the ACJ has identified other laws, policies, acts or practices that impact adversely persons on the basis of sexual orientation and gender identity, and, if so, the extent to which those laws, policies, acts or practices are inconsistent with international human rights law and the nature of the inconsistency; and*
- (v) *Whether the law, policy and practice in a State is adequate to ensure the protection of the rights of persons and organisations that defend the human rights of persons of diverse sexual orientation and gender identity.*

Structure of Report

There are several sections to this report:

Section 1 summarises the application of international human rights law to sexual orientation and gender identity, particularly with regard to the States' obligation to ensure rights without discrimination and the individual's right to equality before, and equal protection of, the law. This section should be read in conjunction with the ACJ Background Paper² and the International Commission of Jurists "Practitioners Guide No. 4"³ which provide greater detail on discrimination and equality, as well as the application of these principles/rights to other established rights such as the right to life, privacy, assembly, expression and association, and freedom from torture and ill treatment and arbitrary deprivation of liberty. Copies of the background paper and the practitioners guide are available on the APF website.

Section 2 responds to the terms of reference elaborated immediately above, highlighting some key developments as well as shortcomings in the Asia Pacific region.

Section 3 then provides a series of recommendations for action that can be undertaken by member institutions. The broad scope of recommendations acknowledges that, while there may be several core issues common to most jurisdictions, each country's situation and each NHRI is different. Member institutions will therefore need to determine their own priorities based on their unique domestic situation and their institutional mandates and capacity.

Finally, Table 1 provides a summary of the legislative provisions dealing with criminalisation of same sex sexual conduct, anti-discrimination and recognition of gender identity in each

2 Advisory Council of Jurists Background Paper: Human Rights, Sexual Orientation and Gender Identity. Alternative Law Forum. 2010. Available at: www.asiapacificforum.net/acj/references.

3 Sexual Orientation, Gender Identity and International Human Rights Law: Practitioners Guide No. 4. International Commission of Jurists. 2009. Available at: www.ici.org/default.asp?langage=1&nodeID=420. Last accessed: 20 August 2010.

member institution's jurisdiction. The list is not exhaustive and is intended only to highlight some key provisions or gaps in legislative protection that should be considered by NHRIs. Further information is available in the ACJ Background Paper in Chapters 3 and 5. NHRIs should note that the lists in the Background Paper are also not intended to be exhaustive, nor are they intended to be in order of priority. They do, however, provide member institutions with examples of laws, policies and practices that should be considered in the context of responding to this reference.

Terminology

The terms gender identity and sexual orientation have been defined by the Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity as follows:

'Sexual orientation' refers to each person's capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender;

'Gender identity' refers to each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms;

While sexual orientation and gender identity are the two terms which have the broadest legal acceptance it might be useful to also indicate the other terms which have been used to describe those who suffer discrimination on grounds of sexual orientation and gender identity.

Bisexual – a person who is emotionally/sexually/physically attracted to both men and women.

Gay – a man who is emotionally/sexually/physically attracted to men.

Lesbian – a woman who is emotionally/sexually/physically attracted to women.

Transgender – a person born anatomically with a certain sex, but who is more comfortable with a different gender/sexual identity.

Intersex – "Intersex" is a general term used for a variety of conditions in which a person is born with a reproductive or sexual anatomy that does not fit typical definitions of female or male reproductive or sexual anatomy.

LGBT – an acronym for 'lesbian, gay, bisexual and transgender'. This acronym is taken to include intersex people.

MSM – an acronym for 'Men who have Sex with Men'. This term is used in the HIV/AIDS sector to denote a vulnerable population of men who have sex with men but may not identify as homosexual or bisexual.

Sexuality minorities – people discriminated against due to their sexual identity/orientation or gender identity. This includes gays, lesbians, bisexuals, transgender and other traditional gender identities from around the world like hijras, kothis, warias, katoye, berdache etc.

This report will follow the use of the terms sexual orientation and gender identity and will also use the terms LGBT as and when applicable and appropriate.

1. International Law

Discrimination, equality before the law and equal protection of the law

International human rights law elaborates a series of rights and freedoms to which all human beings are entitled. The rights to freedom from discrimination and to equality before the law and equal protection of the law “constitute a basic and general principle relating to the protection of human rights.”⁴

The principle of non-discrimination is recognised in the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the International Convention on the Rights of the Child, (CROC); the International Convention on the Rights of Persons with Disabilities (ICRPD) and the International Convention on the Protection of Migrant Workers. By way of example, Article 2 of the ICCPR provides:

Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

The related rights to equality before the law and to equal protection of the law are recognised the UDHR and the ICCPR with Article 26 of the latter providing:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Discrimination is understood to refer to any distinction, exclusion, restriction or preference, based on the proscribed grounds, which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.⁵

It should also be noted that the above mentioned Articles elaborating the State's obligation to respect rights free from discrimination, as well as those promoting equality before the law and equal protection of the law, are an inclusive, rather than exhaustive list of the proscribed grounds of discrimination. All proscribed grounds relevantly include 'sex' and 'other status'.

The rights to freedom from discrimination, equality before the law and equal protection of the law are also recognised in regional instruments, notably the African Charter, the American and European Conventions, and in the Asia Pacific region, the Arab Charter on Human Rights.⁶

⁴ Human Rights Committee, General Comment No. 18: Non-discrimination, (paragraph 1).

⁵ Human Rights Committee, General Comment No. 18: Non-discrimination, (paragraph 7).

⁶ The African Charter on Human and Peoples Rights, the American Convention on Human Rights, European Convention on Human Rights and the Arab Charter on Human Rights.

States Obligations regarding discrimination and equality

In order for a State to “guarantee” rights without discrimination of any kind, United Nations (UN) Treaty Bodies have commented that the State must:

- ensure that its constitution, laws and policy documents do not discriminate on prohibited grounds; and
- adopt necessary measures to prevent, diminish and eliminate the conditions and attitudes which cause or perpetuate discrimination.

In addition, a State may adopt special measures to attenuate or suppress conditions that perpetuate discrimination.⁷

More specifically, the UN Human Rights Committee (HRC) which is charged with interpreting the ICCPR, states that the equality right prohibits discrimination in law or in fact in any field regulated and protected by public authorities, and that the State shall guarantee to all persons equal and effective protection against discrimination on any of the enumerated grounds. In addition, the State may also be held to have violated rights where it fails to prevent, punish, investigate or redress harm caused by private persons or entities.⁸

Application to Sexual Orientation and Gender Identity

– by UN Treaty Bodies

The rights to freedom from discrimination, equality before the law and equal protection of the law in the context of sexual orientation and gender identity have been the subject of interpretive comments and decisions by various UN Treaty Bodies.

The first acknowledgement that international human rights law applies to those discriminated against on grounds of sexual orientation was the decision of the HRC in *Toonen vs. Australia*.⁹ In this case, the applicant Nicholas Toonen challenged laws criminalising same sex sexual conduct between consenting adults, arguing they were a violation of Article 2(1), Article 17 and Article 26 of the ICCPR.

In concluding that such laws violated Toonen’s right to privacy (ICCPR Art. 17), the HRC held that the reference to the word ‘sex’ in Article 2(1) and Article 26 was to be taken as including sexual orientation.¹⁰ The interpretation was reinforced in subsequent decisions of the HRC, for example *Young vs. Australia* and *X vs. Columbia* where the HRC found that the State had been unable to demonstrate in each case that the differential treatment of homosexuals and heterosexuals was reasonable and objective.¹¹

7 Human Rights Committee, General Comment No. 18. Human Rights Committee, General Comment No. 31. Committee on Economic, Social and Cultural Rights, General Comment No. 20.

8 Human Rights Committee, General Comment No. 18: Non-discrimination, (paragraph 12).

9 Communication No.488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994). <http://hrlibrary.ngo.ru/undocs/html/vws488.htm> accessed on 26 April 2010.

10 Communication No.488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994). <http://hrlibrary.ngo.ru/undocs/html/vws488.htm> accessed on 26 April 2010.

11 *Young v Australia*. Communication No. 941/2000. Accessed on 1 May 2010. www.unhcr.ch/tbs/doc.nsf/0/3c839cb2ae3bef6fc1256dac002b3034?Opendocument. *X v. Columbia*, Communication No. 1361/2005. Accessed on 1 May 2010. www.unhcr.ch/tbs/doc.nsf/0/51537efd406147c3c125730600464373?Opendocument.

The Committee on Economic, Social and Cultural Rights (CESCR) has adopted a similar interpretation in relation to various rights contained in the ICESCR. In its General Comments on Health (14/2000), Water (15/2002) and Work (18/2005), the CESCR has variously stated that the Covenant proscribes any discrimination on the basis of sexual orientation that has the intention or effect of nullifying or impairing the equal enjoyment or exercise of Covenant rights.¹²

In General Comment No. 20 on non-discrimination, the CESCR reiterating earlier views stated:

*'other status' as recognized in article 2(2) includes sexual orientation. States parties should ensure that a person's sexual orientation is not a barrier to realising Covenant rights In addition, gender identity is recognized as among the prohibited grounds of discrimination.*¹³

The comments of other treaty bodies adopt a similar approach, with the Committee Against Torture and the Committee on the Rights of the Child listing sexual orientation as among the prohibited grounds of discrimination.¹⁴

– by UN Special Procedures¹⁵

Reports of UN Special Procedures have taken a similar approach to the UN Treaty Bodies, highlighting within the context of their specific mandates, human rights violations on the basis of sexual orientation and gender identity, particularly extra-judicial killing, rape, torture, violence and discrimination.

The UN Working Group on Arbitrary Detention, which is mandated by the UN Human Rights Council to investigate cases of deprivation of liberty in a manner inconsistent with international human rights standards, has responded to a number of cases involving deprivation of liberty on the basis of sexual orientation. In so doing, it has expressed the view that such detention violates guarantees of equality before the law and the right to equal legal protection against all forms of discrimination, including that based on sex.¹⁶ More recently, in its decision on Cameroon, the Working Group reiterated that, since the HRC decision in

12 Committee on Economic, Social and Cultural Rights, General Comment No. 14: The right to the highest attainable standard of health (Article 12), para 18. Committee on Economic, Social and Cultural Rights, General Comment No. 15: The right to water, E/C.12/2002/11, 26 November 2002, para 13.

13 Committee on Economic, Social and Cultural Rights, General Comment No. 20: Non-Discrimination in Economic, Social and Cultural Rights (art. 2, para. 2)

14 Committee Against Torture, General Comment No.2: Implementation of Article 2 by State parties, paras 21 and 22. Committee on the Rights of the Child, General Comment No.4: Adolescent Health, para 6 and General Comment No. 3, HIV/AIDS and the rights of the child, para 8.

15 "Special procedures" is the general name given to the mechanisms established by the UN Commission on Human Rights and assumed by the UN Human Rights Council to address either specific country situations or thematic issues in all parts of the world. Currently, there are 31 thematic and 8 country mandates. The Office of the High Commissioner for Human Rights provides these mechanisms with personnel, policy, research and logistical support for the discharge of their mandates. Special procedures' mandates usually call on mandate holders to examine, monitor, advise and publicly report on human rights situations in specific countries or territories, known as country mandates, or on major phenomena of human rights violations worldwide, known as thematic mandates. Various activities are undertaken by special procedures, including responding to individual complaints, conducting studies, providing advice on technical cooperation at the country level, and engaging in general promotional activities. See www2.ohchr.org/english/bodies/chr/special/index.htm accessed on 30 May 2010.

16 Report of the Working Group on Arbitrary Detention, UN Doc.E/CN.4/2004/3, of 15 December 2003, para 73. Working Group on Arbitrary Detention, Opinion No7/2002 (Egypt) of 21 June 2002, para 28, in UN Doc. E/CN.4/2003/8/Add.1, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G03/105/53/PDF/G0310553.pdf?Op> accessed on 1 May 2010.

Toonen, the criminalization of homosexuality is considered incompatible with Articles 17 and 26 of the ICCPR.¹⁷

In addition, a variety of Special Procedure mandate holders have referenced the issue of persecution on grounds of sexual orientation and gender identity as coming within their respective mandates. These include:

- Special Rapporteur on violence against women, its causes and consequences;¹⁸
- Special Rapporteur on extrajudicial, summary or arbitrary executions;¹⁹
- Special Representative of the Secretary General on Human Rights Defenders;²⁰
- Special Rapporteur on the Independence of Judges and Lawyers;²¹
- Special Rapporteur on Torture;²²
- Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography;²³
- Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health.²⁴

– by the UN General Assembly and Human Rights Council

The General Assembly has referenced sexual orientation in its 2008 resolution on extrajudicial, summary or arbitrary executions, which urged all States to:

17 Opinion No22/2006 (Cameroon) of 31 August 2006, para 19, in UN Doc. A/HRC/4/40/Add.1.

18 The Special Rapporteur stated 'sexual assault and coercion can occur at all stages of a woman's life, whether in the context of marriage, between close family or extended family members, between acquaintances or total strangers. Cases of lesbian women being targeted for rape specifically because of their sexual orientation in order for the aggressor to "prove [the victim's] womanhood" have also been documented,' Report E/CN.4/2005/72 (para. 27).

19The Special Rapporteur outlined that 'reports have been received of serious human rights violations committed in Afghanistan during the Taliban period, including reports of persons suspected to be homosexuals being buried alive.' Report E/CN.4/2003/3 (paras 66-67).

20 The Special Representative noted that 'Greater risks are faced by defenders of the rights of certain groups as their work challenges social structures, traditional practices and interpretations of religious precepts that may have been used over long periods of time to condone and justify violation of the human rights of members of such groups. Of special importance will be women's human rights groups and those who are active on issues of sexuality, especially sexual orientation and reproductive rights. These groups are often very vulnerable to prejudice, to marginalization and to public repudiation, not only by State forces but by other social actors.' Report E/CN.4/2001/94 (para.24).

21 The Special Rapporteur noted that, 'transvestites, transsexuals and homosexuals are also frequently the victims of violence and discrimination. When they turn to the judicial system, they are often confronted with the same prejudices and stereotypes they face in society at large.' Report E/CN.4/2005/60/Add.3 (para.28). See also paras 24-29.

22 The Special Rapporteur has received information according to which members of sexual minorities have been subject to cruel, inhuman or degrading treatment in non-penal institutions. In a number of countries, members of sexual minorities are said to have been involuntarily confined to state medical institutions where they were allegedly subjected to forced treatment on grounds of their sexual orientation or gender identity, including electric shock therapy and other "aversion therapy", reportedly causing psychological and physical harm. The Special Rapporteur notes, in particular, that the World Health Organization removed homosexuality from its International Classification of Diseases-10 (ICD-10) in 1992. The Special Rapporteur has received information according to which, in a number of countries, persons suspected of homosexuality have been subjected to compulsory, intrusive and degrading medical examinations of anus and penis in order to determine whether penetration had taken place, inter alia, within the context of enlistment for military service.' Report A/56/156 (para 24) Also see (paras 17–25). See also E/CN.4/2002/76 (pag.11).

23 Transgender youth may be especially vulnerable to entering into prostitution because of adverse reactions to their gender and sexuality on the part of family and peers that may leave them alone and unsupported. The levels of discrimination experienced by young transgender people when trying to find accommodation, obtain an education, get a job and access health services generally leaves them among the most vulnerable and marginalized young people in society. Report E/CN.4/2004/9 (See Para 123). Also see paras. 118-125.

24 As has been noted, discrimination on the grounds of sexual orientation is impermissible under international human rights law. The legal prohibition of same-sex relations in many countries, in conjunction with a widespread lack of support or protection for sexual minorities against violence and discrimination, impedes the enjoyment of sexual and reproductive health by many people with lesbian, gay, bisexual and transgender identities or conduct. Report E/CN.4/2004/49 (para38). Also see paras 32 and 54. www2.ohchr.org/english/bodies/chr/special/sexualorientation.htm accessed on 1 May 2010.

*ensure the effective protection of the right to life of all persons under their jurisdiction and to investigate promptly and thoroughly all killings, including those targeted at . . . human rights defenders . . . [and] all killings committed for any discriminatory reason, including sexual orientation . . .*²⁵

This Resolution was followed by a more broad ranging statement on Human Rights, Sexual Orientation and Gender Identity, issued in December 2008 by Argentina on behalf of 66 countries, which stated:

1 We reaffirm the principle of universality of human rights, as enshrined in the Universal Declaration of Human Rights whose 60th anniversary is celebrated this year, Article 1 of which proclaims that “all human beings are born free and equal in dignity and rights”;

2 We reaffirm that everyone is entitled to the enjoyment of human rights without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, as set out in Article 2 of the Universal Declaration of Human Rights and Article 2 of the International Covenants on Civil and Political, Economic, Social and Cultural Rights, as well as in article 26 of the International Covenant on Civil and Political Rights;

3 We reaffirm the principle of non-discrimination, which requires that human rights apply equally to every human being regardless of sexual orientation or gender identity;

4 We are deeply concerned by violations of human rights and fundamental freedoms based on sexual orientation or gender identity;

5 We are also disturbed that violence, harassment, discrimination, exclusion, stigmatisation and prejudice are directed against persons in all countries in the world because of sexual orientation or gender identity, and that these practices undermine the integrity and dignity of those subjected to these abuses;

*6 We condemn the human rights violations based on sexual orientation or gender identity wherever they occur, in particular the use of the death penalty on this ground, extrajudicial, summary or arbitrary executions, the practice of torture and other cruel, inhuman and degrading treatment or punishment, arbitrary arrest or detention and deprivation of economic, social and cultural rights, including the right to health.*²⁶

25 UNGA resolution A/63/430/Add.2 of 2008. The resolution on extrajudicial summary or arbitrary executions was adopted by a recorded vote of 127 in favour to none against, with 58 abstentions. The votes in favour of the Resolution were: Afghanistan, Albania, Algeria, Andorra, Angola, Antigua and Barbuda, Argentina, Armenia, Australia, Austria, Azerbaijan, Barbados, Belarus, Belgium, Belize, Bhutan, Bolivia, Bosnia and Herzegovina, Botswana, Brazil, Bulgaria, Burundi, Cambodia, Cameroon, Canada, Cape Verde, Chad, Chile, Colombia, Comoros, Congo, Costa Rica, Croatia, Cuba, Cyprus, Czech Republic, Denmark, Dominica, Dominican Republic, Ecuador, El Salvador, Eritrea, Estonia, Ethiopia, Fiji, Finland, France, Gabon, Georgia, Germany, Ghana, Greece, Grenada, Guatemala, Guinea, Guinea-Bissau, Guyana, Haiti, Honduras, Hungary, Iceland, India, Ireland, Italy, Jamaica, Japan, Jordan, Kazakhstan, Kyrgyzstan, Latvia, Lesotho, Liechtenstein, Lithuania, Luxembourg, Maldives, Mali, Malta, Mauritania, Mauritius, Mexico, Micronesia (Federated States of), Monaco, Mongolia, Montenegro, Morocco, Mozambique, Nepal, Netherlands, New Zealand, Nicaragua, Norway, Panama, Papua New Guinea, Paraguay, Peru, Philippines, Poland, Portugal, Republic of Korea, Republic of Moldova, Romania, Samoa, San Marino, Sao Tome and Principe, Serbia, Singapore, Slovakia, Slovenia, Somalia, South Africa, Spain, Suriname, Sweden, Switzerland, Tajikistan, Thailand, The former Yugoslav Republic of Macedonia, Timor-Leste, Togo, Tonga, Tunisia, Ukraine, United Kingdom, Uruguay, Uzbekistan, Vanuatu, Venezuela. <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N08/634/73/PDF/N0863473.pdf?OpenElement> accessed on 1 May 2010.

26 <http://ilga.org/ilga/en/article/1211> accessed on 15 May 2010. State signatories where: Albania, Andorra, Argentina, Armenia, Australia, Austria, Belgium, Bolivia, Bosnia and Herzegovina, Brazil, Bulgaria, Canada, Cape Verde, Central African Republic, Chile, Colombia, Croatia, Cuba, Cyprus, Czech Republic, Denmark, Ecuador, Estonia, Finland, France, Gabon, Georgia, Germany, Greece, Guinea-Bissau, Hungary, Iceland, Ireland, Israel, Italy, Japan, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Mauritius, Mexico, Montenegro, Nepal, Netherlands, New Zealand, Nicaragua, Norway, Paraguay, Poland, Portugal, Romania, San Marino, Sao Tome and Principe, Serbia, Slovakia, Slovenia, Spain, Sweden, Switzerland, the former Yugoslav Republic of Macedonia, Timor-Leste, United Kingdom, Uruguay, and Venezuela.

A similar approach has also been taken at the Human Rights Council. In 2006, Norway authored a statement on behalf of 54 member States, noting that the Human Rights Council had received extensive evidence of human rights violations based on sexual orientation and gender identity, including deprivation of the rights to life, freedom from violence and torture, and stating that the principles of universality and non-discrimination require that these issues be addressed.²⁷

The aforementioned 2008 joint statement has the status of neither an international legal instrument nor a UN resolution. It does not purport to create new rights but rather an authoritative interpretation of existing human rights law. It should also be noted that the 2008 joint statement received support from States in all five UN regional groups, namely the Africa Group, the Asia Group, the Eastern European Group, the Latin America and Caribbean Group, and the Western Europe and Others Group.

The issue of sexual orientation and gender identity is also being increasingly raised in the course of the Universal Periodic Review, with the rights to non-discrimination being stressed in the context of the review of individual states.²⁸

– by Regional Human Rights Mechanisms

At the regional level, the European Court of Human Rights (ECHR) has a significant body of jurisprudence dealing with the violation of rights under the European Convention for the Protection of Human Rights and Fundamental Freedoms (the European Convention) due to discrimination based on sexual orientation and gender identity.

The first successful cases on issues of sexual orientation concerned the interpretation of the privacy clause in the European Convention.²⁹ In *Dudgeon vs. United Kingdom*³⁰ and *Norris vs. Ireland*³¹ the criminalisation of same sex sexual conduct between consenting adults was deemed a violation of the privacy protection in Article 8 of the European Convention. In the former case, the ECHR held that such legislation constituted a continuing interference with the applicant's right to respect for his private life (which included his sexual life) within the meaning of Article 8.1. In the latter case, the ECHR held that one of the continuing effects of such criminal sanctions was to reinforce the misapprehension and general prejudice of the public and increase the anxiety and guilt feelings of homosexuals leading, on occasion, to depression and the serious consequences which could follow. Like the HRC in *Toonen*, the

27 Norwegian joint statement on human rights violations based on sexual orientation and gender identity, Human Rights Council, 3rd session, Geneva, 1 December 2006, available at: http://uklgig.org.uk/docs/Norwegian_Joint_Statement-UNHRC_06.doc. (5 February 2008). Countries: Albania, Andorra, Argentina, Australia, Austria, Belgium, Bosnia and Herzegovina, Brazil, Bulgaria, Canada, Chile, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Guatemala, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Mexico, Montenegro, Netherlands, New Zealand, Panama, Peru, Poland, Portugal, the former Yugoslav republic of Macedonia, the Republic of Korea, the Republic of Moldova, Romania, Serbia, Spain, Slovakia, Slovenia, Sweden, Switzerland, Timor-Leste, Ukraine, the United Kingdom, the United States of America, Uruguay, and Norway. Note: Brazil attempted to move a resolution on sexual orientation in 2003 at the then UN Commission on Human Rights, but withdrew the resolution in the face of strong opposition. See <http://ilga.org/ilga/en/article/406> accessed on 1 May 2010.

28 <http://www.upr-info.org/-UPR-Process-.html> accessed on 12 May 2010.

29 Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms reads: Right to respect for private and family life: Everyone has the right to respect for his private and family life, his home and his correspondence. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

30 *Dudgeon v. UK* A 45 (1981); (1982) 4 EHRR 149.

31 *Norris v. Ireland* A 142 (1988); (1988) 13 EHRR 186.

ECHR stated, in the subsequent case of *Modinos vs. Cyprus*, that a 'consistent policy' of not bringing prosecutions under the law was no substitute for full repeal.³²

The ECHR has also found violations of the European Convention rights due to discrimination on the basis of sexual orientation and/or gender identity in a range of situations including:

- recruitment to the military;³³
- capacity to change legal identities and associated papers to match their post-operative genders;³⁴
- access to medical services (including sex-reassignment surgery);³⁵
- denial of child custody;³⁶
- succession in tenancy;³⁷
- different ages of consent for sexual conduct.³⁸

Jurisprudence from other regional human rights mechanisms is less developed. In the Americas, the Organisation of American States (OAS) has recognized violations based on sexual orientation and gender identity in several resolutions that express concern and 'condemn acts of violence and related human rights violations committed against individuals because of their sexual orientation and gender identity'.³⁹

Box 1: The Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity (2006)⁴⁰

In 2006 a distinguished group of eminent international human rights experts met in Yogyakarta Indonesia to consider the application of existing international human rights law to sexual orientation and gender identity.

Having considered relevant international human rights law instruments, as well as their interpretation by the various international, regional and domestic bodies and by academics and practitioners, the Expert Group adopted 29 '*Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity*', (the Yogyakarta Principles).⁴¹

The Yogyakarta Principles clarify the application of existing human rights standards, and in addition, recommend to States a series of activities that they should undertake to ensure respect for, and the enjoyment of human rights by, persons of diverse sexual orientation and gender identity.

With regard to the rights to equality and non-discrimination, Principle 2 of the Yogyakarta Principles states as follows:

"Everyone is entitled to enjoy all human rights without discrimination on the basis of sexual orientation or gender identity. Everyone is entitled to equality before the law and

32 *Modinos v. Cyprus* A 259 (1993); (1993) 16 EHRR 485.

33 *Smith and Grady vs. United Kingdom* 1999-VI 45; (1999) 29 EHRR 493, *Lustig-Prean and Beckett vs. United Kingdom* (1999) 29 EHRR 548.

34 *Goodwin vs. United Kingdom* (2002) 35 EHRR 18. *I. vs. United Kingdom* (2003) 36 EHRR 53.

35 *Van Kuck v. Germany* 2003-VII 1; (2003) 37 EHRR 51. *L. v. Lithuania* Application No. 27527/03, Judgment of 11 September 2007.

36 *Salgueiro da Silva Mouta v. Portugal* 1999-IX 309; (1999) 31 EHRR 1055.

37 *Karner v. Austria*, (2003) 36 EHRR 53. *Kozak v. Poland* [2010] ECHR 280.

38 *L. and V. v. Austria* 2003-I 29; (2003) 36 EHRR 55. *S.L. v. Austria* 2003-I 71; (2003) 37 EHRR 3.9.

39 AG/RES. 2435 (XXXVIII-O/08) and AG/RES. 2435 (XXXVIII-O/08).

40 The Yogyakarta Principles. Available at: www.yogyakartaprinciples.org/ Last accessed 14 June 2010.

41 The Yogyakarta Principles, Preamble paragraph 7. Available at: www.yogyakartaprinciples.org/

the equal protection of the law without any such discrimination whether or not the enjoyment of another human right is also affected. The law shall prohibit any such discrimination and guarantee to all persons equal and effective protection against any such discrimination.

Discrimination on the basis of sexual orientation or gender identity includes any distinction, exclusion, restriction or preference based on sexual orientation or gender identity which has the purpose or effect of nullifying or impairing equality before the law or the equal protection of the law, or the recognition, enjoyment or exercise, on an equal basis, of all human rights and fundamental freedoms. Discrimination based on sexual orientation or gender identity may be, and commonly is, compounded by discrimination on other grounds including gender, race, age, religion, disability, health and economic status.”

Although a relatively short period of time has elapsed since the launch of the Principles in 2006, they are increasingly cited in UN fora, including the Human Rights Council and its Special Procedures and the human rights treaty monitoring bodies. They have also been referenced in domestic courts and tribunals in Australia⁴², Nepal⁴³, India⁴⁴ and the Philippines⁴⁵.

Summary

The interpretations by UN Treaty Bodies, Special Procedures and regional human rights mechanisms evince a clear acknowledgment that sexual orientation and gender identity are among the grounds of discrimination proscribed by international human rights law.

The authoritative pronouncements of the HRC demonstrate how anti-sodomy laws violate Article 17 of the ICCPR, are a violation of the prohibition against discrimination in Article 2 and are in violation of the equality requirements in Article 26.⁴⁶ Conversely, their pronouncements clearly reject the assertion that sexual orientation or gender identity cannot be protected simply because sexual orientation and gender identity are not ‘expressly’ mentioned in the grounds of discrimination enumerated in international human rights treaties.⁴⁷

Statements and resolutions made within the UN political bodies also indicate growing support for such recognition, though it must be noted that support, while extending across all regions, is not universal.

42 Decisions of the Refugee Review Tribunal of Australia: 1000927 [2010] RRTA 444 (18 May 2010), and 071263822 [2007] RRTA 115 (13 June 2007).

43 Sunil Babu Pant and others v. Nepal Government and others, www.gaylawnet.com/laws/cases/PantvNepal.pdf accessed on 26 April 2010.

44 Naz Foundation v. NCT Delhi (2009) 160 DLT 277, at paras 43 and 44. See also *Sexual Orientation, Gender Identity and International Human Rights Law: Contextualising the Yogyakarta Principles* by Michael O Flaherty and John Fisher. Human Rights Law Review. Oxford University Press. (pages 207 – 248).

45 Ang Ladad LGBT Party vs. Commission On Elections G.R. No. 190582 (8 April 2010). In this case, the Philippines Supreme Court sought to clarify the status of the Principles, stating that the: "Yogyakarta Principles, consisting of a declaration formulated by various international law professors, are - at best - de lege ferenda - and do not constitute binding obligations on the Philippines". For a more detailed commentary on the use of the Yogyakarta Principles, refer to David Brown "Making Room for Sexual Orientation and Gender Identity in International Human Rights Law: An Introduction to the Yogyakarta Principles" (2010) 31 Michigan Journal of International Law 821.

46 See Toonen v. Australia, Communication No.488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994). <http://hrlibrary.ngo.ru/undocs/html/vws488.htm> accessed on 26 April 2010. X v. Columbia, Op. Cit. and Young vs Australia, Op. cit.

47 Sexual Orientation, Gender Identity and International Human Rights Law: Practitioners Guide No. 4. International Commission of Jurists, 2009. pp 29 – 32.

This approach has begun to find favour in the domestic courts of the Asia Pacific region, with the judiciary a pro-active force in ensuring that universal human rights apply to persons of diverse sexual orientation and gender identity. Key decisions by the Superior Courts in Australia⁴⁸, Philippines⁴⁹, Korea⁵⁰, Nepal⁵¹, Fiji⁵² and India⁵³ are illustrative of greater domestic and regional recognition of the rights of lesbian, gay, bisexual and transgender persons.

The most recent decision from India, which dealt with the constitutional validity of criminal laws penalising same sex sexual conduct between consenting adults, provides a good example of this trend. In referring to the right of all persons to dignity, equality and privacy, the Delhi High Court found that the criminalisation of private same sex sexual conduct between consenting adults constituted discrimination on the basis of sexual orientation and was therefore unconstitutional. The court further stated:

*“We hold that sexual orientation is a ground analogous to sex and that discrimination on the basis of sexual orientation is not permitted by Article 15 . . . [The criminalisation of same sex sexual conduct between consenting adults] denies a person's dignity and criminalises his or her core identity solely on account of his or her sexuality and thus violates [the right to privacy] in Article 21 of the Constitution . . . [and] denies a gay person a right to full personhood which is implicit in notion of life under Article 21 of the Constitution”.*⁵⁴

48 Decisions of the Refugee Review Tribunal of Australia: 1000927 [2010] RRTA 444 (18 May 2010), and 071263822 [2007] RRTA 115 (13 June 2007).

49 Republic of the Philippines v. Jennifer B. Cagandahan, G.R. No.166676 (September 12, 2008).

50 National Human Rights Commission of Korea (NHRCK) looking at activities in relation to sexual orientation and gender identity available at www.asiapacificforum.net/issues/sexual_orientation accessed on 20 May 2010.

51 Sunil Babu Pant and others v. Nepal Government and others, op. cit.

52 Dhirendra Nadan and another v. State, HAA 85 & 86 of 2005.

53 Naz Foundation v. NCT Delhi (2009) 160 DLT 277.

54 Naz Foundation v. NCT Delhi (2009) 160 DLT 277, para 41, 104.

2. Terms of Reference

TOR 1 – Criminal law

Term of reference 1 asks the ACJ to consider whether, and in what respects, State criminal law is consistent with international human rights law in its application to and effect on persons on the basis of sexual orientation and gender identity.

– Introduction

Perhaps the most egregious violation of international human rights law with regard to persons of diverse sexual orientation and gender is the existence of laws criminalising same sex sexual conduct between consenting adults.

In 1998, the South African Constitutional Court in its decision invalidating laws prohibiting same sex sexual conduct between consenting adults, held:

*history and experience teach us that the scarring comes not from poverty or powerlessness, but from invisibility. It is the tainting of desire, it is the attribution of perversity and shame to spontaneous bodily affection, it is the prohibition of the expression of love, it is the denial of full moral citizenship in society because you are what you are, that impinges on the dignity and self-worth of a group.*⁵⁵

The ACJ is of the view that such laws are an invasion of the rights of privacy, non-discrimination and to freedom of expression. Such laws also express a profound contempt for the fundamental right to equality before, and protection of, the law. Equally, such laws often serve to stigmatise persons of diverse sexual orientation and gender identity by referring to same sex sexual conduct as ‘unnatural carnal intercourse’, ‘intercourse against the order of nature’, ‘unnatural desire’, ‘gross indecency’ etcetera.

The ACJ notes that within the region, many such laws are remnants of a colonial past and represent the prejudices and morals of a different era, society and culture. It further notes that in many cases, such laws have since been repealed in those countries from whence they originated.

– Advances

Over the last five decades, there have been welcome advances in the area of decriminalisation.

Negative provisions have been reformed by the legislature in Thailand (1957), New Zealand (1986), Australia (progressively from the 1960s to 1997) and Hong Kong (1991). Judicial reforms have also played a significant role. In 2005, judicial decisions in Fiji and Hong Kong declared anti-sodomy laws unconstitutional.⁵⁶ In 2007, the Nepalese Supreme Court held that a provision defining ‘unnatural behaviour’, which could be interpreted as criminalising same sex sexual conduct between consenting adults, was invalid, unconstitutional and in

⁵⁵ National Coalition For Gay and Lesbian Equality v. Minister of Justice, [1998] {12} PCLR 1517

⁵⁶ (Fiji) Dhirendra Nadan and another v. State, HAA 85 &86 Of 2005. (Hong Kong) Leung T C William Roy v. Secretary for Justice, CACV 317/2005.

breach of international human rights law.⁵⁷ Two years later, the Delhi High Court held that provisions of the criminal code penalising same sex sexual conduct between consenting adults were unconstitutional, stating

*“In our view, Indian Constitutional law does not permit the statutory criminal law to be held captive by popular misconceptions of who the [lesbians, gays, bisexuals and transgender persons] are. It cannot be forgotten that discrimination is [the] antithesis of equality and that it is the recognition of equality which will foster the dignity of every individual . . . homosexuals and third gender people . . . cannot be discriminated on the grounds of sexual orientation”.*⁵⁸

– Inconsistency with International human rights law

Notwithstanding these advances, within the Asia Pacific region there are approximately 20 States and territories that continue to criminalise same sex sexual conduct between consenting adults. There are APF member institutions in seven such States.

For the reasons advanced above, the ACJ is of the view that laws criminalising same sex sexual conduct between consenting adults are in breach of international human rights law. In particular, laws that criminalise sodomy are considered directly discriminatory when applied solely to same sex sexual activity between consenting adults, and indirectly discriminatory when equally applicable to homosexual and heterosexual sexual activity between consenting adults.

Furthermore, the ACJ endorses the view of the UN HRC that even where such laws are not regularly enforced, their very existence continues to affect adversely the enjoyment of rights by people of diverse sexual orientations and gender identities. As the Delhi High Court stated:

*“The criminalisation of homosexuality condemns in perpetuity a sizable section of society and forces them to live their lives in the shadow of harassment, exploitation, humiliation, cruel and degrading treatment at the hand of the law enforcement machinery . . . Even without actual enforcement, [such] laws serve to stigmatise an entire section of society, thereby violating their dignity as citizens”*⁵⁹

Some States have also legislated differential ages of consent for heterosexual and homosexual sexual conduct. The ACJ considers such laws to be discriminatory but notes advances in some States to provide uniform ages of consent.

In addition to laws directly criminalising same sex sexual conduct between consenting adults, a range of other laws containing criminal sanctions have been used to target people of diverse sexual orientations and gender identities. These include laws relating to: vagrancy, public nuisance, national security, public morality, obscenity, indecency and public order. The existence of some such laws, or their discriminatory application, breach rights to equality and non-discrimination.

Criminal or similar sanctions may also be imposed on the basis of certain religious or other beliefs. While some religions and beliefs are respectful of people of diverse sexual orientations or gender identities, and emphasise the acceptance of human diversity, some

⁵⁷ *Sunil Babu Pant and others v. Nepal Government and others*, www.gaylawnet.com/laws/cases/PantvNepal.pdf accessed on 26 April 2010.

⁵⁸ *Naz Foundation v. NCT Delhi* (2009) 160 DLT 277, para 131.

⁵⁹ *Naz Foundation v. NCT Delhi* (2009) 160 DLT 277, para 52.

interpretations may give rise to criminal and/or extra-legal sanctions against people in their private sexual relations. The ACJ is of the view that the appropriate balance is struck by the Vienna Declaration and Programme of Action, which provides:

“While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.”⁶⁰

The ACJ is of the view that fundamental to any improvement in the human rights situation of persons of diverse sexual orientation and gender identity is the repeal, amendment or appropriate application of the types of laws outlined above. Such changes must also be accompanied by action to address a culture of impunity towards those who violate the basic rights of lesbian, gay, bisexual or transgender persons. Until this occurs, further basic socio-economic rights such as the right to health, education and employment may be rendered out of reach.

Annex 1 below provides a table listing the laws in each State that criminalise or potentially criminalise same sex sexual conduct between consenting adults and give rise to a breach of international human rights law.

TOR 2 – Anti-discrimination law

Term of reference 2 asks the ACJ to consider “whether, and in what respects, that State’s anti-discrimination law applies to protect the human rights of persons on the basis of sexual orientation and gender identity and the adequacy of that protection”.

– Introduction

As with international human rights law, anti-discrimination laws in most countries have not explicitly included sexual orientation or gender identity among their proscribed grounds of discrimination. This has often meant that lesbian, gay, bisexual and transgender persons in many parts of the Asia Pacific region have been strangers to the guarantee of equality.

– Advances

Within the Asia Pacific region there are some significant examples of progress in the area of protection from discrimination.

The Constitution of Fiji specifically recognises the rights of lesbian, gay, bisexual and transgender persons,⁶¹ though within the Asia Pacific region, it remains the only country to expressly do so.

Constitutional protection is also afforded in Thailand through more general equality provisions. In this jurisdiction, the Constitutional Drafting Assembly’s “Intentions of the

60 Vienna Declaration And Programme Of Action. A/CONF.157/23, 12 July 1993. Available at: [http://www.unhcr.ch/huridocda/huridoca.nsf/\(symbol\)/a.conf.157.23.en](http://www.unhcr.ch/huridocda/huridoca.nsf/(symbol)/a.conf.157.23.en)

61 The Fijian Constitution, Section 38(2) reads: “A person must not be unfairly discriminated against, directly or indirectly, on the ground of his or her: (a) actual or supposed personal characteristics of circumstances, including race, ethnic origin, colour, place of origin, gender, sexual orientation, birth, primary language, economic status, age or disability . . .”.

Constitution of the Kingdom of Thailand” (which is similar to an ‘Explanatory Memoranda’ or ‘Travaux Préparatoires’) provides that the guarantee of equality is applicable to persons of diverse sexual orientation and gender identity. Thai courts have subsequently interpreted the Constitution in this manner.⁶²

Constitutional protection may also be afforded in South Korea, where the government has expressed the view that its Constitutional provisions ‘implicitly’ cover sexual orientation, and that legislation establishing the NHRI permits individuals or organisations to file complaints about discrimination on that basis.⁶³

Courts have also made favourable determinations based on the principle of non-discrimination and equality. In a recent case from the Philippines, the Supreme Court upheld the right of an LGBT political party to stand for election based on the principle of non-discrimination.⁶⁴ In Hong Kong, the High Court applied the equality provisions in the Basic Law to strike down anti-sodomy legislation, finding that the unequal age of consent violated the right to equality.⁶⁵

In a small number of countries, anti-discrimination legislation exists. New Zealand for example has anti-discrimination legislation specifically covering grounds of sexual orientation at the national level.⁶⁶ In Australia, there is limited protection at the federal level, though provincial anti-discrimination laws prohibit discrimination on relevant grounds, variously referring to ‘sexual orientation’, ‘sexuality’, ‘transexuality’, ‘homosexuality’, ‘gender identity’, and ‘transgender’.⁶⁷

– Limitation in coverage of anti-discrimination legislation

Fifteen APF member institutions operate in jurisdictions that have no anti-discrimination legislation that clearly and unambiguously protects persons of diverse sexual orientation and gender identity.

In the absence of either legislative or constitutional rights protections, and the limited consideration by the courts of discrimination based on sexual orientation and gender identity, the ACJ is of the view that fundamental to any improvement in the human rights situation of persons of diverse sexual orientation and gender identity is the implementation of strong anti-discrimination and anti-vilification legislation which, in order to remove any doubt, should include specific reference to non-discrimination on grounds of sexual orientation and gender identity.

The ACJ notes also that the identity of each individual is made up of a multitude of components. In addition to sexual orientation and gender identity, other factors include

62 Douglas Sanders, “The Rainbow Lobby: The Sexual Diversity Network and the Military-Installed Regime in Thailand”. An audio recording of the paper presented by Professor Sanders at the Third ILGA Conference in Changmai in 2008 is available at <http://isiswomen.org/downloads/ILGA3/Douglas%20Sanders.mp3>, (accessed on June 18, 2010).

63 National Human Rights Commission of Korea (NHRCK) activities in relation to sexual orientation and gender identity available at www.asiapacificforum.net/issues/sexual_orientation accessed on 20 May 2010.

64 Ang Ladlad LGBT Party Vs. Commission On Elections. G.R. No. 190582, April 8, 2010. Available at: <http://sc.judiciary.gov.ph/jurisprudence/2010/april2010/190582.htm> accessed on 30 May 2010.

65 Leung T C William Roy v. Secretary for Justice, CACV 317/2005.

66 Human Rights Act 1993, s21(1)(m).

67 See for example: Australian Capital Territory Discrimination Act 1991; New South Wales Anti-Discrimination Act 1977 (NSW); Northern Territory Anti-Discrimination Act 1996; Queensland Anti-Discrimination Act 1991; South Australia Equal Opportunity Act 1984; Tasmania Anti-Discrimination Act 1998; Victoria Equal Opportunity Act 1995; Western Australia Equal Opportunity Act 1984.

gender, age, nationality, profession, political opinion, religious affiliation and social origin. Minority groups therefore often face the cumulative effects of discrimination on a variety of grounds. This is often the case for persons of diverse sexual orientations and gender identities, where the impact of discrimination is felt more acutely when experienced in association with other forms of this form of discrimination or exclusion.

Annex 1 below provides a table listing the coverage of anti-discrimination laws in each State.

TOR 3 – Recognition of change of gender identity

Term of reference 3 asks the ACJ to consider whether, and in what respects, that State's laws enable the official recognition of changes of gender identity from that assigned to a person at birth and the consistency of those laws with international human rights law.

– Introduction

The definition of 'gender identity' contained in the preamble of the Yogyakarta Principles has been endorsed and utilised internationally, regionally and domestically. It provides as follows:

'Gender Identity' refers to each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms.

Article 16 of the ICCPR guarantees the basic human right to be legally recognized as a person before the law. Such recognition is fundamental to accessing the range of rights and entitlements guaranteed by law with legal commentators noting that:

if one's humanity is not legally recognized, one will lose legal recognition of, and therefore be effectively denied one's other human rights. For example, Jews in Nazi Germany were deprived of legal recognition; this denial was a precursor to denial of all of their other human rights. Article 16 is a non-derogable right.⁶⁸

One of the key issues faced by the transgender community in particular is the lack of legal recognition of their chosen gender, including a third gender. The failure to facilitate and formally recognize change of gender means that transgender persons are required to formally retain the gender assigned at birth, notwithstanding personally having transitioned to another gender.

The ACJ is of the view that the denial of recognition of changes to one's gender identity is in breach of international human rights law.

– Advances

The Yogyakarta Principles considered the application of Article 16 of the ICCPR to gender identity in Principle 3,⁶⁹ which states that:

68 Sarah Joseph, Jenny Shultz and Melissa Castan, *The International Covenant on Civil and Political Rights*, Oxford University Press, New York, 2005. p.680.

69 Yogyakarta Principles. Available at: www.yogyakartaprinciples.org/ Last accessed 14 June 2010.

Everyone has the right to recognition everywhere as a person before the law. Persons of diverse sexual orientations and gender identities shall enjoy legal capacity in all aspects of life. Each person's self-defined sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom. No one shall be forced to undergo medical procedures, including sex reassignment surgery, sterilisation or hormonal therapy, as a requirement for legal recognition of their gender identity. No status, such as marriage or parenthood, may be invoked as such to prevent the legal recognition of person's identity. No one shall be subjected to pressure to conceal, suppress, or deny their sexual orientation or gender identity.

Regional jurisprudence highlights some developments in this regard.

The decision of the Pakistani Supreme Court recognizing the eunuch community is at the forefront of developments in this regard. In *Mohammad Aslam Khaki vs. S.S.P (Operations) Rawalpindi and others*, the Supreme Court held that transgender people enjoy the protections guaranteed under Article 4 (rights of individuals to be dealt with in accordance of law) and Article 9 (security of person) of the Constitution of Pakistan.⁷⁰ The Supreme Court subsequently issued directives regarding access to social services, the addition of a 'third gender' on national identity cards for transgender people, and the entitlement of transgender people to register as such on the electoral rolls.

The Nepali Supreme Court has also commented on the rights of transgender people to recognition before the law, stating that:

*The fundamental rights comprised under Part III of the Constitution are enforceable fundamental human rights guaranteed to the citizens against the state. For this reason, the fundamental rights stipulated in Part III are the rights similarly vested in the third gender people as human beings . . . people other than 'men' and 'women' including the people of 'third gender' cannot be discriminated on the ground of sexual orientation. The State should recognize the existence of all natural persons including the people of third gender other than the men and women.*⁷¹

Advances have also been seen in judicial decisions from India,⁷² Philippines⁷³ and South Korea.⁷⁴ In New Zealand courts have recognised the right of individuals to change their legal gender status without undergoing gender reassignment surgery, and further that post operative transsexuals can marry under their reassigned gender status.⁷⁵

70 Legal environments, human rights and HIV responses among men who have sex with men and transgender people in Asia and the Pacific: An agenda for action. John Godwin. UNDP, July 2010.

71 *Sunil Babu Pant and others v. Nepal Government and others*, <http://www.gaylawnet.com/laws/cases/PantvNepal.pdf> accessed on 26 April 2010.

72 *Naz Foundation v. NCT Delhi* (2009) 160 DLT 277. See also Siddharth Narrain, Crystallizing Queer Politics: The Naz Foundation Case and its Implications for India's Transgender Communities, 2 NUJS L. Rev. (2009) 455.

73 *Republic of the Philippines v. Jennifer B. Cagandahan*, G.R. No.166676 (September 12, 2008).

74 In South Korea, the Supreme Court ruled that a person can access identity documents in a gender other than their gender of birth, stating that "gender should be decided by not only physical appearance but also the person's mentality and psychology, and society's attitude to that person . . . This means that gender is decided by diverse factors, and that a person's mental and social gender, which he or she did not recognize at birth, can be found during his or her social life", (*In re Change of Name and Family Register*, 2004 Seu 24 (s.Kor., June 22, 2006)). This decision led to the making of the Supreme Court Administrative Guideline No.716 on Family Register (dated September 6, 2006, which now has become No.256). The Guideline, however, states that in order for the change of legal sex to occur, the complete Sex Reassignment Surgery is required, and, neither history of marriage, nor child in marriage should exist.

75 *Attorney-General v Otahuhu Family Court* [1995] 1 NZLR 603. See also Births, Deaths and Marriages Registration Act 1995, Part 8 – Certificates, section 64. Birth certificates after sexual assignment or reassignment.

– Limited recognition of changes to gender identity

The failure to recognise and to facilitate formal changes to one's gender identity continues to have a significant impact on transgender persons. The impact of the absence of formal legal recognition of changes to gender identity is specifically manifest in the capacity to obtain legal documentation that accurately reflects ones' chosen gender identity. Amongst other things, transgender persons are unable to obtain birth certificates, identity cards, driver licenses and passports in their chosen gender. As a result they are often unable, or find it difficult to participate in public life, to access essential health and social services, or travel freely.

In the Asia Pacific region legislative provisions allowing changes to gender identity are rare, as are judicial developments in this regard. While a small number of countries facilitate formal recognition of changes to gender identity without medical intervention, many require gender reassignment surgery as a pre-condition to doing so. Indeed, in some contexts there have been extra-legal injunctions against gender reassignment surgery which further inhibit the enjoyment of rights and increase stigmatisation of transgender people.

Annex 1 below provides a table listing the whether States permit formal changes to gender identity.

TOR 4 – Other laws, policies and practices

Term of reference 4 asks the ACJ to advise on whether, in the course of undertaking the reference, it has identified other laws, policies, acts or practices that impact adversely persons on the basis of sexual orientation and gender identity, and, if so, the extent to which those laws, policies, acts or practices are inconsistent with international human rights law and the nature of the inconsistency.

– Introduction

Notwithstanding the constitutional, legislative and judicial developments discussed above, a wide range of laws, policies and practices continue to undermine the capacity of persons of diverse sexual orientation and gender identity to enjoy the full range of human rights.

– Advances

As has been articulated above, there have been some significant advances at both the legislative and judicial level, with a number of jurisdictions decriminalising same sex sexual conduct by consenting adults, as well as explicitly recognising sexual orientation and gender identity as proscribed grounds of discrimination under domestic law. Recognition of changes to gender identity is also permissible in some states.

In addition, a number of unique inquiries have been undertaken at the national level to understand, document and advocate for the removal of discriminatory laws, policies and practices. A study undertaken by the Australian Human Rights Commission was successful in advancing significant changes to institutional discrimination in that country.⁷⁶ A similar

⁷⁶ *Same-Sex: Same Entitlements (SSSE) Report*, National Inquiry into Discrimination against People in Same Sex Relationships: Financial and Work-Related Entitlements and Benefits, May 2007, www.humanrights.gov.au/human_rights/samesex/report/index.html accessed on 26 May 2010.

inquiry by the New Zealand Human Rights Commission documented for the first time the obstacles to dignity, equality and security for transgender people in that country, recommending changes in a range of areas including discrimination law, legal recognition and the provision of health services.⁷⁷

These developments have however been limited and lesbian, gay, bisexual and transgender people continue to face a broad range of laws, policies and practices that deny or impinge upon their human rights

– Limitations

In Australia, the Australian Human Rights Commission's recent 2007 report on the discrimination experienced by persons in same sex relationships provides a stark illustration of the very broad range of institutional discrimination endured by persons of diverse sexual orientation and gender identity. First and foremost, the report highlighted the absence of equal recognition of same-sex relationships, and documented discriminatory treatment in relation to: the recognition of children of same same-sex couples; employment; workers' compensation; tax; social security; veteran's entitlements; health care costs; family law; superannuation; aged care; and migration. While its findings were specific to Australia and led to significant changes in that jurisdiction, there is no doubt that similar forms of discrimination occur in many other countries.

A graphic illustration of some of the more egregious practices that occur in many countries was highlighted by the Chief Justice of the Philippines Supreme Court in the Ang Ladlad case.⁷⁸ The judgment documents the violence and discrimination experienced by the lesbian, gay, bisexual and transgender community in the Philippines citing amongst other things:

- the murders of gay men;
- parents or guardians beating effeminate or gay youth to ensure gender conformity;
- fathers allowing lesbian daughters to be raped to cure them;
- the use of an anti-kidnapping law to break up adult consensual same sex partnerships;
- the performance of exorcisms and other religious practices to cure LGBT persons; and
- forced psychiatric therapy and counselling to 'cure' young gays and lesbians.

Again, while these examples were specific to the Philippines, there is no doubt that similar forms of discriminatory treatment occur in many other countries.

In undertaking the reference, the ACJ noted in particular the impact of other laws, policies and practices impinging on rights to equality before the law, freedom from arbitrary detention and human treatment in detention, freedom from torture, privacy, health and freedom of expression, association and assembly. The impact on other rights is discussed further in the ACJ Background Paper in Chapter 2.

⁷⁷ *To Be Who I Am*. Report of the Inquiry into Discrimination Experienced by Transgender People. Human Rights Commission of New Zealand. May 2009. Available at:

www.hrc.co.nz/home/hrc/humanrightsenvironment/actiononthetransgenderingquiry/resources/transgenderingquirysummaryofsubmissions/transgenderingquirysummaryofsubmissions.php accessed on 21 May 2010.

⁷⁸ Ang Ladlad LGBT Party Vs. Commission On Elections. G.R. No. 190582, April 8, 2010. Available at: <http://sc.judiciary.gov.ph/jurisprudence/2010/april2010/190582.htm> accessed on 30 May 2010.

– Equal protection of the law

As a result of the stigma attached to issues of sexual orientation and gender identity, physical violence against lesbian, gay, bisexual and transgender people frequently goes unreported. When it is reported, prejudice within State agencies often means that it is not formally documented or investigated and therefore ultimately goes unpunished. Even when such matter are investigated and come before the courts, societal prejudices continue to arise. As was noted by the UN Special Rapporteur on the Independence of the Judiciary:

*Transvestites, transsexuals and homosexuals are also frequently the victims of violence and discrimination. When they turn to the judicial system, they are often confronted with the same prejudices and stereotypes they face in society at large.*⁷⁹

The experience of lesbian, gay, bisexual and transgender persons is that the application of criminal laws protecting an individual's physical and emotional integrity, the administrative policies and practices associated with the investigation of such offences, and the judicial procedures that determine criminal liability often conspire against their rights to equality before and equal protection of the law. International human rights law requires that such laws be implemented in a manner that respects the rights and dignity of all members of society, regardless of their sexual orientation or gender identity.

– Arbitrary detention, torture and inhuman or degrading treatment or punishment

As was mentioned above with regard to criminal laws, there are documented accounts in many jurisdictions of police and security forces using vagrancy, public nuisance, national security, public morality, obscenity, indecency and public order laws to detain, harass and intimidate persons of diverse sexual orientation and gender identity. During detention, and often after their release, lesbian, gay, bisexual and transgender persons face torture and ill treatment at the hands of State authorities as well as non-State actors.

The targeting of persons of diverse sexual orientation and gender identity has been documented by the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, who states that:

*most of the victims of arbitrary detention, torture and inhuman conditions of detention are usually ordinary people who belong to the poorest and most disadvantaged sectors of society, including . . . gays, lesbians, bisexuals, transgender persons . . .*⁸⁰

The gravity and seriousness of these forms of rights violations was most recently recognised by the Delhi High Court in *Naz Foundation vs. NCR Delhi*.⁸¹ The Court listed instances of harassment and ill treatment and noted that lesbian, gay, bisexual and transgender persons are forced to live their lives in the shadow of harassment, exploitation, humiliation and cruel and degrading treatment at the hands of the law enforcement machinery.⁸²

79 Report of the Special Rapporteur on the independence of judges and lawyers, Mr. Leandro Despouy, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G05/11/67/PDF/G0511167.pdf?OpenElement> accessed on 3 May 2010.

80 Interim Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, A/64/215, 3 August 2009.

81 *Naz Foundation v. NCT Delhi*, op. cit. paras 20-22.

82 See *Naz Foundation v. NCT Delhi*, op. cit. para 52

Such policies and practices breach rights to equality and to freedom from discrimination and torture,⁸³ as well as the right of those deprived of their liberty to be treated humanely.⁸⁴

– Privacy

The right to privacy is clearly recognised in international human rights law and has been the subject of significant jurisprudence in international and regional human rights fora, particularly in the context of criminal laws that penalise same sex sexual conduct between consenting adults.⁸⁵ This has been discussed in relation to term of reference 1 above, particularly in the context of rights to equality and non-discrimination.

The case of *Toonen vs. Australia*⁸⁶ also considered whether the non-enforcement of existing criminal laws was a breach of the applicant's rights. The HRC found that the continued existence of such laws, notwithstanding a practice of non-enforcement, failed to protect the applicant's right to privacy, noting that the continued threat of criminal sanction restricted the applicant's capacity to fully realise the right to privacy in the context of his personal relationships.

Similarly, the differential application by police and security forces of laws dealing with vagrancy, public nuisance, national security, public morality, obscenity, indecency and public order laws to detain, harass and intimidate persons of diverse sexual orientation and gender identity adversely impacts on the right to privacy.

– Health

The ability to access general health services, and the provision of particular health services remains a significant issue for lesbian, gay, bisexual and transgender persons, with more specific concerns in relation to transgender and intersex persons. In each case, concerns revolve around the availability, accessibility, acceptability and quality of medical services. For transgender and intersex persons, access to more specific medical services and procedures is problematic and is further complicated by their inability to have changes to their gender formally acknowledged on identity and entitlement documentation.

With regard to communicable diseases, laws, policies and practices criminalizing homosexual activity impede public health programmes by driving underground those groups at the risk of infection. The ability of such groups to be legally recognised and to be safely visible is fundamental to their ability to access relevant health services and to the effective implementation of government programs.⁸⁷

83 Article 7 reads: No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

84 Article 10 (1) reads: All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

85 Article 17 of the ICCPR reads: 1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation. 2. Everyone has the right to the protection of the law against such interference or attacks.

86 Communication No.488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994). <http://hrlibrary.ngo.ru/undocs/html/vws488.htm> accessed on 26 April 2010.

87 See *Naz Foundation v. NCT Delhi*, op. cit. Para 61.

– Freedom of Expression, Assembly and Association

International human rights law and regional human rights instruments recognise the rights to freedom of expression, assembly and association.⁸⁸ Together, these rights form a cornerstone of democratic society, protecting the right to impart and to receive information and ideas both individually and collectively.⁸⁹

While States may derogate from such rights in times of emergency, their capacity to do so is not unlimited. The ICCPR, for example, permits derogations only in the context of incitement to war or hatred, national security, and the maintenance of public order, health and safety.⁹⁰

Freedom of expression, assembly and association are of fundamental importance to people of diverse sexual orientation and gender identity as they facilitate participation and recognition within the body politic, as well as access to information about their rights within the community. Such rights are also crucial in supporting human rights defenders promoting the rights of lesbian, gay, bisexual and transgender people. They are also fundamental to the success of governmental and community programs that promote and support basic human rights such as the rights to employment, education and health.

Within the Asia Pacific region, police and security forces, as well as religious and community groups have sought to limit the ability of lesbian, gay, bisexual and transgender people to enjoy such rights particularly through the use of laws dealing with public order, public nuisance and public morality, but also through harassment and intimidation.

TOR 5 – Human Rights Defenders

Term of reference 5 asks the ACJ to consider whether the law, policy and practice in a State is adequate to ensure the protection of the rights of persons and organisations that defend the human rights of persons of diverse sexual orientation and gender identity.

– Introduction

The role of human rights defenders is expressly recognised in Article 18 of the *UN Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognised Human Rights and Fundamental Freedoms*. The Declaration states that individuals, groups, institutions and NGOs have both an important role and a responsibility in contributing to the promotion of the right of everyone to a social and international order in which the rights and freedoms set forth in the Universal Declaration of Human Rights and other human rights instruments can be fully realised.⁹¹

88 Universal Declaration of Human Rights, Art 19 and 20; the International Covenant on Civil and Political Rights, Art 19, 21 and 22; the International Covenant on Economic, Social and Cultural Rights, Art 8; the International Convention on the Rights of the Child, Art 13 and 15; the African Charter on Human and Peoples Rights, Art 19 and 20; the American Convention on Human Rights, Art 19, 20; and European Convention on Human Rights, Art 19 and 20; and in the Asia Pacific region, the Arab Charter on Human Rights, Art 24 and 32

89 United Nations Human Rights Committee. *Boris Zvozkov and Others v. Belarus*. Communication No. 1039/2001 para 7.2

90 Refer ICCPR art 4, 19 and 20

91 Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognised Human Rights and Fundamental Freedoms. A/RES/53/144, 8 March 1999. Available at: www2.ohchr.org/english/issues/defenders/translation.htm.

– Positive developments

The widespread formal recognition, in constitutional and legislative texts, of the right to freedom of assembly, association and speech should in theory serve to provide protection for human rights defenders. The ACJ has also noted positive examples of NHRIs engaging with and supporting the rights of lesbian, gay, bisexual and transgender defenders in this region.⁹²

However, notwithstanding formal constitutional and legislative recognition of these rights in many countries, those promoting the rights of people of diverse sexual orientation and gender diversity often find their basic human rights, as well as the rights to freedom of assembly, opinion and expression, are neither respected nor protected.

– Limitations in protection

The abuse of the rights of human rights defenders has been acknowledged by the UN Special Rapporteurs on human rights defenders, extrajudicial, summary or arbitrary executions, independence of judges and lawyers, torture, children, and health. Together they have documented a litany of human rights violations directed at the defenders of the rights of lesbian, gay, bisexual, transgender and intersex persons. These include: being subjected to threats of violence and death threats; the arbitrary invasion of their privacy by raiding houses and offices; physical violence; torture; sexual abuse; and murder.⁹³

The UN Committee Against Torture has observed that States should take effective measures to protect human rights defenders against harassment, threats and attacks. For example, the right of individuals to protection under the law implies the duty of the State to guarantee the right to life (Article 6(1)) and the right to personal security (Article 9(1)) with particular reference to protection from private parties.

In the context of the Universal Periodic Review the HRC has found that the failure of the State to take adequate measures to ensure the personal security of an individual constitutes a violation of the right to security under the ICCPR. Similarly, the HRC has strongly opposed the use of legislation, including emergency legislation, to restrict the activities of human rights defenders, and has advised States to take 'urgent steps' to amend such legislation.

Children

Though not specifically referenced in the terms of reference, the ACJ noted in particular the experiences of children who identify as, or whose parents are, lesbian, gay, bisexual or transgender. Such children face discrimination and the abuse of their rights in a wide variety of circumstances.

Article 2 of the Convention on the Rights of the Child prohibits discrimination on various grounds, including with regard to "race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status". In considering this provision, the Committee on the Rights of the Child (CRC) stated that, 'these grounds also cover . . . sexual orientation'.⁹⁴

Article 2, paragraph 2 further provides that: "States Parties shall take all appropriate measures to

92 The NHRIs of Australia, Indonesia, Korea, Mongolia, New Zealand and Thailand have engaged with local human rights defenders on a variety of issues and projects. More information is available in the ACJ Background Paper at Chapter III.

93 Refer to section 2 above re UN Special Procedures.

94 Committee on the Rights of the Child, General Comment No. 4: Adolescent health and development in the context of the Convention on the Rights of the Child, 1 July 2003, CRC/GC/2003/4.

ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members". This article may be invoked in respect of both the discrimination faced by children and that faced by their lesbian, gay, bisexual or transgender parents.

In addition to the State's obligation to respect and protect the rights of all citizens, the ACJ noted in particular the obligation of States under the Convention on the Rights of the Child with regard to health, education, participation and information. With regard to the former, Article 24 requires that States develop preventive health care, guidance for parents and family planning education and services. The obligation extends to the provision of health related information on sex and sexuality.⁹⁵ In considering the 'best interests of the child' in that context, the CRC has expressly referred to the State's obligation to provide adequate information and support to homosexual and transsexual young people.⁹⁶

A further issue of particular concern to transgender and intersex children is that of formal recognition of gender identity. In this regard, the Yogyakarta Principles requires States to "take all necessary legislative, administrative and other measures to ensure that no child's body is irreversibly altered by medical procedures in an attempt to impose a gender identity without the full, free and informed consent of the child in accordance with the age and maturity of the child and guided by the principle that in all actions concerning children, the best interests of the child shall be a primary consideration".⁹⁷ Such an approach has been evident in recent judgements from the Americas, which have supported the child's right to self-determine their gender identity and prohibited the imposition of irreversible medical procedures in the absence of the child's consent.⁹⁸

95 General Comment No.3 of the Committee on the Rights of the Child's states: effective HIV/AIDS prevention requires States to refrain from censoring, withholding or intentionally misrepresenting health-related information, including sexual education and information, and that, consistent with their obligations to ensure the right to life, survival and development of the child (art. 6), States parties must ensure that children have the ability to acquire the knowledge and skills to protect themselves and others as they begin to express their sexuality.

96 Concluding observations of the Committee on the Rights of the Child: United Kingdom of Great Britain and Northern Ireland. 09/10/2002. CRC/C/15/Add.188. Para 43 – 44

97 Yogyakarta Principles, Principle 18.2. Available at: www.yogyakartaprinciples.org/ Last accessed 14 June 2010.

98 An Argentinean court recognised a minor's right to change her sexual identity, ruling in favour of a minor's wish to have a sex change operation and to amend her identity card and birth certificate accordingly. In October 2008, the Constitutional Court of Colombia protected the right of a five-year-old hermaphrodite to decide his/her sex. The judgment was made against the family's wish to submit the child to an operation which would remove the child's genitalia. Reported at: www.crin.org/resources/infoDetail.asp?ID=19896. Last accessed 25 August 2010.

3. Recommendations

Introduction

These recommendations are based on the understanding that human rights apply to all people by virtue of their inherent dignity and humanity, and that every person is entitled to be treated humanely, irrespective of their origin and status.

The NHRIs which comply with the Paris Principles have the role of protecting and promoting the human rights of all persons. Their mandates therefore extend to the rights of those who suffer human rights violations on the basis of sexual orientation or gender identity.

There are a variety of functions common to Asia Pacific NHRIs, including research, education, monitoring, and advocacy and the recommendations of the ACJ are grouped under these functions. Finally, a number of recommendations are directed to the APF more generally.

Implementation of recommendations

The recommendations have been structured in a way that facilitates a staged approach to their implementation. In the first instance, the recommendations are directed towards building the internal capacity of NHRIs and to the production and dissemination of research on violations of the human rights of persons of diverse sexual orientation or gender identity. They then move to the promotion of respectful interaction and dialogue between the wider community and persons of diverse sexual orientation or gender identity, and the monitoring of the extent to which such persons enjoy the full range of human rights including, in particular, the right to freedom from discrimination. They progress to recommending ways in which NHRIs might advocate for the full realisation of all human rights for all persons, including persons of diverse sexual orientation or gender identity.

While structured in this manner, it is not necessary for the recommendations to be implemented in this way. In prioritising whether, and the order in which these recommendations are pursued, the ACJ appreciates that APF member institutions have different priorities, contexts, and resources, and operate in different cultural and religious frameworks. It also recognises the value of locally owned and locally driven initiatives and actions. Country specific, cultural, religious and political factors may therefore be relevant in determining such initiatives. All initiatives must, however, be in accordance with the international human rights framework which recognises the universality, indivisibility and interdependency of the human rights of all persons, including persons of diverse sexual orientation or gender identity.

Finally, it should be noted that the recommendations are not necessarily complete and NHRIs should consider any other actions aimed at promoting and protecting the rights of persons of diverse sexual orientation or gender identity.

Consultative and Participatory Approach

In implementing these recommendations, a consultative and participatory approach is to be encouraged. Accordingly, wherever relevant and appropriate, NHRIs should:

- Seek to consult with people of diverse sexual orientations and gender identity and use participatory processes in their work with these groups to build up trust and empower those groups.
- Partner with those who have access to these diverse communities with a view to engaging those communities most effectively.
- Consult widely with the community, including the full range of civil society organisations and governmental institutions. This would include health care professionals, social workers and other social service and health providers as well as community and religious leaders.

Capacity Building and Research

We recommend that NHRIs:

Build NHRI Capacity

1. Undertake an internal dialogue on issues relating to the human rights of persons of diverse sexual orientation or gender identity and build the capacity of the institution to understand the issues and to react appropriately.
2. Build relationships, consult and work with persons of diverse sexual orientations and gender identities, including CSOs, in order to inform the work of the NHRI in the promotion and protection of human rights generally and in relation to the rights of persons of diverse sexual orientation or gender identity.
3. Develop communication strategies for positive engagement with persons of diverse sexual orientations and gender identities. NHRIs should consider engaging with SOGI NGOs to ensure that their experience and expertise is utilised to ensure an effective communication outreach to the SOGI community.

Conduct Research

4. Inform themselves about available or on-going research in their jurisdiction and overseas relating to the nature and incidence of human rights violations based on sexual orientation or gender identity.
5. Identify gaps in that research and foster or undertake research to fill those gaps for example through universities and CSOs.
6. Foster or undertake research, documentation and the gathering of information on discrimination, including direct and indirect, multiple and intersecting forms of discrimination, on the basis of sexual orientation or gender identity including by non-State and private actors.
7. Facilitate studies with appropriate stakeholders on protecting the rights (including economic, social and cultural rights) of persons of diverse sexual orientations and gender identities in the context of local social and cultural traditions and religious beliefs.

Document the Domestic Impact

8. Identify and document at the domestic level:
 - i. human rights violations of transgender and intersex persons as a result of their inability to gain legal recognition or access legal documentation in the gender of their choice;
 - ii. the impact (both direct and indirect) of laws criminalising same sex sexual conduct between consenting adults. The indirect effects might include an inability or unwillingness to access social services such as health and HIV prevention, and treatment and care services and a vulnerability to blackmail, extortion, and harassment;
 - iii. the extent to which public order and sex work offences are selectively or disproportionately enforced against persons of diverse sexual orientation or gender identity;
 - iv. the socio-economic impact of human rights violations and discrimination on persons of diverse sexual orientation or gender identity. For example, disproportionate incidences of poverty, limited employment opportunities and reported cases of trafficking or forced prostitution;
 - v. the extent to which stigma and discrimination limits access to social services including social protection schemes, income generation projects and health care services, including HIV prevention and treatment, and sexual health services;
 - vi. the disproportionate impact and application of other laws that may violate human rights in relation to sexual orientation or gender identity, for example vagrancy, pornography, and public nuisance laws;
 - vii. the issues faced by human rights defenders working on issues of sexual orientation or gender identity.
9. Share information amongst NHRIs about best practices in other jurisdictions amongst NHRIs.

Education, Promotion and Dialogue

We recommend NHRIs:

Facilitate a dialogue with key stakeholders

10. Provide a platform for and assist persons of diverse sexual orientation or gender identity to engage in dialogue with all relevant groups including parliamentarians, the judiciary, judicial officers, law enforcement officials, providers of social services and community and religious leaders and thinkers on the promotion, protection and fulfilment of their human rights (including their economic, social and cultural rights).
11. Promote dialogue among progressive community and religious leaders and thinkers on the relationship between faith, religion, custom and tradition and sexual orientation or gender identity.

12. Find or provide neutral and safe places for a constructive engagement between persons of diverse sexual orientation or gender identity, their families and the wider community.
13. Foster dialogue with government agencies about the wider implications of discrimination including access to social services, employment, and health services including HIV prevention, treatment and care services.

Raise awareness within the lesbian, gay, bisexual and transgender community

14. Provide human rights education and information about remedies for human rights violations to persons of diverse sexual orientation and gender identity.
15. Disseminate and promote the Yogyakarta Principles, especially to those whose rights they affirm, including in local languages.
16. Support capacity building in the areas of legal literacy, remedies, human rights and advocacy skills for people of diverse sexual orientation and gender identity.

Raise awareness within the judiciary and law enforcement

17. Build the capacity of law enforcement officers, members of the judiciary, other judicial officers, lawyers, and the providers of social services (including health and HIV prevention, treatment and care services) to interact appropriately with persons of diverse sexual orientation or gender identity. This includes providing them with information on best practice and assisting in the development of protocols, as well as providing or fostering the provision of education and training. In particular, training should concentrate on how best to address violence and discrimination directed at persons of diverse sexual orientation or gender identity through supportive laws, policing, education and care.
18. Encourage the sharing of information between members of the judiciary and other judicial officers within and across jurisdictions in the region and the sharing of experiences from other regions where appropriate.
19. Encourage the sharing of information and best practice between law enforcement officers and those providing social services within and across jurisdictions in the region and share experience from outside the Asia Pacific region where appropriate.

Raise awareness within the education system

20. Include in the general human rights education conducted by NHRIs and others (including in schools) education on the human rights of persons of diverse sexual orientation or gender identity in order to nurture understanding of human pluralism and to foster the respect for human rights of all.
21. Educate and work with teachers and Ministries of Education and other educational professionals to protect and promote the human rights of students and teachers of diverse sexual orientation or gender identity, with a view to ensuring their full participation in school life. It is particularly important to ensure that such students (and teachers) are free from harassment, violence and bullying (both physical and psychological).

Raise awareness within professional organisations and support services

22. Engage with professional bodies with a view to promoting, respecting and fulfilling the human rights of persons of diverse sexual orientation or gender identity (including medical associations, bar associations, psychologists associations, and educational professional associations).
23. Engage with and educate the media on the human rights issues relating to persons of diverse sexual orientation or gender identity. Use the media in a creative manner as a platform to promote messages to the general population about the human rights of persons of diverse sexual orientation or gender identity and to promote a balanced approach by the media.
24. Encourage discussion between health professionals, and intersex and transgender people about the issues relating to medical procedures affecting them.
25. Network with parental/family associations to encourage understanding of persons of diverse sexual orientation or gender identity and build support systems to access parents/families accordingly.

Monitoring

We recommend NHRIs:

26. Consider the use of national inquiry powers to document and monitor the human rights situation of persons of diverse sexual orientation or gender identity.
27. Recognise persons of diverse sexual orientation and gender identity as groups that are vulnerable to human rights violations and monitor the progress towards ensuring the human rights (including economic, social and cultural rights) of persons of diverse sexual orientation and gender identity are respected, protected and promoted.
28. Ensure that persons of diverse sexual orientation and gender identity are included in NHRI activities, for example, in projects on trafficking, access to justice, health, housing, education and poverty.
29. Respond in an urgent manner to instances of torture as well as cruel, inhuman and degrading treatment of persons of diverse sexual orientation or gender identity.
30. Document and respond to issues of discrimination brought forward by persons of diverse sexual orientation or gender identity in order to assist them to find the appropriate remedy.
31. Ensure that NHRIs' complaints mechanisms (where these exist) are accessible to those who suffer human rights violations on the basis of their actual or perceived sexual orientation or gender identity. In particular, NHRIs should be able to receive complaints about discrimination, including by non-State and private actors.
32. Where there is no complaints function, NHRIs should advocate for all allegations of human rights violations perpetrated against persons of diverse sexual orientation or gender identity to be investigated thoroughly by the appropriate independent body and that those responsible are held accountable for their actions.

33. Pay attention to the rights of persons of diverse sexual orientation or gender identity who are detained, including in juvenile facilities. This includes, in particular, their right not to be subjected to torture or to cruel, degrading or inhuman treatment.

Advocacy

We recommend that NHRIs consider advocacy in relation to:

The interpretation and amendment of domestic laws

34. Advocate the review of existing laws to remove all laws that violate the human rights of persons of diverse sexual orientation or gender identity and ensure the application of all laws in a non-discriminatory manner.
35. Advocate the repeal or revision, as appropriate, of relevant domestic laws to decriminalise same sex sexual conduct between consenting adults.
36. Advocate the revision or removal of laws and policies that criminalize, penalise or prohibit diverse gender expressions.⁹⁹
37. Advocate uniform age-of-consent laws for heterosexual and same sex sexual conduct;
38. Advocate the removal of legal barriers to the distribution of sexual health information, including by providing exceptions to obscenity offences for such material.
39. Advocate the enactment of legal protections from hate crimes and prohibit vilification on the grounds of gender identity and sexual orientation.
40. Advocate the introduction of laws that make sexual assault of males a criminal offence, where they do not exist.
41. Advocate the enactment of anti-discrimination provisions that ensure protection and promotion of the human rights of persons of diverse sexual orientation and gender identity. Provisions should specifically prohibit discrimination on these grounds and cover actions by non-State and private actors. Areas of discrimination of particular concern include employment, access to services including health care, education, accommodation, provision of identity documents, and access to welfare services.

The enforcement of domestic laws

42. Advocate the end of selective or disproportionate enforcement of laws (such as vagrancy, prostitution, assembly laws) with regard to persons of diverse sexual orientation or gender identity.
43. Advocate the end of the selective enforcement of criminal laws, including public order and sex work offences and particularly where this is used as a pretext for extortion or for harassing, assaulting, detaining and punishing persons of diverse sexual orientation or gender identity.

⁹⁹ The expression of gender identity may occur through, amongst other things, dress, speech mannerisms, or through permanent (medical) or temporary changes to ones appearance.

44. Consider engagement in litigation designed to promote the human rights of persons of diverse sexual orientation or gender identity, including providing information to those involved in such litigation and, where the mandate allows, taking action as an intervenor or amicus curiae.

Application of international law

45. Advocate for the application of the UN Declaration relating to human rights defenders, including human rights defenders in relation to sexual orientation or gender identity.
46. Continue to advocate for the ratification or accession to all international human rights instruments.
47. Promote the consideration of human rights issues in relation to sexual orientation or gender identity at the international level, including through inclusion of these issues where relevant in reports (including shadow reports) to Treaty Bodies, Special Procedures, the Universal Periodic Review and the Human Rights Council and by encouraging governments to support serious discussion of these issues in international human rights forums.

The interpretation and application of religious and traditional laws and practices

48. Advocate for an interpretation of religious and traditional law and practices that aligns with the Yogyakarta Principles.¹⁰⁰

Provision of Services

49. Advocate that governments ensure transparent and independent police complaint mechanisms are in place in order to help prevent and remedy instances of police exceeding their authority in policing of persons of diverse sexual orientation and gender identity, or involved in harassment, extortion and violence towards such groups.
50. Advocate for the elimination of stigmatisation and discrimination by social and health service providers which have been shown to limit the access by persons of diverse sexual orientation or gender identity to social and health services, including HIV services.
51. Advocate for the recognition of the gender identity of choice for transgender individuals, whether or not they have undertaken sex reassignment surgery. Such individuals should be accorded the same legal rights as other citizens and equal rights to passports and other identification documents that recognize the person's chosen gender identity. Transgender people should have the right to marry on the basis of their chosen gender
52. Advocate for the provision of legal protections for persons of diverse sexual orientation or gender identity from being subject to treatment without informed consent, including aversion therapy or other medical interventions that purport to control or alter sexual

¹⁰⁰ That is, an interpretation that promotes and reiterates respect for human dignity and rights, and in particular, the right to privacy and to humane treatment.

orientation or gender identities. Such protections should recognise the special position of children and the obligation to ensure that the 'best interests of the child' should be the determining factor in relation to decisions regarding medical treatment.

53. Advocate for governments and the medical profession to discourage the use of diagnostic categorisations, such as "gender identity disorder" which stigmatise transgender people as mentally ill and undermine the legitimacy of sex reassignment procedures.
54. Advocate the promotion of human rights programmes that reflect the full range of human rights (including economic, social and cultural rights) and remedies for the breach of those rights for all persons, including persons of diverse sexual orientation or gender identity.

Asia Pacific Forum

We recommend that the Asia Pacific Forum:

55. Help organise mutual exchanges between NHRIs to support NHRIs in their work on the human rights of persons of diverse sexual orientation and gender identity.
56. Encourage mutual sharing across NHRIs of best practice including assistance as to how to begin work in this area.
57. Organise subregional meetings to share information about participatory processes and shared cultural issues relating to the promotion and protection of the human rights of persons of diverse sexual orientation or gender identity.
58. Work on encouraging the development of toolkits on the various issues that can be used throughout the region.
59. Review the progress towards the implementation of these recommendations at regular intervals.
60. Engage with the UN and institutional mechanisms such as the International Coordinating Committee of National Human Rights Institutions about the work NHRIs in the region are doing with regard to the human rights of persons of diverse sexual orientation or gender identity.

Table: Relevant laws in the Asia-Pacific

Overview of key laws in the Asia Pacific regarding dealing with: criminalisation of same sex sexual conduct between consenting adults; coverage of anti-discrimination legislation; and legal recognition of changes of gender identity.

Name of the State	Does anti-discrimination law explicitly protect the rights of persons of diverse sexual orientation and gender identity?		Does the law criminalise person on the basis of their sexual orientation of gender identity.		Does the State enable official recognition of changes of gender identity from that assigned to a person at birth	
	Yes/No	Commentary	Yes/No	Commentary	Yes/No	Commentary
1. Afghanistan	No	–	Yes	Arts. 427 and 430 of the Penal Code. Sharia Law.	No	–
2. Australia	Yes	Equality is guaranteed irrespective of SO/GI by provincial laws. No federal anti-discrimination legislation exists.	No	–	Yes	Part 5A, Births, Deaths and Marriages Registration Act, 1995; Sexual Reassignment Act, 1988, subject to 'unmarried status; and sex reassignment surgery.
3. India	Yes	Equality before law is guaranteed by the Constitution (rather than via anti-discrimination legislation) as a fundamental right and discrimination on the basis of sexual orientation is not permitted by Art. 15.	No	Decriminalised by a court verdict. The interpretation of the constitutional equality provisions is also as per the same court verdict. Note: the decision on s.377 of the Penal Code may be appealed	No	Transgendered individuals are permitted to declare their gender as 'other'.
4. Indonesia	No	–	Yes	Sharia law in force in one province (Aceh), penalizes homosexual conduct. Provincial criminal laws related to prostitution are used to target LGBT persons.	Yes	Change of gender after reassignment surgery can be legally effected by a district court, based on jurisprudence after the case of Iwan Rubianto è Vivian Rubianto at the South Jakarta District Court in 1973.

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	Yes	No	Yes	No	Yes	No
5. Jordan		No		No		No
6. Malaysia		No	Yes	Sections 337, 337A, B and D of the Penal Code as well as Sharia, which is in force, penalise homosexual and other conduct including cross dressing.		No
7. Maldives		No	Yes	Sharia Law penalises homosexual conduct.		No
8. Mongolia		No	No	S.125 of the Penal Code uses the term 'unnatural desire' to criminalise coercive sexual conduct. Evidence indicates that this provision is used to target lesbians, gays, bisexuals and transgender persons.		No
9. Nepal		No	No	The interpretation of the constitutional equality provisions is as per a court verdict.	Yes	Permitted as a result of a court verdict.
10. New Zealand	Yes		No		Yes	Permitted as a result of a court verdict.

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	Yes	No	Yes	No	Yes	No
11. Palestinian Territories	No	–	Yes	S. 152 of the Criminal Code Ordinance, 1936, which penalises homosexual conduct, is enforced in some parts (Gaza Strip).	No	–
12. Philippines	No	–	No	–	Yes (Intersex) No (Trans gender)	A court verdict has allowed intersex persons to change their names officially. Transgender persons can change their name through an administrative process, but cannot alter their sex in official documents.
13. Qatar	No	–	Yes	Sections 285, 294 and 296 of the Penal Code of 2004 penalise homosexual conduct and cross-dressing.	No	–
14. South Korea	No	–	Yes (partly)	Art.92 of the Military Criminal Law criminalises same sex sexual conduct.	Yes	Permitted as a result of a court verdict yet on the condition that the full Sex Reassignment Surgery is conducted, and neither history of marriage, nor child in marriage should exist.
15. Sri Lanka	No	–	Yes	Sections 365 and 365A of the Penal Code of 1883 penalises homosexual conduct.	No	–
16. Thailand	No	–	No	–	No	Sex Reassignment Surgery is legally recognised but banned for those below 18. For 18-20 age group, parental permission is required.

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17. Timor-Leste	No	–	No	–	No	–