



Kaleidoscope
Australia

Human Rights Foundation

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

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1. Executive Summary

1.1 Kaleidoscope Human Rights Foundation (**Kaleidoscope**) is a non-governmental organisation that works with local activists to protect and promote the rights of lesbian, gay, bisexual, transgender and intersex (**LGBTI**) persons in the Asia-Pacific Region. Kaleidoscope has prepared this report for the United Nations Human Rights Council (**UNHRC**) in respect of Nauru. This report outlines the progress Nauru has made to date, and highlights the work to be done in order to ensure the human rights of LGBTI persons in Nauru.

1.2 We urge the UNHRC to recommend that Nauru:

- (a) acts in accordance with the joint statement entitled "*Ending Acts of Violence and Related Human Rights Violations Based on Sexual Orientation and Gender Identity*" (**Joint Statement**), to which it is a signatory, and take the legal and practical measures necessary to meet the aspirations espoused therein;
- (b) completes the review of its failed 2010 referendum and formulate a strategy for successfully passing the proposed amendments to Constitution;
- (c) ratifies all significant human rights treaties, including, but not limited to, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights (and their Optional Protocols) to reinforce the implementation of, and compliance with, international human rights law in Nauru;
- (d) implements a framework of legal reform that will actively prevent and prohibit discrimination of LGBTI persons in all facets of life and society;
- (e) explicitly legalises same-sex marriage and adoption by same-sex couples; and
- (f) completes the review of the *Criminal Code 1899* (**Criminal Code**), decriminalises sexual activity between consenting adults of the same sex, and introduces a bill for a modernised Code in accordance with the Universal Declaration of Human Rights.

2. Positive steps taken by Nauru

Referendum

2.1 In 2010, Nauru held a referendum that proposed significant amendments to the *Constitution of Nauru* (**Constitution**), including Part II, which is entitled "Protection of Fundamental Rights and Freedoms".¹ Under Article 84, an amendment of this Part must be approved by two thirds of votes cast at a referendum.² The proposed amendments included the insertion of a positive and substantive right to equality for all people; the expansion of the prohibited grounds of discrimination to include sexual orientation;³ and the requirement that Nauruan Courts have regard, where relevant, to public international law applicable to the protection

¹ *Constitution of Nauru (Referendum Amendments) Bill 2009*.

² Article 84 *Constitution of the Republic of Nauru* (1968).

³ Sections 5 - 6 *Constitution of Nauru (Referendum Amendments) Bill 2009*.

of the rights and freedoms under the Constitution.⁴ The referendum failed, with two thirds of the voting public voting against it.⁵

Commitment to reviewing domestic law

- 2.2 During the UNHRC's Universal Periodic Review (UPR) of Nauru in 2011, Nauru accepted recommendations that it decriminalise sexual activity between consenting adults of the same sex.⁶ It indicated that it was, with the assistance of the Australian Attorney-General's Department, undertaking a review of its Criminal Code with the aim of introducing a bill for a modernised code in accordance with the Universal Declaration of Human Rights. Such a bill would propose the decriminalisation of sexual activity between consenting adults of the same sex. Nauru indicated it would take at least three years to produce its first draft bill.⁷ This is yet to occur.⁸

Commitment to reviewing obligations under international law

- 2.3 During Nauru's 2011 UPR, Nauru accepted recommendations that it ratify the core human rights treaties.⁹ It stated that it had established an inter-ministerial Working Group on Treaties tasked with reviewing Nauru's existing international obligations and making recommendations to government regarding the ratification of treaties to which Nauru was not yet a party.¹⁰ On 23 June 2011, Nauru acceded to the *Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)*.¹¹

Becoming a signatory to the Joint Statement

- 2.4 Nauru has signalled its support for the protection and maintenance of the human rights of LGBTI persons by becoming a signatory to the Joint Statement, which was issued during the general debate of the UNHRC in November 2011.¹² The Joint Statement called on states to end violence, criminal sanctions and related human rights violations based on sexual orientation and gender identity and implored the UNHRC to address these important

⁴ Section 25 *Constitution of Nauru (Referendum Amendments) Bill 2009*.

⁵ The Government of the Republic of Nauru, *Constitutional Review Project* accessed at <<http://www.naurogov.nr/parliament-of-nauru/projects/constitutional-review-project.aspx>>.

⁶ United Nations Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Nauru*, 17th sess, UN Doc A/HRC/17/3/Add.1 (30 May 2011) [31].

⁷ United Nations Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Nauru*, 10th sess, UN Doc A/HRC/WG.6/10/NRU/1 (5 November 2010) [37].

⁸ The Government of the Republic of Nauru, *Bills – the laws proposed to be passed by Parliament* accessed at <<http://www.naurogov.nr/parliament-of-nauru/bills-the-laws-proposed-to-be-passed-by-parliament.aspx>>.

⁹ United Nations Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Nauru*, 17th sess, UN Doc A/HRC/17/3/Add.1 (30 May 2011) [2].

¹⁰ United Nations Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Nauru*, 17th sess, UN Doc A/HRC/17/3 (8 March 2011) [21].

¹¹ United Nations Office of the High Commissioner for Human Rights, *Ratification Status for Nauru* accessed at <http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?CountryID=121&Lang=EN>.

¹² United Nations High Commissioner for Human Rights, *Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity*, 19th sess, UN Doc A/HRC/19/41 (17 November 2011).

human rights issues.¹³ The significance of the Joint Statement cannot be underestimated. It remains the most unequivocal and endorsed piece of state sanctioned multilateral action which has implicitly endorsed the notion that LGBTI rights and human rights are one and the same, they are not distinct and separate ideas which can be fragmented.¹⁴

- 2.5 By signing the Joint Statement, Nauru, together with the other signatory states, acknowledged its responsibility to end human rights violations against all those who are vilified and to prevent discrimination in all forms.¹⁵ Furthermore, the Joint Statement placed an obligation on all states to end human rights abuses committed against persons because of their sexual orientation or gender identity. By signing the Joint Statement, Nauru has made a statement to the international community that it recognises the particular challenges faced by LGBTI persons when examined through a human rights lens.
- 2.6 We urge the UNHRC to recommend that Nauru act in accordance with the Joint Statement, and take the legal and practical measures necessary to meet the aspirations espoused in the Joint Statement.

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

Ratification of the ICCPR and the ICESCR

- 3.1 Nauru is yet to ratify several key human rights treaties, including the International Covenant on Civil and Political Rights (**ICCPR**) and the International Covenant on Economic, Social and Cultural Rights (**ICESCR**).¹⁶ The ICCPR and ICESCR form the cornerstone of the international legal framework for the protection of human rights. The ratification of these covenants will assist in strengthening Nauru's obligations under international law, particularly the anti-discrimination provisions, in respect of the protection of the human rights of LGBTI persons.
- 3.2 Article 2(1) of the ICCPR sets out a principle of equal rights without distinction of any kind and Article 26 sets out a principle where discrimination on any ground is to be prohibited. The ICCPR does not expressly refer to sexual orientation, however the UNHRC has held that the treaty includes an obligation to prevent discrimination on the grounds of sexual orientation.¹⁷ It is also likely that these principles would extend to gender identity. The Human Rights Committee has for example, emphasised the importance of protecting transsexual communities from violence, torture and harassment¹⁸ and has recognised the

¹³ United Nations Human Rights Council, *Joint Statement on Ending Acts of Violence Related Human Rights Violations Based on Sexual Orientation and Gender Identity* (22 March 2011) accessed at <<http://www.state.gov/r/pa/prs/ps/2011/03/158847.htm>>.

¹⁴ International Gay and Lesbian Human Rights Commission, *UN Human Rights Council: A stunning Development Against Violence* (23 March 2011).

¹⁵ United Nations Human Rights Council, *Joint Statement on Ending Acts of Violence Related Human Rights Violations Based on Sexual Orientation and Gender Identity* (22 March 2011) accessed at <<http://www.state.gov/r/pa/prs/ps/2011/03/158847.htm>> [9].

¹⁶ United Nations Office of the High Commissioner for Human Rights, *Ratification Status for Nauru* accessed at <http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?CountryID=121&Lang=EN>.

¹⁷ Human Rights Committee, *Views: Communication No 488/1992*, 50th sess, UN Doc CCPR/C/50/D/488/1992 (31 March 1994) [8.7] ('*Toonen v Australia*').

¹⁸ See, for example, *Human Rights Committee, Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Concluding Observations of the Human Rights Committee, Columbia* (4 August 2010) UN Doc CCPR/C/CO/6.

right of transsexuals to change their gender through allowing the issue of new birth certificates.¹⁹

- 3.3 Nauru signalled its intention to comply with the ICCPR by becoming a signatory to it on 12 November 2001.²⁰ During Nauru's 2011 UPR, it accepted recommendations that it ratify the ICCPR and its two Optional Protocols,²¹ and during the 2012-2013 year, Nauru's inter-ministerial Working Group on Treaties prepared a Cabinet Submission on recommended treaty actions, including on the ICCPR.²² Nonetheless, Nauru has not yet ratified the ICCPR.
- 3.4 The Committee on Economic, Social and Cultural Rights has specifically stated that gender identity is recognised as a prohibited ground of discrimination under Article 2, Paragraph 2 of the ICESCR.²³
- 3.5 During Nauru's 2011 UPR, Nauru noted the recommendations that it ratify the ICESCR and its Optional Protocol but advised that it was not at the time considering becoming a party to these.²⁴
- 3.6 *The CEDAW and the Convention on the Rights of the Child (CRC)*
- 3.7 Nauru has acceded to both the CEDAW and the CRC.²⁵ Whilst neither treaty explicitly prohibits discrimination against a person based on sexual orientation or gender identity, both treaties do oblige State Parties to prevent such discrimination.
- 3.8 Article 2 of the CEDAW requires State Parties to condemn discrimination against women in all forms.²⁶ The Committee on the Elimination of All Forms of Discrimination Against Women issued a general recommendation stating that the discrimination of women based on sex and gender is inextricably linked with sexual orientation and gender identity.²⁷ Similarly, Article 2 of the CRC requires State Parties to take all appropriate measures to ensure that

¹⁹ See, for example, *Human Rights Committee, Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Concluding Observations of the Human Rights Committee, Ireland* (30 July 2008) UN Doc CCPR/C/IRL/CO/3.

²⁰ United Nations Office of the High Commissioner for Human Rights, *Ratification Status for Nauru* accessed at <http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?CountryID=121&Lang=EN>.

²¹ United Nations Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Nauru*, 17th sess, UN Doc A/HRC/17/3/Add.1 (30 May 2011) [2].

²² Republic of Nauru Office of Parliamentary Counsel, *Annual Report July 2012 – June 2013* [3.7].

²³ Committee on Economic, Social and Cultural Rights, *General Comment No 20 – Non-Discrimination in Economic, Social and Cultural Rights* UN Doc E/C.12/GC/20 (2009) [32].

²⁴ United Nations Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Nauru*, 17th sess, UN Doc A/HRC/17/3/Add.1 (30 May 2011) [3].

²⁵ United Nations Office of the High Commissioner for Human Rights, *Ratification Status for Nauru* accessed at <http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?CountryID=121&Lang=EN>.

²⁶ Article 2, *Convention on the Elimination of All Forms of Discrimination Against Women*, United Nations, *Treaty Series* vol. 1249, p 13.

²⁷ Committee on the Elimination of Discrimination against Women, *General Recommendation No. 28 on the core obligations of State parties under article 2 of the Convention on the Elimination of All Forms of Discrimination Against Women*, UN Doc CEDAW/C/GC/28 (16 December 2010) [18].

children are protected against all forms of discrimination, including on the ground of sex.²⁸ Significantly, the obligations on State Parties in Article 2 of the CRC extend to a child's parent or legal guardian, and accordingly a State Party cannot discriminate against a child on the basis of their parent's or legal guardian's sex.²⁹

- 3.9 Accordingly, Nauru has obligations under its existing international law commitments to prevent and prohibit discrimination of women and children, and a child's parent or legal guardian, based on sexual orientation and gender identity. Nauru has a dualistic system with respect to international law,³⁰ and absent domestic legislation, obligations under international law do not create obligations under domestic law.

4. Discrimination against LGBTI persons

The Births, Deaths and Marriages Act 1957

- 4.1 Same-sex marriage is impliedly excluded from the *Births, Deaths and Marriages Act 1957*, which prescribes a marriage certificate noting the details of the "husband" and "wife".³¹
- 4.2 Despite the decision in *Joslin v New Zealand*³², there is growing support in the international community that international human rights law can and should be interpreted to include a right for same-sex couples to marry.³³ If viewed from this perspective, Nauru would be in breach of its obligations under international law by prohibiting marriage between same-sex couples.

The Adoption of Children Act 1965 (Adoption Act)

- 4.3 The Adoption Act gives Nauru's Family Court the power to make adoption orders. Section 6 prohibits the Court from making an adoption order in favour of joint applicants unless "the applicants are a man and his wife", although the Court is permitted to depart from this position if it is of the opinion that the interests of the child will be best promoted by doing so.³⁴ This effectively imposes a prohibition on adoptions by same-sex couples in Nauru.
- 4.4 *The Criminal Code 1899*
- 4.5 Chapter XXII of Nauru's Criminal Code is headed "Offences against Morality". It criminalises sexual activity between consenting male adults and contains other discriminatory and anachronistic offences. The Criminal Code is a legacy of Nauru's colonial past, being

²⁸ Article 2, *Convention on the Rights of the Child*, United Nations, *Treaty Series*, vol. 1577, p. 3.

²⁹ UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, *Treaty Series*, vol. 1577, p. 3.

³⁰ United Nations Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Nauru*, 10th sess, UN Doc A/HRC/WG.6/10/NRU/1 (5 November 2010) [31].

³¹ Section 24 *Births, Deaths and Marriages Act 1957*.

³² Human Rights Committee, Views: Communication No 902/1999, 75th sess, UN Doc CCPR/C/75/D/902/1999 (17 July 2002) ('*Joslin v New Zealand*').

³³ Paula Gerber, Kristine Tay and Adiva Sifris, *Marriage: A Human Right*, Sydney Law Review (Vol. 36:643)

³⁴ Section 6 *Adoption of Children Act 1965*.

founded on the Queensland *Criminal Code* 1899 and remaining largely unchanged since then.³⁵

- 4.6 Under Section 208 of the Code, having “carnal knowledge against the order of nature” is a crime punishable by imprisonment with hard labour for fourteen years. Attempting to do so is a crime punishable by imprisonment with hard labour for seven years, under Section 209.
- 4.7 Under Section 211, a male who commits an act of “gross indecency” with another male in public or private, or procures or attempts to procure the same, is guilty of a misdemeanour punishable by imprisonment with hard labour for three years.

5. Lack of anti-discrimination laws protecting LGBTI persons

5.1 Constitution

- 5.2 The protection of fundamental rights and freedoms of the people of Nauru are enshrined in Part II of its Constitution. Article 3 of this Part contains a Preamble, which states:

Whereas every person in Nauru is entitled to the fundamental rights and freedoms of the individual, that is to say, has the right, whatever his race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following freedoms, namely:-

(i) life, liberty, security of the person, the enjoyment of property and the protection of the law;

(ii) freedom of conscience, of expression and of peaceful assembly and association; and

(iii) respect for [one's] private and family life.

*the subsequent provisions of this Part have effect for the purpose of affording protection to those rights and freedoms, subject to such limitations of that protection as are contained in those provisions...*³⁶

- 5.3 Articles 4 – 13, which follow, confer specific rights and freedoms, subject to limitations. For example, Article 5 states that no person shall be deprived of his personal liberty, but subject to exceptions, including where a sentence is imposed in respect of an offence of which the person has been convicted.³⁷
- 5.4 First, it is notable that absent from the list of potential grounds of discrimination in the first sentence of Article 3 are a person's sexual orientation, gender identity and gender expression.
- 5.5 Secondly, the Supreme Court of Nauru has held that the reference in Article 3 to an entitlement to fundamental rights and freedoms is “clearly not intended to refer to any pre-existing rights and freedoms” but only to those set out in Articles 4 – 13, which follow the

³⁵ United Nations Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Nauru*, 17th sess, UN Doc A/HRC/17/3 (8 March 2011) [9].

³⁶ Article 3 *Constitution of the Republic of Nauru* (1968).

³⁷ Article 5 *Constitution of the Republic of Nauru* (1968).

Preamble.³⁸ The Preamble was therefore interpreted in such a way as to render it practically meaningless.³⁹ Notably, Articles 4 – 13 do not specifically protect LGBTI rights.

5.6 *Anti-discrimination Laws*

- 5.7 Nauru does not currently have any laws or policies which prohibit discrimination of a person based on sexual orientation, gender identity or gender expression. Although there is no evidence that the discrimination of LGBTI persons is pervasive within Nauruan society, a framework of legal reform needs to be implemented that will actively prevent and prohibit discrimination based on sexual orientation, gender identity or gender expression in all aspects of Nauruan society, including, but not limited to, employment, education, and housing.

6. **Measures to protect the human rights of LGBTI persons**

6.1 *Amendment of the Constitution*

- 6.2 Following Nauru's failed referendum in 2010, a Standing Committee of Parliament, known as the Constitutional Review Committee, resolved to conduct a survey in order to gain an understanding of the main reasons for the referendum's failure and whether the proposed amendments were worthwhile pursuing at a later date.⁴⁰ During Nauru's 2011 UPR, the head of the Nauruan delegation stated that he thought that the rejection of the amendments proposed in the referendum likely had more to do with the complexity and number of amendments than with any concern on the part of Nauruans with the proposed changes. He indicated that whilst Nauru was committed to exploring alternative approaches that might result in a successful referendum, much thought was needed prior to its organisation.⁴¹

- 6.3 We urge the UNHRC to recommend that Nauru complete its review of the 2010 referendum and formulate a strategy for successfully amending its Constitution to include a positive and substantive right to equality for all people, and to include sexual orientation, gender identity and gender expression as prohibited grounds for discrimination.

Amendment of domestic laws

- 6.4 During Nauru's 2011 UPR, Nauru accepted the recommendation that it recognise the principle of non-discrimination, which prohibits discrimination on any ground, including sexual orientation.⁴² We urge the UNHRC to recommend that Nauru implement a framework of legal reform that will actively prevent and prohibit discrimination of LGBTI persons in all facets of life and society.
- 6.5 By including a prohibition on same-sex couples adopting children under section 6 of the Adoption Act, Nauru is expressly discriminating against LGBTI persons. This law is not in

³⁸ *In re the Constitution, Jeremiah v Nauru Local Government Council* [1971] NRSC 5; [1969-1982] NLR (A) 11 (5 March 1971).

³⁹ The Nauru Constitutional Review Commission, "*Naoero Ituga*" Report (28 February 2007), p. 18.

⁴⁰ The Government of the Republic of Nauru, *Constitutional Review Project* accessed at <<http://www.naurugov.nr/parliament-of-nauru/projects/constitutional-review-project.aspx>>.

⁴¹ United Nations Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Nauru*, 17th sess, UN Doc A/HRC/17/3 (8 March 2011) [77].

⁴² United Nations Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Nauru*, 17th sess, UN Doc A/HRC/17/3/Add.1 (30 May 2011) [32].

compliance with Nauru's obligations under international law, including the CRC and the CEDAW, as it distinguishes a person's eligibility to adopt a child based on their sexual orientation and gender identity. We urge the UNHRC to recommend that Nauru amend section 6 of the Adoption Act in order to remove the requirement that joint applicants for an adoption order "are a man and his wife".

- 6.6 In 2011-2012, the Australian Attorney-General's Department provided Nauru with the first of three Draft Bills to reform its Criminal Code.⁴³ We urge the UNHRC to recommend that Nauru decriminalise sexual activity between consenting adults of the same sex by introducing a bill for a modernised Code in accordance with the Universal Declaration on Human Rights.

Ratification of key human rights treaties

- 6.7 Whilst highlighting that the burden of reporting, specifically the financial cost, was a significant factor behind Nauru's low rate of participation in international human rights instruments, Nauru has stated that its inter-ministerial Working Group on Treaties would be looking at the recommendations from the UPR Working Group, and it was likely that the treaties therein mentioned would be given individual consideration in 2011.⁴⁴ In addition, it accepted the recommendation made during its 2011 UPR that it seeks appropriate assistance regarding international reporting obligations and implementation of international commitments.⁴⁵ We urge the UNHRC to recommend that Nauru ratify all significant human rights treaties (and their Optional Protocols) to reinforce the implementation of, and compliance with, international human rights law in Nauru.

7. Conclusion and recommendation

- 7.1 We strongly encourage the UNHRC to make recommendations that Nauru:
- (a) acts in accordance with the Joint Statement, and takes the legal and practical measures necessary to meet the aspirations espoused therein;
 - (b) completes the review of its failed 2010 referendum and formulates a strategy for successfully passing the proposed amendments to Constitution;
 - (c) ratifies all significant human rights treaties (and their Optional Protocols) to reinforce the implementation of, and compliance with, international human rights law in Nauru;
 - (d) implements a framework of legal reform that will actively prevent and prohibit discrimination of LGBTI persons in all facets of life and society;
 - (e) explicitly legalises same-sex marriage and adoption by same-sex couples; and
 - (f) completes the review of the Criminal Code, decriminalise sexual activity between consenting adults of the same sex and introduces a bill for a modernised Code in accordance with the Universal Declaration on Human Rights.

⁴³ Australian Government Attorney-General's Department, *Annual Report 2011-2012*, p. 156.

⁴⁴ United Nations Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Nauru*, 17th sess, UN Doc A/HRC/17/3 (8 March 2011) [21].

⁴⁵ United Nations Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Nauru*, 17th sess, UN Doc A/HRC/17/3/Add.1 (30 May 2011) [47].