



Kaleidoscope
Australia
Human Rights Foundation



Submission to the UN Universal Periodic Review regarding the protection of the rights of LGBTI persons in the Republic of the Union of Myanmar

21st session of the Universal Periodic Review

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1. Executive Summary

- 1.1 Kaleidoscope Human Rights Foundation (**Kaleidoscope**) is a non-government 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. In conjunction with local community members, Kaleidoscope has prepared this report for the United Nations Human Rights Council (**UNHRC**) in respect of the Republic of the Union of Myanmar (**Myanmar**). This report highlights instances where the legal framework of Myanmar is failing to adequately protect the human rights of LGBTI persons and where Myanmar may not be meeting its obligations under international human rights law.
- 1.2 Myanmar law expressly discriminates against LGBTI persons. Consensual same-sex conduct has been a crime in Myanmar since 1860 under section 377 of the *Myanmar Penal Code of 1860 (India Act XLV)* (**Penal Code**). Although incarceration on the basis of section 377 is now rare in respect of consenting adults, Myanmar law enforcement officials continue to perpetrate discriminatory and abusive acts against LGBTI people through various other indirect laws, particularly Myanmar's *Police Act 1945* (**Police Act**).
- 1.3 Despite the human rights protections enshrined under the Myanmar 2008 Constitution (**Constitution**), there are no laws which prohibit discrimination against a person based on their sexual orientation or gender identity.
- 1.4 Coupled with the deficiencies under its local laws to prevent discrimination, Myanmar's lack of international treaty ratification means the human rights of LGBTI persons remain vulnerable.
- 1.5 Accordingly, we urge the UNHRC to recommend that Myanmar:
- (a) at a minimum, Myanmar amends section 377 of the Penal Code to apply only to instances of non-consensual acts;
 - (b) ratify the key international human rights treaties including, but not limited to, the International Covenant on Civil and Political Rights (**ICCPR**) and the International Covenant on Economic, Social and Cultural Rights (**ICESCR**);
 - (c) enact comprehensive anti-discrimination laws that prohibit discrimination on the grounds of sexual orientation, gender identity and gender expression;
 - (d) amend section 348 of the Constitution to include sexual orientation and gender identity and gender expression among the grounds upon which a person cannot be discriminated against; and
 - (e) enact laws that expressly recognise same-sex marriage.

2. Positive steps taken by Myanmar

- 2.1 Although same-sex conduct remains a crime in Myanmar under section 377 of the Penal Code, recent positive steps taken by the nation may be suggestive of it transitioning towards recognising the human rights of LGBTI persons.
- 2.2 Although the Myanmar National Human Rights Commission was established in September 2011, critics have questioned its ability to effectively challenge the government.¹

¹Burma sets up human rights commission, BBC News Asia-Pacific (6 September 2011) accessed at <<http://www.bbc.com/news/world-asia-pacific-14807362>>.

- 2.3 In March 2014, Myanmar hosted the largest ever Association of Southeast Asian Nations (**ASEAN**) Civil Society Conference and ASEAN People's Forum since the event's inception in 2005.² The theme of the event, "Advancing ASEAN Peoples' Solidarity Towards Sustainable Peace, Development, Justice and Democratisation", reflected current challenges in the region and a transition towards a "genuinely people-centred ASEAN".³ In furtherance of this theme, all participating nations issued a joint statement (**Statement**). Significantly, the Statement advocated for the "universal human rights and dignity ... social cultural, economic and ecological justice, gender equality and gender justice, non-discrimination [and] inclusivity", amongst other things, of "LGBTIQ and persons of diverse sexual orientation, gender identities and expressions, including intersex persons".⁴ The Statement recognised that LGBTI people continue to be neglected by ASEAN member states and "continue to face criminalisation denying them of enjoyment of basic rights, freedoms and benefits of development guaranteed to all persons within ASEAN."⁵
- 2.4 The Statement described Myanmar as being "a country in transition".⁶ However, the Statement urged the host nation to repeal or amend all of its laws that do not conform with international human rights standards and principles, including reform of its Constitution.⁷ The Statement also recommended generally that all member states repeal laws and regulations that directly or indirectly criminalise LGBTI persons and harmonise national laws with UN human rights treaties.⁸ Member states were also urged to take the further step of developing and instituting mechanisms to protect LGBTI human rights.⁹
- 2.5 We urge the UNHRC to recommend that Myanmar acts in accordance with the Statement, and take the legal and practical measures necessary to implement its recommendations.
- 3. Obligations under international law to protect LGBTI persons from discrimination**
- 3.1 Although Myanmar has not ratified many of the core human rights treaties, it has ratified both the *Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)* and the *Convention on the Rights of the Child (CRC)*.
- 3.2 Article 2 of the CEDAW requires State Parties to condemn discrimination against women in all forms.¹⁰ 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

²ASEAN, *Over 3,000 Participants at Largest Ever ASEAN Civil Society Conference / ASEAN People's Forum* (24 March 2014) accessed at <<http://aseanpeople.org/over-3000-participants-at-largest-ever-asean-civil-society-conference-asean-peoples-forum/>>.

³ASEAN, *Over 3,000 Participants at Largest Ever ASEAN Civil Society Conference / ASEAN People's Forum* (24 March 2014) accessed at <<http://aseanpeople.org/over-3000-participants-at-largest-ever-asean-civil-society-conference-asean-peoples-forum/>>.

⁴*Statement of the ASEAN Civil Society/ASEAN People's Forum 2014*, ASEAN,(24 March 2014), p 1.

⁵*Statement of the ASEAN Civil Society/ASEAN People's Forum 2014*, ASEAN,(24 March 2014), p 4.

⁶*Statement of the ASEAN Civil Society/ASEAN People's Forum 2014*, ASEAN,(24 March 2014), p 2.

⁷*Statement of the ASEAN Civil Society/ASEAN People's Forum 2014*, ASEAN,(24 March 2014), p 2.

⁸*Statement of the ASEAN Civil Society/ASEAN People's Forum 2014*, ASEAN,(24 March 2014), p 5.

⁹*Statement of the ASEAN Civil Society/ASEAN People's Forum 2014*, ASEAN,(24 March 2014), p 9.

¹⁰Article 2, *Convention on the Elimination of All Forms of Discrimination Against Women*, United Nations, *Treaty Series* vol. 1249, p 13.

and gender is inextricably linked with sexual orientation, gender identity and gender expression.¹¹ Similarly, Article 2 of the CRC requires State Parties to take all appropriate measures to ensure that children are protected against all forms of discrimination, including on the ground of sex.¹² The obligations on State Parties in Article 2 of the CRC extend to a child's parent or legal guardian. A State Party cannot discriminate against a child on the basis of their parent's or legal guardian's sex. Under international law, discrimination based on sex includes discrimination on the grounds of sexual orientation and gender identity.¹³ Furthermore, the term 'other status' used in all non-discrimination provisions of the treaties encompasses discrimination based on sexual orientation and gender identity.¹⁴

- 3.3 Accordingly, Myanmar 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.

4. Discrimination against LGBTI persons

- 4.1 Myanmar law expressly discriminates against LGBTI persons. Consensual same-sex conduct has been a crime in Myanmar since 1860 under section 377 of its Penal Code, which states:

Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to a fine.

- 4.2 In May 2011, a Myanmar transgender woman was sentenced to five years in prison under section 377. However, incarceration on the basis of section 377 is now increasingly rare as the section is hardly ever used in modern Myanmar society against consenting adults.¹⁵ However, its continuing presence in criminal law has a negative impact on LGBTI people, and sends a message to society that LGBTI people are criminals. Furthermore, Myanmar law enforcement officials continue to undertake discriminatory and abusive acts against LGBTI people through various (less obvious) laws, particularly Myanmar's Police Act. For example, on 7 July 2013, 20 plain-clothed police officers forcefully arrested 10 gay men and transgender women in Mandalay, Myanmar.¹⁶ The International Gay and Lesbian Human

¹¹ 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].

¹² Article 2, *Convention on the Rights of the Child*, United Nations, *Treaty Series*, vol. 1577, p. 3.

¹³ 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*').

¹⁴ See General Comment 20

¹⁵ Alex Bookbinder, *The Battle for gay rights in Burma* (29 November 2013) accessed at <<https://www.dvb.no/news/the-battle-for-gay-rights-in-burma-myanmar/34765>>.

¹⁶ Alex Bookbinder, *The Battle for gay rights in Burma* (29 November 2013) accessed at <<https://www.dvb.no/news/the-battle-for-gay-rights-in-burma-myanmar/34765>>; Myanmar LGBT Rights Network, *Myanmar LGBT Rights Network Joins Daw Aung San Suu Kyi in Calling for Decriminalization of Homosexuality in Myanmar* (22 November 2013) accessed at <<http://www.burmapartnership.org/2013/11/myanmar-lgbt-rights-network-joins-daw-aung-san-suu-kyi-in-calling-for-the-decriminalization-of-homosexuality-in-myanmar/>>; International Gay and Lesbian Human Rights Commission, *Myanmar: Gay Men and Transgender Women Wrongfully Arrested, Violently Abused* (26 July 2013) accessed at <<http://iglhrc.org/content/myanmar-gay-men-and-transgender-women-wrongfully-arrested-violently-abused>>.

Rights Commission (IGLHRC) reported that while one person was able to escape, the remaining nine were subjected to verbal, physical and sexual abuse. The IGLHRC also reported that on 6 July 2013, two other transgender women were arrested in the same area. The IGLHRC provided the following account from one of those arrested:

When we arrived at the Division Police Station, the police forcibly pulled off our clothes, kicked and beat us. Our breasts were squeezed, scratched and beaten with police batons.

They forced us to do frog jumps, without clothes, and shout that we are not women but men. When we did as they said, we were beaten again because our voices sound feminine. They slapped our faces and shouted out, 'Shout like a man! Sound like a man!' I've never experienced terror like this.¹⁷

Mandalay Police denied the allegations, maintaining that the arrests were in respect of "public disturbances".¹⁸

- 4.3 Similarly, Kaleidoscope has received anecdotal evidence from activists in Myanmar of transgender women being targeted by police.
- 4.4 Examples of other charges which may be utilised to discriminate against LGBTI persons include:
- (a) negligently spreading sexual disease;¹⁹
 - (b) activity that may "affect the morality" of an individual or society in a negative way;²⁰ and
 - (c) being found between sunset and sunrise with a covered face or being otherwise disguised and therefore unable to give satisfactory account of oneself.²¹
- 4.5 The absence of express protection of LGBTI human rights under Myanmar law coupled with a conservative view amongst public officials that homosexuality is not a part of "Burmese culture", facilitates discrimination of Myanmar LGBTI persons. Repeal of these discriminatory laws must be effected in order to comply with international human rights standards.
- 4.6 The law in Myanmar is silent on the issue of same-sex marriage, however, it is arguably impliedly prohibited as a consequence of consensual same-sex conduct being criminalised under section 377 of the Penal Code.²²

¹⁷International Gay and Lesbian Human Rights Commission, *Myanmar: Gay Men and Transgender Women Wrongfully Arrested, Violently Abused* (26 July 2013) accessed at <<http://iglhrc.org/content/myanmar-gay-men-and-transgender-women-wrongfully-arrested-violently-abused>>.

¹⁸International Gay and Lesbian Human Rights Commission, *Myanmar: Gay Men and Transgender Women Wrongfully Arrested, Violently Abused* (26 July 2013) accessed at <<http://iglhrc.org/content/myanmar-gay-men-and-transgender-women-wrongfully-arrested-violently-abused>>. The power to arrest in respect of "public nuisance" is contained in section 34(7) of the Police Act.

¹⁹Section 269 Penal Code.

²⁰ Section 5(j) *Emergency Provisions Act 1950*.

²¹Section 35C Police Act.

4.7 Despite the decision in *Joslin v New Zealand*²³, 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.²⁴ If viewed from this perspective, Myanmar would be in breach of its obligations under international law by implicitly prohibiting marriage between same-sex couples.

4.8 We urge the UNHRC to recommend that Myanmar at a minimum, amend its existing laws which directly discriminate against LGBTI persons, particularly section 377 of the Penal Code to apply only to instances of non-consensual activities, and institute mechanisms for protecting LGBTI human rights so that indirect laws cannot be used as a means of discrimination. Further we urge the UNHRC to recommend that Myanmar pass laws that expressly recognise same-sex marriage.

5. Lack of anti-discrimination laws protecting LGBTI persons

5.1 Myanmar LGBTI persons currently have no express right to any remedies or legal protection from discrimination on the basis of sexual or gender identity.

5.2 However, under section 347 of the Constitution, each person is guaranteed equal rights before the law and equal legal protection. Further, under section 353 of the Constitution, "[n]othing shall, except in accordance with existing laws, be detrimental to the life and personal freedom of any person." However, the Penal Code and the Police Act would arguably qualify as being "existing law".

5.3 A framework of legal reform needs to be implemented that will actively prevent and prohibit discrimination of LGBTI people in all facets of life and society including employment, health and education in Myanmar. Such a framework should include legislation that specifically prohibits discrimination based on sexual orientation and gender identity in all aspects of Myanmar society, including, but not limited to, employment, education, and housing.

5.4 We urge the UNHRC to recommend that Myanmar undertakes a program of law reform which includes the enactment of anti-discrimination legislation that prohibits discrimination based on sexual orientation and gender identity.

6. Amend the Constitution

6.1 The most fundamental protections and freedoms of citizens of Myanmar are enshrined in its 2008 Constitution. Chapter VIII of the Constitution lists the "Fundamental Rights" of Myanmar citizens. In addition to sections 347 and 353 of the Constitution referenced at paragraph 5.2 above, section 348 provides that citizens shall not be discriminated against based on "*race, birth, religion, official position, status, culture, sex and wealth.*" Notably absent from this list is discrimination based on the sexual orientation and gender identity of Myanmar citizens.

6.2 Chapter XII of the Constitution contains the mechanism for amendment. Under that chapter, a Bill to amend the Constitution must be submitted by 20 percent of the total number of PyidaungsuHluttaw representatives (Myanmar's national bi-cameral legislature) in order for

²²International Lesbian, Gay, Bisexual, Trans and Intersex Association, *Law in Myanmar – Laws and policies affecting LGBTI people in Myanmar* (17 December 2014) accessed at <<http://ilga.org/country/myanmar/law/>>.

²³ 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*').

²⁴ Paula Gerber, Kristine Tay and Adiva Sifris, *Marriage: A Human Right*, Sydney Law Review (Vol. 36:643)

it to be considered by the PyidaungsuHluttaw.²⁵ While some provisions of the Constitution require amendments to be approved by more than 75 percent of both houses of the PyidaungsuHluttaw together with a nation-wide referendum,²⁶ amendment of section 348 only requires approval of more than 75 percent of both houses of the PyidaungsuHluttaw.²⁷

- 6.3 With the approval of the PyidaungsuHluttaw, a Constitutional Review Joint Committee was formed in 2013 to review and recommend amendments to the Constitution. The Committee's report simply collated statistics on the number of submissions received in respect of each provision of the Constitution, rather than drawing any conclusions or making any recommendations.²⁸ Therefore, it is not clear whether any recommendations to amend section 348 have been made. It has been reported that a referendum will be held in May 2015 to change some clauses, with such changes coming into force only after the new parliament – elected in 2015 – is seated.²⁹
- 6.4 We urge the UNHRC to recommend that constitutional amendments include adding sexual orientation and gender identity as prohibited grounds for discrimination.

7. Ratification of key human rights treaties

- 7.1 Myanmar has not ratified the majority of key human rights treaties, including the ICCPR and the ICESCR. The ratification of these Covenants would assist in strengthening Myanmar's obligations under international law, particularly the anti-discrimination provisions, in respect of the protection of the human rights of LGBTI persons.
- 7.2 Myanmar was last reviewed as part of the Universal Periodic Review (**UPR**) in January 2011. Nearly 200 recommendations were made and approximately 50 of these recommendations called for ratification of the ICCPR and the ICESCR. However, it appears no progress has been made to ratify these treaties.
- 7.3 We urge the UNHRC to recommend that Myanmar ratifies all significant human rights treaties (and their Optional Protocols) including, but not limited to, the ICCPR and the ICESCR, to reinforce the implementation of, and compliance with, international human rights law in Myanmar.

8. Conclusion and recommendation

- 8.1 As a nation in a period of transition, now is an opportune time for Myanmar to make the necessary legislative changes to enshrine and protect the human rights of LGBTI people.
- 8.2 Accordingly, we encourage the UNHRC to make the following recommendations that Myanmar:
- (a) at a minimum, amend section 377 of the Penal Code;

²⁵Section 435 Constitution.

²⁶Section 436(a) Constitution.

²⁷ Section 436(b) Constitution.

²⁸Constitutional Review Joint Committee, *Report of Constitution Review Joint Committee's findings and assessment* (February 2014) accessed at <<http://www.constitutionnet.org/vl/item/myanmar-report-constitutional-review-joint-committees-findings-and-assessment>>.

- (b) ratify the key international human rights treaties including, but not limited to, the ICCPR and the ICESCR;
- (c) enact comprehensive anti-discrimination laws that prohibit discrimination on the grounds of sexual orientation and gender identity;
- (d) amend section 348 of the Constitution to include sexual orientation and gender identity among the grounds upon which a person cannot be discriminated against; and
- (e) enact laws that expressly recognise same-sex marriage.