

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

25th session of the Universal Periodic Review

September 2015

Executive Summary

1. This report has been by Kaleidoscope Australia Human Rights Foundation,¹ in conjunction with Sexual Rights Initiative² and local members of the Samoan LGBTI communities. It highlights some instances where Samoa is failing to adequately protect the rights of lesbian, gay, bisexual, transgender and intersex (**LGBTI**) persons.
2. In recent years, Samoa has taken certain steps to protect the rights of LGBTI persons. However, it continues to criminalise consensual sex between men. Samoan law also fails to adequately protect against discrimination on the basis of sexual orientation, gender identity and intersex status in all areas of public life and continues to not provide any legal rights to same-sex couples.
3. **Key words:** sexual orientation, gender identity, criminalisation, *fa'afafine*, discrimination.

Positive steps taken by Samoa

4. Samoa has, in recent years, taken the following steps to protect the rights of LGBTI people:
 - (a) **Repealing criminal provisions prohibiting males 'impersonating' females.** The *Crimes Act 2013*, which entered into force on 1 May 2013, removes provisions contained in the previous *Crimes Ordinance 1961* which criminalised males 'impersonating' females in a public place, and which could be used to target transgender women and sex- and gender-diverse persons.
 - (b) **Prohibiting employment discrimination on the basis of sexual orientation.** The *Labour and Employment Relations Act 2013* prohibits direct and indirect discrimination on the basis of sexual orientation against an employee or applicant for employment in any employment policies, procedure or practices.³
 - (c) **Signing the Joint Statement on Ending Acts of Violence and Related Human Rights Violations Based on Sexual Orientation and Gender Identity in 2011.** The Joint Statement was issued during general debate of the UNHRC.⁴ The Joint Statement called on states to end violence, criminal sanctions and related human rights violations based on sexual orientation and gender identity and implored the UNHRC to address these important human rights issues.⁵ By signing the Joint

¹ **Kaleidoscope Australia 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.

² **Sexual Rights Initiative** is a coalition including Akahata – a Latin American team working on sexualities and genders, Action Canada for Population and Development, Creating Resources for Empowerment and Action – India, the Polish Federation for Women and Family Planning, and others.

³ *Labour and Employment Relations Act 2013*, section 20(2).

⁴ 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).

⁵ 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)
<<http://www.state.gov/r/pa/prs/ps/2011/03/158847.htm>>.

Statement, Samoa 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.

- (d) **Voting in favour of the Asian and Pacific Ministerial Declaration on Population and Development.**⁶ The declaration expressed concerns about acts of violence and discrimination committed against individuals on the grounds of their sexual orientation and gender identity.⁷ It also included policy directions to work to reduce vulnerability and eliminate discrimination based on (amongst other things) sexual orientation and gender identity,⁸ and noted that despite progress, challenges from multiple forms of inequality, disempowerment and discrimination need to be addressed, through commitment to equality before the law and non-discrimination for all persons, without distinction of any kind.⁹
- (e) **Establishing a National Human Rights Institution.** On 10 December 2013 (International Human Rights Day), Samoa launched its own National Human Rights Institution as part of the Komesina o Sulufaiga (Ombudsman), which has the mandate to protect and promote human rights in the country.¹⁰ The Ombudsman's first National State of Human Rights Report, released in August 2015, mentioned *fa'afafine* (persons assigned a male sex at birth who express gender characteristics of both men and women). The report referred to *fa'afafine* as "the third gender that has always existed in Samoa" and noted "their hard work and dedication to the family in carrying out both roles and responsibilities for men and women".¹¹

Criminalisation of sexual relations between persons of the same sex

5. The *Crimes Act 2013*, which entered into force on 1 May 2013, continues to criminalise consensual sex between men through its prohibition on "sodomy".¹²
6. The *Crimes Act 2013* also punishes "keeping [a] place of resort for homosexual acts".¹³ Since "place of resort" is not defined, this provision can potentially be used to criminalise same-sex couples living together, as well as their landlords or real estate agents.
7. The *Crimes Act 2013* has removed provisions in the previous *Crimes Ordinance 1961* which criminalised "indecent acts between males".¹⁴ While this has potentially narrowed the

⁶ United Nations Economic and Social Council, *Report of the Sixth Asian and Pacific Population Conference*, UN Doc E/ESCAP/APPC(6)/3 (18 November 2013) <<http://www.unescapsdd.org/files/documents/Report%20of%20the%20Sixth%20APPC.pdf>>.

⁷ Ibid [8].

⁸ Ibid [84].

⁹ Ibid [24].

¹⁰ United Nations Development Programme, "UN commends Samoa on the establishment of a National Human Rights Institution," 10 December 2013 <<http://www.asia-pacific.undp.org/content/rbap/en/home/presscenter/pressreleases/2013/12/10/un-commends-samoa-on-the-establishment-of-a-national-human-rights-institution.html>>.

¹¹ Komesina o Sulufaiga (Office of the Ombudsman), *State of Human Rights Report 2015*, p. 23 <http://www.ombudsman.gov.ws/images/20150806_stateofhumanrightsreport_english.compressed.pdf>.

¹² **Section 67** punishes "sodomy" with a term of imprisonment not exceeding five years and explicitly mentions that consent is not a defence to a charge against this section. **Section 68** punishes "attempts to commit sodomy" with a term of imprisonment not exceeding five years.

¹³ **Section 71** punishes "keeping place of resort for homosexual acts" with a term of imprisonment not exceeding seven years. This criminalises the keeping or management of "any premises used as a place of resort for the commission of indecent acts between males" (including as a tenant, lessee, occupier, lessor, landlord, or agent of the lessor or landlord).

¹⁴ *Crimes Ordinance 1961* (Samoa), section 58D.

scope of criminalisation of consensual sex between men, the continued prohibition of “sodomy” and on “keeping [a] place of resort for homosexual acts” means that Samoa’s criminal laws can be used to target gay and bisexual men, and potentially transgender and intersex persons.¹⁵

8. At Samoa’s first Universal Periodic Review (UPR) in 2011, it was recommended that Samoa repeal all legal provisions that criminalize sexual activity between consenting adults,¹⁶ a recommendation that Samoa agreed to examine,¹⁷ but ultimately, rejected.¹⁸ Samoa defended its rejection of the recommendations by asserting that no cases regarding sexual orientation or gender identity were pending before the courts, and even if such a case were to arise, the courts would rule them out as discriminatory.¹⁹ Samoa also stated that decriminalizing sodomy was “not possible at this time because of cultural sensitivities and Christian beliefs of the Samoan society.”²⁰ In addition, Samoa pointed to its Samoa Law Reform Commission’s ongoing work on considering domestic legislation.²¹
9. In June 2010, the Samoa Law Reform Commission, in its report to the Prime Minister, recommended “repealing all criminal penalties attached to the criminal offence of sodomy and related acts conducted in private between consenting adult males.” The Commission noted that legalization received support in the majority of public submissions.²²

Recommendations

The Independent State of Samoa should:

10. Urgently repeal laws that criminalise consensual sexual activity between persons of the same sex, in line with recommendations made at Samoa’s previous UPR and by the Samoa Law Reform Commission.

Failure to protect LGBTI people from discrimination

11. At its first UPR in 2011, Samoa received recommendations to “investigate all cases of discrimination based on sexual orientation and gender identity” and to “adopt appropriate legislative measures to include sexual orientation and gender identity in equality and non-discrimination laws”.²³ Samoa agreed to examine these recommendations,²⁴ but ultimately rejected them.²⁵

¹⁵ The Human Rights Committee has affirmed as early as 1994 that the criminalisation of consensual sexual activity between persons of the same sex violates the right to privacy in Article 17 of the ICCPR: 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*).

¹⁶ Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Samoa*, 18th sess, UN Doc A/HRC/18/14 (11 July 2011) [75.38–75.41].

¹⁷ *Ibid* [75].

¹⁸ Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Samoa*, 18th sess, UN Doc A/HRC/18/14/Add.1 (21 September 2011) [75.38–75.41].

¹⁹ *Ibid*.

²⁰ *Ibid*.

²¹ *Ibid*.

²² Samoa Law Reform Commission, *Crimes Ordinance 1961*, Report 01/10 (June 2010) at p. 24 <<http://www.samoalawreform.gov.ws/wp-content/uploads/2014/08/Crimes-Ordinance-1961-Final-Report.pdf>>.

²³ Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Samoa*, 18th sess, UN Doc A/HRC/18/14 (11 July 2011) [75.38], [75.40].

²⁴ *Ibid* [75].

²⁵ Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Samoa*, 18th sess, UN Doc A/HRC/18/14/Add.1 (21 September 2011) [75.38–75.41].

12. The *Labour and Employment Relations Act 2013* prohibits direct and indirect discrimination on the basis of sexual orientation against an employee or applicant for employment in any employment policies, procedure or practices.²⁶ Employment discrimination on the basis of gender identity and intersex status is not prohibited. Moreover, Samoa does not have any laws or policies which prohibit discrimination against LGBTI persons in other areas of public life, such as education, health care or access to goods or services.
13. The *Constitution of the Independent State of Samoa 1960 (Constitution)* also lacks any protections for LGBTI people. The fundamental protections and freedoms of the people of Samoa are enshrined in Part II of the Constitution. Article 15 within Part II specifically deals with equality of persons before the law and equal protection under the law, and sets out a number of non-discrimination grounds.²⁷ However, sexual orientation, gender identity and intersex status are notably absent from this list of non-discrimination grounds.
14. The absence of comprehensive anti-discrimination laws or policies creates an environment that facilitates discrimination against LGBTI persons, including Samoa's traditional *fa'afafine* community (persons assigned a male sex at birth who express gender characteristics of both men and women).
15. Some *fa'afafine* report that their gender identity is accepted and respected by their families and communities.²⁸ However, there is significantly higher resistance to *fa'afafine* affirming or displaying their sexual orientation (e.g. by living with male partners), as this is regarded as contravening Christian religious norms which remain highly influential in Samoa.²⁹ There are also reports of gender non-conforming young people facing physical violence and verbal abuse from family members and other members of the community, including in the education environment.³⁰
16. Lesbian women and female-to-male transgender persons face high levels of stigma and invisibility, with lesbian women often pressured to marry men by their families and other members of the community.³¹
17. The inclusion of sexual orientation, gender identity and intersex status within the Constitution, as well as within anti-discrimination laws and policies, would play a key role in reducing societal discrimination and increasing positive acceptance of LGBTI people in Samoa. It would also ensure that Samoa gives effect to the Joint Statement on Ending Acts

²⁶ *Labour and Employment Relations Act 2013*, section 20(2).

²⁷ Article 15(2) of the Constitution states "... no law and no executive or administrative action of the State shall, either expressly or in its practical application, subject any person or persons to any disability or restriction or confer on any person or persons any privilege or advantage on grounds only of descent, sex, language, religion, political or other opinion, social origin, place of birth, family status, or any of them."

²⁸ Patrick Abboud, "Fa'afafine: The Boys Raised to be Girls", *SBS News*, 26 August 2013 <<http://www.sbs.com.au/news/article/2013/07/16/faafafine-boys-raised-be-girls>>; Catherine Graue, "Criminalisation of homosexual behaviour in Pacific countries undermining HIV effort, advocates say", *ABC News*, 25 July 2014 <<http://www.abc.net.au/news/2014-07-24/an-pac-hiv-transgender/5621290>>.

²⁹ Joseph Erbenraut, "Transgendered in Samoa: Acceptance of Tradition in the South Pacific", Interview with Alex Su'a, *Edge Media Network*, 28 July 2011 <<http://www.edgeboston.com/index.php?ch=news&sc=international&sc3=&id=122752&pg=1>>.

³⁰ In an interview with SBS News, one man who was raised as *fa'afafine* in Samoa states that he experienced "a lot of physical violence, a lot of pulling my pants down, tying me up, beating me up in front of everybody" from his brothers and other boys in the community: Patrick Abboud, "Fa'afafine: The Boys Raised to be Girls", *SBS News*, 26 August 2013 <<http://www.sbs.com.au/news/article/2013/07/16/faafafine-boys-raised-be-girls>>.

³¹ ILGA World Conference 2012, 'Ever Heard of LGBT Issues from Samoa?', Interview with Ken Moala <<http://ilga2012.org/ever-heard-of-lgbt-issues-from-samoa/>>; Joseph Erbenraut, "Transgendered in Samoa: Acceptance of Tradition in the South Pacific", Interview with Alex Su'a, *Edge Media Network*, 28 July 2011 <<http://www.edgeboston.com/index.php?ch=news&sc=international&sc3=&id=122752&pg=1>>.

of Violence and Related Human Rights Violations Based on Sexual Orientation and Gender Identity that it signed in 2011.³²

Recommendations

The Independent State of Samoa should:

18. Enact comprehensive anti-discrimination legislation that prohibits discrimination on the grounds of sexual orientation, gender identity and intersex status in all areas of public life, including employment, health, education and access to goods and services;
19. Amend its constitution to include sexual orientation, gender identity and intersex status as prohibited grounds of discrimination in its Constitution;
20. Take positive steps to counter stigma, stereotypes and prejudice against LGBTI people, including through public education initiatives.

Lack of legal recognition of same-sex couples

21. Marriage between same-sex couples is not permitted in Samoa and same-sex couples are not provided with any legal rights through other forms of relationship recognition, such as civil unions or registered partnerships.³³
22. Moreover, Samoan Prime Minister declared in August 2012 that, "As long as I am here; gay marriage will never be a part of Samoan culture and society. I hope that whoever replaces me will hold to that as well."³⁴ The Prime Minister repeated his opposition to marriage equality in March 2013.³⁵
23. Despite the decision of the Human Rights Committee in *Joslin v New Zealand*,³⁶ there is growing support within the international community that international human rights law can, and should be, interpreted to include a right for same-sex couples to marry.³⁷

Recommendations

The Independent State of Samoa should:

24. Extend the same legal rights to same-sex couples as to opposite-sex married couples.

³² 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).

³³ The *Marriage Ordinance 1961* uses gender-specific language. For example, Section 9, which sets out the minimum age of marriage, states, "A marriage officer shall not solemnise or record any marriage unless the **husband** is at least 18 years of age and the **wife** is at least 16 years of age..." <http://www.paclii.org/ws/legis/consol_act/mo1961138/>

³⁴ Samoa Observer, 31 August 2012 <<http://samoobserver.ws/editorial/671-as-long-as-i-am-here-gay-marriage-will-never-be-a-part-of-samoan-culture-and-society-i-hope-that-whoever-replaces-me-will-hold-to-that-as-well--pm-tuilaepa-sailele-malielegaoi>>.

³⁵ Prime Minister Tuilaepa Sa'ilele Malielegoai stated in March 2013 that, "My view as the leader of Samoa on this gay marriage issue is simple: There is no way, none whatsoever, that this issue will ever be considered in Samoa." Samoa Observer, "PM firm on rejection of same-sex marriage", 31 March 2013 <<http://www.samoobserver.ws/samoans-abroad/4174-pm-firm-on-rejection-of-same-sex-marriage>>.

³⁶ 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*').

³⁷ Paula Gerber, Kristine Tay and Adivia Sifris, *Marriage: A Human Right*, Sydney Law Review (Vol. 36:643).

Ratification of key international human rights treaties

- 24.1 Samoa has ratified some of the significant human rights treaties which form the foundation of international human rights law, including the International Covenant on Civil and Political Rights (**ICCPR**), the Convention on the Elimination of All Forms of Discrimination Against Women (**CEDAW**), and the Convention on the Rights of the Child (**CRC**).³⁸ The non-discrimination provisions within these treaties have been interpreted by the relevant treaty bodies as obliging states-parties to prevent discrimination against persons on the grounds of sexual orientation or gender identity.³⁹
25. However, Samoa has not ratified the International Covenant on Economic, Social and Cultural Rights (**ICESCR**). The ICESCR is a critical part of the international legal framework for the protection of human rights. The ratification of this Covenant would assist in strengthening Samoa's obligations under international law, particularly the anti-discrimination provisions, with respect to the protection of human rights of LGBTI persons. The Committee on Economic, Social and Cultural Rights has specifically recognised that sexual orientation and gender identity are prohibited grounds of discrimination under the ICESCR.⁴⁰
26. At its previous Universal Periodic Review, it was recommended that Samoa accede to the ICESCR.⁴¹ Samoa supported this recommendation⁴² and indicated that it accepted the recommendation to take further steps to promote the protection of human rights, and it will continue its assessment of the implications of membership to make sure it is able to deliver on the prescribed obligations.⁴³ However, it does not appear that Samoa has made progress toward achieving this.

Recommendations

The Independent State of Samoa should:

27. Ratify the International Covenant on Economic, Social and Cultural Rights and other key international human rights treaties.

³⁸ Status of Ratification – Interactive Dashboard <<http://indicators.ohchr.org/>>.

³⁹ While the ICCPR also does not expressly refer to sexual orientation, the **Human Rights Committee** has held that the treaty includes an obligation to prevent discrimination on the grounds of sexual orientation: 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*'). 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: United Nations 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]. The **Committee on the Rights of the Child** has stated that sexual orientation and gender identity are included within the non-discrimination grounds in Article 2: United Nations Committee on the Rights of the Child, *General Recommendation No. 4 on adolescent health and development in the context of the Convention on the Rights of the Child*, UN Doc CRC/GC/2003/4 (1 July 2003) [6]; United Nations Committee on the Rights of the Child, *General Recommendation No. 15 on the right of the child to the enjoyment of the highest attainable standard of health* (Art. 24), UN Doc CRC/C/GC/15 (17 April 2013) [8].

⁴⁰ Committee on Economic, Social and Cultural Rights, *General Comment No. 20, Non-Discrimination in Economic, Social and Cultural Rights* (Art. 2 para. 2), 42nd sess, Geneva, 4-22 May 2009, UN Doc E/C.12/GC/20 (10 June 2009) 10 [32].

⁴¹ Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Samoa*, 18th sess, UN Doc A/HRC/18/14 (11 July 2011) [75.19].

⁴² Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Samoa*, 18th sess, UN Doc A/HRC/18/14/Add.1 (21 September 2011) [75.19].

⁴³ *Ibid.*