

Shadow Report to the UN Human Rights Committee regarding the Republic of Korea's protection of the rights of LGBTI Persons

(Adoption of List of Issues)

**Compiled by the Kaleidoscope Human Rights Foundation with
the assistance of DLA Piper International LLP**

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1. EXECUTIVE SUMMARY

- 1.1 Kaleidoscope Australia Human Rights Foundation is an NGO that works with local activists to protect and promote the rights of Lesbian, Gay, Bisexual, Transgendered and Intersex (**LGBTI**) persons in the Asia Pacific region. Kaleidoscope has prepared this report, with the assistance of DLA Piper and with input from Rainbow Action, a coalition of 20 LGBT organisations in the Republic of Korea, to inform the UN Human Rights Committee (**Committee**) of areas of concern with respect to the Republic of Korea's obligations under the International Covenant on Civil and Political Rights (**ICCPR**) to respect the human rights of LGBTI persons.
- 1.2 In recent years there has been some social traction in the Republic of Korea (**Korea**) towards the recognition of the rights of sexual and gender minorities. However, there has been a lack of government support or action to implement these rights. Consequently there is very little legal recognition and protection of the rights of LGBTI persons throughout Korea. Considerable work is required in order for Korea to achieve compliance with the ICCPR in respect of the rights of LGBTI persons. The following matters are of particular concern:
- 1.2.1 The absence of any anti-discrimination laws to protect LGBTI persons, resulting in a failure to protect against widespread discrimination in a range of areas such as employment and health care;
 - 1.2.2 The failure of the State to combat social exclusion, stigma and prejudice directed towards LGBTI persons, by failing to sanction hate speech in the media or to implement campaigns or strategies to raise awareness of LGBTI persons and issues;
 - 1.2.3 The failure to provide an accessible and acceptable process for individuals to legally change their gender without discrimination or violation of their human rights;
 - 1.2.4 An inadequate understanding of, and lack of healthcare systems to combat, HIV and other health related issues for the LGBTI community;
 - 1.2.5 The lack of protection for same-sex couples in regards to domestic violence, and lack of equal protection for LGBTI persons in regards to sexual assault;
 - 1.2.6 The prohibition of homosexual acts in the military under Article 92-6 of the *Military Criminal Act*; and
 - 1.2.7 The failure of Korea to recognise same-sex relationships.
- 1.3 In Korea there are local NGOs that support LGBTI persons, organise events and advocate for equal rights. However, these groups face opposition and hostility and their political visibility remains minimal.¹ Negative comments made against LGBTI communities by public officials and the media perpetuate stigma and negative

¹ Y D Bong, 'The Gay Rights Movement in Democratizing Korea', *Korean Studies*, Vol 32, 2008, p 87.

stereotypes.² In addition the government of Korea has shown a general reluctance to engage with the issue of LGBTI rights or to afford such persons rights and recognition under the law.³ The Government continues to deny recognition of same-sex marriages.

- 1.4 These issues raise concerns with respect to the rights in Articles 2, 6, 9, 17, 23 and 26 of the ICCPR which are significant for the situation of LGBTI persons in Korea.

Recommendations for List of Issues

- 1.5 There are still many areas of law, regulation and policy where a considerable amount of work is required. Accordingly we recommend the Committee include in its list of issues questions as to whether Korea intends to:
- 1.5.1 Enact anti-discrimination legislation to protect LGBTI persons and clarify that sexual orientation and gender identity are prohibited grounds for discrimination under Article 11 of the Constitution (Articles 2 and 26);
 - 1.5.2 Repeal Article 92-6 of the *Military Criminal Act* to remove discrimination against same-sex attracted men in the military (Articles 9, 17 and 26);
 - 1.5.3 Ensure individuals can obtain legal recognition of their gender without discrimination or violation of their human rights (Articles 9, 17, 23 and 26);
 - 1.5.4 Remove stereotypes concerning HIV and the LGBTI community through public awareness raising campaigns and education (Articles 9, 17 and 26);
 - 1.5.5 Provide remedies for LGBTI persons where their human rights are violated (Article 2(3));
 - 1.5.6 Amend laws to ensure that the LGBTI community are equally protected against domestic violence and rape (Articles 6, 9 and 26);
 - 1.5.7 Introduce legislative measures that protect the right to privacy for LGBTI persons (Article 17); and
 - 1.5.8 Legislate for marriage equality to ensure that same-sex couples are able to enjoy the same legal protections and benefits as those granted to married heterosexual couples (Articles 2 and 23).

2. LEGAL AND SOCIAL CONTEXT IN KOREA

- 2.1 Korea's efforts in regards to LGBTI rights must be viewed in the context of the quarter of a century of military authoritarianism which concluded in the late 1980s. Throughout this time political conditions were hostile and oppressive to all minorities in society, including sexual and gender minorities.⁴ In Korean society, the traditional heterosexual concept of the family is not just an emotional and physical unit but also a

² S Long, 'Letter: Exclusion Undermines Landmark Bill', Human Rights Watch, 6 November, 2007.

³ United States, Department of State, *2013 Country Reports on Human Rights Practices - Republic of Korea*, 27 February 2014.

⁴ Y D Bong, 'The Gay Rights Movement in Democratizing Korea', *Korean Studies*, Vol 32, 2008, p 88-89.

prototype of social structure and life.⁵ Homosexuality is not prohibited in Korea but evidence does suggest that the LGBTI community continue to suffer a significant degree of stigma, abuse, harassment and discrimination. Marriage of same-sex couples remains illegal.

- 2.2 At the international level Korea's actions appear more progressive. Korea has signed the vast majority of UN human rights treaties.⁶ It delivered a statement to the United Nations Human Rights Council regarding the human right violations on the basis of sexual orientation and called for the UN to give these issues the appropriate attention. Korea has been commended for showing "*leadership by condemning discrimination on the basis of sexual orientation and gender identity...*".⁷ Additionally it has been noted by non-governmental groups that Korea's policies on LGBTI issues have been relatively progressive.⁸⁹

3. POSITIVE STEPS

- 3.1 There have been a few important initiatives aimed at removing discrimination against LGBTI persons. In 2004, Attached table no.1 of Article 7 of the Enforcement Ordinance of the Juvenile Protection Act was revised. Prior to the revision homosexual behaviour was listed as "*socially unacceptable*" along with intercourse with animals, orgies and incest.¹⁰ This was the basis of many decisions by the Committee for Ethics of Information and Communication that censored content favourable to homosexuals or that explicitly mentioned them. This listing has since been removed.
- 3.2 In 2006, the Supreme Court of Korea held that individuals should be able to obtain legal recognition of their preferred gender. In two decisions the Supreme Court of Korea found that it was not just biological factors that should be taken into account when determining someone's gender. The court held that psychological factors as well as well as the public's evaluation and attitude all contributed towards the determination of a person's gender.¹¹ The Court held that transgender persons should be entitled to have their gender corrected on the national register and that under Article 120 it was reasonable to allow a transgender person to change the Family Register to reflect his or her changed gender.
- 3.3 The Government has also taken some steps to increase awareness and understanding throughout the community. For example, in a sexual education manual provided to junior high school teachers, homosexuality is referred to as another human lifestyle and expression of affection.¹² The Queer Cultural Festival has become an annual

⁵ Y Kim, S Hahn, 'Homosexuality in ancient and modern Korea', *Culture, Health and Sexuality*, Jan-Feb, No 8(1); 59-60, 2006, p 60.

⁶ http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx

⁷ Ibid.

⁸ 'South Korea; LGBTQ Activists Ramp Up Efforts Under New Right Wing Government', *International Gay and Lesbian Human Rights Commission*, Published January 2008, p 1.

⁹ 'South Korea: Anti-Discrimination Bill Excludes Many', *Human Rights Watch*, 7 November 2007.

¹⁰ Y D Bong, 'The Gay Rights Movement in Democratizing Korea', *Korean Studies*, Vol 32, 2008, p 92.

¹¹ International Commission of Jurists, 'Sexual Orientation, Gender Identity and Justice: A comparative Law Casebook', 2011, p 181, <http://www.icj.org/sexual-orientation-gender-identity-and-justice-a-comparative-law-casebook/>; In re Change of Name and Correction of Family Register, Supreme Court of South Korea (22 June 2006) 2004Su42", Black, E. Ann, and Gary F. Bell, eds. Law and Legal Institutions of Asia: Traditions

¹² S McDonald, 'Discrimination lingers for queer community in South Korea', *SBS*, 19 March 2014.

event in Korea since 2000, and aims to promote self-pride among sexual minorities and to encourage a positive understanding among the general population.¹³

4. RIGHT TO LEGAL PROTECTION, EQUALITY AND NON-DISCRIMINATION (ARTICLES 2 and 26).

Relevant Articles of the ICCPR

- 4.1 Article 2 of the ICCPR obligates State Parties to legislate where necessary to give effect to the rights recognised in the ICCPR. Article 2 states that "(1) Each State Party to the present Covenant undertakes to respect and ensure that all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant without discrimination of any kind...".
- 4.2 Article 26 provides that "All persons are equal before the law and are entitled without *any discrimination to the equal protection of the law*". It is an autonomous equality principle that is not dependent upon any other right in the ICCPR being infringed. This has the effect of widening the scope of the non-discrimination principle beyond the ICCPR.
- 4.3 In the 1994 case of *Toonen v Australia*,¹⁴ the Human Rights Committee found that the provisions of Article 2 and Article 26 should be understood to include sexual orientation as a status protected against discrimination.
- 4.4 Korea has not enacted legislation that adequately protects against discrimination on the basis of sexual orientation or gender identity. It has also failed to repeal laws which discriminate on the basis of gender identity and sexual orientation, both in law and in effect.

Lack of anti-discrimination laws

- 4.5 Korea has not yet enacted enforceable anti-discrimination laws to protect against discrimination on the basis of sexual orientation or gender identity.
- 4.6 While Article 11 of the Constitution protects against discrimination on the basis of sex, the courts have thus far declined to interpret laws regarding sexual orientation as being about 'sex'.¹⁵ Kim Hee-Jung, Current Minister of Gender Equality and Family has indicated that the Constitution and the National Human Rights Commission Act prohibit any discrimination by sex or sexual orientation. It remains to be seen whether the courts follow this interpretation.
- 4.7 The *National Human Rights Commission of the Republic of Korea Act 2001* does allow the Commission to investigate complaints of discrimination on the basis of sexual orientation. However a finding of discrimination does not lead to an

¹³ Y D Bong, 'The Gay Rights Movement in Democratizing Korea', *Korean Studies*, Vol 32, 2008, p 91.

¹⁴ Nicholas Toonen v Australia, U.N Doc, CCPR/C/50/D/488/1992, (1994).

¹⁵ *2008 Hun-Ga21 (Military Criminal Act Article 92)*(March 31, 2011)) Canada: Immigration and Refugee Board of Canada, Korea, Republic of: Treatment of homosexuals including legislation, availability of State protection and support services, (2009), <http://www.refworld.org/cgi-bin/tehis/vtx/rwmain?page=search&docid=4b7cee8137&skip=0&query=LGBT&coi=KOR>

enforceable remedy, the Commission having powers of inquiry and recommendation only.¹⁶

- 4.8 During the first half of 2014 the National Human Rights Commission reported four instances of alleged discrimination on the basis of sexual orientation.¹⁷ It is likely the figures are much higher, with stigma and fear of harassment preventing victims from reporting discrimination.¹⁸
- 4.9 Discrimination exists in both the private and public sphere. In 2013, it was reported that the Mapo District Council in Central Seoul refused to permit the Map Rainbow Coalition to hang two banners that raised awareness about LGBTI issues. The office decided not to hang the banners after numerous requests from parents and church groups, among others, not to do so.¹⁹ Reports by a trans woman indicate that transgender persons experience physical harassment and assault, including rape. Anecdotal evidence suggests transgender persons are not comfortable in going to the police to report the assaults.²⁰

Attempts to change discrimination laws to include LGBTI rights

- 4.10 In 2007, Korea attempted to draft anti-discrimination legislation that would have prohibited discrimination on the basis of, among many other things, sexual orientation. However the Ministry of Justice decided to exclude this category from the bill after the inclusion of sexual orientation came under attack.²¹
- 4.11 A petition was sent to the Ministry of Justice as well as other branches of government alleging that if it were to become law "homosexuals will seduce everyone, including adolescents. Victims will be forced to become homosexuals; and sexual harassment by homosexuals will increase".²²
- 4.12 Additionally one academic professor publically stated that "if homosexuality is allowed, the morals of our society will immediately collapse and the society will become a world of animals".²³
- 4.13 We recommend that questions regarding the Government's intentions to enact anti-discrimination legislation that protects LGBTI persons in all areas of life, and particularly in the areas of employment, education, political activities and the provision of goods and services, should be added to the list of issues to be raised with Korea.

Continuing discriminatory laws and policies: homosexuality in the military

¹⁶ United States, Department of State, *2010 Country Reports on Human Rights Practices - Republic of Korea*, 8 April 2011.

¹⁷ United States, Department of State, *2013 Country Reports on Human Rights Practices - Republic of Korea*, 27 February 2014.

¹⁸ S McDonald, 'Discrimination lingers for queer community in South Korea', *SBS*, 19 March 2014.

¹⁹ United States, Department of State, *2013 Country Reports on Human Rights Practices - Republic of Korea*, 27 February 2014.

²⁰ S McDonald, 'Discrimination lingers for queer community in South Korea', *SBS*, 19 March 2014.

²¹ S Long, 'Letter: Exclusion Undermines Landmark Bill', *Human Rights Watch*, 6 November, 2007.

²² *Ibid.*

²³ *Ibid.*

- 4.14 Article 92-6 of Korea's *Military Criminal Act* provides for punishment of consensual same sex sexual conduct between men in the military. Punishment is up to one year imprisonment.²⁴ Military service is mandatory for male citizens of Korea.²⁵
- 4.15 This provision was examined extensively in the case of *2008Hu-Ga-21*.²⁶ In that case a platoon sergeant was indicted under Article 92-6 on the grounds that he had a sexual relationship with another service member.
- 4.16 The National Human Rights Commission submitted a brief to the Constitutional Court in relation to this case which argued that Article 92-6 was unconstitutional because it "violated the rights to sexual self-determination, privacy and the equality of service members".²⁷ The Ministry of Defence argued that the provision was necessary to maintain military cohesion and morale.
- 4.17 In March 2011, the court concluded that the objective of military cohesion and morale was legitimate and that the law was a proportional means of reaching this objective. The court declined to interpret Article 92-6 as being about discrimination based on sex.²⁸ The court held that treating sex between same sex-partners differently from sex between opposite-sex partners did not amount to discrimination on the basis of sex, circumventing the rights outlined in the constitution.²⁹
- 4.18 In relation to Article 37(2) of the Constitution, the court held that the importance of preserving sound living conditions and morale within the armed forces and the public interest of national security outweighed the right to sexual self-determination.
- 4.19 Article 92-6 of the Military Criminal Act clearly discriminates against homosexual men on the basis of sexual orientation. As outlined further below, it also breaches their right to privacy under Articles 17 of the ICCPR.
- 4.20 We recommend that the repeal of Article 92-6 of Korea's Military Criminal Act be added to the list of issues.

Continuing discriminatory laws and policies: Change of legal gender

- 4.21 As noted above, in 2006, transgender persons were afforded the right to be recognised according to their preferred gender. The Supreme Court subsequently drafted guidelines for legal recognition of a change of gender. Under the Established Rules of

²⁴ International Commission of Jurists, 'Sexual Orientation, Gender Identity and Justice: A comparative Law Casebook', 2011, p 123,

http://www.coe.int/t/dg4/lgbt/Source/Sexual%20Orientation,%20Gender%20Identity%20and%20Justice-%20A%20Comparative%20Law%20Casebook_EN.pdf.

²⁵ Canada: Immigration and Refugee Board of Canada, Korea, Republic of: Treatment of homosexuals including legislation, availability of State protection and support services, (2009), <http://www.refworld.org/cgi-bin/texis/vtx/rwmain?page=search&docid=4b7cee8137&skip=0&query=LGBT&coi=KOR> ,

²⁶ Ibid; International Commission of Jurists, Sexual orientation, gender identity, and justice: a comparative law casebook, 2011, p 133

²⁷ Canada: Immigration and Refugee Board of Canada, Korea, Republic of: Treatment of homosexuals including legislation, availability of State protection and support services, (2009), <http://www.refworld.org/cgi-bin/texis/vtx/rwmain?page=search&docid=4b7cee8137&skip=0&query=LGBT&coi=KOR>

²⁸ Ibid; International Commission of Jurists, Sexual orientation, gender identity, and justice: a comparative law casebook, 2011, p 134

²⁹ Ibid.

the Supreme Court, Korean courts may only grant a legal change of gender if the applicant:

- 4.21.1 Is an unmarried Korean citizen over 19 years of age with no minor children;
 - 4.21.2 Has suffered from continued gender dysphoria and had the sense of belongingness to the opposite gender due to being transsexual;
 - 4.21.3 After having undergone psychiatric treatment or hormone therapy, still wished to receive surgical treatment and alter his/her physical appearance, including external genitalia through sexual reassignment surgery;
 - 4.21.4 Has become sterile as a result of sexual reassignment surgery with zero, or extremely remote, possibility that they will return to their former gender;
 - 4.21.5 Does not show indications that he or she filed the application for the purpose of committing a crime or evading the law.
 - 4.21.6 Has parental consent.
- 4.22 The requirements are incredibly complex, discriminatory and restrictive. The requirement that a person be unmarried without children clearly infringes upon an individual's right to family and privacy (Articles 23 and 17); while the requirement for surgery breaches the right to security and liberty (Article 9), forcing an individual to undergo surgery in order to obtain legal recognition.
- 4.23 Requiring an individual to meet the above requirements therefore amounts to discrimination on the basis of gender identity under Article 2(1), restricting a person's ability to enjoy their rights to family, privacy, liberty and security. In addition the inability for a transgender person to obtain legal recognition before the law on an equal basis as other's amounts to a violation of Article 26.
- 4.24 Individuals who cannot obtain a legal change of gender are, by extension, unable to change their gender associated with their national ID number and card. Each person's national ID number reveals both their date of birth and their gender. The ID number is an all-purpose, lifetime number. It prevents transgender persons, who do not wish to reveal their gender identity, from using their legal documents in most areas of society including the labour market, medical institutions and financial institutions.³⁰ Not only does this amount to discrimination, it is a violation of a person's right to privacy under Article 17.
- 4.25 It is recommended the legal recognition of a person's gender, and the continued harassment of transgender persons, be included on the list of issues.

Stigma, education and awareness campaigns

- 4.26 In addition to enacting legislation to protect the rights of LGBTI persons in Korea, the Government has an obligation to take positive steps, including awareness raising

³⁰ T Youngjung, H Y Choo, *Becoming a Female-to-Male transgender (FTM) in South Korea*, ed 'Embodied Resistance: Challenging the Norms, breaking the Rules' (2011).

campaigns, education and training, to ensure the positive enjoyment of rights by LGBTI persons.

- 4.27 Despite some steps being taken, stigma and discrimination continues and has been supported by some politicians. Former President Lee, who was in office until 2013, is on the record saying that homosexuality is abnormal and that the only *"normal union is between a man and a woman"*.³¹ This view point, while not the view of the current administration in government, is harmful to building acceptance of the LGBTI community.
- 4.28 The realities of stigma and harassment are evident in the treatment of a well-known Korean television actor who publically declared his homosexuality, The public were quick to condemn him and he was immediately dismissed from both radio and television programs with no legal recourse. In an interview in 2013, the actor, Hong Suk-Chon, said he regretted coming out to the public.³² This situation is not unique with another actor committing suicide after he received a barrage of messages denouncing his sexual orientation and lost his television contract.³³ This not only raises issues under Article 2, but also under Article 6 (right to life), article 7 (freedom from inhuman and degrading treatment) and others.
- 4.29 It has been acknowledged that gay and lesbian networks play an important role in providing young people with social and psychological support. These organisations also play an important role in alleviating hopelessness, isolation and depression and also provide unique opportunities for friendship and socialisation.³⁴
- 4.30 The visibility of these groups remains minimal in Korean society, with most groups choosing a low profile. This lack of political visibility is highlighted by the lack of official data or reliable statistics that actually measure the population of the LGBTI community.³⁵ Accordingly, the Government should provide funding and support to these NGO groups to ensure that the rights of LGBTI persons become more accepted throughout the community.
- 4.31 It has been reported that in modern Korean society, *"homosexuality is often described as a disease, a mental disorder and a sin."*³⁶ Additionally the dominant perception throughout Korea is the view that homosexuality is *"psychologically deviant, sociologically detrimental and morally corrupt."*³⁷ These statements emphasise the need for the government to actively engage in awareness and education campaigns.
- 4.32 Accordingly we recommend that combatting the social stigmatisation of LGBTI persons, be added to the list of issues to be raised with Korea in its review.

³¹ 'South Korea; LGBTQ Activists Ramp Up Efforts Under New Right Wing Government', *International Gay and Lesbian Human Rights Commission*, Published January 2008, p 1.

³² 'South Korean easing homophobic views on news of gay 'wedding'', *news.com.au*, 2 June 2013.

³³ P Si-Soo, 'Gay Actor Found Dead in Apparent Suicide', *The Korea Times*, 20 August 2010.

³⁴ Y Kim, S Hahn, 'Homosexuality in ancient and modern Korea', *Culture, Health and Sexuality*, Jan-Feb, No 8(1); 59-60, 2006, p 64.

³⁵ Y D Bong, 'The Gay Rights Movement in Democratizing Korea', *Korean Studies*, Vol 32, 2008, p 87.

³⁶ Y Kim, S Hahn, 'Homosexuality in ancient and modern Korea', *Culture, Health and Sexuality*, Jan-Feb, No 8(1); 59-60, 2006, p 63.

³⁷ Ibid.

5. RIGHT TO MARRY (ARTICLE 23)

- 5.1 Article 23 mandates the right to marry. The wording of this provision neither requires nor prohibits same-sex marriage: "(a) the family is the natural and fundamental unit of society and is entitled to protection by society and the states; (b) the right of men and women of marriageable age to marry and to found a family shall be recognised".
- 5.2 In *Joslin v New Zealand*,³⁸ the Committee found that Article 23 does not apply to same-sex marriage. However that decision is now more than 12 years old and the State Party involved in that case, New Zealand, has now legislated for marriage equality. The ICCPR is a living instrument which should be interpreted in light of present circumstances which include a significant trend towards legislation in favour of same-sex marriage.

Relevant Republic of Korea Law

- 5.3 While homosexuality is not illegal in Korea, same-sex unions and marriages are not recognised.
- 5.4 In 2013, a prominent film director and producer held a wedding ceremony to raise awareness of LGBTI rights in Korea. The couple stated an intention to move forward with a constitutional challenge under Article 11 to have the marriage recognised legally. The ceremony was hailed as an important step forward in recognising same-sex relationships in Korea and to community understanding and acceptance.³⁹ During the wedding a Christian fundamentalist forced his way on stage in an attempt to douse the couple with a mixture of fermented soybean paste and human excrement.⁴⁰
- 5.5 The failure of Korea to legislate for marriage equality unfairly and unreasonably discriminates on the basis of sexual orientation and constitutes a breach of Articles 23 and 26 of the ICCPR.

Relevance of recognition of same-sex relationships

- 5.6 Under Korean law married couples are afforded certain rights that are not available to unmarried couples, including same-sex couples. The failure of Korea to comply with Article 23 of the ICCPR has therefore resulted in the following discrimination against LGBTI persons:
- 5.6.1 Unmarried and same-sex couples are not afforded the same visa and immigration rights as married couples;⁴¹ children from unmarried couples have difficulty registering for school,⁴² inheritance and estate planning laws do not recognise de facto relationships.⁴³
- 5.6.2 Same-sex couples face significant obstacles in proving their relationship. A marriage certificate allows married partners to easily prove their legal rights if challenged, for example in emergency situations;

³⁸ *Ms Juliet Joslin et al. v New Zealand*, Communication No. 902/1999, UN Doc. A/57/40 2002.

³⁹ O Kyu-Wook, 'First gay marriage stirs controversy', *The Korea Herald*, 9 September 2013.

⁴⁰ S Borowiec, 'South Korea's LGBT Community Is Fighting for Equal Rights', *Time*, 11 February 2014.

⁴¹ <http://www.justlanded.com/english/South-Korea/South-Korea-Guide/Visas-Permits/Permanent-residence-in-South-Korea>

⁴² <http://www.nytimes.com/1996/09/11/world/korea-s-romeos-and-juliets-cursed-by-their-name.html>

⁴³ Mee-Hyon Lee *South Korea International Estate Planning*

- 5.6.3 Denying marriage equality fosters prejudice, discrimination and unequal treatment against LGBTI people in the wider community. By denying same-sex marriage a negative message is sent and social stereotypes are reinforced. The ban on same sex marriage sends a message that LGBTI persons are less capable of love and commitment than heterosexual people.
- 5.7 Young people in Korea face enormous pressure to marry, both from their family and society. This often adds to the difficulties that LGBTI people face in freely expressing their sexual and gender identities. Often this means they hide or suppress their sexual orientation which also impedes on the creation of a strong gay and lesbian movement through Korea.⁴⁴
- 5.8 We recommend that marriage equality be added to the list of issues to be raised with Korea in its review.

6. FREEDOM FROM UNLAWFUL INTERFERENCE WITH PRIVACY (ARTICLE 17)

- 6.1 Discrimination on the basis of sexual orientation and gender identity can also lead to a breach of Article 17 of the ICCPR which promotes 'freedom from arbitrary interference with privacy, home, family and correspondence and unlawful attacks on honour and reputation'. Privacy encapsulates a wide range of concepts and issues wherein a person should be able to shape their life according to their own desires. It is often interpreted as including personal autonomy over one's life and includes the ability to choose one's name, one's gender identity, to enter into consensual relationships with others, to be free from forced medical treatment and to have medical records treated confidentially.⁴⁵
- 6.2 Article 17 of the Korean Constitution mirrors the ICCPR and outlines that the privacy of no citizen shall be infringed.⁴⁶ Despite this, a number of laws and policies continue to negatively impact upon the privacy of LGBTI persons.
- 6.3 Right to privacy in the military
 - 6.3.1 As noted above, consensual same-sex conduct is banned the Korean military. However, men who are same-sex attracted are still required to undertake the compulsory two years of military service. The *Forces Management Directive by the ministry of National Defense* prohibits discrimination on the basis of sexual orientation. The same directive also requires a supervisor to designate a person who is same-sex attracted as a 'soldier who needs special attention' which can lead to discriminatory conduct towards the soldier.
 - 6.3.2 Senior officers may notify parents of the sexual orientation of servicemen without their consent.⁴⁷ They may also be "advised" to be taken to a

⁴⁴ J Cho, 'The Wedding Banquet Revisited: "Contract Marriages" between Korean Gays and Lesbians', *Anthropological Quarterly*, vol 82, No 2 (Spring 2009) p 406.

⁴⁵ Sarah Joseph, Melissa Castan *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* 3rd Ed, 2013 at 533-561.

⁴⁶ Constitution of the Republic of Korea Art 17.

⁴⁷ Y D Bong, 'The Gay Rights Movement in Democratizing Korea', *Korean Studies*, Vol 32, 2008, p 90

military hospital to undergo intensive mental healthcare and HIV tests.⁴⁸ Under the *Homosexual Management Guidelines by the Ministry of National Defense*, homosexual soldiers are encouraged to 'convert' to heterosexuality.⁴⁹

6.3.3 The Human Rights Commission of Korea has found that military law criminalising same-sex conduct is a violation of a soldiers' right to equality and to privacy. However, the Constitutional Court reached the opposite conclusion shortly after this recommendation.⁵⁰

6.3.4 As was established in the case of *Toonen v Australia*, individuals have the rights to form sexual relationships with others without interference, or threat of interference from the state.⁵¹ As a result, the infringement on privacy stems not only from the actions of the military in informing parents of sexual orientation but in the general prohibition on same-sex consensual sexual conduct itself.

6.4 Difficulties in obtaining legal recognition of gender.

6.4.1 As noted above, it is prohibitively difficult for transgender persons to legally change their gender. The requirements in place are onerous, invasive and violate a number of human rights. The Committee has previously noted that a person's gender is a fundamental part of their identity and failure to recognise a person's gender is a breach of their right to privacy. This failure can be de jure or de facto. In the case of Korea, the requirements, such as forcing a person to divorce, or to undergo surgery, in many cases act as a de facto restriction on changing one's legal gender and is therefore a breach of privacy.

6.4.2 Given the difficulties faced in legally changing gender, the continued presence of gender on an ID number, thus revealing a person's gender identity when presenting documents is an additional breach of privacy.⁵²

6.5 Accordingly we recommend that the right to privacy for LGBTI persons be added to the list of issues raised with Korea in its review.

7. RIGHT TO LIBERTY AND SECURITY OF PERSON (ARTICLE 9(1)) and RIGHT TO LIFE (ARTICLE 6)

7.1 Article 6 of the ICCPR recognises an individual's inherent right to life and requires it to be protected by law. Article 19 recognises the right to liberty and security of the person. Security of the person concerns freedom from injury to the body and the mind, or bodily and mental integrity. State parties have an obligation to take

⁴⁸ Ibid.

⁴⁹ <http://www.koreaherald.com/view.php?ud=20111216000668>

⁵⁰ International Commission of Jurists, 'Sexual Orientation, Gender Identity and Justice: A comparative Law Casebook', 2011, p 181,

http://www.coe.int/t/dg4/lgbt/Source/Sexual%20Orientation,%20Gender%20Identity%20and%20Justice-%20A%20Comparative%20Law%20Casebook_EN.pdf

⁵¹ Nicholas Toonen v Australia, U.N Doc, CCPR/C/50/D/488/1992, (1994).

⁵² *Consideration of Reports Submitted by State 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 at p3.

appropriate measures to protect individuals from foreseeable threats to life or bodily integrity, including enacting and enforcing criminal laws in response to past injury.⁵³

- 7.2 There are many aspects of Korean law which fail to effectively protect the right to liberty and the security of person, or the right to life, in the LGBTI community. In particular, LGBTI persons are not afforded the same protection in regards to domestic violence and sexual assault.
- 7.3 Laws around domestic violence in Korea do not protect LGBTI persons on an equal basis as other persons. The *Act on Special Cases Concerning the Punishment, etc. of Crimes of Domestic Violence* and *Act on the Prevention of Domestic Violence and Protection etc. of Victims* define domestic violence to include activities among family members. A family member is defined to include married persons and persons in de facto relationships. The courts have failed to recognise same-sex couples as being in a de-facto relationship under family law jurisprudence. Same-sex couples, and many relationships involving transgender persons, are therefore not covered by domestic violence protections, endangering their health, security and potentially their life.
- 7.4 In regards to sexual assault, the current definition of rape fails to afford equal protection to victim/survivors of assault by a person of the same-sex. The Criminal Law Code defines rape as penile/vaginal as penile-vaginal rape only. A second, lesser crime of 'imitative rape' under Article 297-2 refers to a person inserting a sexual organ into another person's body part, such as a mouth or anus, or by inserting fingers into a person's genitals or anus. Imitative rape attracts a lesser punishment. As such, individuals who are assaulted by a person of the same sex are not afforded the same access to justice as victim/survivors of penile/vaginal assault.
- 7.5 The Criminal Law Code also fails to adequately define 'vagina'. The lack of a comprehensive definition has led to uncertainty as to whether a person with a constructed vagina would be protected under the definition of rape, potentially discriminating against victim/survivors of sexual assault who are trans women.
- 7.6 We recommend that a question regarding amending the law to ensure that LGBTI persons are afforded equal protection against domestic violence and sexual assault.

Right to health care and treatment for HIV

- 7.7 There are an estimated 13,000 people in Korea living with HIV. That number has been increasing over the past few years, having doubled since 2001.⁵⁴ LGBTI persons make up a large proportion of persons living with HIV.⁵⁵ Stigma around HIV/AIDS remains incredibly high. There is a view in Korea that HIV is a problem of "others".⁵⁶ It is believed that it can be controlled by testing all those who try to enter Korea and barring those who live with HIV from coming or staying.⁵⁷

⁵³ Concluding observations El Salvador 2003, para. 16.

⁵⁴ J Amon, 'Blaming Foreigners', *Human Rights Watch*, March 12 2009.

⁵⁵ Byong-Hee Cho 'HIV/AIDS Policy in South Korea *International Studies in Education* 9 (2008) http://www.aidsdatahub.org/sites/default/files/documents/HIVAIDS_Policy_in_South_Korea.pdf

⁵⁶ Ibid.

⁵⁷ Ibid.

- 7.8 It is acknowledged that Korea has made some significant steps in terms of condom promotion, the testing of HIV and information and awareness campaigns but prejudice and stigma still remain.⁵⁸
- 7.9 In 2008, a Chinese citizen of Korean descent was visiting his mother in Korea and was tested for HIV and found to be positive. He was then detained and ordered to be deported. A court held that the public health goals must be balanced against the rights to privacy, and that detection and treatment rather than deportation were the most effective means of curbing the spread of HIV.⁵⁹ This was a positive step in terms of awareness of HIV. Travel restrictions on people with HIV were removed in 2012.
- 7.10 However discrimination against those with HIV further stigmatises and differentiates the LGBTI community in Korea, making it difficult to access testing and treatment.⁶⁰ Lack of access to treatment not only has implications under the right to non-discrimination, but also to the right to life under Article 6. Further action must be taken by the government to educate the community about HIV and the way in which the disease is spread.
- 7.11 We recommend that discrimination on the basis of sexual orientation or gender identity in health services, particularly in regards to HIV, be added to the list of issues.

8. RIGHT TO EFFECTIVE REMEDIES (ARTICLE 2(3))

Relevant Articles of the ICCPR

- 8.1 Article 2 of the ICCPR obligates parties to legislate where necessary to give effect to the rights recognised in the ICCPR, and to provide an effective legal remedy for any violation of those rights.

Relevant Korean laws and Policies

- 8.2 Korea's failure to enact anti-discrimination legislation that specifically protects LGBTI people from discrimination constitutes a breach of Article 2 of the ICCPR. While the Article 11 of the Korean Constitution guarantees equality before the law on the basis of sex it does not specifically make reference to LGBTI persons. The courts have thus far declined to recognise sexual orientation as a protected attribute, and legislation discriminating against persons on the basis of sexual orientation has been upheld in the courts. As it currently stands there is no clear legal protection from discrimination on the grounds of sexual orientation and gender identity. As a result LGBTI persons can be discriminated against with impunity.
- 8.3 We recommend the Committee add the lack of an adequate remedy for discrimination to the list of issues.

⁵⁸ Ibid.

⁵⁹ Ibid.

⁶⁰ S Korea, 'HIV Patients suffer from stigma', *Aljazeera*, 15 September 2014.

9. COMBINED AND CUMULATIVE EFFECT OF ICCPR VIOLATIONS

- 9.1 The combined and cumulative effects of Korea's failure to comply with the ICCPR in respect to the LGBTI community has led to, and continues to lead to violations not only of Articles 2, 17 and 23, but also of Articles 6, 7 and 9 in that, LGBTI people:
- 9.1.1 Feel ostracised and isolation from the community, contributing to depression or other forms of mental illness;
 - 9.1.2 Are, in some instances, unable to find regular, safe and meaningful employment;
 - 9.1.3 Face discrimination, violations of privacy and harassment in the military, including pressure to 'convert' to heterosexuality.
 - 9.1.4 Are unable to access a range of service or being discriminated against in services such as healthcare;
 - 9.1.5 Are exposed to increased risk of contracting HIV/AIDS and other serious communicable diseases;
 - 9.1.6 Are exposed to discrimination and harassment, especially for transgender people;
 - 9.1.7 Find it difficult, if not impossible, to obtain legal recognition of their gender identity; and
 - 9.1.8 Have no protection from Korean domestic violence and unequal protection under sexual assault provisions.

10. CONCLUSIONS AND RECOMMENDATIONS

- 10.1 Korea is to be commended for the steps it has taken to protect and fulfil the rights of LGBTI persons. However Korea's failure to decide and implement a legislative, regulatory and policy regime to combat harassment, abuse, stigmatism and discrimination against its LGBTI population is a serious human rights concern, and a violation of the ICCPR.
- 10.2 In view of the matters outlined above, we therefore recommend that the following matters be added to the list of issues to be raised with Korea in its review.
- 10.2.1 Enact anti-discrimination legislation to protect LGBTI persons and clarify that sexual orientation and gender identity are prohibited grounds for discrimination under Article 11 of the Constitution (Articles 2 and 26);
 - 10.2.2 Repeal Article 92-6 of the *Military Criminal Act* to remove discrimination against same-sex attracted men in the military (Articles 9, 17 and 26);
 - 10.2.3 Ensure individuals can obtain legal recognition of their gender without discrimination or violation of their human rights (Articles 9, 17, 23 and 26);

- 10.2.4 Remove stereotypes concerning HIV and the LGBTI community through public awareness raising campaigns and education (Articles 9, 17 and 26);
- 10.2.5 Provide remedies for LGBTI persons where their human rights are violated (Article 2(3));
- 10.2.6 Amend laws to ensure that the LGBTI community are equally protected against domestic violence and rape (Articles 6, 9 and 26);
- 10.2.7 Introduce legislative measures that protect the right to privacy for LGBTI persons (Article 17); and
- 10.2.8 Legislate for marriage equality to ensure that same-sex couples are able to enjoy the same legal protections and benefits as those granted to married heterosexual couples (Articles 2 and 23).