

Shadow Report to the UN Human Rights Committee regarding Cambodia's protection of the Rights of LGBTI Persons

(List of Issues Report)

Compiled by the Kaleidoscope Human Rights Foundation with the assistance of DLA
Piper International LLP and Cambodian LGBTI Advocacy Groups

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1. EXECUTIVE SUMMARY

- 1.1 Kaleidoscope Australia Human Rights Foundation (**Kaleidoscope**) 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 global law firm DLA Piper International LLP and members of the Cambodian LGBTI community. This report has been prepared to inform the UN Human Rights Committee of areas where Cambodia is failing to comply with its obligations under the ICCPR to respect the human rights of LGBTI individuals. It includes recommendations of matters that should be added to the list of issues to be raised with Cambodia in its review in March 2015.
- 1.2 While Cambodia should be commended for recent public comments made in support of the advancement of LGBTI rights (see paragraph 3.1 below), practically, there are significant areas of law, regulation and policy where considerable work is required in order for Cambodia to achieve compliance with the ICCPR in respect of the rights of sexual minorities. In particular, Cambodia:
 - 1.1.1 in respect of fulfilling the right to life (Article 6) and the right to security of person (Article 20), has failed to devise, enact and implement anti-hate crime laws to protect LGBTI persons from violent attacks, harassment, abuse and discrimination.
 - 1.1.2 in respect of the right to equality & non-discrimination (Article 26) and the right to legal protection (Article 2), failed to devise, enact and implement anti-discrimination laws to protect LGBTI persons from direct and indirect discrimination in a range of areas including employment, health care and education.
 - 1.1.3 in respect of freedom from inhumane & degrading treatment (Article 7) and freedom from unlawful interference with privacy (Article 17), failed to devise, enact and implement a range of public campaigns and awareness raising to combat negative stereotyping and associated stigmatisation of LGBTI persons.
 - 1.1.4 in respect of the right to marry (Article 23), failed to amend legislation prohibiting same-sex marriage, or at a minimum, same-sex unions, thereby discriminating against same-sex attracted couples with associated consequences, including denial of access to IVF treatment, spousal benefits, community programs, entitlements, as well as contributing to mental illness, isolation and other health problems.
 - 1.1.5 in respect of the right to effective remedies (Article 2), failed to provide devise, enact and implement a comprehensive suite of mechanisms that allow LGBTI persons (as well as other minorities) from seeking redress and recourse when their human rights have been violated.
- 1.3 The failure to properly devise, develop, enact and implement these laws, regulations and policies constitute violations of Articles 2, 6, 7, 14, 17, 23 and 26 of the *International Covenant on Civil and Political Rights (ICCPR)*.
- 1.4 We therefore **recommend** that the following matters be added to the list of issues to be raised with Cambodia in its review in March 2015:
 - 1.1.6 enactment of anti-hate crime legislation to protect LGBTI persons (right to life (Article 6) and the right to security of person (Article 20));
 - 1.1.7 enactment of anti-discrimination legislation to protect LGBTI persons (right to equality & non-discrimination (Article 26) and the right to legal protection (Article 2));

- 1.1.8 development of public campaigns and education to raise awareness of LGBTI rights and issues (freedom from inhumane & degrading treatment (Article 7) and freedom from unlawful interference with privacy (Article 17));
- 1.1.9 take steps to recognise same-sex relationships (right to marry (Article 23)); and
- 1.1.10 provide remedies that LGBTI persons may pursue when their human rights have been violated (right to effective remedies (Article 2)).

2. LEGAL & SOCIAL CONTEXT IN CAMBODIA

Status of the ICCPR under Cambodian Law

- 2.1 Cambodia ratified the ICCPR in 1992, and has been incorporated into domestic law. The legal status of the ICCPR was confirmed by the Constitutional Council on 10 July 2007, when it stated, "*International Covenants that Cambodia has recognised form part of Cambodian law*".¹

Constitution of the Kingdom of Cambodia

- 2.2 Article 31 of the Constitution of the Kingdom of Cambodia (**Constitution**) states that "*Every Khmer Citizen shall be equal before the law, enjoying the same rights and freedoms and fulfilling the same obligations regardless of race, colour, sex, language, religious belief, political tendency, birth origin, social status, wealth or other status*".² The Constitution is silent as to sexual orientation and/or gender identity. Relevantly, Article 71 of the Constitution states that "*The health of the people shall be guaranteed. The State shall pay attention to disease prevention and medical treatment*".³

Summary of the Situation for LGBTI People in Cambodia

- 2.3 Homosexuality is not expressly prohibited under Cambodian law. While Cambodia is classified as a 'neutral' country with respect to its laws and policies on sexual orientation and gender identity, leading Cambodian NGOs, including the Rainbow Community Kampuchea, suggest that LGBTI Cambodians continue to suffer a significant degree of stigma, abuse, harassment and discrimination.⁴ According to the Rainbow Community Kampuchea:

*LGBTI people report being verbally abused, beaten up, and excluded from school activities, family gatherings, and work opportunities. This rejection and exclusion leads to people leaving schools, families and hometowns at a relatively young age, thus eliminating a valuable source of social support: family and relatives. The lack of education and suitable work opportunities, coupled with discriminatory attitudes of family, teachers, local leaders and law enforcers limits options for employment.*⁵

3. POSITIVE STEPS TAKEN BY THE STATE PARTY

- 3.1 The Cambodian Government should be commended for public statements made recently in support of LGBTI rights, namely:

- 3.1.1 In 2004, the late King Norodom Sihanouk said that he was impressed by marriage of same-sex partners in the United States of America, and that if his people wished

¹ Constitutional Council of the Kingdom of Cambodia, Decision No. 092/003/2007, 10 July 2007.

² Constitution of the Kingdom of Cambodia, p 10.

³ Constitution of the Kingdom of Cambodia, p 23.

⁴ Rainbow Community Kampuchea (RoCK) and Ors, (undated), "*Joint Submission to Human Rights Council*", p.2 -

<http://webcache.googleusercontent.com/search?q=cache:oBj5hknZBPKJ:https://updoc.ohchr.org/uprweb/downloadfile.aspx%3Ffilename%3D426%26file%3D%26EnglishTranslation+%26cd=2&hl=en&ct=clnk&gl=au>

⁵ Ibid, p.2

same-sex marriage to be legalized in Cambodia, he would do so. King Sihanouk also stated that he believed that God views homosexuals, as well as transvestites, as equal because "[God loves a] wide range of tastes" and as a "liberal democracy", Cambodia must allow "marriage between man and man ... or between woman and woman".

3.1.2 In 2012, Prime Minister Hun Sen spoke out against LGBTI discrimination in Cambodia, arguing "There are gays and lesbians in every country, so there should be no discrimination against them just because of their destiny".⁶ However, it should be noted that prior to this comment Prime Minister Sen had publicly denounced his daughter for being gay.

3.2 In spite of these public comments, the Cambodian Government has comprehensively failed to devise and implement any meaningful legislative, regulatory and policy regime to tackle the serious human rights concerns of LGBTI persons in Cambodia (outlined in detail below). This inaction amounts to a violation of several provisions in the ICCPR.

4. RIGHT TO LIFE (ARTICLE 6) & RIGHT TO SECURITY OF PERSON (ARTICLE 20)

Relevant Articles of the ICCPR

4.1 Article 6 of the ICCPR recognises an individual's 'inherent right to life' and requires it to be protected by law. It is a 'supreme right' from which no derogation can be permitted, and must be interpreted widely: "Every human being has the inherent right to life. This right shall be protected by law". Article 20 of the ICCPR mandates sanctions against inciting hatred: "Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law".

Relevant Cambodian Laws & Policies

4.2 There is no 'anti-hate' crime legislation in Cambodia to protect LGBTI persons from harassment, acts of violence (both physical and/or verbal) or incitement to discrimination, hostility or violence. However, of relevance, to strengthen the *Criminal Code* (2009) (which criminalises certain conduct, including acts of violence), the *Village Commune Safety Policy (VCSP)* was implemented and focuses on security and public order. In essence, it requires local authorities to take "appropriate measures" to eliminate all forms of crime in villages and communes with specific reference to illegal drugs, prostitution, human trafficking, domestic violence, gang activity, illegal gambling and illegal weapons.⁷ But rather than actually working for the betterment of LGBTI persons (which, we concede was not its intention), Cambodian NGOs have raised serious concerns that this policy is actually having very serious, adverse and disproportional effect on LGBTI persons (discussed in detail below).

Cambodia's Failure to Comply with Articles 6 & 20 of the ICCPR

4.3 Cambodia's failure to enact anti-hate crime legislation to protect LGBTI people from acts of violence, discrimination, abuse and harassment constitutes a breach of Articles 6 and 20 of the ICCPR. As it currently stands, there are no laws that specifically protect LGBTI people from harassment and abuse. Courts in the United States have observed that hate crimes are "thought to inflict greater individual and societal harm.... bias-motivated crimes are more likely to provoke retaliatory crimes, inflict distinct emotional harms on their victims, and incite community unrest".⁸

⁶ "Hun Sen Speaks Out Against Anti-Gay Bias" (11 December 2012), *Huffington Post* at: http://www.huffingtonpost.com/2012/12/11/hun-sen-cambodias-prime-m_n_2277453.html

⁷ Cambodian Center for Human Rights & Ors, (January/February 2014), "Universal Periodic Review of Cambodia - Joint Submission", p.7

⁸ *Wisconsin v. Mitchell*, 508 U.S. 476 (1993) - http://en.wikipedia.org/wiki/Wisconsin_v._Mitchell

4.9 We **recommend** that the enactment of anti-hate crime legislation be added to the list of issues to be raised with Cambodia in its review in March 2015.

5. **RIGHT TO LEGAL PROTECTION (ARTICLE 2) & RIGHTS TO EQUALITY & NON-DISCRIMINATION (ARTICLE 26)**

Relevant Articles of the ICCPR

5.1 Article 2 of the ICCPR obliges 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 to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant..." 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.

Relevant Cambodian Laws & Policies

5.2 Article 31 of the Constitution guarantees equal labour rights: "*Khmer citizens of either sex shall enjoy the right to choose any employment according to their ability and the needs of the society*". However, no reference is made to sexual orientation or gender identity.

5.3 Article 12 of the *Labour Law* (1997) also states that employers shall not discriminate based on personal characteristics and beliefs of an individual, including their gender: "*no employer shall consider on account of: race, colour, sex, creed, religion, political opinion, birth, social origin, membership of workers' union or the exercise of union activities; to be the invocation in order to make a decision on: hiring, defining and assigning of work, vocational training, advancement, promotion, remuneration, granting of social benefits, discipline or termination of employment contract.*" Again, there is no protection from discrimination based on sexual orientation or gender identity.

5.4 The *Criminal Code* (2009) identifies the following as prohibited grounds for discrimination:

- (1) membership or non-membership of a given ethnic group, nationality or race;
- (2) membership or non-membership of a given religion;
- (3) political affiliation;
- (4) union activities;
- (5) family situation;
- (6) gender;
- (7) state of health; and
- (8) disability.

Once again, no reference is made to sexual orientation or gender identity.

Cambodia's Failure to Comply with Articles 2 and 26 of the ICCPR

5.5 Cambodia's failure to enact anti-discriminatory legislation that specifically protects LGBTI people from discrimination constitutes a breach of Articles 2 and 26 of the ICCPR. While the Constitution guarantees equality before the law without discrimination on the basis of sex, it does not specifically mention LGBTI persons. As it currently stands, there is no legal protection from discrimination on the grounds of sexual orientation or gender identity. Thus, LGBTI persons can be discriminated against with impunity in the areas of employment, education, housing, health care, banking, telecommunications and a range of other public and private services.

Discrimination Based on Sexual Orientation & Gender Identity

- 5.6 In Cambodia, LGBTI people continue to be subjected to discrimination, hostility and stigmatisation on the basis of their sexual orientation and/or gender identity. And as noted in paragraph 5.5 above, there is no anti-discrimination legislation to protect LGBTI persons. As the Cambodian Center for Human Rights has noted, "*In a country still recovering from the impact of years of civil war and repression, and in a society already faced with on-going human rights abuses in numerous areas, LGBTI individuals in the Kingdom of Cambodia face a difficult challenge in achieving equality. While homosexuality is not illegal ... LGBTI people are often politically and socially marginalised.*"¹⁷
- 5.7 In the home, many parents do not support their LGBTI children publicly for fear of social stigma: "*Coming out to their families is often a very negative experience. Parents sometimes disown their children afterwards, cutting them off from emotional and financial support, which often drives young people onto the streets, where they face hunger, homelessness and vulnerability to further abuse by strangers and law enforcement officials. Social misconceptions lead some parents to believe that being gay is a mental illness and can be cured by taking their son or daughter to the traditional doctor ("groukhmer") to throw water on their child and "cure" their homosexuality.*"¹⁸
- 5.8 In the broader community, the Cambodian Center for Human Rights has further observed that: "*While LGBTI persons appear to most commonly face abuse from their own families and communities, they also suffer at the hands of the State through the actions of those in positions of authority. Those in positions of authority within the state who instigate or oversee discrimination or violence against LGBTI individuals may consciously or unconsciously conceive of such treatment as 'punishment' for not adhering to accepted social norms. The perpetrators may also feel a sense of entitlement, seeing themselves as of a higher social status and morally superior to LGBTI individuals, who they treat as morally deplorable and second-rate citizens.*"¹⁹

Discrimination in the Employment Setting

- 5.9 As noted in paragraphs 5.2 and 5.3, neither the Constitution nor the *Labour Law* specifically prohibit discrimination on the basis of sexual orientation. This means that potential employers can refuse to hire someone on the basis of their sexuality, or even terminate employment without having to provide a reason. It is therefore not surprising that many LGBTI persons find it difficult to gain employment where their sexual orientation or gender identity is disclosed. In addition to a range of other problems, this has led to transgendered, or third gendered persons, engaging in work in the sex industry as this is the only form of paid work available to them.²⁰ Excluding LGBTI persons from the workplace, not only creates an underclass of LGBTI persons, it also leads to increased sexual health and related problems, particularly HIV/AIDS and other serious sexually communicable diseases. Sex work also perpetuates LGBTI stereotypes. These discriminatory attitudes have become more entrenched in recent years and for many LGBTI people, it has become increasingly difficult to find and maintain suitable employment in Cambodia.

Discrimination in Health Care

- 5.10 In the health care setting, discrimination against LGBTI people is also widespread. In the absence of legislation to protect against discrimination, health providers are able to discriminate on the

¹⁷ Cambodian Center for Human Rights, (December 2010), "*Coming Out in the Kingdom: Lesbian, Gay, Bisexual and Transgender People in Cambodia*", - http://cchrcambodia.org/index_old.php?url=media/media.php&p=report_detail.php&reid=8&id=5. p.7

¹⁸ Cambodian Network Men-Women Development & CCHR Workshop (Phnom Penh, 18 December 2011), in CCHR, '*Rainbow Khmer: From Prejudice to Pride*' - www.cchrcambodia.org/index_old.php?url=media/media.php&p=report_detail.php&reid=85&id=5

¹⁹ Ibid at p 6.

²⁰ Cambodian Centre for Human Rights, (December 2010), "*Coming Out in the Kingdom: Lesbian, Gay, Bisexual and Transgender People in Cambodia*", p16 - http://cchrcambodia.org/index_old.php?url=media/media.php&p=report_detail.php&reid=8&id=5.

basis of a person's sexual orientation or gender identity with impunity. The Cambodian Center for Human Rights, together with the Asia Pacific Network of People Living with HIV/AIDS, have spoken of how LGBTI people, particularly transgendered persons, face discrimination and misinformation from a range of health care professionals.²¹ Fear of discrimination has prevented many LGBTI persons from seeking medical treatment when it is needed, or felt it necessary to not disclose to treating doctors all relevant information to allow for their proper care and treatment. As the Cambodian People Living with HIV/AIDS Network has affirmed, "*stigma associated with being LGBT – which is perpetuated by families, communities, local authorities, employers and health services workers – deters many LGBT Cambodians from regularly accessing available health services. Data, however, suggests that LGBT, and in particular men who have sex with men (MSM), are at greater risk of HIV transmission and thus of sexual health services.*"²²

- 5.11 According to the Cambodian People Living with HIV/AIDS Network, people with HIV/AIDS in Cambodia are "*particularly threatened by deficiencies in the health care sector. Discrimination against PLHIV remains a regular occurrence, especially in the health sector, where a lack of appropriate training results in many health workers being under-qualified to appropriately treat, counsel and refer PLHIV to other health-care providers. In turn, this results in many PLHIV being afraid to disclose their HIV status to health professionals and family members.*"²³

Recommendation

- 5.12 We **recommend** that amendment of anti-discrimination legislation to include sexual orientation and gender identity be added to the list of issues to be raised with Cambodia in its review in March 2015.

6. FREEDOM FROM INHUMAN & DEGRADING TREATMENT (ARTICLE 7) & FREEDOM FROM UNLAWFUL INTERFERENCE WITH PRIVACY (ARTICLE 17)

Relevant Articles of the ICCPR

- 6.1 Article 7 prohibits torture and cruel, inhuman or degrading punishment. As with Article 6, it cannot be derogated from under any circumstances: "*No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment*". Article 17 mandates the right of privacy and also protects people against unlawful attacks to their honor and reputation and grants the protection of the law against such attacks: "*No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation; and (2) Everyone has the right to the protection of the law against such interference or attacks*".

Relevant Cambodian Law & Policy

- 6.2 As noted above, Cambodia has failed to devise and implement appropriate anti-discrimination and anti-hate crime legislation to protect LGBTI persons. We also note that the *Law on the Suppression of Human Trafficking and Sexual Exploitation* (2008) criminalizes the solicitation of "*another in public for the purpose of prostituting himself or herself*" and the procurement of prostitution (Chapter IV, Articles 23-32). In other words, all forms of prostitution are illegal. Due to the high prevalence of LGBTI people involved in sex work, they are more likely to come into contact with authorities through this law. Evidence suggests that these sex workers have been abused (physically and verbally, as well as sexually) by law enforcement agents who abuse the powers they have. This law interferes with LGBTI persons' right to be freed from inhuman and degrading treatment.

²¹ "NGOs see gaps in rights record", (29 October 2013), *Phnom Penh Post*, at: <http://www.phnompenhpost.com/national/ngos-see-gap-rights-record>.

²² Rainbow Community Kampuchea & Ors, (undated), "*Joint Submission to Human Rights Council*", p.4

²³ *Ibid.*, p.4

- 6.3 Relevantly, Article 23 of the *Education Law* gives the Ministry of Education power to determine the curriculum for all levels of education in Cambodia. The Ministry of Education, Youth and Sport's Education Strategic Plan 2009-2013, includes "*Strengthening and Expanding the School Health Promotion Program*," which provides for training on "*sexual, re-productive health, HIV/AIDS, awareness on violence, gender, drug and relevant topics*."²⁴ However, this policy did not purport to discuss sexual orientation and/or gender identity, and we are not aware of any further educational policy that has been released. A comprehensive 'Sexuality Education Curriculum' was introduced recently, but from all reports, it is not being implemented at a local level. This law and policy has failed to uphold LGBTI peoples freedom from unlawful interference.

Cambodia's Failure of Comply with Articles 7 & 17 of the ICCPR

- 6.4 Cambodia's failure to enact anti-hate crime and non-discrimination legislation, as well as its failure to take positive steps (through awareness raising campaigns, education and training) to ensure the positive enjoyment of rights by LGBTI persons, constitutes a breach of Articles 7 and 17 of the ICCPR. The *Law on the Suppression of Human Trafficking and Sexual Exploitation* (2008) has the reverse effect of actually subjecting LGBTI people to increased risk of inhuman and degrading treatment, particularly by law enforcement officers, and the *Education Strategic Plan 2009-2013* did nothing to combat unlawful interference with LGBTI people's right to privacy.

Harassment, Abuse & Reinforcement of Stereotypes

- 6.5 Anecdotal evidence supplied by individuals and Cambodian NGOs, including the Cambodian Center for Human Rights, suggests that LGBTI persons continue to be subjected to significant discrimination and harassment (often violent). The enactment of anti-discrimination legislation is not sufficient in and of itself to combat negative stereotypes which can lead to breaches of Articles 7 and 17.
- 6.6 Of particular concern is evidence of violence towards LGBTI persons in Cambodia, including being targeted and exploited by police, subject to verbal harassment, beatings and gang rape.²⁵ Authorities have done very little to protect LGBTI people, and activists, from harm. According to the Cambodian Center for Human Rights, gay men have been targeted and exploited by police for financial gain: "*Those targeted have said that while in public places they have been arrested by police under false charges (often relating to human trafficking, drug use or prostitution) and mistreated.*"²⁶ The report added, "*They said that unless they agreed to pay between US\$10 and \$30, they were detained overnight.*"²⁷
- 6.7 Anecdotal evidence also suggests that transgender sex workers are particularly vulnerable to discrimination and physical abuse. As one transgender sex worker explained (to the Cambodian Center for Human Rights): "*Three police officers beat me up seriously at Wat Phnom commune police station after I was taken from the park. One of the police officers pointed his gun at my head and pulled the trigger, but the bullet did not fire... They kicked my neck, my waist, and hit my head and my body with a broom stick ... It lasted about half an hour.*"²⁸
- 6.8 Of great concern is a criminal case in 2012, in which a young gay woman was sentenced to a five-year term of imprisonment for 'human trafficking' and 'illegal detention', after her girlfriend's brother made a complaint to the police. The accused insisted that her relationship with the alleged victim was consensual, that she was of the legal age (18 years) and that the case against her had been concocted by her girlfriend's family, who would not tolerate their daughter's same-sex

²⁴ Cambodian Center for Human Rights & Ors, (January/February 2014), "*Universal Periodic Review of Cambodia - Joint Submission*", p.7

²⁵ "*Groups insist on equal rights*" (11 December 2013), *Phnom Penh Post* at: <http://www.phnompenhpost.com/national/groups-insist-equal-rights>.

²⁶ Cambodian Center for Human Rights, (December 2010), "*Coming Out in the Kingdom: Lesbian, Gay, Bisexual and Transgender People in Cambodia*", p16.

²⁷ *Ibid*, p 17.

²⁸ *Ibid*, p 17.

relationship. Admittedly, the conviction was overturned on appeal. But according to local news reports, "*Rights workers and members of Cambodia's gay community say the case is simply an example of homophobia. Moreover, they say, the country's weak judicial system has been used by an angry family to break apart a relationship between two young women.*"²⁹

- 6.9 The disparity between the legal framework and social attitudes towards sexual minorities in Cambodia can be attributed to the broader cultural environment and lack of understanding regarding LGBTI issues. Whilst there has been significant progress on these issues, The Immigration and Refugee Board of Canada has observed: "*The Cambodian government and society do not respect homosexuals. (citing a local news report) ...there is enormous pressure from family and society to marry, which adds to the difficulties gay men face in trying to hide their sexuality.*"³⁰
- 6.10 The urbanisation and modernisation of Cambodia, particularly in Phnom Penh, has promoted the rights of sexual minorities, and an emerging middle class is making it easier for individuals to express their own sexual identity. For instance, in 2003, international and Cambodian activists began 'Pride' in Phnom Penh, "*an annual celebration and recognition of LBGTI rights which includes workshops, film festivals, art exhibits and social gathering and coincides with International Day Against Homophobia.*"³¹ However, there is still much to be done to change attitudes across the entire Cambodian culture.

Recommendation

- 6.11 We **recommend** that public campaigns and awareness education promoting greater acceptance of LGBTI persons be added to the list of issues and raised with Cambodia in its review in March 2015.

7. RIGHT TO MARRY (ARTICLE 23)

Relevant Article of the ICCPR

- 7.1 Article 23 mandates the right to marry. The wording of this provision neither requires nor prohibits same-sex marriage:³² "*(a) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State; (b) The right of men and women of marriageable age to marry and to found a family shall be recognized.*"
- 7.2 In *Joslin v New Zealand*,³³ 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 same-sex marriage. The ICCPR is a living instrument which should be interpreted and applied in light of present circumstances, which include a significant trend towards legalisation of same-sex marriage.

Relevant Cambodian Law

- 7.3 Same-sex marriages/unions are expressly prohibited under Cambodian law. Article 31 of the Constitution guarantees equal rights to all citizens regardless of personal characteristics: "*Every Khmer citizen shall be equal before the law, enjoying the same rights and freedoms and fulfilling the same obligations regardless of race, colour, sex, language, religious belief, political tendency, birth origin, social status, wealth or other status.*" Additionally, Article 35 of the Constitution guarantees the right of all citizens to participate actively in the political, economic, social and

²⁹ "Paying a steep price for love", (26 January 2012), *Phnom Penh Post* at: <http://www.phnompenhpost.com/national/paying-steep-price-love>.

³⁰ The Immigration & Refugee Board of Canada, (14 August 2013), "*Cambodia: Treatment of homosexuals in Cambodia*", p.6

³¹ Cambodia Centre for Human Rights, (December 2010), "*Coming Out in the Kingdom: Lesbian, Gay, Bisexual and Transgender People in Cambodia*", p6

³² ICCPR, Article 2.2, 2.3

³³ Human Rights Committee, *Views: Communication No 902/1999*, 75th sess, CCPR/C/75/D/902/1999 (17 July 2002) (*Joslin et al v New Zealand*).

cultural life of the nation.³⁴ The concept of 'marriage' is set out in Article 45 of the Constitution, which defines 'marriages' as an agreement between 'a man and a women'. This concept of marriage is then reinforced through Article 3 of the *Law on Marriage and the Family*, which provides that: "A marriage is a solemn contract between a man and a woman in a spirit of love in accordance with the provisions of law and with the understanding that they cannot dissolve it as they please." Same-sex marriage is specifically prohibited by Article 6 of the *Law on Marriage and the Family* which states, "A marriage shall be prohibited as to: a person whose sex is the same sex as the other".

- 7.4 Despite these provisions, two women (Khav Sokha and Pum Eth), were 'married' in the village of Kro Bao Ach Kok in Kandal Province in 1995. Ms Sokha said in an interview to the Phnom Penh Post, "The authorities thought it was strange, but they agreed to tolerate it because I have three children already (from a previous marriage). They said that if we were both single (and childless), we would not be allowed to get married because we could not produce children". However, the official status of Ms Sokha's and Ms Eth's marriage remains entirely unclear given the prohibition contained in the *Law on Marriage and the Family* and demonstrates the law in relation to same-sex relationships has being inconsistently applied. And there have been other instances of this inconsistency³⁵.

Cambodia's Failure to Comply with Article 23 of the ICCPR

- 7.5 The primary criticism of the *Joslin* decision is that it failed to consider how a restrictive reading of Article 23 can be compatible with Articles 2 and 26.³⁶ The Committee has noted that equal treatment does not mean identical treatment. However, the Committee has stated that differential treatment 'will not constitute discrimination if the criteria for such differentiation are "reasonable and objective"'.³⁷
- 7.6 Determining if a country's marriage legislation is 'reasonable and objective' requires first, a determination of whether the grounds for discrimination are direct, or indirect ... When domestic laws intend to explicitly prohibit the marriage of same-sex couples, or prevent recognition of same-sex marriages solemnised in another country, the grounds for discrimination are direct.³⁸ Cambodia expressly prohibits same-sex marriage.
- 7.7 Cambodia's opposition to same-sex marriage has been justified by various Government spokespeople on the basis of 'protecting the sanctity of marriage,' 'tradition' and the 'protection of children'. But Restrictive marriage laws based on a criteria aimed at the protection of children will find little traction as 'objective and reasonable', given the irrefutable medical and psychological consensus that same-sex relationships pose no greater threat either to the individuals involved or children of those individuals, than opposite-sex relationships. Arguments based on 'sanctity' and 'tradition' are just as weak.
- 7.8 In the absence of any compelling reasons against same-sex marriage, assessed against 'reasonable' and 'objective' criteria, we suggest that Cambodia's express prohibition against same-sex marriage unfairly and unreasonably discriminates on the basis of sexual orientation and therefore, constitutes a breach of Article 23 of the ICCPR.

³⁴ Cambodia Centre for Human Rights, (December 2010), "Coming Out in the Kingdom: Lesbian, Gay, Bisexual and Transgender People in Cambodia", p 19 - http://www.asylumlaw.org/docs/sexualminorities/CambodiaCCHR_Report120910.pdf.

³⁵ "Lesbians legally married in Cambodia despite no law change" (6 May 2013), Gaystar News, <http://www.gaystarnews.com/article/lesbians-legally-married-cambodia-despite-no-law-change060513>.

³⁶ Gerber, Tay & Sifris (undated), "Marriage: A human right for all?", p.7

³⁷ Human Rights Committee, *General Comment 18: Non-discrimination*, 37th sess, CCPR/C/21/Rev.1/Add.10, [7] cited by Gerber, Tay & Sifris (undated), "Marriage: A human right for all?", p.8

³⁸ Gerber, Tay & Sifris (undated), "Marriage: A human right for all?", p.8

Relevance of Recognition of Same-Sex Relationships

- 7.9 Cambodia's arguable failure to comply with Article 23 of the ICCPR, together with its non-discrimination obligations (Article 26), result in the following problems for LGBTI people:
- 7.9.1 same-sex couples do not have equal access to fertility services, relationship entitlements, legal protections, employee benefits, estate planning, taxation and welfare, medical visitation, next-of-kin rights and rights to purchase subsidised public housing.
- 7.9.2 same-sex couples face significant obstacles in proving their relationships. A marriage certificate allows married partners to easily prove their legal rights if challenged, for example in emergency situations. The capacity to quickly and easily prove one's relationship status is particularly important for same-sex partners because prejudice against same-sex relationships can mean legal rights are denied.
- 7.9.3 denying same-sex couple inclusion in such a universal and valued institution as marriage means they miss out on real social and cultural benefits.
- 7.9.4 denying same-sex marriage fosters prejudice, discrimination and unequal treatment against LGBTI people in the wider community. Cambodia's ban on same-sex marriages sends a message that LGBTI people are less capable of love and commitment than heterosexual people.
- 7.9.5 by denying same-sex marriage, negative messages are sent and stereotypes are reinforced. This has a profound impact on the health and well-being of same-sex attracted people and their families. LGBTI people are more likely to experience below-average health outcomes including higher levels of depression, substance abuse, homelessness, early school leaving, conflict with peers and parents and suicide ideation.
- 7.9.6 LGBTI people can only be included in 'community social protection activities' and have access to the Health Equity Fund (HEF), in circumstances where they are accepted within the community. According to the Rainbow Community Kampuchea, the HEF provides a range of 'family' services such as counselling, housing support and ways in which to register relationships. Some authorities are flexible and find ways to allow LGBTI to be included so that they qualify for HEF support (for example, recording information on family books as "sisters" or "twins" for same-sex partners who live together). But this is entirely dependent on whether the partners are well known and established within the community.³⁹
- 7.10 Young people in Cambodia face enormous pressure to marry, from both their family and society, which often adds to the difficulties that LGBTI people face in freely expressing their sexuality and gender expressions and identities. This means that many hide or suppress their sexual orientation. As the Cambodian Center for Human Rights observes, *"this pressure leads to gay men marrying and still engaging in homosexual activities"*.⁴⁰
- 7.11 Internationally, the Canadian Psychological Association has said: *"The literature indicates that parents' financial, psychological and physical well-being is enhanced by marriage and that children benefit from being raised by two parents within a legally-recognized union"*.⁴¹ The American Academy of Pediatrics has said, *"There is ample evidence to show that children raised by same-gender parents fare as well as those raised by heterosexual parents. More than 25 years*

³⁹ Rainbow Community Kampuchea & Ors, (undated), *"Joint Submission to Human Rights Council"*, p.4

⁴⁰ CCHR, *'Rainbow Khmer: From Prejudice to Pride'* (Report) (December 2012).

⁴¹ Canadian Psychological Association, (28 September 2012), *"Marriage of Same-Sex Couples – 2006 Position Statement"*.

of research have documented that there is no relationship between parents' sexual orientation and any measure of a child's emotional, psychosocial, and behavioral adjustment".⁴²

Recommendation

- 7.12 We **recommend** that recognition of same-sex marriage be added to the list of issues to be raised with Cambodia in its review in March 2015.

8. RIGHT TO EFFECTIVE REMEDIES (ARTICLE 2)

Relevant Articles of the ICCPR

- 8.1 Article 2 of the ICCPR obliges parties to legislate where necessary to give effect to the rights recognised in the Covenant, and to provide an effective legal remedy for any violation of those rights. Article 2 provides that "(1) Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant...; (3) Each State Party to the present Covenant undertakes: (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity..."

Cambodia's Failure to Provide Effective Remedies

- 8.2 We understand that Cambodia is continuing on the path of establishing a National Human Rights Commission which will be responsible for conducting investigations, monitoring agencies and hearing complaints relating to violations of human rights. We also understand that Prime Minister Hun Sen passed a sub-decree late in 2013 to expand the scope of his Government's Cambodian Human Rights Committee by creating new departments and placing rights monitors in villages.⁴³ However, we note that both of these initiatives have recently stalled, and neither are yet operative. As such, Cambodia has failed to provide remedies for LGBTI persons whose human rights have been violated to seek appropriate remedies. Compounding this problem is the absence of comprehensive anti-discrimination and anti-hate laws to protect LGBTI persons. Thus, the current situation of persecution and discrimination of LGBTI people will continue in abeyance.

9. COMBINED AND CUMULATIVE EFFECT OF ICCPR VIOLATIONS

- 9.1 All in all, the combined and cumulative effects of Cambodia's failure to comply with the ICCPR in respect of its LGBTI community has led to, and continues to lead to, LGBTI people:

- 9.1.1 leaving school early and being removed from the family home;
- 9.1.2 being unable to find regular, safe and meaningful employment, and more likely to opt for sex work;
- 9.1.3 being more likely to feel ostracised and isolated from the community, thereby contributing to depression and other mental health related illnesses;
- 9.1.4 being unable to access a range of services or being discriminated against when services are accessed, such as health care;
- 9.1.5 being exposed to increased risk of contracting HIV/AIDS and other serious communicable diseases; and

⁴² Pawelski, J. G.; Perrin, E. C.; Foy, J. M.; Allen, C. E.; Crawford, J. E.; Del Monte, M.; Kaufman, M.; Klein, J. D.; Smith, K.; Springer, S.; Tanner, J. L.; Vickers, D. L. (2006), "The Effects of Marriage, Civil Union, and Domestic Partnership Laws on the Health and Well-being of Children". *Pediatrics* **118** (1): 349–364. doi:10.1542/peds.2006-1279. PMID 16818585.

⁴³ "CPP Takes Steps to 'Reform' Human Rights Commission", (21 January 2014), Cambodia Daily, p2.

9.1.6 being exposed to an increased risk of rape and violence by law enforcement officials.

10. CONCLUSIONS AND RECOMMENDATIONS

- 10.1 The positive public comments in relation to LGBTI people and their relationships is a step in the right direction. However, Cambodia's failure to devise and implement a legislative, regulatory and policy regime to combat violence, harassment, abuse, stigmatization and discrimination against its LGBTI community is a serious human rights concern, violating Articles 2, 6, 7, 14, 17, 23 and 26 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 Cambodia in its review in March 2015:
- 10.2.1 enactment of anti-hate crime legislation to protect LGBTI persons (right to life (Article 6) and the right to security of person (Article 20));
 - 10.2.2 enactment of anti-discrimination legislation to protect LGBTI persons (right to equality & non-discrimination (Article 26) and the right to legal protection (Article 2));
 - 10.2.3 development of public campaigns and education to raise awareness of LGBTI rights and issues (freedom from inhumane & degrading treatment (Article 7) and freedom from unlawful interference with privacy (Article 17));
 - 10.2.4 recognition of same-sex relationships (right to Marry (Article 23)); and
 - 10.2.5 provision of remedies for LGBTI persons where their human rights are violated (right to effective remedies (Article 2)).