Shadow Report to the UN Human Rights Committee
regarding Japan's protection of the
Rights of LGBTI Persons
(Response to List of Issues)

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

June 2014

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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 Tokyo Partnership, to inform the UN Human Rights Committee of areas of concern with respect to Japan's obligations under the International Covenant on Civil and Political Rights (ICCPR) to respect the human rights of LGBTI individuals.

1.2 The Japanese Government has taken several positive steps in recent years to improve the situation for LGBTI persons. However there are significant areas of law, regulation and policy where Japan is falling short of meeting its obligations under the ICCPR in respect of the rights of LGBTI persons. In particular Japan should:

- provide various legal protections for same-sex couples, including against domestic violence and harassment;
- amend or repeal laws that discriminate against LGBTI persons;
- legislate against discrimination based on sexual-orientation and gender identity; and
- implement strategies to combat discrimination, stigma and prejudice against LGBTI persons.

These areas raise concerns with respect to Articles 2, 6, 7, 17, 20, 23 and 26 of the ICCPR.

2. SCOPE OF REPORT

2.1 This report responds to the UN Human Rights Committee List of Issues in relation to the sixth periodic report of Japan, released November 2013 (List of Issues), as well as raising additional concerns not covered by the List of Issues. The relevant issues for this report are:

- Paragraph 4: Legislation outlawing direct and indirect discrimination on the basis of sexual orientation and gender identity;
- Paragraph 7: Measures taken to combat domestic violence for same-sex couples;
- Paragraph 8: Legislation and strategies to combat discrimination on the basis of gender identity and sexual orientation.
- Paragraph 10: Measures taken by the State Party to address statements and speeches targeting LGBT persons.

Where we have responded to particular concerns in the List of Issues we have provided a reference to the corresponding Article and paragraph number.

2.2 There are also a number of laws that continue to discriminate against LGBTI persons, particularly in areas of tax, marriage and immigration, that were not raised in the List of Issues. We also provide information on these.
3. POSITIVE STEPS TAKEN BY THE STATE PARTY

3.1 Legislation on change of gender for gender identity disorders (List of Issues paragraph 8, Articles 2(1), 23 and 26 of the ICCPR)

In 2003 Japan enacted the Act on Special Provisions for Handling People with Gender Identity Disorders, so that people with gender identity disorder may change their gender in their family registers, which generally equates to a change of gender under all laws. The 2008 revision to the Act has relaxed rules that prohibited any person with a child registering a change in their gender. The change allows a person with gender identity disorder to change their gender if the person does not have a child under the age of 20. There are still a number of concerns regarding this legislation, outlined further below.

3.2 Supporting the UN Human Rights Council’s Resolution

At the 16th session of the Human Rights Council held in March 2011, Japan joined the joint statement calling for an end to criminalization and violence against people because of their sexual orientation and gender identity, and supported the resolution concerning “human rights, sexual orientation and gender identity” at the 17th session of the Human Rights Council in June 2011.

3.3 Amendment of Act on Public Housing (List of Issues paragraph 8, Articles 2(1), 3 and 26 of the ICCPR)

In 2012 the Act on Public Housing was amended by the Act on the Development of Related Acts for Promoting Reform for Enhancing Regional Autonomy and Independence (effective since 1 April 2012) removing the requirement that lodgers or lessees should be related. Therefore, same-sex couples are no longer excluded from the publicly operated housing system under the current legislation at the state level. There remain, however, issues of discrimination in the implementation of this Act, outlined below.

3.4 Campaign for human rights awareness raising activities on various issues including LGBTI people’s human rights (List of Issues paragraph 10, Articles 2(1), 7 and 17)

The Human Rights Organs of the Ministry of Justice conducted various promotional activities in 2013, such as distributing leaflets nationwide throughout the year, that included statements to "Eliminate Discrimination on the Grounds of Sexual Orientation" and "Eliminate Discrimination on the Grounds of Gender Identity Disorder" to promote awareness of the problem. The Human Rights Organ is empowered to investigate complaints of human rights infringements. According to the Human Rights Organ, however, in 2013, no human rights infringement against LGBTI persons were reported.

3.5 Recent Supreme Court Case

In a positive move for the rights of LGBTI persons to have a family (Article 23), on 10 December 2013, the Supreme Court of Japan ruled that a transgender male, who had legally changed his gender, should be presumed to be the legal father of a child born to his partner.

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1 Act No. 111 of 16 July 2003.
2 The no-child requirement had been set forth from the perspective of preventing confusion in parental relationships and considering children’s welfare. However, it was considered that the influence on parental relationships and children’s welfare would not require special consideration in cases in which children are adults (i.e., over 20 years old), thus the 2008 revision eased said requirements to no minor child.
3 Act No. 193 of 4 June 1951.
overturning the decision of a lower court. This presumption holds regardless of whether the father has a biological connection to the child.\(^5\)

4. **RESPONSE TO THE LIST OF ISSUES**

4.1 **No explicit legislation for non-discrimination to LGBTI persons (List of Issues paragraph 4, Articles 2 and 24 of the ICCPR)**

Article 14 of the Japanese Constitution guarantees fundamental human rights and prohibits discrimination on the basis of “race, sex, social status or family origin.” Japan ratified the ICCPR in 1979. However, there is still no anti-discrimination law which explicitly prohibits discrimination against LGBTI persons.

The Japanese government has previously attempted to enact a Human Rights Commission Bill to prohibit violation of human rights such as discrimination on the basis of “race, ethnic, creed, sex, social status, family origin, disabled, disease or sexual-orientation”. However, the Bill, which was submitted to the National Diet on 9 November 2012 during the 181st Diet session, was scrapped due to the dissolution of the House of Representatives, i.e. the lower house of the national Diet.

While Japan agreed in an addendum to the Report of the Working Group on the Universal Periodic Review to follow up on the Human Rights Council’s recommendation regarding elimination of discrimination based on sexual orientation and gender identity in August 2008\(^6\), no explicit legislation with respect to non-discrimination against LGBTI persons has been enacted, nor is there legislation providing for a remedy against the infringement of LGBTI persons’ human rights.

The Committee may wish to include in its Concluding Observations, a recommendation that Japan should enact legislation to protect against discrimination on the grounds of sexual-orientation, gender identity and intersex status.

4.2 **Protection from Domestic Violence (List of Issues paragraph 7, Articles 2(1), 3 and, 6 and 20 of the ICCPR)**

Although same sex couples are at risk of physical, sexual or psychological violence by their partner, the *Act for the Prevention of Spousal Violence and the Protection of Victims*\(^7\), does not extend to same-sex partners, and it is generally considered that the Act still applies only to married and divorced couples and to unmarried opposite-sex couples. Therefore, people in same-sex relationships are excluded from the protection of this Act, including the ability to obtain a restraining order and occupation order (excluding the spouse from the home). The failure to protect same sex couples from domestic violence raises concerns under the right to life (Article 6) and the right to security of the person (Article 20), as well as broader considerations of non-discrimination and equality before the law.

The Committee may wish to include in its Concluding Observations, a recommendation that Japanese Government amend the *Act for the Prevention of Spousal Violence and the Protection of Victims* to include same-sex couples.

4.3 **Requirements on publicly operated housing (List of Issues paragraph 8, Articles 2(1) and 24 of the ICCPR)**


\(^6\) The addendum is publicly available at the UNHCR's web site ([http://lib.ohchr.org/HRBodies/UPR/Documents/Sessi\(on2/JP/A_HRC_8_44_Add1_Japan_E.pdf](http://lib.ohchr.org/HRBodies/UPR/Documents/Sessi\(on2/JP/A_HRC_8_44_Add1_Japan_E.pdf))].

\(^7\) Act No. 31 of 13 April 2001.
The Act on Public Housing used to have a requirement that lessees should be related, meaning for couples, public housing was only available to married same-sex couples. While this requirement has been removed, it still remains that each local government has a discretion to determine who should be accepted in publicly operated housing. Many municipal governments do not allow same-sex couples to apply for publicly operated housing.\(^8\)

The Committee may wish to include in its Concluding Observations, a recommendation that the Japanese (central) government encourage municipal governments to remove restrictions toward same-sex couples with respect to publicly operated housing services or amend the Act on Public Housing to prohibit discrimination against same-sex couples for public housing. This would have the effect of repealing the local bylaws which are inconsistent with such language.

4.4 Gender Identity Disorder Legislation (List of Issues, Paragraph 8. Articles 2, 7, 17, 23 and 26 of the ICCPR)

Japan should be commended for allowing individuals to legally change their gender. However, the restrictions on the ability of gender diverse persons to be recognised according to their preferred gender potentially breaches the, among other rights, the right to equal recognition before the law under Article 26. The specific restrictions, and relevant rights, are:

4.4.1 Transgender persons with a child under 20 years of age still cannot apply to change their gender on their family registry under the current legislation, in breach of the right to a family and freedom from interference with privacy and the family (Articles 17 and 23). The Japan Federation of Bar Associations has recommended the requirement should be set forth as "not contrary to the best interests of the child if the applicant has a child", which calls for case-by-case judgement for the application.\(^9\)

4.4.2 In order to legally change sex, an individual must have genitalia that closely resemble the physical form of the alternative gender, which requires transgender persons to undergo sex reassignment surgery, depriving them of their right to have their own children. Again this is in breach of the right to privacy and a family (Articles 17 and 23) and potentially also in breach of the right to be free from cruel, inhuman and degrading treatment or punishment, and freedom from medical treatment without consent (Article 7).

4.4.3 Finally, an individual cannot change their gender if they are already married, forcing them to divorce should they wish to be recognised according to their preferred gender, in breach of the right to non interference with privacy and the family (Articles 17 and 23).

The Committee may wish to include in its Concluding Observations, a recommendation that the Gender Identity Disorder Legislation be amended to ensure individuals can legally change their gender, regardless of marital or parental status and without the need for surgical intervention.

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\(^8\) For example, Article 5, Paragraph 1(1) of the bylaws of public apartments owned by Toshima ward (one of the central districts in Tokyo Metropolitan) requires that applicants for public housing must be relative(s) living together or who are going to be living together (including those who have not registered their marriage but who are in a de facto marriage situation, including his fiancée/her fiancé). (http://www1.g-reiki.net/toshiba/reiki_honbun/l600RG00000412.html) (in Japanese).

4.5 Strategies to eliminate discrimination against LGBTI persons (List of Issues paragraph 8, Article 2(1), 7, 17 and 26 of the ICCPR)

As abovementioned, the Human Rights Organs of the Ministry of Justice conducted various promotional activities in 2013, which included distributing promotion leaflets, nationwide throughout the year, with statements such as “Eliminate Discrimination on the Grounds of Sexual Orientation” and “Eliminate Discrimination on the Grounds of Gender Identity Disorder” as a priority promotional matter.

However, this was just one of the topics picked up in a series of annual promotional events. Stigma surrounding sexual orientation continues to be a major concern in Japan, with individuals feeling that they cannot be open about their sexual orientation due to concerns regarding personal safety and bullying. As such, the current efforts may not be sufficient to combat the stigma and prejudice suffered by LGBTI persons, which are deeply ingrained in Japan.

In addition, although the Third Basic Plan for Gender Equality is mentioned in paragraph 8 of the List of Issues as a plan which tries to eliminate discrimination based on sexual orientation and gender identity, it mainly addresses promotion of women's participation in society and harmonization of work and life balance. It does not include actions for eliminating discrimination against LGBTI persons.

The Committee may wish to include in its Concluding Observations, a recommendation that the Japanese government increase its awareness raising activities to combat stigma, prejudice and discrimination against LGBTI persons.

4.6 Measures taken to address incitement of hatred and discrimination towards LGBTI person (List of Issues paragraph 10, Article 2(1), 6 and 20)

There is no ‘anti-hate’ criminal legislation to protect LGBTI persons from harassment, acts of violence, or to criminalise incitement to discrimination, hostility or violence. Considering the continuing societal discrimination against LGBTI persons and the negative public statements made by government officials, strong action to protect individuals from harassment, bullying or hostility must be considered in order for Japan to fulfil its obligations to protect the right to life and security of the person (articles 6 and 20).

The Committee may wish to include in its Concluding Observations, a recommendation that the Japanese government take immediate steps to condemn any government statements stigmatising LGBTI persons and implement legislation protecting against vilification and incitement to discrimination and hatred against LBGTI persons.

5. LAWS NOT INCLUDED IN THE LIST OF ISSUES THAT DISCRIMINATE AGAINST LGBTI PERSONS

5.1 Same-sex Marriage (Articles 2, 23 and 26 of the ICCPR)

Japanese law does not recognise marriage between same-sex couples. The Constitution of Japan (Constitution of 3 November 1946) specifically refers to "both sexes" and the partners being "husband and wife." Specifically, Article 24, Paragraph 1 of the Constitution of Japan provides:

Marriage shall be based only on the mutual consent of both sexes and it shall be maintained through mutual cooperation with the equal rights of husband and wife as a basis.

In addition, Articles 731 through 737 of the Civil Code of Japan address issues related to marriage. None of the provisions specifically exclude marriage between same-sex couples or define marriage as a union between one man and one woman. The provisions of the Civil Code address basic issues such as the minimum age for men and women to marry\(^{11}\), a prohibition against plural marriages\(^{12}\) and a prohibition against marriage between an adopted child and parent. However, it is understood that based on Article 24 of the Constitution and the general language of the provision of the Civil Code governing marriage, that marriage in Japan is limited to a union between one man and one woman.

There are a number of benefits that married couples are afforded that are not available to same-sex couples. These include using the same family name, legal rights with respect to inheritance, Spouse Tax Benefits (as mentioned below), and eligibility for certain categories of social insurance.

Japan does not provide for an alternative form of recognition, such as civil unions. Instead of getting married, same-sex couples in Japan often utilise the adoption system in order to create a "legal family relationship" since adoption can be carried out relatively easily under the Japanese law. Such "family members" can enjoy various legal protections including using same family name, inheritance or social insurance although the adoption system did not contemplate being utilized in this manner when it was adopted. However, they are still not allowed to enjoy the Spouse Tax Benefits, and a party of adopted "couple" does not enjoy the protection under the domestic violence legislation (as discussed above).

The Committee may wish to include in its Concluding Observations, a recommendation that the Japanese government take immediate steps to ensure same-sex couples are able to enjoy the same legal protections and benefits as those granted to opposite-sex couples, ideally through legal recognition of same sex marriage.

5.2 Spouse Visa (Articles 2, 23 and 26 of the ICCPR)

Under the Immigration Control and Refugee Recognition Act\(^{13}\) (Immigration Act), spouses and children dependent on a foreign national immigrating to Japan for work may be granted the status of "dependent" and obtain a visa. The "dependent" relationship must be a legally recognised relationship; partners in a de facto relationship are not considered ‘dependents’, nor are same sex spouses.

The Ministry of Justice's internal rules regarding the interpretation of the Immigration Act state that the term "spouse" for the purposes of dependent visa status does not include a same-sex spouse, even if the couple is legally married in a foreign country.\(^{14}\) Thus, the same-sex spouse of a person being transferred to Japan for work will not qualify as a dependent and would need to apply for the right to live in Japan on his or her own. If the spouse can qualify for a visa under another category, for example, by finding a job in Japan, he or she could

\(^{11}\) Civil Code Article 731.

\(^{12}\) Civil Code Article 732.

\(^{13}\) Cabinet Order No. 319 of October 4, 1951.

\(^{14}\) Standards for Examination of Immigration and Residence Permission, issued by the Immigration Bureau of the Ministry of Justice. These standards are not officially published by the Immigration Bureau but are available on some online sources that have obtained them through Japan's Freedom of Information law (Act on Access to Information Held by Administrative Organs (Act No. 42 of 14 May 1999)). The standards are subject to revision and revisions may not be revealed to the public as these are internal rules only.
apply for his or her own visa. However, they would have no right or preference, under current rules, to receive a visa to live in Japan with their spouse.

The Committee may wish to include in its Concluding Observations, a recommendation that the Japanese immigration authority revisit its internal rules regarding the granting of a spouse visa to ensure same sex couples are able to obtain visas on an equal basis with opposite sex couples.

5.3 **Spouse Tax Benefits (Articles 2, 23 and 26 of the ICCPR)**

Under the Income Tax Act, 15 a spouse allowance of JPY 380,000 (approximately USD$3,800) is given to a taxpayer who has a spouse who meets certain requirements:

The Income Tax Act does not define the term "spouse" with respect to the spousal allowance. However it is considered that the term "spouse" should be interpreted in accordance with the Civil Code. Therefore these tax benefits are applicable only to a spouse in a marriage. Although a foreign same-sex spouse is not explicitly excluded under the law and administrative circular 16, because the National Tax Agency, or the Japanese state tax authority, has not expressed a formal opinion on the matter, it is unclear whether a foreign same-sex spouse can enjoy these spouse allowance benefits.

The Committee may wish to include in its Concluding Observations, a recommendation that Japanese government should clarify the scope of this benefit to include same-sex couples.

6. **CONCLUSIONS AND RECOMMENDATIONS**

Several positive steps taken by the Japanese government in recent years, including amendment of the Act on Public Housing and the recent Supreme Court judgement, have improved the situation for LGBTI persons in Japan. However, Japan still remains in breach of its ICCPR obligations in a number of areas, including failing to introduce comprehensive anti-discrimination legislation, ensure existing legislation provides equal protection and benefits to LGBTI persons, or combat stigma and prejudice against LGBTI persons.

Therefore, we strongly encourage the Committee to include in its Concluding Observations, recommendations that the State Party:

(i) enact legislation to protect against discrimination on the grounds of sexual-orientation, gender identity and intersex status;

(ii) amend the Act for the Prevention of Spousal Violence and the Protection of Victims to include same-sex couples;

(iii) encourage municipal governments to remove restrictions toward same-sex couples with respect to publicly operated housing services or amend the Act on Public Housing to prohibit discrimination against same-sex couples for public housing;

(iv) the Gender Identity Disorder Legislation be amended to ensure individuals can legally change their gender, regardless of marital or parental status and without the need for surgical intervention

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15 Act No. 33 of 31 March 1965.
(v) increase its awareness raising activities to combat stigma, prejudice and discrimination against LGBTI persons;

(vi) ensure same-sex couples are able to enjoy the same legal protections and benefits as those granted to opposite-sex couples, ideally through legalising same sex marriage;

(vii) take immediate steps to condemn any government statements stigmatising LGBTI persons and to implement legislation protecting against vilification and incitement to discrimination and hatred against LBGTI persons;

(viii) take immediate steps to ensure same-sex couples are able to enjoy the same legal protections and benefits as those granted to opposite-sex couples, ideally through legal recognition of same sex marriage;

(ix) amend laws and regulations to ensure same-sex couples are able to obtain spousal visas and spousal grants on an equal basis with opposite sex couples.