

**THE REPORT OF THE ADVISORY COUNCIL OF JURISTS:
SEXUAL ORIENTATION AND GENDER EQUITY
IN THE ASIA-PACIFIC REGION**

By Justice Susan Glazebrook¹

Introduction

[1] In December 2010, an independent report on human rights relating to sexual orientation and gender identity in the Asia-Pacific region was released. The report was written by the Advisory Council of Jurists (ACJ),² a group of jurists from across the region, at the request of the Asia-Pacific Forum of National Human Rights Institutions (APF). The ACJ was asked to review the laws of 17 States in the Asia-Pacific region to assess whether they were consistent with international human rights law relating to sexual orientation and gender identity.

The Asia-Pacific Forum

[2] The Asia-Pacific Forum of National Human Rights Institutions (APF) is a human rights organisation that was founded in 1996. It supports the establishment and development of independent human rights institutions (NHRIs) in the region.³ The APF provides practical support to aid its members in promoting, monitoring and protecting human rights. It also occasionally provides specialist advice to governments and civil society groups.

[3] There are three membership categories within the APF: full members, candidate members and associate members. To be admitted as a full member, an NHRI must meet the criteria set out in the United Nations (UN) Paris Principles, which were adopted by the UN General Assembly in December 1993.⁴ The Paris Principles are a set of international standards which require NHRIs to be independent from government, to have sufficient

¹ New Zealand Court of Appeal. This paper was prepared for the Asia-Pacific Human Rights Conference in Wellington, New Zealand on 16–18 March 2011. My thanks to Court of Appeal clerk, Yasmin Monifar, for her assistance with this paper.

² I was a member of the ACJ at the time the report was written.

³ NHRIs are organisations established by national governments, charged with the specific role of promoting and protecting human rights. Whilst NHRIs may be required to report to government on a regular basis, they generally operate independently from government. The degree of their independence depends on a number of factors, such as the NHRI's legal framework, membership and financial resources.

⁴ *Principles relating to the Status of National Institutions* GA Res 48/134, A/Res/48/134 (1993).

resources, adequate powers of investigation, and a broad mandate based on universal human rights standards.⁵

[4] There are currently 15 full members of the APF and 2 associate members:

- Afghanistan
- Australia
- India
- Indonesia
- Jordan
- Malaysia
- Mongolia
- Nepal
- New Zealand
- Palestinian Territories
- Philippines
- Qatar
- Republic of Korea
- Republic of the Maldives (associate)
- Sri Lanka
- Thailand
- Timor Leste

[5] The APF has a Forum Council and a Secretariat. The Forum Council is the APF's decision-making body and operates as its "board of directors". The Secretariat manages the APF's day-to-day operations and implements the Forum Council's decisions.

The Advisory Council of Jurists

[6] The Advisory Council of Jurists (ACJ) prepares independent legal advice for the APF on human rights issues within the Asia-Pacific region. The APF first mooted the idea of establishing the ACJ in 1997 and it was formally approved in 1998. The ACJ's establishment reflects the APF's recognition of the need to develop a cohesive jurisprudence relating to the interpretation and application of international human rights standards within the region, and to make independent, authoritative advice on these issues readily accessible.

[7] The ACJ is comprised of eminent jurists from across the Asia-Pacific region, who have held high judicial office or senior academic or human rights appointments. ACJ members serve a five-year term (which can be renewed once), and are nominated by the APF

⁵ Candidate members are NHRIs that do not entirely meet the criteria set out in the Paris Principles but could do so within a reasonable period of time, and associate members are NHRIs which currently do not meet the criteria and are unlikely to do so within a reasonable period.

full member institution from their country. They are independent of their governments and serve on the ACJ in their personal capacities.⁶

[8] The APF's Forum Council decides on the issues that are referred to the ACJ for its consideration. The specific questions that the Forum Council wants answered are set out in the terms of reference. The APF Secretariat prepares the terms of reference, a background paper and other supporting information relating to each issue for the ACJ.

[9] Members of the ACJ will normally consider the reference over the course of three days, in conjunction with the APF's annual meeting. The ACJ presents an interim report for the Forum Council's consideration before completing its final report. The report answers the particular questions set out in the terms of reference, presents an in-depth examination of each issue, and makes practical recommendations to aid APF members in protecting and promoting human rights in their countries and across the Asia-Pacific.

[10] Once the report is released, the APF's member institutions are requested to review the report and present to the APF (at their next annual meeting) on actions they propose to take (and/or have already taken) in implementing the ACJ's recommendations.

Completed References

[11] Since its establishment, the ACJ has developed a substantial body of jurisprudence on the interpretation and application of international human rights law in the Asia-Pacific. It has considered nine references:⁷

- the regulation of child pornography on the internet (2000);
- the death penalty (2000);
- trafficking of women and children (2002);
- anti-terrorism legislation and the rule of law (2004);
- torture (2005);
- the right to education (2006);

⁶ The members of the ACJ as at the time of the sexual orientation and gender equity reference were: Dr Qasim Hashimzai, Associate Professor Andrea Durbach, Shri Gopal Subramaniam, Professor Mohamed Olwan, Dato' Ranita Hussein, Mr Jugnee Amarsanaa, Justice Susan Glazebrook, Dr Purificacion Quisumbing, Professor Seong-Phil Hong, Mr Nihal Jayamanne and Professor Vitit Muntarbhorn.

⁷ All of the ACJ's completed reports are available on the APF website at <www.asiapacificforum.net>.

- the right to environment (2007);
- human rights and transnational corporations (2008); and
- sexual orientation and gender identity (2010).

Sexual Orientation and Gender Identity

Background and Terms of Reference

[12] The background to the sexual orientation and gender identity reference is as follows. In November 2006, a group of 26 international human rights experts (the Expert Group) developed and unanimously adopted the Yogyakarta Principles,⁸ which seek to clarify the existing international human rights standards relating to sexual orientation and gender identity with which all States must comply. The Yogyakarta Principles transform the scattered jurisprudence on this issue into a uniform statement of the application of human rights law in this area. The Expert Group recommended that NHRIs promote respect for the Yogyakarta Principles by both State and non-State actors.⁹

[13] In May 2009, in response to this recommendation, the APF held a workshop for its member institutions to discuss their role in promoting the Yogyakarta Principles' implementation. Nine NHRIs attended the workshop, and they issued a consensus statement recommending that the APF request its ACJ to provide advice and recommendations on the question of whether the laws in States whose NHRIs are members of the APF are consistent with international human rights law in their application in relation to sexual orientation and gender identity.¹⁰

[14] The APF agreed to this proposal in its 2009 annual meeting. Specifically, in relation to the domestic jurisdictions of the States of the APF's member institutions, the APF asked the ACJ to comment on the following terms of reference:¹¹

⁸ *Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity* (Meeting of International Commission of Jurists and human rights experts at Gadjah Mada University, Indonesia, 6–9 November 2006) [Yogyakarta Principles].

⁹ Yogyakarta Principles, Additional Recommendations (L).

¹⁰ See *Conclusions of the Workshop on the role of National Human Rights Institutions in the promotion and implementation of the Yogyakarta Principles* (Workshop of the Asia-Pacific Forum of National Human Rights Institutions, Indonesia, 5–7 May 2009) at [13].

¹¹ See Advisory Council of Jurists *ACJ Report: Human Rights, Sexual Orientation and Gender Identity* (December 2010) at 7 [Final Report].

1. *Criminal law* - whether each member State's criminal law is consistent with international human rights law in its treatment of persons on the basis of sexual orientation and gender identity;
2. *Anti-discrimination law* - whether each member State's anti-discrimination law applied to protect the human rights of persons on the basis of sexual orientation and gender identity and the adequacy of that protection;
3. *Recognition of change of gender identity* - whether each member State's laws enabled the official recognition of changes of gender identity from that assigned to a person at birth, and the consistency of those laws with international human rights law;
4. *Other laws, policies and practices* - whether any other laws, policies, acts or practices impact adversely on persons on the basis of sexual orientation and gender identity, and if so, the nature and extent of their inconsistency with international human rights law; and
5. *Human rights defenders* - whether the laws, policies and practices in each member State are adequate to ensure the protection of the rights of persons and organisations that defend the human rights of persons of diverse sexual orientation or gender identity.

[15] A background paper¹² on emerging legal issues for lesbian, gay, bisexual and transgender (LGBT) persons in the Asia-Pacific was prepared for the ACJ by the APF Secretariat, with the assistance of the Alternative Law Forum (ALF).¹³ The background paper outlined a number of challenges faced by LGBT persons, and examined the specific application of international law norms to the domestic laws and policies of each member State. The background paper provided the foundation for the ACJ's final report.

¹² *ACJ Reference: Human Rights, Sexual Orientation and Gender Identity – Background Paper* (15th Annual Meeting of the Asia Pacific Forum of National Human Rights Institutions, Indonesia, 3–5 August 2010) [Background Paper].

¹³ The ALF is an autonomous research institution which is dedicated to the identification of a practice of law which will respond to issues of social and economic injustice.

[16] The ACJ's consideration of the sexual orientation and gender identity reference was co-chaired by Justice Susan Glazebrook, Professor Vitit Muntarbhorn, and Associate Professor Andrea Durbach. Members of the ACJ met to consider the reference during the APF's 15th annual meeting in Bali from 3–5 August 2010. During its deliberations, the ACJ were assisted by five human rights experts from the Asia-Pacific region.¹⁴

[17] At the end of their deliberations, on 5 August 2010, the ACJ presented their interim findings and recommendations to the APF.¹⁵ The ACJ recommended that sexual orientation and gender identity be included in the work of NHRIs, through research, dialogue, and education, and that NHRIs advocate the decriminalisation of same-sex sexual conduct and the prohibition of discrimination on the grounds of sexual orientation and gender identity in anti-discrimination laws.

[18] The ACJ's final report on the reference was released in December 2010. The NHRI members of the APF were requested to review this report and are expected to present to the APF's 16th annual meeting in September 2011 on actions they propose to take in implementing the ACJ's recommendations.

[19] The report is in three parts. The first part summarises the application of international human rights norms to LGBT persons. The second part responds to the terms of reference. The ACJ report then sets out a series of recommendations for actions that can be taken by member NHRIs with regard to human rights and sexual orientation and gender identity.¹⁶ Finally the ACJ report provides a table summarising the legislative provisions dealing with the criminalization of same sex sexual conduct, anti-discrimination and recognition of gender identity in each member state.¹⁷ The table is not exhaustive but is designed to point NHRIs to key legislative provisions that should be considered in responding to this reference.

¹⁴ John Fisher, from ARC-International, Joy Liddicoat, from the New Zealand Human Rights Commission, Siddharth Narrain, from the Alternative Law Forum, Grace Poore, from the International Gay and Lesbian Human Rights Commission and Edmund Settle, from the United Nations Development Program.

¹⁵ For a summary of the ACJ's preliminary findings, see Grace Poore "SOGI Takes Center Stage at Asia Pacific Forum of National Human Rights Institutions – Part 1" (2010) International Gay and Lesbian Human Rights Commission <iglhrc.wordpress.com/2010/09/10/sogi-takes-center-stage-at-asia-pacific-forum-of-national-human-rights-institutions-%E2%80%93-part-1/>.

¹⁶ These are general recommendations and there are no specific recommendations addressed to each member NHRI. However, there is much more detail and recommendations in the Background Paper which relate to individual jurisdictions.

¹⁷ More information is contained in the Background Paper in Chapters 3 and 5.

Application of human rights law to LGBT persons

[20] The final report of the ACJ first notes that UN treaty bodies, special procedures and regional human rights mechanisms have interpreted international human rights law in a manner which clearly acknowledges that sexual orientation and gender identity are proscribed grounds of discrimination in international human rights law:¹⁸

- the principle of non-discrimination is recognised in a number of international human rights instruments, including the Universal Declaration of Human Rights,¹⁹ the International Covenant on Civil and Political Rights (ICCPR),²⁰ and the International Covenant on Economic, Social and Cultural Rights (ICESCR);²¹
- the UN Human Rights Committee (HRC) in *Toonen v Australia* acknowledged that international human rights law applies to those discriminated against on the basis of sexual orientation,²² by interpreting the prohibition of discrimination on the grounds of “sex” in article 2 of the ICCPR as including sexual orientation;²³
- reports of UN special procedures have highlighted, within the context of their specific mandates, human rights violations on the basis of sexual orientation and gender identity;²⁴
- the UN General Assembly referenced sexual orientation in its 2008 resolution on extrajudicial, summary or arbitrary executions, which urges States to ensure

¹⁸ Final Report, at 17.

¹⁹ *Universal Declaration of Human Rights* GA Res 217A (III), UN Doc A/810 at 71 (1948), art 2.

²⁰ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976), art 2 [ICCPR].

²¹ International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976), art 2(2) [ICESCR].

²² In *Toonen v Australia* Communication No 488/1992, UN Doc CCPR/C/50/D/488/1992 (1994), the applicant was challenging laws which criminalised same-sex sexual conduct between consenting adults on the basis that they violated the ICCPR.

²³ This interpretation was subsequently followed by the HRC in *Young v Australia* Communication No 941/2000 and *X v Columbia* Communication No 136/2005. Similar interpretations have been adopted by the Committee on Economic, Social and Cultural Rights in relation to the rights contained in the ICESCR.

²⁴ For example, the UN Working Group on Arbitrary Detention has stated that the deprivation of liberty on the basis of sexual orientation violates the guarantees of equality before the law and the right to equal legal protection against all forms of discrimination, including sex. See Report of the Working Group on Arbitrary Detention, UN Doc E/CN.4/2004/3, 15 December 2003 at [73] and Working Group on Arbitrary Detention, Opinion No 7/2002 (Egypt), 21 June 2002 at [28] in UN Doc E/CN.4/2003/8/Add 1.

the effective protection of the right to life and to investigate promptly and thoroughly the killing of people for any discriminatory reason,²⁵ and

- at a regional level, the European Court of Human Rights has developed a substantial body of jurisprudence dealing with the violation of rights under the European Convention for the Protection of Human Rights and Fundamental Freedoms,²⁶ due to discrimination on the basis of sexual orientation and gender identity.²⁷

Discussion of terms of reference

[21] The report then responds to the terms of reference given to the ACJ by the APF, highlighting emerging legal concerns of LGBT persons in the Asia-Pacific region.²⁸ The report incorporates much of the material contained in the background paper, and a summary of this combined material in respect of each term of reference is presented below.

Criminal law

[22] The final report states that the most egregious violation of international human rights law in relation to LGBT persons is the existence of laws criminalising same-sex sexual conduct between consenting adults.²⁹ Whilst legislative and/or judicial reform has occurred in some parts of the Asia-Pacific region to decriminalise same-sex sexual conduct between consenting adults,³⁰ there are still seven States of APF member institutions that continue to criminalise such conduct within the region.³¹

[23] The ACJ also notes that legislative reform in some States in the Asia-Pacific has only provided partial consistency with international human rights law. For example, some States have legislated an age of consent for homosexual sexual conduct which is different from that

²⁵ *Extrajudicial, Summary or Arbitrary Executions* GA Res A/63/430/Add 2, A/Res/63/182 (2008).

²⁶ European Convention on Human Rights (adopted 4 November 1950, entered into force 3 September 1953).

²⁷ See for example *Dudgeon v United Kingdom* (1982) 4 EHRR 149 (ECHR), *Norris v Ireland* (1988) 13 EHRR 186 (ECHR) and *Modinos v Cyprus* (1993) 16 EHRR 485 (ECHR).

²⁸ Final Report, at 19–31.

²⁹ Final Report, at 19.

³⁰ For example, same-sex sexual conduct between consenting adults has been decriminalised by the legislature in Thailand (1957), New Zealand (1986), Australia (from the 1960s to 1997) and Hong Kong (1991). Judicial decisions in Fiji, Hong Kong, Nepal and India have declared laws criminalising same-sex sexual conduct between consenting adults as unconstitutional. See for example the decision of the Delhi High Court in *Naz Foundation v NCT Delhi* (2009) 160 DLT 277.

³¹ Sri Lanka, the Maldives, Afghanistan, Malaysia, Palestine, Qatar and Mongolia.

for heterosexual sexual conduct.³² Further, some States have laws which indirectly target LGBT persons in their private sexual relations, for example laws relating to public nuisance, national security, public morality and obscenity.³³

[24] In some jurisdictions, criminal or extra-legal sanctions can be imposed on the basis of certain religious or cultural beliefs. The ACJ endorses the view expressed in the Vienna Declaration and Programme of Action that States need to find an appropriate balance between country-specific cultural and religious backgrounds and fulfilling their duty to promote and protect *all* human rights and fundamental freedoms.³⁴

Anti-discrimination law

[25] The report notes that anti-discrimination laws in fifteen of the seventeen States surveyed do not explicitly include sexual orientation or gender identity among their proscribed grounds of discrimination, meaning that LGBT persons in those countries have been denied the right to equality.³⁵

[26] Some States recognise the rights of LGBT expressly in their constitutions,³⁶ or more generally.³⁷ However, in some jurisdictions, even when the State's constitution recognises the norms of equality, non-discrimination and freedom of expression, there may be specific limitation clauses, based on grounds of public order, morality or religion, which may inhibit the enjoyment of all human rights by LGBT persons.³⁸ Arguments based on religion and culture are sometimes used to negate LGBT rights, contending that the enjoyment of rights by LGBT persons is antithetical to existing religious or cultural practices. This is a particular

³² Whilst the report did not point to any specific examples from the States of APF NHRIs, it did note that in Australia, while the age of consent is the same for homosexual and heterosexual relationships in each State and Territory, the age of consent for sexual activity is different across the States and Territories.

³³ For example, provincial criminal laws in Indonesia relating to prostitution are used to target LGBT persons. In Mongolia, the term "unnatural desire" in the Penal Code is used to criminalise coercive sexual conduct, but there is evidence which indicates that it has been used to target LGBT persons.

³⁴ *Vienna Declaration and Programme of Action* A/CONF.157/23, 12 July 1993 (adopted by the World Conference on Human Rights on 25 June 1993).

³⁵ Final Report, at 21.

³⁶ For example, the Constitution of Fiji, s 38(2).

³⁷ For example, the Thailand's Constitutional Drafting Assembly "Intentions of the Constitution of the Kingdom of Thailand" states that the guarantee of equality applies to LGBT persons (and this has been interpreted by Thai courts accordingly), and the government in South Korea has stated that its Constitution "implicitly" covers sexual orientation. Judicial decisions from the Philippines and Hong Kong have also held that guarantees of equality and non-discrimination protect LGBT persons.

³⁸ For example, the Malaysian Constitution provides the right to equality before law, but this is subject to customary laws and other personal law based on religious policies.

issue when a State's constitution explicitly requires the State to be based on religious norms.³⁹

[27] The ACJ states that clear and unambiguous references to non-discrimination on the grounds of sexual orientation and gender identity in anti-discrimination legislation are needed in order to adequately protect LGBT persons. The ACJ observes the key developments in New Zealand and Australia, where anti-discrimination legislation covering sexual orientation and gender identity as a ground of discrimination exists. In New Zealand, non-discrimination rights provided for under the Human Rights Act 1993 ensure that citizens have the right to freedom from discrimination on the ground of sexual orientation. At the State level in Australia, the law prohibits discrimination on the basis of sexual orientation in employment, accommodation and the provision of goods and services.⁴⁰

[28] Several NHRIs in the region have also been attempting to address the challenges faced by LGBT persons and give voice to their concerns, in particular the Korean Human Rights Commission,⁴¹ the NHRI of Thailand,⁴² and the Australian Human Rights Commission.⁴³

Recognition of change of gender identity

[29] The ACJ's report identifies the lack of legal recognition of a third gender as a key issue facing the transgender community.⁴⁴ Twelve of the seventeen States surveyed do not provide legal recognition for gender changes.⁴⁵ This can often make it difficult or impossible for transgender persons to participate in public life, access essential health and social services, and travel freely. The ACJ views the denial of legal recognition for changes to one's gender identity as a breach of international human rights law.⁴⁶

³⁹ For example, the Maldivian Constitution explicitly states that fundamental rights are subject to the tenets of Islam.

⁴⁰ However, there is limited protection at the federal level.

⁴¹ The Korean Human Rights Commission has proposed legislative reform to cover discrimination on the basis of sexual orientation and has worked closely with LGBT organisations in operationalising its mandate.

⁴² Thailand's NHRI has proposed law reforms which address discrimination on the ground of sexual orientation.

⁴³ The Australian Human Rights Commission conducted an inquiry in 2007 into discrimination against persons in same-sex relationships in their financial and work-related entitlements and benefits, which resulted in substantial and far-reaching changes to domestic legislation.

⁴⁴ Final Report, at 23.

⁴⁵ Afghanistan, India, Jordan, Malaysia, the Maldives, Mongolia, Palestine, the Philippines (to an extent), Qatar, Sri Lanka, Thailand and Timor Leste.

⁴⁶ For example, article 16 of the ICCPR expressly guarantees the right to recognition before the law.

[30] The report does note, however, some advances that have been seen in judicial decisions from some parts of the region to recognise gender changes. For example, the eunuch community has been recognised by the Pakistani Supreme Court,⁴⁷ and the right to recognition before the law for transgender persons has been noted by the Nepali Supreme Court.⁴⁸ In New Zealand, the courts have recognised the right of individuals to change their legal gender status without undergoing gender reassignment surgery and that post-operative transsexuals can marry under their reassigned gender status.⁴⁹

[31] Further, some NHRIs have attempted to address these issues, most notably the New Zealand Human Rights Commission.⁵⁰ Several governments in the region have also been proactive in recognising LGBT rights in certain areas, for example, the Indian government has been proactive in recognising a third gender in its election identification cards and passports, and has also recognised the right of transgender persons to contest elections.⁵¹

Other laws, policies and practices

[32] When addressing this term of reference, the ACJ reiterates the legislative and judicial advances that it outlined in relation to the other terms of reference, and the national inquiries that have been conducted to document discriminatory laws and practices and to suggest their removal. Despite these developments, the report notes that there are still a number of laws, policies and practices that continue to undermine the ability of LGBT persons to enjoy the full spectrum of human rights.⁵²

[33] The Australian Human Rights Commission's report in 2007 recorded wide-ranging institutional discrimination faced by LGBT persons in Australia.⁵³ More graphic violations of

⁴⁷ *Mohammad Aslam Khaki v SSP (Operations) Rawalpindi* Constitution Petition No 43 of 2009.

⁴⁸ *Sunil Babu Pant v Nepal Government* Writ No 917 of 2007.

⁴⁹ *Attorney-General v Otahuhu Family Court* [1995] 1 NZLR 603. Other advances have been seen in judicial decisions from India, the Philippines, and South Korea.

⁵⁰ The New Zealand Human Rights Commission conducted a pioneering inquiry into transgender rights and released its report, "To Be Who I Am", in 2009. The report highlighted several areas requiring immediate attention, namely improving participation rights for transgender persons, improving their legal protections, improving their access to health services, and simplifying requirements for legally changing one's gender.

⁵¹ Background Paper, at 89.

⁵² Final Report, at 25–26.

⁵³ The report, referred to above at footnote 43, documented discrimination against LGBT persons through: the absence of equal recognition of same-sex relationships, discriminatory treatment in relation to the recognition of children of same-sex couples, employment, workers' compensation, tax, social security, veteran's entitlements, health care costs, family law, superannuation, aged care, and migration.

LGBT persons' rights were highlighted in a judgment of the Philippines Supreme Court,⁵⁴ which identified extreme violence inflicted upon members of the LGBT community in the Philippines.

[34] The ACJ took particular note of other laws, policies and practices implemented by both State and non-State actors which were inconsistent with the following international human rights:

- *right to equal protection of the law* – physical violence against LGBT persons is frequently unreported due to the stigma attached to issues of sexual orientation and gender identity. Prejudice within State agencies also means that this violence often is not formally documented or investigated further;⁵⁵
- *freedom from arbitrary detention, torture and inhuman or degrading treatment or punishment* – there are documented accounts in a number of States of police and security forces using vagrancy, public nuisance, national security, public morality, obscenity, indecency and public order laws to detain, harass, and intimidate LGBT persons.⁵⁶ Torture and ill treatment of LGBT persons at the hands of non-State actors has also been well-documented and repeatedly brought to the attention of the UN special procedures;⁵⁷
- *right to privacy* – the existence of laws which criminalise same-sex sexual conduct (even where such laws are not strictly enforced) breaches this right.⁵⁸ Similarly, the differential application by police and security forces of vagrancy, public nuisance, national security, public morality, obscenity, indecency and public order laws to detain, harass and intimidate LGBT persons negatively impacts on this right;⁵⁹
- *right to health* – for transgender persons, access to specific medical services and procedures is problematic and often complicated by their inability to have

⁵⁴ *Ang Ladlad LGBT Party v Commission on Elections* GR No 190582, 8 April 2010.

⁵⁵ See also the discussion in the Background Paper, at 27–29.

⁵⁶ See also the discussion in the Background Paper, at 29–31.

⁵⁷ The gravity and seriousness of violations of the right to freedom from torture with respect to LGBT persons has also been recognised by the Delhi High Court in *Naz Foundation v NCT Delhi* (2009) 160 DLT 277 at [20]–[22].

⁵⁸ This has been recognised by decisions from UN treaty bodies and the European Court of Human Rights. The UN Group on Arbitrary Detention has also recognised that the existence of laws which criminalise same-sex sexual conduct threatens the right to be free from arbitrary detention.

⁵⁹ See also the discussion in the Background Paper, at 26–27.

changes to their gender formally recognised on identity and entitlement documentation. With regard to the spread of HIV/AIDS, laws, policies and practices criminalising homosexual activity impede public health programmes by driving underground those groups at risk of infection;⁶⁰ and

- *freedom of expression, association and assembly* – within the Asia-Pacific region, police and security forces, as well as religious and community groups have attempted to limit the ability of LGBT persons to enjoy such rights particularly through the use of laws dealing with public order, public nuisance and public morality, but also through harassment and intimidation.⁶¹

Human rights defenders

[35] The ACJ emphasises the important role that human rights defenders play in promoting human rights. This is expressly recognised in article 18 of the UN Declaration on Human Rights Defenders.⁶² The UN Committee Against Torture has also observed that States need to take effective measures to protect human rights defenders from harassment, threats and attacks.

[36] The report notes that, whilst there is formal constitutional and legislative recognition of the rights of human rights defenders in many countries, there have been numerous human rights violations directed towards defenders of the rights of LGBT persons, such as being subjected to threats of violence and death, sexual abuse, and murder.⁶³ The background paper observed that the treatment of human rights defenders was particularly problematical in Indonesia, Jordan, Malaysia and Sri Lanka.

[37] The ACJ also considers the experiences of children who identify as, or whose parents are, LGBT (this was an issue that the APF did not specifically refer to the ACJ in its terms of reference). The ACJ observed that these children often face discrimination.⁶⁴ The ACJ noted that the Committee on the Rights of the Child has interpreted the UN Convention on the

⁶⁰ See also the discussion in the Background Paper, at 31–32.

⁶¹ See also the discussion in the Background Paper, at 33–34.

⁶² *United Nations Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognised Human Rights and Fundamental Freedoms* A/Res/53/144 (1999).

⁶³ These human rights violations have been documented by the United Nations special rapporteurs on human rights defenders, extrajudicial, summary or arbitrary executions, independence of judges and lawyers, torture, children, and health.

⁶⁴ Final Report, at 29–31.

Rights of the Child as prohibiting discrimination against children on the ground of sexual orientation,⁶⁵ and that the Convention places a number of obligations on States in relation to health, education, participation and information.

The ACJ's Key Recommendations

[38] The ACJ's report concludes with a series of recommendations. These recommendations are based on the understanding that human rights apply to all people by virtue of their inherent dignity and humanity and that every person is entitled to be treated humanely, irrespective of their origin or status. NHRI's role in protecting human rights therefore applies to all persons, including LGBT persons.

[39] The ACJ decided that, rather than relating the recommendations directly to the terms of reference, it would arrange the recommendations under core functions of NHRIs: research, education, monitoring and advocacy. It also directed a number of recommendations to the APF more generally.

[40] The ACJ's recommendations are structured in a way which supports a 'staged approach' to their implementation. The ACJ's recommendations, in order of their suggested progression, are as follows:⁶⁶

- building NHRI capacity and conducting research relating to the nature and incidence of human rights violations based on sexual orientation and gender identity;
- promoting respectful interaction and dialogue between the wider community and LGBT persons, including raising awareness within the judiciary, law enforcement, education system and professional organisations and support services;
- monitoring the human rights situation of LGBT persons and in particular the right of freedom from discrimination; and
- advocating the interpretation, amendment and enforcement of domestic laws, the application of international law, the interpretation and application of

⁶⁵ *United Nations Convention on the Rights of the Child* GA/Res/44/25 (1989), art 2.

⁶⁶ Final Report, at 32–39.

religious and traditional laws and practices to align with the Yogyakarta Principles, and the provision of services that help eliminate the stigmatisation of and discrimination against LGBT persons.

[41] There are a broad range of more detailed recommendations under each category. These are set out in full in the Appendix to this paper. While the ACJ's recommendations are structured in a staged manner, the ACJ emphasised that it is not necessary for the recommendations to be implemented in the order given. Nor are the recommendations intended to be exhaustive. The ACJ recognised that member institutions may have different priorities, country-specific contexts and resources, and operate in different cultural and religious frameworks. Thus member institutions were encouraged to determine the selection and priority of these initiatives.⁶⁷ The ACJ also noted that a consultative and participatory approach should be encouraged when implementing these recommendations.⁶⁸ Ultimately, however, the goal is for all LGBT persons to enjoy the full range of human rights.

[42] The specific recommendations to the APF itself included supporting NHRI's in their work in this area, encouraging the sharing of best practice and developing toolbits and reviewing progress in the region at regular intervals.

Conclusion

[43] In summary, the ACJ's response to the terms of reference given to it by the APF highlights a number of inconsistencies between international human rights law relating to sexual orientation and gender identity and the laws and policies of States whose NHRIs are APF members. The ACJ's recommendations outline a broad spectrum of initiatives which NHRIs are encouraged to implement, in order to facilitate the full enjoyment of all human rights by persons of diverse sexual orientation or gender identity.

⁶⁷ Final Report, at 32.

⁶⁸ Final Report, at 32–33.

APPENDIX:**RECOMMENDATIONS OF THE ACJ****CAPACITY BUILDING AND RESEARCH**

We recommend that NHRIs:

Build NHRI Capacity

1. Undertake an internal dialogue on issues relating to the human rights of persons of diverse sexual orientation or gender identity and build the capacity of the institution to understand the issues and to react appropriately.
2. Build relationships, consult and work with persons of diverse sexual orientations and gender identities, including CSOs, in order to inform the work of the NHRI in the promotion and protection of human rights generally and in relation to the rights of persons of diverse sexual orientation or gender identity.
3. Develop communication strategies for positive engagement with persons of diverse sexual orientations and gender identities. NHRIs should consider engaging with SOGI NGOs to ensure that their experience and expertise is utilised to ensure an effective communication outreach to the SOGI community.

Conduct Research

4. Inform themselves about available or on-going research in their jurisdiction and overseas relating to the nature and incidence of human rights violations based on sexual orientation or gender identity.
5. Identify gaps in that research and foster or undertake research to fill those gaps for example through universities and CSOs.
6. Foster or undertake research, documentation and the gathering of information on discrimination, including direct and indirect, multiple and intersecting forms of discrimination, on the basis of sexual orientation or gender identity including by non-State and private actors.
7. Facilitate studies with appropriate stakeholders on protecting the rights (including economic, social and cultural rights) of persons of diverse sexual orientations and gender identities in the context of local social and cultural traditions and religious beliefs.

Document the Domestic Impact

8. Identify and document at the domestic level:

- (a) human rights violations of transgender and intersex persons as a result of their inability to gain legal recognition or access legal documentation in the gender of their choice;
 - (b) the impact (both direct and indirect) of laws criminalising same sex sexual conduct between consenting adults. The indirect effects might include an inability or unwillingness to access social services such as health and HIV prevention, and treatment and care services and a vulnerability to blackmail, extortion, and harassment;
 - (c) the extent to which public order and sex work offences are selectively or disproportionately enforced against persons of diverse sexual orientation or gender identity;
 - (d) the socio-economic impact of human rights violations and discrimination on persons of diverse sexual orientation or gender identity. For example, disproportionate incidences of poverty, limited employment opportunities and reported cases of trafficking or forced prostitution;
 - (e) the extent to which stigma and discrimination limits access to social services including social protection schemes, income generation projects and health care services, including HIV prevention and treatment, and sexual health services;
 - (f) the disproportionate impact and application of other laws that may violate human rights in relation to sexual orientation or gender identity, for example vagrancy, pornography, and public nuisance laws;
 - (g) the issues faced by human rights defenders working on issues of sexual orientation or gender identity.
9. Share information amongst NHRIs about best practices in other jurisdictions amongst NHRIs.

EDUCATION, PROMOTION AND DIALOGUE

We recommend NHRIs:

Facilitate a dialogue with key stakeholders

- 10. Provide a platform for and assist persons of diverse sexual orientation or gender identity to engage in dialogue with all relevant groups including parliamentarians, the judiciary, judicial officers, law enforcement officials, providers of social services and community and religious leaders and thinkers on the promotion, protection and fulfilment of their human rights (including their economic, social and cultural rights).
- 11. Promote dialogue among progressive community and religious leaders and thinkers on the relationship between faith, religion, custom and tradition and sexual orientation or gender identity.

12. Find or provide neutral and safe places for a constructive engagement between persons of diverse sexual orientation or gender identity, their families and the wider community.
13. Foster dialogue with government agencies about the wider implications of discrimination including access to social services, employment, and health services including HIV prevention, treatment and care services.

Raise awareness within the lesbian, gay, bisexual and transgender community

14. Provide human rights education and information about remedies for human rights violations to persons of diverse sexual orientation and gender identity.
15. Disseminate and promote the Yogyakarta Principles, especially to those whose rights they affirm, including in local languages.
16. Support capacity building in the areas of legal literacy, remedies, human rights and advocacy skills for people of diverse sexual orientation and gender identity.

Raise awareness within the judiciary and law enforcement

17. Build the capacity of law enforcement officers, members of the judiciary, other judicial officers, lawyers, and the providers of social services (including health and HIV prevention, treatment and care services) to interact appropriately with persons of diverse sexual orientation or gender identity. This includes providing them with information on best practice and assisting in the development of protocols, as well as providing or fostering the provision of education and training. In particular, training should concentrate on how best to address violence and discrimination directed at persons of diverse sexual orientation or gender identity through supportive laws, policing, education and care.
18. Encourage the sharing of information between members of the judiciary and other judicial officers within and across jurisdictions in the region and the sharing of experiences from other regions where appropriate.
19. Encourage the sharing of information and best practice between law enforcement officers and those providing social services within and across jurisdictions in the region and share experience from outside the Asia Pacific region where appropriate.

Raise awareness within the education system

20. Include in the general human rights education conducted by NHRIs and others (including in schools) education on the human rights of persons of diverse sexual orientation or gender identity in order to nurture understanding of human pluralism and to foster the respect for human rights of all.
21. Educate and work with teachers and Ministries of Education and other educational professionals to protect and promote the human rights of students and teachers of

diverse sexual orientation or gender identity, with a view to ensuring their full participation in school life. It is particularly important to ensure that such students (and teachers) are free from harassment, violence and bullying (both physical and psychological).

Raise awareness within professional organisations and support services

22. Engage with professional bodies with a view to promoting, respecting and fulfilling the human rights of persons of diverse sexual orientation or gender identity (including medical associations, bar associations, psychologists associations, and educational professional associations).
23. Engage with and educate the media on the human rights issues relating to persons of diverse sexual orientation or gender identity. Use the media in a creative manner as a platform to promote messages to the general population about the human rights of persons of diverse sexual orientation or gender identity and to promote a balanced approach by the media.
24. Encourage discussion between health professionals, and intersex and transgender people about the issues relating to medical procedures affecting them.
25. Network with parental/family associations to encourage understanding of persons of diverse sexual orientation or gender identity and build support systems to access parents/families accordingly.

MONITORING

We recommend NHRIs:

26. Consider the use of national inquiry powers to document and monitor the human rights situation of persons of diverse sexual orientation or gender identity.
27. Recognise persons of diverse sexual orientation and gender identity as groups that are vulnerable to human rights violations and monitor the progress towards ensuring the human rights (including economic, social and cultural rights) of persons of diverse sexual orientation and gender identity are respected, protected and promoted.
28. Ensure that persons of diverse sexual orientation and gender identity are included in NHRI activities, for example, in projects on trafficking, access to justice, health, housing, education and poverty.
29. Respond in an urgent manner to instances of torture as well as cruel, inhuman and degrading treatment of persons of diverse sexual orientation or gender identity.
30. Document and respond to issues of discrimination brought forward by persons of diverse sexual orientation or gender identity in order to assist them to find the appropriate remedy.

31. Ensure that NHRIs' complaints mechanisms (where these exist) are accessible to those who suffer human rights violations on the basis of their actual or perceived sexual orientation or gender identity. In particular, NHRIs should be able to receive complaints about discrimination, including by non-State and private actors.
32. Where there is no complaints function, NHRIs should advocate for all allegations of human rights violations perpetrated against persons of diverse sexual orientation or gender identity to be investigated thoroughly by the appropriate independent body and that those responsible are held accountable for their actions.
33. Pay attention to the rights of persons of diverse sexual orientation or gender identity who are detained, including in juvenile facilities. This includes, in particular, their right not to be subjected to torture or to cruel, degrading or inhuman treatment.

ADVOCACY

We recommend that NHRIs consider advocacy in relation to:

The interpretation and amendment of domestic laws

34. Advocate the review of existing laws to remove all laws that violate the human rights of persons of diverse sexual orientation or gender identity and ensure the application of all laws in a non-discriminatory manner.
35. Advocate the repeal or revision, as appropriate, of relevant domestic laws to decriminalise same sex sexual conduct between consenting adults.
36. Advocate the revision or removal of laws and policies that criminalize, penalise or prohibit diverse gender expressions.⁶⁹
37. Advocate uniform age-of-consent laws for heterosexual and same sex sexual conduct;
38. Advocate the removal of legal barriers to the distribution of sexual health information, including by providing exceptions to obscenity offences for such material.
39. Advocate the enactment of legal protections from hate crimes and prohibit vilification on the grounds of gender identity and sexual orientation.
40. Advocate the introduction of laws that make sexual assault of males a criminal offence, where they do not exist.
41. Advocate the enactment of anti-discrimination provisions that ensure protection and promotion of the human rights of persons of diverse sexual orientation and gender identity. Provisions should specifically prohibit discrimination on these grounds and cover actions by non-State and private actors. Areas of discrimination of particular

⁶⁹ The expression of gender identity may occur through, amongst other things, dress, speech mannerisms, or through permanent (medical) or temporary changes to ones appearance.

concern include employment, access to services including health care, education, accommodation, provision of identity documents, and access to welfare services.

The enforcement of domestic laws

42. Advocate the end of selective or disproportionate enforcement of laws (such as vagrancy, prostitution, assembly laws) with regard to persons of diverse sexual orientation or gender identity.
43. Advocate the end of the selective enforcement of criminal laws, including public order and sex work offences and particularly where this is used as a pretext for extortion or for harassing, assaulting, detaining and punishing persons of diverse sexual orientation or gender identity.
44. Consider engagement in litigation designed to promote the human rights of persons of diverse sexual orientation or gender identity, including providing information to those involved in such litigation and, where the mandate allows, taking action as an intervenor or amicus curiae.

Application of international law

45. Advocate for the application of the UN Declaration relating to human rights defenders, including human rights defenders in relation to sexual orientation or gender identity.
46. Continue to advocate for the ratification or accession to all international human rights instruments.
47. Promote the consideration of human rights issues in relation to sexual orientation or gender identity at the international level, including through inclusion of these issues where relevant in reports (including shadow reports) to Treaty Bodies, Special Procedures, the Universal Periodic Review and the Human Rights Council and by encouraging governments to support serious discussion of these issues in international human rights forums.

The interpretation and application of religious and traditional laws and practices

48. Advocate for an interpretation of religious and traditional law and practices that aligns with the Yogyakarta Principles.⁷⁰

Provision of Services

49. Advocate that governments ensure transparent and independent police complaint mechanisms are in place in order to help prevent and remedy instances of police exceeding their authority in policing of persons of diverse sexual orientation and gender identity, or involved in harassment, extortion and violence towards such groups.

⁷⁰ That is, an interpretation that promotes and reiterates respect for human dignity and rights, and in particular, the right to privacy and to humane treatment.

50. Advocate for the elimination of stigmatisation and discrimination by social and health service providers which have been shown to limit the access by persons of diverse sexual orientation or gender identity to social and health services, including HIV services.
51. Advocate for the recognition of the gender identity of choice for transgender individuals, whether or not they have undertaken sex reassignment surgery. Such individuals should be accorded the same legal rights as other citizens and equal rights to passports and other identification documents that recognize the person's chosen gender identity. Transgender people should have the right to marry on the basis of their chosen gender
52. Advocate for the provision of legal protections for persons of diverse sexual orientation or gender identity from being subject to treatment without informed consent, including aversion therapy or other medical interventions that purport to control or alter sexual orientation or gender identities. Such protections should recognise the special position of children and the obligation to ensure that the 'best interests of the child' should be the determining factor in relation to decisions regarding medical treatment.
53. Advocate for governments and the medical profession to discourage the use of diagnostic categorisations, such as "gender identity disorder" which stigmatise transgender people as mentally ill and undermine the legitimacy of sex reassignment procedures.
54. Advocate the promotion of human rights programmes that reflect the full range of human rights (including economic, social and cultural rights) and remedies for the breach of those rights for all persons, including persons of diverse sexual orientation or gender identity.

ASIA PACIFIC FORUM

We recommend that the Asia Pacific Forum:

55. Help organise mutual exchanges between NHRIs to support NHRIs in their work on the human rights of persons of diverse sexual orientation and gender identity.
56. Encourage mutual sharing across NHRIs of best practice including assistance as to how to begin work in this area.
57. Organise subregional meetings to share information about participatory processes and shared cultural issues relating to the promotion and protection of the human rights of persons of diverse sexual orientation or gender identity.
58. Work on encouraging the development of toolkits on the various issues that can be used throughout the region.
59. Review the progress towards the implementation of these recommendations at regular intervals.

60. Engage with the UN and institutional mechanisms such as the International Coordinating Committee of National Human Rights Institutions about the work NHRIs in the region are doing with regard to the human rights of persons of diverse sexual orientation or gender identity.