



# **The Violations of the Rights of Lesbian, Gay, Bisexual and Transgender Persons in JAPAN**

## **A Shadow Report**

Submitted to the Human Rights Committee by:

GayJapanNews

Global Rights

International Gay and Lesbian Human Rights Commission (IGLHRC)

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School

October 2008

## **1. Introduction**

This shadow report is collaborative effort created and submitted by GayJapanNews,<sup>1</sup> Global Rights, the International Gay and Lesbian Human Rights Commission, and the International Human Rights Clinic, Human Rights Program at Harvard Law School.<sup>2</sup> This report aims to offer an evaluation of Japan's compliance with the International Covenant on Civil and Political Rights (ICCPR),<sup>3</sup> and to complement ongoing advocacy of greater protection and promotion of LGBT persons in Japan.

Japan ratified the ICCPR on June 21, 1979 and presented its fifth periodic state report to the Human Rights Committee in December 2006 (document dated April 25, 2007). On October 13-31, 2008, Japan will go before the Human Rights Committee for consideration of its compliance with the covenant. Non-governmental organizations may submit shadow reports to serve as an additional source of information for UN committee members.

## **2. Executive Summary**

While Article 14 of the Constitution of Japan prohibits discrimination based on “race, creed, sex, social status, or family origin,”<sup>4</sup> there is no law allowing individuals or groups to see legal redress for discrimination.<sup>5</sup> To date, including sexual orientation as further constitutional grounds of prohibited discrimination has not been widely supported.<sup>6</sup> Japan has no specific legislation on anti-discrimination or human rights, and no independent institution to ensure the protection and promotion of human rights. The UN Human Rights Council has repeatedly noted Japan's failure to establish an independent human rights institution in line with standards of the Paris Principles, stating that the existing

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<sup>1</sup> GayJapanNews is a Tokyo-based LGBT news source and advocacy group, provides information on the status of civil and political rights of lesbian, gay, bisexual, and transgender/transsexual (LGBT) persons in Japan.

<sup>2</sup> This report was drafted by Lauren Birchfield (3L HLS), under the supervision of Mindy Jane Roseman (J.D., Ph.D. HLS) with significant assistance from Azusa Yamashita of GayJapanNews; special thanks to Stefano Fabeni (J.D., LL.M.), Director of the LGBT Initiative of Global Rights; Anthony DiStefano, PhD, MPH; Grace Poore, Regional Coordinator for Asia and the Pacific Islands of the International Gay and Lesbian Human Rights Commission; Greg Pflugfelder; Katsuhiko Suganuma; Hiroyuki Taniguchi; Julie Rosseau; Claire Maree; Yukiko Hanawa; Akira Miyama of Delta G; Chieko Kuramoto; Mameta Endo; Riki Hirabayashi; and those who contributed on condition of anonymity.

<sup>3</sup> Japan is party to six of the seven major international rights instruments, including the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social, and Cultural Rights (ICESCR), and the Convention on the Elimination of All Forms of Racial Discrimination (CERD).

<sup>4</sup> Article 14 Constitution of Japan

<sup>5</sup> Summary Prepared by the Office of the High Commissioner for Human Rights, Japan (3 April 2008) A/HRC/WG.6/2/JPN/3

<sup>6</sup> The inclusion of gender identity has not been considered so far.

Human Rights Commission's obligation to report to the Ministry of Justice undermines its authority to function effectively and to speak out on human rights concerns.<sup>7</sup>

Japan does not criminalize sodomy or same-sex sexual acts. However, Japanese law does not guarantee substantive equality on grounds of sexual orientation and gender identity, nor does it protect from discrimination and abuses. No laws in Japan explicitly prohibit or protect against discriminatory applications of the civil and political rights enshrined in the ICCPR to LGBT persons. For example, the Law for the Prevention of Spousal Violence and the Protection of Victims and the Public Housing Law apply only to opposite-sex couples (either married or unmarried) and do not extend to same-sex couples.<sup>8</sup>

Legislation allowing transgender persons, defined by law as having Gender Identity Disorder, to undergo sex reassignment surgery and to legally change one's gender has only recently been enacted.<sup>9</sup> Changing one's gender, however, requires meeting specific conditions that stand as a significant, discriminatory barrier to many transgender persons seeking to legally change their civil gender.

Overall, Japan is not accepting of LGBT person. Only in 1994 did the Japanese Society of Psychiatry and Neurology change its official stance on homosexuality and cease to classify it as a disease or illness. Transgender persons, however, are still labeled as suffering from "gender identity disorder" (GID), and lesbian, gay, and bisexual persons in Japan continue to experience the legacy of pathologization.<sup>10</sup> Not only are LGBT persons in Japan subject to discrimination under laws and policies, but they face discrimination in employment, housing, healthcare, and education, as well.<sup>11</sup> Moreover, LGBT persons experience several forms of violence, including physical, psychological, verbal, and sexual assaults perpetrated both publicly, by persons motivated by the victim's sexual orientation, and privately, within intimate partner relationships and by family members.<sup>12</sup>

### **3. Substantive Violations of the Convention**

#### **Articles 2(1) and 26 (Non-discrimination)**

Articles 2(1) and 26 of the ICCPR clearly articulate a non-discrimination standard that states parties are obliged to uphold. Article 2(1) requires states parties to "undertake to respect and to ensure to all individuals within its territory and subject to its jurisdiction

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<sup>7</sup> Id.

<sup>8</sup> Law for the Prevention of Spousal Violence and the Protection of Victims; Public Housing Law Article 23(1)

<sup>9</sup> Law Concerning Special Cases in Handling Gender for People with Gender Identity Disorder

<sup>10</sup> DiStefano, Anthony. *Suicidality and Self-harm Among Sexual-Minorities in Japan*, Qualitative Health Research (August 2008). Copyright 2008 by SAGE publications.

<sup>11</sup> DiStefano, Anthony. *Report on Violence Involving Sexual Minorities in Japan: Summary and Recommendations from the JLGBT Study, 2003-2004*.

<sup>12</sup> Id.

the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”<sup>13</sup> In General Comment 31 on Article 2, the Human Rights Committee stated that state parties could be held accountable for violations of ICCPR rights perpetrated by non-state if the state has failed to measures to protect individuals from these violations.<sup>14</sup> In *Toonen v. Australia*, the Human Rights Committee interpreted the provision of “sex” to include sexual orientation and thereby extended article 2(1) to prohibit discrimination based on sexual orientation.

Article 26 states that “all persons are equal before the law and are entitled without any discrimination to the equal protection of the law,” prohibits discrimination, and requires that all persons are guaranteed “equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”<sup>15</sup>

The following section identifies laws, policies, and practices that discriminate against LGBT persons in Japan and thereby violate article 2(1) and article 26 of the ICCPR.

### Rights Awarded to Opposite-Sex Couples Are Denied to Same-Sex Couples

In *Joslin v. New Zealand*, Human Rights Committee found that refusal to legalize same-sex marriage did not violate Article 23.<sup>16</sup> In *Young v. Australia* and in *X v. Colombia*, however, the Human Rights Committee did find the refusal to grant unmarried same-sex couples de facto benefits awarded to unmarried opposite-sex couples to be a violation of Article 26.<sup>17</sup>

Article 24 of the Japanese Constitution states that “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.”<sup>18</sup> The phrase “both sexes” in Article 24 has been academically and generally interpreted to mean man and woman, thereby supporting the restriction of marriage to opposite-sex couples. Moreover, Articles 731-737 of the Japanese Civil Code restrict marriage to opposite-sex unions.<sup>19</sup> Same-sex couples are not able to marry, and same-sex couples are not granted rights derived from marriage.<sup>20</sup> Finally, same-sex marriages performed abroad are not legally recognized in

<sup>13</sup> International Covenant on Civil and Political Rights, G.A. Res. 2200A, 999 U.N.T.S. 171, art. 2(1) (Dec. 16, 1966) [hereinafter ICCPR].

<sup>14</sup> General Comment 31 to Article 2 of the ICCPR.

<sup>15</sup> ICCPR, *supra* note 12 at Article 26.

<sup>16</sup> *Joslin v. New Zealand*, Communication No. 941/200.

<sup>17</sup> *Young v. Australia*, Communication No. 901/1999. *X v. Colombia*, Communication No.1361/2005, 30 March 2007.

<sup>18</sup> Article 24, Constitution of Japan

<sup>19</sup> Article 731-741 Japanese Civil Code. Under Japanese marriage law, the male partner must be 18 years of age or older and the female partner must be 16 years or older. A woman cannot get married within six months of the dissolution of her previous marriage. Most people related by blood, by adoption or through other marriages are, under article 736, ineligible for marriage in Japan.

<sup>20</sup> In order to protect same-sex relationships, some LGBT persons draft private contracts to demonstrate social or public proof of the relationship. Homosexual couples obtain notary deeds stipulating their

Japan and bi-national same-sex couples cannot obtain a visa for the foreign partner based on their relationship.

While the restriction of legal marriage in Japan to opposite-sex couples is perhaps not a violation of the ICCPR, the denial of de facto partnership rights to same-sex couples that are awarded to opposite-sex couples is a violation of Article 26.<sup>21</sup> For example, unlike unmarried opposite-sex couples, same-sex couples are not entitled to public housing under the Public Housing Law.<sup>22</sup> Article 23(1) of the Public Housing Law makes rental of public housing available to relatives who are cohabitating or are planning to cohabit, including those who, while not legally married, are de facto married. As de facto marriage applies only to unmarried opposite-sex couples, unmarried same-sex couples are ineligible for public housing under the Public Housing Law. Similarly, the Law for the Prevention of Spousal Violence and the Protection of Victims protects only to married, divorced, and unmarried opposite-sex couples and does not extend to same-sex partners.<sup>23</sup>

#### Absence of National Legislation Explicitly Prohibiting Discrimination Based on Sexual Orientation and Gender Identity

While Japan does not criminalize same-sex sexual conducts, “there is no legislation to combat discrimination based on sexual orientation and gender identity that would protect LGBT people from discrimination in different areas of their lives such as employment, housing, social security, health care system and so forth.”<sup>24</sup> Failure to enact anti-discrimination legislation is a violation of Article 26.<sup>25</sup> Japanese law does not guarantee substantive equality on grounds of sexual orientation and gender equality, nor does it explicitly protect LGBT persons from discrimination and abuses.

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agreement to hospital visitation and inheritance, or to make evidence of their cohabitation. However, these documents have no legal effects outside the partnership. Another means of protecting partnership rights involves turning to the adult adoption system. One partner will adopt the other as a child, establishing a legal relationship that provides for and protects rights such as inheritance and health benefits. While not illegal, using the adoption system in this way is against the true intent of the system and could provide sufficient grounds for annulment of the adoption based on the non-existence of intention to adopt. Moreover, should a same-sex marriage or same-sex partnership law be enacted, couples in adoptive relationships would not be eligible for marriage. *See* Article 736 Civil Code; *see also* Hiroyuki, Taniguchi. “The Legal Situation Facing Sexual Minorities in Japan” in *Intersections: Gender, History, and Culture in the Asian Context*. Issue 12 January 2006 available at <http://intersections.anu.edu/issue12/taniguchi.html>, citing: Yanagihashi, Akitoshi, ‘Towards Legal Protection for Same-Sex Partnerships in Japan: From the Perspective of Gay and Lesbian Identity,’ in *Legal Recognition*, Wintemute and Andenaes (eds), p. 352.

<sup>21</sup> *Young v. Australia*, Communication No. 901/1999.

<sup>22</sup> Article 23(1), Public Housing Law

<sup>23</sup> Law for the Prevention of Spousal Violence and Protection of Victims. Law No. 31 of 2001, as amended by Law No. 64 of 2004. Tentative translation of the Law by the Research Committee on Society of Cooperative Way of Life, House of Councillors is available at <http://www.gender.go.jp/dv/sv.pdf> (last viewed on 22 September, 2008).

<sup>24</sup> GayJapanNews et al., Joint Submission of the Universal Periodic Review on: Japan.

<sup>25</sup> ICCPR *supra* note 12 at Article 26.

In 2002, the Ministry of Justice put forth a Draft Bill of Human Rights Protection that included sexual orientation as a category against which discrimination was prohibited. This bill, however, failed to pass in 2002, 2003, and 2005. Further, Japan has yet to establish a domestic human rights commission that meets the standards of the Paris Principles.

In his 2006 report on his mission to Japan, the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia, and related intolerance, recommended that:

“79. A national commission for equality and human rights should be established, in conformity with the Paris Principles, in particular with the requirement of its independence. Given the interlinkage between all forms of discrimination, and for the purposes of efficiency and empowerment, this Commission’s mandate should bring together in a holistic way the most important and indeed related fields of contemporary discrimination, namely: race, colour, gender, descent, nationality, ethnic origin, disability, age, religion and sexual orientation.”<sup>26</sup>

In 2008, the Human Rights Council in its Universal Periodic Review recommended that Japan adopt legislation to combat hate crimes in order to protect the lives of LGBT people and prohibit violence and harassment based on sexual orientation and gender identity; enact Anti-Discrimination legislation prohibiting discrimination based on sexual orientation and gender identity; and establish an independent national human rights institution based on ‘Principles relating to the Status of the National Human Rights Commission’ (Paris Principles).<sup>27</sup> In August 2008, 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 to take measures to eliminate discrimination based on sexual orientation and gender identity.<sup>28</sup>

While there is no national legislation protecting the human rights of sexual minorities, non-discrimination provisions for LGBT persons have, however, been explicitly included in some local ordinances.<sup>29</sup>

### Discrimination in Public Accommodation/Public Housing and Employment

<sup>26</sup> E/CN.4/2006/16/Add.2 (para 79)

<sup>27</sup> General Assembly Resolution 48/134 December 1993

<sup>28</sup> A/HRC/8/44/Add.1 (13 August 2008)

<sup>29</sup> Taniguchi cites examples such as: “Danjo Byōdō no Machi Zukuri Jōrei [Ordinance of Community Renovation based on Equality for Men and Women], Yame-shi, Fukuoka-ken, enacted 1 April 2004 (Section 7[4]: No-one should discriminate based on gender identity disorder within home, community, school, workplace or other places in society); Danjo Byōdō Shakai no Keisei no Sokushin ni kansuru Jōrei [Ordinance to Promote and Establish a Society with Equality for Men and Women], Sakai-shi, Osaka-fu, enacted 1 April 2002 (Section 3 [6], not only applies to men and women, but to the human rights of people with gender identity disorder, people with ambiguous physical sex by nature and any other people should be considered).” Hiroyuki, Taniguchi. “The Legal Situation Facing Sexual Minorities in Japan” in *Intersections: Gender, History, and Culture in the Asian Context*. Issue 12 January 2006 available at <http://intersections.anu.edu/issue12/taniguchi.html>

As described in General Comment 31 on Article 2 of the ICCPR, state parties can be held accountable for rights violations perpetrated by non-state if it has failed to enact measures to protect individuals from these violations.<sup>30</sup> The absence of anti-discrimination legislation in Japan demonstrates state failure to adequately protect the rights of individuals against discrimination perpetrated by non state actors in areas such as public accommodation and public housing and employment.

### Discrimination in Places of Public Accommodation and Public Housing

LGBT persons are sometimes denied use of public places of accommodation and hotels, and some hotel websites state that male couples are not allowed to use the hotel. While some local governments have enjoined hotels from denying access to same-sex couples,<sup>31</sup> few local governments intervene in these discriminatory practices because they find no problem with it.<sup>32</sup> Despite well-known discrimination related precedents involving local government actions, the Japanese state still neglects the problem.

Moreover, as noted above, the Public Housing Law effectively bars same-sex couples from renting public housing. Article 23(1) of the Public Housing Law makes rental of public housing available to relatives who are cohabitating or are planning to cohabit, including those who, while not legally married, are de facto married. As Japan does not recognize either same-sex marriage or same-sex partnership, this law applies only married and unmarried opposite-sex couples.<sup>33</sup> In regards to housing, in general, discrimination exists against single men, especially once they become older or if they want to live with other men.

### Discrimination in Employment and in the Workplace

In regards to employment, specific cases document evidence of discrimination based on gender identity in the workplace. Incidents such as those noted here clearly illustrate the need for antidiscrimination legislation as a means to adequately address and protect the rights of LGBT persons under Article 26.

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<sup>30</sup> General Comment 31 to Article 2 of the ICCPR.

<sup>31</sup> In October 2006, a business hotel in Osaka denied accommodation to gay couples who had come to the city to participate in the Kansai Rainbow Parade. The City of Osaka issued an administrative order to the hotel saying that the denial was against the Hotel Management Law. (Kansai Rainbow Parade cites reports by Asahi Shimbun and NHKKansai News available at <http://blog.kansaiparade.org/?eid=196737>.) In 1997: the Tokyo District Court ruled that the rejection of an LGBT group's request to use a hotel was illegal and discriminatory, and ordered the metropolitan government to pay both pecuniary and non-pecuniary damages. The Tokyo Metropolitan Government appealed to the Tokyo High Court. The High Court rejected the appeal and stated: "When governmental bodies accomplish their duties, they must pay due attention to the situation of the homosexual minority and guarantee that their rights and interests be upheld." Hiroyuki, Taniguchi. "The Legal Situation Facing Sexual Minorities in Japan" in *Intersections: Gender, History, and Culture in the Asian Context*. Issue 12 January 2006 available at <http://intersections.anu.edu/issue12/taniguchi.html>, citing Tokyo District Court, Case no H3-Wa-1557, 30 March 1994 and Tokyo High Court, Case no H6-Ne-1580, 16 September 1997.

<sup>32</sup> Azusa Yamashita, GayJapanNews

<sup>33</sup> Public Housing Law Article 23(1)

A 50 year old woman, “K,” was fired by her employer, a social welfare corporation in Osaka because of she was diagnosed with Gender Identity Disorder in 2006. She filed a lawsuit against her former employer, seeking compensation of two million yen. According to Japanese media, K told her employer about her GID when she applied for the job. Though she was hired for job, she was banned from using women’s washrooms and from putting on make-up when working. In March 2006, her employer told her that they would not renew her employment contract without stating any clear reasons. K and her employer reached reconciliation in the Osaka District Court in January 2008.<sup>34</sup>

A Male-to-Female (MTF) transgender woman was working for a publisher when she was diagnosed with Gender Identity Disorder. She asked her employer to recognize her as a woman in January 2002. In March 2002, she began going to the office in women’s clothes. Her employer ordered her not to wear women’s clothes and to stay home. However, the woman continued to wear women’s clothes to the office. Her employer fired her in April 2002. The woman subsequently filed a lawsuit. In June 2002, the Tokyo District court found that the initial dismissal of the case was unjust.<sup>35</sup>

### Domestic Violence and Spousal Abuse Legislation Does Not Apply to Same-Sex Couples

Despite the fact that studies have shown that intimate partner violence is experienced physically, sexually, and psychologically in all sexual minority groups, the Law for the Prevention of Spousal Violence and the Protection of Victims does not extend to same-sex partners.<sup>36</sup> Enacted in 2001 and revised in May 2004, the law still applies only to married and divorced couples and to unmarried opposite-sex couples. LGBT persons who do not marry a partner of the opposite gender are excluded from the law’s protection.<sup>37</sup> Moreover, a report issued by a cabinet office revealed that domestic violence shelters are ill-equipped to deal with domestic violence in same-sex couples.

### **Article 6 (Right to Life)**

Under Article 6 of the ICCPR, “every human being has the inherent right to life.” The right to life is to be protected by law and “no one shall be arbitrarily deprived of his life.”<sup>38</sup> While a direct violation of Article 6 requires a state action, the state may be held accountable for violations of ICCPR rights perpetrated by non-state actors, such as hate crimes, if it fails to adequately address and protect against these violations.

<sup>34</sup> “Gender identity transformed from ‘freak’ into rights issue,” The Japan Times (23 January 2007) available at <http://search.japantimes.co.jp/cgi-bin/fl20070123zg.html>.

<sup>35</sup> Azusa Yamashita, GayJapanNews

<sup>36</sup> Law for the Prevention of Spousal Violence and Protection of Victims. Law No. 31 of 2001, as amended by Law No. 64 of 2004. Tentative translation of the Law by the Research Committee on Society of Cooperative Way of Life, House of Councillors is available at <http://www.gender.go.jp/dv/sv.pdf> (last viewed on 22 September, 2008).

<sup>37</sup> DiStefano, Anthony. “Intimate Partner Violence Among Sexual Minorities in Japan: Exploring Perceptions and Experiences,” *Journal of Homosexuality* (in press).

<sup>38</sup> ICCPR, *supra* note 12 at Article 6.

## Hate Crimes

Reports of crimes motivated by hatred based on the victim's sexual orientation or gender identity in Japan demonstrate a need for effective hate crime legislation. Equal protection of rights for LGBT persons and adequate response to violations committed by private parties requires enactment of hate crime legislation. The current absence of hate crime legislation contributes to ongoing stigmatization of LGBT persons in Japan and underreporting of attacks perpetrated against LGBT victims.

In February 2000, a 33-year-old man was murdered by two boys as well as a 25-year-old man in Shinkiba Park, Koto-ku, Tokyo. Based on statements issued by the perpetrators, LGBT rights groups and activists believe it was a homophobic crime. Upon arrest, the boys and the man stated that they targeted gay men. Authorities have not taken any effective measure to prevent hate crimes against gay men and the Government has failed to legislate against hate crimes that target particular social groups, such as LGBT people.<sup>39</sup>

Other instances of hate motivated crimes further illustrate the need for hate crime legislation in Japan. For example, on the night of 8 July 2007, a 34-year-old man was knocked to the ground, beaten, kicked and robbed of 21,000 yen (approx. 180 USD) by four boys in Yumenoshima Park, Koto-Ku, Tokyo. The arrested boys told the authorities they did not think that gay men would report crimes to the police. According to activists, a series of muggings which targeted gay men have happened but have gone unreported because victims were afraid of being "outed".<sup>40</sup>

## **Article 10 (Treatment of Individuals Deprived of Their Liberty)**

Article 10 requires that all persons deprived of their liberty be treated with humanity and with respect for the inherent dignity of the human person.<sup>41</sup> In its 2006 Fifth Periodic Report to the UN Human Rights Council, Japan made no mention of its treatment of detained LGBT persons. It did state, however, that human rights education has been integrated into all forms of training offered to national public officers and to newly recruited police personnel.<sup>42</sup>

## Discrimination in Prison

In January 2007, a gay man asked the Tokyo Detention Center for both an adult content heterosexual magazine and an adult content gay magazine, which would be purchased at

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<sup>39</sup> Azusa Yamashita, GayJapanNews; See GayJapanNews et al., Joint Submission of the Universal Periodic Review on: Japan.

<sup>40</sup> "Tokyo: Gay men mugged, 4 youth arrested," GayJapanNews. (27 July 2006) available at [http://gayjapannews.com/news\\_english/news1.htm](http://gayjapannews.com/news_english/news1.htm).

<sup>41</sup> ICCPR, *supra* note 12 at Article 10.

<sup>42</sup> Fifth Periodic Reports of States Parties due in 2002: Japan (December 2006) at para. 23. CCPR/C/JPN/5

his own expense. The Centre allowed him access to a heterosexual magazine but denied his request for a gay magazine. The gay man filed a complaint to the Tokyo Bar Association. In June 2008, the Association warned the Detention Centre that preventing access to a gay magazine is a violation of the Constitutional right to access books.<sup>43</sup>

### **Article 13 (Expulsion of Aliens)**

#### No Rights Given to Asylum Seekers on the Basis of Sexual Orientation

Article 13 of the ICCPR states:

“An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.”<sup>44</sup>

In past cases, Japan has not recognized fear of persecution for one’s sexual orientation or gender identity as legitimate grounds for refugee status and asylum.

In 2000, an Iranian man applied for refugee status on the basis of his sexual orientation, stating that he was afraid of being deported to Iran because he feared being punished for being homosexual and for participating in the gay movement in Japan since 1991. The Government refused his application and held him in detention facilities for 19 months. In 2001, the Office of the UN High Commissioner for Refugees (UNHCR) recognized him as a legitimate refugee. Despite the fact that his refugee status had been recognized by the UNHCR, the Tokyo District Court rejected his lawsuit filing for recognition as a refugee. After a trial of more than five years, the man had no choice but to seek refugee status in another country.<sup>45</sup>

### **Article 17 (Right to Privacy)**

#### Discriminatory Conditions in the Law on Gender Changes on the Family Registry

Article 17 specifically protects against arbitrary or unlawful interference with privacy and family.<sup>46</sup> Requirements for changing one’s civil status, established under the Law Concerning Special Cases in Handling Gender for People with Gender Identity Disorder, are extremely intrusive into the private lives of persons seeking to change their gender and thereby constitute a violation of Article 17.

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<sup>43</sup> See [http://www.toben.or.jp/news/relief/pdf/08\\_20080630.pdf](http://www.toben.or.jp/news/relief/pdf/08_20080630.pdf)

<sup>44</sup> ICCPR, *supra* note 12 at Article 13.

<sup>45</sup> GayJapanNews et al., Joint Submission of the Universal Periodic Review on: Japan.

<sup>46</sup> ICCPR, *supra* note 12 at Article 17.

Under Article 3 of the Law Concerning Special Cases in Handling Gender for People with Gender Identity Disorder, enacted in 2003 and recently amended, a family court may render a decree on alternation of sex status against a person with Gender Identity Disorder upon request of a person who meets the following conditions: (1) the applicant is of or above the age of 20; (2) the applicant is not married at the time of application; (3) as amended in June 2008, the applicant does not have a child who is 19 years of age or younger at the time of application; (4) the applicant does not have testicles or is in permanent loss of testicular function; (5) the applicant has a part of the body which assumes the external genital features of the opposite sex.<sup>47</sup> If all conditions are met and a family court gives approval, a new registration may be created with a different sex entry. The law allows both male-to-female (MTF) and female-to-male (FTM) transgender persons to change their gender on the family registry.

While the Division of Family Affairs in the Japanese Supreme Court announced in 2005 that, for the period July 2004-2005, 208 of 218 petitions for sex changes had been accepted,<sup>48</sup> the law's conditions make changing one's legal sex significantly difficult for many of the 70,000 transgender persons estimated to be living in Japan.<sup>49</sup> One of the main problems with the law is the provision requiring applicants to undergo sex reassignment surgery, which is by no means desired by all transgender people. In order to receive sex reassignment surgery, a patient needs "medical judgment and approval from two psychiatrists in order to be deemed 'disordered.'"<sup>50</sup> Very few hospitals offer diagnosis of and treatment for GID in Japan, and treatment for GID is not covered by health insurance.<sup>51</sup> Transgender persons who are unable to change their civil status often face difficulties and discrimination in employment and in obtaining health insurance.<sup>52</sup> Finally, many activists view the label of "disorder" as negative, as it implies that there is something innately wrong with transgender people.<sup>53</sup>

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<sup>47</sup> Law Concerning Special Cases in Handling Gender for People with Gender Identity Disorder

<sup>48</sup> Hiroyuki, Taniguchi. "The Legal Situation Facing Sexual Minorities in Japan" in *Intersections: Gender, History, and Culture in the Asian Context*. Issue 12 January 2006 available at <http://intersections.anu.edu/issue12/taniguchi.html>; seibetsu no toriatuskai no henko mohitate jiken su (statistics of the number of application for change of legal sex), July 2005, available at Supreme Court website, URL: <http://courtdomino2.courts.go.jp/home.nsf>.

<sup>49</sup> The Japan Times Online – Gender identity transformed from 'freak' into rights issue: <http://search.japantimes.co.jp/cgi-bin/fl20070123zg.html>

<sup>50</sup> The Japan Times Online – Gender identity transformed from 'freak' into rights issue: <http://search.japantimes.co.jp/cgi-bin/fl20070123zg.html>; The Japan Times Online – Sex change recognition law enacted: <http://search.japantimes.co.jp/print/nn20030711b2.html>

<sup>51</sup> The Japan Times Online – Gender identity transformed from 'freak' into rights issue: <http://search.japantimes.co.jp/cgi-bin/fl20070123zg.html>; The Japan Times Online – Sex change recognition law enacted: <http://search.japantimes.co.jp/print/nn20030711b2.html>. Concerning this issue, the Human Rights Committee is encouraged to consider the finding of the European Court of Human Rights in *Van Kuck v. Germany*. In *Van Kuck v. Germany*, the European Court of Human Rights established that the failure of the state to reimburse gender reassignment treatments violates the right to private life under the European Convention. *Case of Van Kück v. Germany*, ECHR 2003/8. 12 June 2003, no. 35968/97 (Third Section).

<sup>52</sup> GayJapanNews et al., Joint Submission of the Universal Periodic Review on: Japan.

<sup>53</sup> Ellis, Justin. "I want to be myself- perspectives on Japan's Transgender Community," Japan Transgender: Japan Visitor available at <http://www.japanvisitor.com/index.php?cID=362&pID=1461>

## **Article 19 (Freedom of Expression) and Article 22 (Freedom of Association)**

### Infringement on the Freedom of Expression and Association in Universities

In October 2007, an LGBT club at a private university in Kanagawa Prefecture had its posters peeled off from information boards by school staff, despite having obtained approval to post them by the university office. When club members asked the school staff why they had removed the posters, the staff answered that the contents of the poster suggested association with homosexuality and created a disturbance. Members of the club subsequently sent a letter of protest to the school with support of some teachers. In the end, the school apologized to the club. However, it took a significant amount of time before the school would listen to students' appeal that pressuring groups based its members' sexual orientation or gender identity was a violation both of students' human rights and of the school's policy on sexual harassment.<sup>54</sup>

Article 19 expressly protects freedom of expression through “any . . . media of . . . choice” and notes that this right specifically includes the freedom to “impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.”<sup>55</sup> Interference with student advertisements and posters is clearly a violation of the students' Article 19 and Article 22 rights to expression and association. Moreover, cases such as these demonstrate the existence of discrimination against LGBT persons in education and in schools and further illustrate the need for anti-discrimination legislation in Japan.

## **Article 23 (Family Life)**

### Denial of Post-operative Transgender/Transsexual Individuals' Right to Marry or Found a Family

As is noted above, Article 3 of the Law Concerning Special Cases in Handling Gender for People with Gender Identity Disorder<sup>56</sup> sets five conditions for transgender individuals to change their sex legally. One of these conditions requires that a transgender individual who wishes to change his or her sex be unmarried at the time of application, and another condition requires that the applicant have no children below the age of 19 at the time of application. A transgender person who has undergone sex reassignment surgery may marry a new partner who is of the opposite sex, but cannot remain married to a partner whom they were with prior to their application.

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<sup>54</sup> Azusa Yamashita, GayJapanNews

<sup>55</sup> ICCPR, *supra* note 12 at Article 19.

<sup>56</sup> Law No. 111 of 2003: Law Concerning Special Cases in Handling Gender for People with Gender Identity Disorder.

These conditions create significant barriers for many transgender persons seeking to change their status and interfere with transgender persons' right "to found a family" under Article 23.<sup>57</sup> Denying transgender people with children the right to change their status has brought gay and lesbian activists into the debate over the GID, and, since 2003, activist organizations have demanded deletion of the no-offspring requirement.<sup>58</sup>

### Exclusion of Same-Sex Couples from Domestic Violence Legislation

As is noted above, current legislation on domestic violence does not cover same-sex couples and is restricted to married, divorced, or unmarried opposite-sex couples.<sup>59</sup>

### **Article 24 (Special Protection of Children)**

#### Discrimination and Bullying against Pupils based on their Real or Perceived Sexual Orientation or Gender Identity

In a study targeting gay and bisexual men between the ages of 12 and 82, 64% had considered committing suicide and 15% have attempted suicide.<sup>60</sup> Research conducted in 1999 shows that 83% of gay and bisexual men experienced school bullying and 60% were verbally harassed because of their real or perceived sexual orientation.<sup>61</sup> These findings demonstrate substantial distress amongst gay and bisexual male youth, as well as evidence that bullying and harassment based on sexual orientation contributes to high rates of suicide and attempted suicide in this demographic.

Article 24 requires the government of Japan to protect its youth.<sup>62</sup> Though Japan reports that it is striving to raise human rights awareness through school and social education,<sup>63</sup> harassment and bullying in schools remains an issue. In the Report of the Working Group on the Universal Period Review, Japan was encouraged to further develop appropriate strategies and programs to counter the negative effects of *ijime* or bullying in schools.<sup>64</sup>

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<sup>57</sup> ICCPR, *supra* note 12 at Article 23.

<sup>58</sup> Activist organizations include Gid.jp and TFN (Trans Family Network).

<sup>59</sup> Law for the Prevention of Spousal Violence and Protection of Victims. Law No. 31 of 2001, as amended by Law No. 64 of 2004. Tentative translation of the Law by the Research Committee on Society of Cooperative Way of Life, House of Councilors is available at <http://www.gender.go.jp/dv/sv.pdf> (last viewed on 22 September, 2008).

<sup>60</sup> Azusa Yamashita, GayJapan News, citing research by Dr. Yasuharu Hidaka et al. In 2005, he surveyed 5,731 gay and bisexual men aged 12 to 82 (the average age of targets being 30 years old) regarding their HIV testing behavior, experience of being bullied, suicidal attempt and mental health.

<sup>61</sup> *Id.*

<sup>62</sup> ICCPR, *supra* note 12 at Article 24.

<sup>63</sup> National Report Submitted in Accordance with Paragraph 15(A) of the Annex to Human Rights Council Resolution 5/1, Japan (18 April 2008) at para 16. A/HRC/WG.6/2/JPN/1

<sup>64</sup> Report of the Working Group on the Universal Periodic Review, Japan (30 May 2008) Report of the Working Group on the Universal Periodic Review, Japan (30 May 2008) at para 16. A/HRC/8/44 at para 14. Report of the Working Group on the Universal Periodic Review, Japan (30 May 2008) at para 16. A/HRC/8/44

## **Concluding Notes**

- LGBT persons not only face discrimination under laws and policies such as the public housing and domestic violence laws, but are also subject to discrimination in employment, housing, healthcare, and education. There are no national anti-discrimination laws inclusive of sexual orientation or gender identity as a prohibited basis. LGBTI victims of discrimination or crimes motivated by hatred for their sexual orientation or gender identity lack both civil and criminal redress.
- Unmarried same-sex couples are denied partnership rights that are awarded to unmarried opposite-sex couples.
- Current law creates significant barriers for those seeking to legally change their gender on the family registry. Transgender persons who are unable or ineligible to change their gender status often face difficulties in employment and in receiving health insurance.
- LGBT persons experience physical, sexual, and psychological intimate partner violence, but receive no protection from the law. Same-sex couples are excluded from the Law for the Prevention of Spousal Violence and the Protection of Victims does not extend to same-sex partners.

## **Recommendations**

The Japanese Government should:

1. Adopt legislation to combat hate crimes in order to protect the lives of LGBT people and prohibit violence and harassment based on sexual orientation and gender identity.<sup>65</sup>
2. Enact Anti-Discrimination legislation prohibiting discrimination based on sexual orientation and gender identity in employment, housing, and the social security, education, and health services and consider introducing a definition of discrimination in its criminal law.<sup>66</sup>
3. Establish a national human rights institution, independent from the Government, based on 'Principles relating to the Status of the National Human Rights Commission' (Paris Principles).<sup>67</sup>

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<sup>65</sup> GayJapanNews et al., Joint Submission of the Universal Periodic Review on: Japan.

<sup>66</sup> GayJapanNews et al., Joint Submission of the Universal Periodic Review on: Japan., UPR report

<sup>67</sup> GayJapanNews et al., Joint Submission of the Universal Periodic Review on: Japan., E/CN.4/2006/16/Add.2 (para 79), Report of the Working Group on the Universal Periodic Review, Japan (30 May 2008) at para 16. A/HRC/8/44

4. Provide equality and human rights training for teachers and staff in schools, governmental officials at all levels, and law enforcement officers.<sup>68</sup>
5. Secure a safe space and environment in schools for LGBT pupils.<sup>69</sup>
6. Review and amend current legislation to ensure that a well-founded fear of persecution based on sexual orientation or gender identity is accepted as grounds for asylum.<sup>70</sup>
7. Review current legislation to award to unmarried same-sex couples that same rights awarded to unmarried opposite-sex couples.
8. Review and amend current legislation to extend domestic violence protection to same-sex partners.
9. Review and amend current legislation on people with Gender Identity Disorder (GID) to make sure that no person with GID or any of their family members including their children are disadvantaged from conditions set out in the law.<sup>71</sup>

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<sup>68</sup> GayJapanNews et al., Joint Submission of the Universal Periodic Review on: Japan.

<sup>69</sup> Id.

<sup>70</sup> Id.

<sup>71</sup> Id.

### **Proposed Questions for the Government Delegation**

1. What is the government doing to enact and implement antidiscrimination legislation?
2. What is the government doing to set up an independent human rights institution, in conformity with the Paris Principles, that is responsible for investigating violations of human rights and for providing redress to complainants?
3. What is the government doing to comply with the jurisprudence of the Human Rights Committee in *Young v. Australia* and *X v. Colombia* and ensure that rights awarded to unmarried opposite-sex couples are equally awarded and made available to unmarried same-sex couples?
4. What is the government doing to protect the private lives of transgender individuals who do not undergo sex reassignment surgery as required by the Law Concerning Special Cases in Handling Gender for People with Gender Identity Disorder?