

Submission in the UPR review of Nauru

Legal and Statutory framework:

Nauru affirms its commitment to the principles of equality and non-discrimination. To better further that commitment, we recommend that Nauru repeal archaic laws still on the books which maintain **criminal sanctions against sexual activity between consenting adults**.

According to the Criminal Code applicable in Nauru:

Section 208. Unnatural Offences —Any person who:

- (1) Has carnal knowledge of any person against the order of nature; or
 - (2) Has carnal knowledge of an animal; or
 - (3) Permits a male person to have carnal knowledge of him or her against the order of nature;
- is guilty of a crime, and is liable to imprisonment with hard labour for fourteen years"

Section 209. Attempt to commit Unnatural Offences —Any person who attempts to commit any of the crimes defined in the last preceding section is guilty of a crime, and is liable to imprisonment with hard labour for seven years. The offender cannot be arrested without warrant.

Section 211. Indecent Practices between Males —Any male person who, whether in public or private, commits any act of gross indecency with another male person, or procures another male person to commit any act of gross indecency with him, or attempts to procure the commission of any such act by any male person with himself or with another male person, whether in public or private, is guilty of a misdemeanour, and is liable to imprisonment with hard labour for three years.

Nauru's international human rights obligations:

Provisions against sexual activity between consenting adults have been found to constitute **a clear violation of international human rights law**.

In *Toonen v Australia*, the **UN Human Rights Committee** in March 1994 confirmed that laws criminalizing consensual same-sex activity violate both the right to privacy and the right to equality before the law without any discrimination, contrary to articles 17(1) and 2 of the International Covenant on Civil and Political Rights.¹

The Committee further considered that such laws interfere with privacy rights, whether or not they are actively enforced, and “run counter to the implementation of effective education programmes in respect of HIV/AIDS prevention” by driving marginalised communities underground.

The UN Human Rights Committee has affirmed this position on many occasions, either urging States to repeal laws which criminalize consensual same-sex activity or commending them for bringing their legislation into conformity with the Covenant by repealing such provisions.² The United Nations Working Group on Arbitrary Detention has also found that arrests for consensual homosexual conduct are, by definition, human rights violations.

¹ *Toonen v Australia*, CCPR/C/50/D/488/1992, April 4, 1994.

² See Human Rights Committee Concluding Observations: United States of America, A/50/40, October 3, 1995; Cyprus, CCPR/C/79/Add.88, April 6, 1998; Ecuador, CCPR/C/79/Add.92, August 18, 1998; Chile, CCPR/C/79/Add.104, March 30, 1999; Lesotho, CCPR/C/79/Add.106, April 8, 1999; Romania CCPR/C/79/Add.111, July 28, 1999; Australia, A/55/40, July 24, 2000; Egypt, CCPR/CO/76/EGY, November 28, 2002; Kenya, CCPR/CO/83/KEN, March 28, 2005; United States of America, CCPR/C/USA/CO/3, September 15, 2006; BARabdos, CCPR/C/BRB/CO/3, May 11, 2007; Chile, CCPR/C/CHL/CO/5, May 18, 2007.

This position is consistent with other **regional and national jurisprudence**, including the principles enshrined in decisions of the European Court of Human Rights³ and of the Constitutional Court of South Africa.⁴

The UN Special Rapporteur on the right to the highest attainable standard of physical and mental health recently highlighted that laws criminalising sexual conduct between consenting adults impede HIV education and prevention efforts and are incompatible with the right to health, a position affirmed by UNAIDS.

States' international obligations to respect the human rights of all persons, irrespective of sexual orientation and gender identity, were recently articulated in the "**Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity**". The Principles were developed and unanimously adopted by a distinguished group of human rights experts, from diverse regions and backgrounds. These experts included judges, academics, a former UN High Commissioner for Human Rights, UN Special Procedures, members of treaty bodies, members of civil society and others.

Principle 2 of the Yogyakarta Principles affirms the right of all persons to equality before the law without discrimination on the basis of sexual orientation or gender identity, and specifically confirms the obligation of States to "repeal criminal and other legal provisions that prohibit or are, in effect, employed to prohibit consensual sexual activity among people of the same sex who are over the age of consent, and ensure that an equal age of consent applies to both same-sex and different-sex sexual activity."

Principle 6 of the Yogyakarta Principles affirms the right of all persons, regardless of sexual orientation or gender identity, to the enjoyment of privacy without arbitrary or unlawful interference, and confirms States' obligation to "repeal all laws that criminalise consensual sexual activity among persons of the same sex who are over the age of consent, and ensure that an equal age of consent applies to both same-sex and different-sex sexual activity."⁵ The Principles also call on States to "ensure that criminal and other legal provisions of general application are not applied to *de facto* criminalise consensual sexual activity among persons of the same sex who are over the age of consent."

The **UN High Commissioner for Human Rights**, Ms. Navanethem Pillay, in a statement to a High-level Meeting on Human Rights, Sexual Orientation and Gender Identity, United Nations (New York) Thursday, 18 December 2008, affirmed: "The principle of universality admits no exception. Human rights truly are the birthright of all human beings. (...) Sadly, ... there remain too many countries which continue to criminalize sexual relations between consenting adults of the same sex in defiance of established human rights law. Ironically many of these laws, like Apartheid laws that criminalized sexual relations between consenting adults of different races, are relics of the colonial era and are increasingly becoming recognized as anachronistic and as inconsistent both with international law and with traditional values of dignity, inclusion and respect for all... It is our task and our challenge to move beyond a debate on whether all human beings have rights – for such questions were long ago laid to rest by the Universal Declaration – and instead to secure the climate for implementation... Those who are lesbian, gay or bisexual, those who are transgender, transsexual or intersex, are full and equal members of the human family, and are entitled to be treated as such."

Recommendation:

We therefore recommend that the Human Rights Council, in its upcoming UPR review, urge Nauru to bring its legislation into conformity with its commitment to equality and non-discrimination, and its international human rights obligations, by repealing all provisions which may be applied to criminalise sexual activity between consenting adults of the same sex.

³ *Dudgeon v United Kingdom, Series A no. 45.*, 1981; *Norris v Ireland*, 1991; *Modinos v Cyprus*, 1993.

⁴ *National Coalition for Gay and Lesbian Equality and another v Minister of Justice and others*, 1998.

⁵ Available in all 6 UN languages at: www.yogyakartaprinciples.org.

This information is submitted jointly by:

- **ARC International**, an NGO with a full-time presence in Geneva which engages with the UN Human Rights Council and related mechanisms to advance respect for human rights, including on the grounds of sexual orientation and gender identity.
- **ILGA** (International Lesbian, Gay, Bisexual, Trans and Intersex Association), a global association of over 600 lesbian, gay, bisexual, transgender and intersex (“LGBTI”) groups in over 110 countries
- **ILGA-Europe**, an NGO with ECOSOC consultative status that is recognized by the EU, COE and OSCE.