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Report on Thailand regarding the human rights of LGBTIQ persons



Kaleidoscope
Human Rights Foundation
Email: paula.gerber@monash.edu

Kaleidoscope is a not-for-profit organisation based in Australia that seeks to advance the human rights of lesbian, gay, bisexual, transgender, and intersex people in the Asia Pacific region

and



Sexual Rights Initiative [SRI]
Rue de Monthoux 25, Geneve, 1201
www.sexualrightsinitiative.com
Email: carrie@srigenewa.com

The Sexual Rights Initiative is a coalition of national and regional organizations based in Canada, Poland, India, Argentina, and South Africa that work together to advance human rights related to sexuality at the United Nations.

1. Executive Summary

1.1 This report has been prepared by Kaleidoscope Human Rights Foundation in conjunction with Thai academic Warisa Ongsupankul. It highlights instances where Thailand can better protect the rights of lesbian, gay, bisexual, transgender, queer and intersex (LGBTQI+) persons.

1.2 **Despite advocacy in the previous UPR cycle, Thailand did not receive any recommendations on the sexual and reproductive health and rights of LGBTQI+ persons.** However, Thailand has brought into force a new Constitution which has the effect of protecting the rights of LGBTQI+ people albeit in a limited capacity.

1.3 Overall, Thailand has made considerable improvements in the acceptance of LGBTQI+ people at both a legislative and societal level. This report highlights areas where there is still progress to be made. Recommendations relate to reform of Thai legislation and institutions, as well as reforms designed to empower specific groups within Thai society.

2. Relevant Legislation

2.1 The Constitution

The new Thai Constitution (introduced in 2017) provides that all Thai people should enjoy equal protection under the Constitution whereby the human dignity, rights and liberties of all people shall be equally protected.¹ Similar to the 2007 Constitution, the Thai word *'phet'* (sex) is one of the prohibited grounds of discrimination, while 'sexual orientation', 'gender identity' and 'intersex status' are not explicitly stated in the Constitution.² However, unlike the 2007 Constitution where the 'Intentions of the Constitution of the Kingdom of Thailand' ('intentions' document) issued by the Constitutional Drafting Assembly (CDA) stated that the word *'phet'*, in Section 30 would be understood to mean the differences between men and women, and also 'differences of individuals whose gender identity, gender and sexual diversity are different from their physical sex', the 'intentions' document of the 2017 Constitution does not retain any clarification of the word sex. Therefore, it remains to be seen whether the word 'phet' under Section 27 of the Constitution of 2017, will be interpreted to include LGBTQI+ people.³

If a person has their Constitutional rights violated, they can bring a claim to protect themselves.⁴ The State can account for the varied needs of people of different genders when designing their budget, and can also promote certain groups' ability to exercise their rights and liberties to ensure fairness and eliminate societal obstacles.⁵ Finally, the Constitution dictates that the Thai Government should aim to strengthen the family unit as it is a basic element of society.⁶

¹ Thailand's Constitution of 2017, s4.

² See Thailand's Constitution of 2007, s30 and Thailand's Constitution of 2017, s27.

³ See UNDP, MSDHS (May 2018). Legal Gender Recognition in Thailand: A Legal and Policy Review, p.25-26.

⁴ Thailand's Constitution of 2017, s25.

⁵ Thailand's Constitution of 2017, s71 and s27.

⁶ Thailand's Constitution of 2017, s71.

2.2 The Gender Equality Act ('GEA')

The *GEA* defines unfair gender discriminations as “an act or omission which causes division, discrimination or limitation of any right and benefit either directly or indirectly without justification due to the fact that the person is male or female or of a different appearance from his/her own sex by birth.”⁷ It aims to protect people against gender discrimination. LGBTQI+ people, in particular transgender persons, have relied on the *GEA* to challenge discriminatory measures in workplace and educational institutions.⁸ Court proceedings against unfair gender discrimination can be brought under the *GEA* but requires an aggrieved party to bring them.⁹ For example, a special interest group issued proceedings to challenge Tawanchai Wittaya School’s ban on LGBTQI+ students, but they were dismissed because there were no specific aggrieved parties involved in the proceedings.¹⁰ Moreover, Section 17 of the *GEA* allows discriminatory measures that results from following ‘religious doctrines’ or for reason of ‘security’.¹¹ Such broad language can undermine the effort to promote gender equality.

Both the *GEA* and the Constitution are gendered by only using “he” and “she.” In some sections the Constitution specifies that only men and women enjoy equal protection under the law and equal rights.¹² This would ensure that the better protection of LGBTQI+ people, as the ‘intentions’ document does not have legal force and cannot effectively direct the interpretation of the constitution.

The *GEA* should include key definitions of terms such as gender, transgender, non-binary and intersex. This may assist in delineating the varied subgroups under LGBTQI+ and further contribute to all people gaining legal gender recognition. This is recommended to promote alignment with leading equivalent foreign legislation such as the Commonwealth of Australia’s *Sex Discrimination Act (1984)* (*SDA*).¹³ Indeed, some of these definitions could be drawn directly from the *SDA*.¹⁴

A provision against victimisation of those who have made or are considering making a complaint should be included in the *GEA*. This can be modelled from the *SDA*.¹⁵ This provision would ensure that people who make, or are considering making a complaint, can do so in a safe environment and reduce any perceived or actual repercussions.

Currently, the act focuses solely on the physical aspects of a person’s gender and does not recognise how one identifies themselves, which in turn limits the scope of the

⁷ *Gender Equality Act* B.E. 2558 (2015), s3.

⁸ See the statistic on the complaints as of 29 August 2019 in ‘Assessment Report: Implementation of the Gender Equality Act. B.E. 2558’ (2015), p.7-9. https://www.th.undp.org/content/thailand/en/home/library/gender_equality/assessment-report--implementation-of-the-gender-equality-act--b-.html.

⁹ Pratch Rujivanarom ‘Group calls for strengthening gender equality law’ (23 December 2017) <<https://www.nationthailand.com/national/30334652>>.

¹⁰ *Ibid.*

¹¹ *Gender Equality Act* B.E. 2558 (2015), s17.

¹² Thailand’s Constitution of 2017, s27.

¹³ *Sex Discrimination Act (1984)* Cmth, s3(b).

¹⁴ *Sex Discrimination Act (1984)* Cmth, s4.

¹⁵ *Sex Discrimination Act (1984)* Cmth, s94.

protection provided. It is recommended that the Act is broadened to protect people experiencing discrimination on the basis of their sex, sexual orientation, gender identity, or intersex status.

Special interest groups and NGOs should be able to bring complaints under the *GEA* for unfair gender discrimination in circumstances where there is no aggrieved party. This would allow claims to be made on principle rather than only when someone has faced unfair gender discrimination. The resolution of these claims would be organisations, institutions and individuals changing their discriminatory policies, practices or actions.

Recommendations:

- Adopt gender neutral language in the *GEA* and the Constitution. The section in the Constitution on the prohibition of unfair discrimination should explicitly include the protected grounds of sexual orientation, gender identity, and intersex status.
- Review and revise the *GEA* by:
 - adding a provision against victimisation of those who have made or are considering making a complaint in the *GEA*;
 - including key definitions of terms such as gender, transgender, non-binary and intersex in the *GEA*;
 - allowing special interest groups and NGOs to bring complaints under the *GEA* for unfair gender discrimination in circumstances where there is no aggrieved party; and
 - clarifying the exemptions under Section 17 of the *GEA* to ensure that it cannot be used as a tool to unfairly discriminate against LGBTQI+ people.

3. Relevant institutions

3.1 National Human Rights Commission ('NHRC')

The Constitution creates the NHRC which was constituted as a review body independent of the government. However, the NHRC is run by seven commissioners appointed by the King.¹⁶ The role of the NHRC is to examine and report on violations of human rights, evaluate human rights situations and recommend measures or guidelines for the promotion and protection of human rights to the Thai Parliament, as well as promote the importance of human rights in Thai society.¹⁷ The NHRC first proposed draft legislation on same-sex marriage to the Thai Parliament. It is unclear if they have made other recommendations to the Thai Government concerning LGBTQI+ rights. Individuals and organisations can also lobby or petition the NHRC to act on issues.¹⁸

¹⁶ Thailand's Constitution of 2017, s246.

¹⁷ Thailand's Constitution of 2017, s247.

¹⁸ Prachatai, 'LGBT activists petition National Human Rights Commission over transgender inmates' access to hormones' (2019) <<https://prachatai.com/english/node/8136>>.

3.2 SorTorPor and WorLorPor Committees

The *GEA* establishes the Gender Equality Promotion Committee ('SorTorPor Committee') which provides the Thai Cabinet with policy recommendations for the promotion of gender equality. Further, the SorTorPor Committee provides assistance to, compensation for and remedies for victims of unfair gender discrimination, while also promoting studies and the distribution of knowledge around preventing unfair gender discrimination.¹⁹ It also establishes the Committee on Consideration of Unfair Gender Discrimination ('WorLorPor Committee') which decides matters involving complaints of unfair gender discrimination.

The *GEA* does not provide clear mechanisms for making complaints to the WorLorPor Committee nor does it indicate where information on the process can be found. From additional research on the WorLorPor Committee it remains unclear how complaints are to be made.

It should also be clarified what the repercussions are for organisations, institutions or individuals who fail to follow the recommendations or decisions of the SorTorPor or WorLorPor Committees. It should be clarified whether their decisions are binding. If their decisions are not binding, the *GEA* should be amended to allow for judicial enforcement.

Recommendations:

- Make information on how complaints are to be made publicly available. Restrictions such as time limits on making complaints and whether complaints can be made anonymously should be included in the *GEA* or in regulations which are referenced in it.
- Define the role of the SorTorPor Committee in the receiving and managing of unfair gender discrimination complaints in order for the process to be accessible to all individuals of different backgrounds.

3.3 Perceptions of the LGBTIQ community in Thailand

Foreign visitors often characterise Thailand, and Bangkok in particular, as a haven for LGBTIQ+ people.²⁰ This is largely due to the very visible presence and seemingly open acceptance of the LGBTIQ+ community within Thai society more generally.²¹ In 2018, the Tourism Authority of Thailand (TAT) stated that it wanted Thailand to be seen as a 'safe, tolerant, and respectful' destination for LGBTIQ+ travelers to

¹⁹ Ibid, s10 (3) and (5).

²⁰ Kangwan Fongkaew et al. 'Gay Guys are Shit-Lovers' and "Lesbians are Obsessed With Fingers": The (Mis)Representation of LGBTIQ People in Thai News Media' (2019) *Journal of Homosexuality* 66(2) 260.

²¹ 'Thailand's Gender Equality Act Five Years On', *Thai Inquirer*, 29 December 2020, <<https://www.thaienquirer.com/22048/thailands-gender-equality-act-five-years-on/>>.

experience diversity.²² The LGBTQI+ equality movement has even become attached to a more general push by the Thai people for greater democracy and human rights.²³

However, there are still widely held negative stereotypes and prejudice in Thailand that are inherently problematic for the LGBTQI+ community.²⁴ In-depth studies examining the relevant laws and everyday experiences of SGM persons in Thailand have shown that they still face social exclusion, stigma, and discrimination, especially in securing jobs and housing.²⁵ For example, there is still widespread discrimination and prejudice against LGBTQI+ people emanating from the glorification of traditional family structures. This is evident in s71 of the *Constitution* discussed in section 2.1. This can subsequently permeate all aspects of a person's life including employment, education and health services.²⁶

The media portrayal of LGBTQI+ people is limited and often negative and stereotypical.²⁷ It can even depict LGBTQI+ persons as mentally disturbed, unstable and dangerous.²⁸ This agenda amplifies the bias, negative generalisations and discrimination against LGBTQI+ persons in Thailand.²⁹ There is concern that such language and portrayal of events leads to a deeper misunderstanding of the LGBTQI+ community, and may cause internal conflict for individuals struggling with their own understanding of gender and sexuality.³⁰

The SorTorPor Committee should also have capabilities to, and responsibility for, providing education on the importance of gender equality and the rights of LGBTQI+ people. The *GEA* should be amended to extend the Act's purview beyond preventing discrimination and include completing research and promoting acceptance and cultural understanding. Further, reducing the shame and stigma associated with the LGBTQI+ community should be a strong focus. The academic and news articles referred to above highlight the need for cultural and social reform which ideally would be led by the SorTorPor Committee.

Recommendation:

- Amend the *GEA* to extend the Act's purview beyond preventing discrimination and include completing research and promoting acceptance and cultural understanding.

²² See <https://www.ttgasia.com/2018/07/02/finally-thailand-comes-out-of-closet-and-rolls-out-carpet-for-lgbt-travellers/?fbclid=IwAR0h5EK6XzQeZzXANHYqNLJvOh37tTQq1iq9DYKQ3dluykqE4P4lkmHJbf0>.

²³ Thomson Reuters, 'Thai LGBT and anti-government protesters join in Pride Parade' (2020) <<https://www.reuters.com/article/us-thailand-protests-pride-idUSKBN27N0G9>>.

²⁴ *Ibid.*

²⁵ World Bank Group (n 2); UNDP and USAID, *Being LGBT in Asia: Thailand Country Report* (2014) https://www.usaid.gov/sites/default/files/documents/1861/Being_LGBT_in_Asia_Thailand_Country_Report.pdf.

²⁶ *Ibid.*

²⁷ *Ibid.*

²⁸ *Ibid.*

²⁹ *Ibid.*; Wattanee Phoovatis 'Effects of Language Usage in News Reports of Sexuality in Thai Media: Gender Identity Conflict' (2019) *Kasem Bundit Journal*.

³⁰ Wattanee Phoovatis 'Effects of Language Usage in News Reports of Sexuality in Thai Media: Gender Identity Conflict' (2019) *Kasem Bundit Journal*.

4. Significant issues and groups

4.1 Marriage

In Thailand, marriage is restricted to relationships between men and women.³¹ A Civil Partnership Bill has been proposed and permits a civil union between two people of the same gender. However, Thai Parliament has delayed voting on it numerous times.³² The Bill as proposed would give same-sex couples the ability to enter a civil union, act as healthcare proxies and carers, adopt children and receive inheritance from their partner.³³ It does not address tax deductions or pensions. The Bill has been criticised for its use of discriminatory language, being the use of the term 'civil partnership' instead of 'married couple'. Moreover, there are some complaints from within the LGBTQI+ community that the Bill simply avoids structural change, being the amendment of the *Civil and Commercial Code* itself.³⁴

A same sex marriage bill should be proposed and legislated. This bill should give people in same-sex marriages the same rights as heterosexual married people. Currently, s 1448 of the Civil and Commercial Code states specifically that "a marriage can take place only when the man and woman have completed their seventeenth year of age." The following provisions detailing further marital conditions also contain similarly gendered language and continually refer to couples as 'man and woman' and 'husband and wife'. In order to create equal rights for partners of all gender variations, the wording in these definitions should be changed to be more inclusive. For example, by using the phrase 'between two people'. The amendments should not contain limitations on the rights of same sex couples in their ability to adopt children, act on behalf of their partner when they are incapacitated or receive tax benefits, pensions and other government benefits.

Recommendation:

- o Enact legislation to legalize same sex marriage, with same rights as heterosexual married people, including ability to adopt children act on behalf of their partner, receive government benefits, etc.

4.2 Transgender people

Transgender people are unable to change their gender identity on official documents irrespective of whether they have undergone gender reassignment surgery or have consulted medical professionals. A recent case filed by a transgender woman who

³¹ Civil and Commercial Code B.E 2537 (1925), s1448.

³² Rina Chandran "LGBT people are also humans": Thai Buddhist monk backs equality', *Reuters*, 21 August 2020 <<https://www.reuters.com/article/us-thailand-lgbt-religion-interview-trfn-idUSKBN25H0RZ>>; R May 'Civil partnership Bill delayed', *Bangkok Post*, 15 February 2021.

³³ Vitit Muntarbhorn 'Thailand's same-sex civil partnership law — a rainbow trailblazer?' *East Asia Forum*, 2 September 2020, <<https://www.eastasiaforum.org/2020/09/02/thailands-same-sex-civil-partnership-law-a-rainbow-trailblazer/>>.

³⁴ Pichayada Promchertchoo, 'Thailand's Civil Partnership Bill sparks further debate on same-sex couple rights', *Channel News Asia*, 26 July 2020 <<https://www.channelnewsasia.com/news/asia/thailand-civil-partnership-lgbtqi-gender-equality-discrimination-12954614>>.

was not allowed to use the woman's bathroom was dismissed.³⁵ The Court found that transgender people are more likely to commit crimes and thus should not be allowed into certain areas (including bathrooms of the gender they identify as) in order to protect the welfare and safety of others.³⁶

Positively, the Central Administrative Court ordered Thammasat University to rehire a transgender woman as a permanent lecturer.³⁷ She will be the first transgender lecturer in the university. The same university recently began allowing transgender students to dress in the uniform of the gender they identify with for graduations.³⁸

Recommendation

- Allow transgender people to change gender markers on identity documents and other official documents, including at school, university and work. This should be recognized whenever and irrespective of how one physically appears and whether they have transitioned or not.

4.3 Non-binary people

Non-binary people are forced to conform to their assigned gender at birth. Many organisations have strict uniforms for men and women. This includes the public service, universities and schools.³⁹ There is little information on non-binary people in Thailand and there is no Thai term for gender non-conforming or non-binary.⁴⁰

Recommendations:

- Identity and other official documents should include 'other' or 'non-binary as a third option under gender marker'.
- Require schools, universities and workplaces to provide more fluid uniform options so that people can choose which they wear and swap between them or combine aspects of them. It may assist people of all genders to feel comfortable at work or school.

4.4 Education and young people

Education regarding the human rights of LGBTQI+ people does not form a part of the 2008 Basic Education Core Curriculum, which serves as the core curriculum for national education at the basic level while leaving room for each school to choose

³⁵ 'Thailand's Gender Equality Act Five Years On', *Thai Inquirer*, 29 December 2020, <<https://www.thaienquirer.com/22048/thailands-gender-equality-act-five-years-on/>>.

³⁶ Ibid.

³⁷ 'Thailand university ordered by court to rehire transgender lecturer', *Asia News Network*, 9 March 2018, <<https://www.asiaone.com/asia/thailand-university-ordered-court-rehire-transgender-lecturer>>.

³⁸ 'Thailand's Gender Equality Act Five Years On', *Thai Inquirer*, 29 December 2020, <<https://www.thaienquirer.com/22048/thailands-gender-equality-act-five-years-on/>>.

³⁹ United Nations Development Program Thailand 'Legal Gender Recognition in Thailand' (2018) <<https://hivhealthclearinghouse.unesco.org/library/documents/legal-gender-recognition-thailand-legal-and-policy-review>>.

⁴⁰ Ibid.

which textbooks they use.⁴¹ Education institutions have been criticised for reinforcing patriarchy and reproducing homophobia and transphobia.⁴² In October 2020, the Conference on ‘When School Books Become a Barrier to Gender Equality’, held in Bangkok, exposed how LGBTQI+ people are pathologised and portrayed negatively in school textbooks.⁴³

Thailand is to be commended for its recent reforms to education, to make it more inclusive of LGBTQI+ people and human rights. In 2019, a systematic set of guidelines for teaching Human Rights Education (HRE) in schools was launched for the first time.⁴⁴ In the same year, the health and physical education curricula was revised to be more inclusive and affirmative of LGBTQI+ people and diverse forms of family.⁴⁵

Recommendation:

- Adopt a ‘whole-school approach’ whereby facilities, policies, and pedagogical approaches respond to the needs and challenges of LGBTQI+ students.

⁴¹ See ‘Basic Education Core Curriculum 2008’, Ministry of Education of Thailand <<https://drive.google.com/file/d/1SjQZqQbmU52DP1ODySpOmVEcUzW-7xP7/view>>.

⁴² See e.g. Summary of the Conference on ‘When School Books Become a Barrier to Gender Equality’ on 21 October 2020 at Bangkok Art and Culture Centre, held by Women and Men Progressive Movement Foundation <www.matichon.co.th/lifestyle/social-women/news_2417479>.

⁴³ Ibid.

⁴⁴ ‘Human Rights Knowledge’ National Human rights Commission of Thailand <<http://nhrc.or.th/Human-Rights-Knowledge/Documents/สิทธิมนุษยชนศึกษา.aspx>>.

⁴⁵ Adam Judd, ‘Thailand to formally introduce LGBT Education in Thai School System, starting at First Grade, next semester’ The Pattana News (20 May 2019) <<https://thepattayanews.com/2019/05/20/thailand-to-formally-introduce-lgbt-education-in-thai-school-system-starting-at-first-grade-next-semester/>>.