

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

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

September 2014



Kaleidoscope
Human Rights Foundation



EQU  L GROUND

Contact Person: Dr Paula Gerber
President, Kaleidoscope
Paula.Gerber@monash.edu

CONTENTS

1.	EXECUTIVE SUMMARY	1
2.	SCOPE OF REPORT	3
3.	LEGAL AND SOCIAL CONTEXT IN SRI LANKA	3
4.	POSITIVE STEPS TAKEN BY THE STATE PARTY	4
5.	ISSUE #5: NON-DISCRIMINATION (ARTICLES 2, 3 AND 26).....	4
6.	RIGHT TO PRIVACY (ARTICLE 17)	6
7.	PROHIBITION OF TORTURE AND CRUEL, INHUMAN AND DEGRADING TREATMENT (ARTICLE 7); RIGHT TO LIBERTY AND SECURITY OF PERSON (ARTICLES 9 AND 10); RIGHT TO LIFE (ARTICLE 6).....	8
8.	VIOLENCE AGAINST WOMEN (ARTICLES 2, 3, 6, 7 AND 26)	9
9.	RIGHT TO MARRY AND FOUND A FAMILY (ARTICLE 23)	10
10.	FREEDOM OF EXPRESSION, ASSEMBLY AND ASSOCIATION (ARTICLES 19, 21 AND 22)	11
11.	RIGHT TO AN EFFECTIVE REMEDY (ARTICLE 2).....	11
12.	CONCLUSION AND RECOMMENDATIONS.....	12

1 EXECUTIVE SUMMARY

- 1.1 Kaleidoscope Australia Human Rights Foundation is an NGO that works with local activists to protect and promote the rights of Lesbian, Gay, Bisexual, Transgendered and Intersex (**LGBTI**) persons in the Asia Pacific region. Kaleidoscope has prepared this report, with the assistance of DLA Piper, to inform the UN Human Rights Committee of areas of concern with respect to Sri Lanka's obligations under the International Covenant on Civil and Political Rights (**ICCPR**) to respect the human rights of LGBTI individuals.
- 1.2 While there has been social traction in Sri Lanka towards recognition of the rights of sexual minorities, there has been a lack of Government support or action. Consequently, there is no legal recognition and protection of the rights of LGBTI individuals and there continue to be reports of widespread discrimination, harassment and violence directed towards members of the LGBTI communities within Sri Lanka. Considerable work is required in order for Sri Lanka to achieve compliance with the ICCPR in respect of the rights of LGBTI persons. The following matters are of particular concern:
 - 1.2.1 The criminalisation of consensual same-sex relations of both men and women and the arbitrary application of other criminal laws to harass, arrest and detain LGBTI persons;
 - 1.2.2 The absence of any anti-discrimination laws that protect LGBTI persons, resulting in a failure to protect against widespread discrimination in a range of areas such as employment, housing and health care;
 - 1.2.3 Continuing harassment, abuse (including verbal and sexual) and violence directed towards LGBTI individuals, by State and non-State actors, and the failure of the State to prevent such incidents, hold the perpetrators accountable or provide a remedy to victims; and
 - 1.2.4 The failure of the State to combat social exclusion, stigma and prejudice directed towards LGBTI persons, specifically, by failing to sanction hate speech in the media or to implement campaigns or strategies to raise awareness and train public officials to respect the human rights of LGBTI persons
- 1.3 There are local NGOs¹ that support LGBTI individuals, organise events and advocate for equal rights; however, these groups face opposition, hostility and vilification by State and non-State actors, and many have ceased to operate. It has been noted that, although the increase in NGOs supporting LGBTI rights has led to greater visibility, it has also corresponded with an increase in visible homophobia within the community.² Negative comments made against LGBTI communities by public officials and State-controlled media have perpetuated stigma and negative stereotypes. In addition, the Sri Lankan Government has shown a reluctance to engage with the issue of LGBTI rights or to afford such persons more rights and recognition under the law. Recently, following a request made by the British Government, a Sri Lankan Government minister denied the

¹ For example, EQUAL GROUND, Companions on a Journey, Women's Support Group and the Diversity and Solidarity Trust. Out of these, EQUAL GROUND is the only one that remains active.

² Sri Lanka: Treatment of sexual minorities, including legislation, state protection, and support services, Immigration and Refugee Board of Canada, 13 January 2012, LKA103948.E

recognition of same-sex marriages.³ In 2008, the Sri Lankan Government also refused to sign a historic UN Declaration urging member states to decriminalise homosexuality.⁴

1.4 There is considerable work required within the legal, regulatory and policy regime to tackle the human rights concerns of LGBTI persons in Sri Lanka, and ensure compliance with the rights outlined in the ICCPR. In addition, cultural change is required which requires Sri Lanka to take steps to counter prejudice, stigma and discrimination towards LGBTI persons in various forms. The Sri Lankan Government's inaction thus far in relation to the rights and protections granted to LGBTI persons constitutes a violation of its obligations under the ICCPR.

1.5 **We request the Committee to recommend that Sri Lanka:**

1.5.1 Amend or repeal s 365 and s 365A to legalise consensual same-sex sexual activity.⁵

1.5.2 Include sexual orientation and gender identity as prohibited grounds for discrimination under section 12 of the *Constitution*, and provide for a right to privacy within the *Constitution*.

1.5.3 Enact national legislation and policies to protect against discrimination in various forms on the grounds of sexual orientation and gender identity.

1.5.4 Ensure laws such as s 399 and the *Vagrants Ordinance* are not used discriminatorily and arbitrarily against sexual and gender minorities.

1.5.5 Enact legislation or policies that allow individuals to legally change their gender without the need for sex reassignment surgery first, and allow for the recognition of a third gender.

1.5.6 Enact anti-hate crime laws and policies to protect LGBTI individuals against violence, abuse and harassment. This includes sanctions for individuals, anti-gay groups and media that incite prejudice or hatred towards LGBTI individuals.

1.5.7 Provide for awareness-raising strategies (as well as education and training) to combat stigma, prejudice and discrimination against LGBTI persons.

1.5.8 Ensure same-sex couples are able to enjoy the same legal protections and benefits as those granted to opposite-sex couples. This includes the ability to have their relationship recognised under law, protection against domestic violence and forced marriages, and other social and economic benefits granted to heterosexual couples.

³ "Sri Lanka categorically rules out marriage between same-sex couples", 24 April 2014, *LGBT Weekly* at: <http://lgbtweekly.com/2014/04/24/sri-lanka-categorically-rules-out-marriage-between-same-sex-couples/>.

⁴ "Sri Lanka shuns UN declaration on gay rights", 21 December 2008, *Sunday Times*.

⁵ See Human Rights Committee, *General Comment no 31: The nature of the General Legal Obligations Imposed on States Parties to the Covenant*, 29 March 2004, CCPR/C/21/Rev.1/Add.13, [13]: Where there are inconsistencies between domestic law and the Covenant, article 2 requires that the domestic law or practice be changed to meet the standards imposed by the Covenant's substantive guarantees; [14]: A failure to comply with this obligation cannot be justified by reference to political, social, cultural or economic considerations within the State.

1.5.9 Provide for a comprehensive framework to grant a remedy to LGBTI individuals whose human rights have been violated, investigate human rights violations and hold perpetrators accountable.

2. SCOPE OF REPORT

2.1 This report responds to the UN Human Rights Committee (**Committee**) List of Issues in relation to the fifth periodic report of Sri Lanka (**List of Issues**). The report focuses on the issues that are relevant for LGBTI individuals and communities, specifically issue #5 of the List of Issues which refers to the stigmatization and discrimination of individuals on the basis of their sexual orientation and gender identity. This report also raises concerns with respect to the right to Articles 6, 7, 9, 10, 17, 19, 21, 22 and 23 which, although not included in the List of Issues, are significant for the situation of LGBTI persons in Sri Lanka.

3. LEGAL AND SOCIAL CONTEXT IN SRI LANKA

3.1 Sri Lanka acceded to the ICCPR in 1980, and it has partly been incorporated into domestic law through the *International Covenant of Civil and Political Rights Act* (2007). The *Constitution of the Democratic Socialist Republic of Sri Lanka* guarantees certain fundamental human rights, such as the right to equality and non-discrimination. Section 12 states: “All persons are equal before the law [and] no citizen shall be discriminated against on the grounds of race, religion, language, caste, sex, political opinion, place of birth or any one of such grounds”. There is no explicit reference to sexual orientation, gender identity or intersex status within s 12 or any other provision of the *Constitution*. The *Constitution* also grants other rights recognised within the ICCPR, such as the right to freedom from torture (s 11), freedom from arbitrary arrest, detention and punishment (s 13) and freedom of assembly and association (s 14).

3.2 The National Human Rights Commission (**NHRC**), established by the Government of Sri Lanka in 1996, has the power to investigate complaints relating to human rights violations. However, these are limited to the rights protected under the Constitution. The NHRC has the ability to make recommendations taking into account the rights of minorities and international law and practice. Thus far, the NHRC has not made a recommendation with respect to the rights of LGBTI groups, nevertheless, this is a possibility that remains open.⁶ The NHRC has recently shown a greater understanding of the need to address human rights issues relating to sexual orientation and gender identity.⁷

3.3 It should be kept in mind that particular communities in Sri Lanka have their own personal laws and practices (Muslim, Thesawalamai and Kandyan). This report will only focus on the laws applying to the general population of Sri Lanka.

⁶ *Joint UPR Submission.*

⁷ National Human Rights Commission of Sri Lanka, "Report to the Regional National Human Rights Institutions Project on Inclusion, the Right to Health and Sexual orientation and gender identity".

4. POSITIVE STEPS TAKEN BY THE STATE PARTY

- 4.1 In 2010, Prime Minister D. M. Jayaratne made a public statement that he was open for dialogue regarding rights being granted to LGBTI persons.⁸ However, he failed to respond when a local NGO contacted him for an appointment to further discuss the issue.⁹
- 4.2 Sri Lanka is to be commended for its National HIV/AIDS Strategic Plan 2013-2017¹⁰ which states that a guiding principle for the national HIV/AIDS response is “no discrimination on the basis of gender, HIV status, sexual behaviour and/or sexual orientation” in diagnosing and treating HIV/AIDS. The Plan reiterates the importance of taking into account “universal human rights and dignity of all Sri Lankans, including their sexual and reproductive rights. The Plan recognises MSM (men who have sex with men) as being at risk of contracting HIV/AIDS. Furthermore, the National Human Rights Commission of Sri Lanka (NHRC), in their submission to the Universal Periodic Review of Sri Lanka in 2012, briefly mentioned that the Government should take measures to ensure “legal awareness and free legal aid” for LGBTIQ communities (amongst others) “to ensure dignified life with access to health and legal services” in reference to HIV/AIDS.

RESPONSE TO THE LIST OF ISSUES

5. ISSUE #5: NON-DISCRIMINATION (ARTICLES 2, 3 AND 26)

- 5.1 The Committee has requested Sri Lanka indicate “the measures taken to protect persons from stigmatization and discrimination on the basis of their sexual orientation and gender identity, and indicate whether they are protected by the constitutional provisions on non-discrimination”. In addition, the Committee also requires Sri Lanka to provide information on any measures undertaken to “eradicate persistent and deep-rooted stereotypes regarding the roles, responsibilities and identity of women and men”.

Failure to protect against discrimination on the basis of sexual orientation or gender identity (articles 2 and 26)

- 5.2 There is currently no anti-discrimination legislation that protects the right of LGBTI individuals from discrimination on the basis of sexual orientation or gender identity. Although the *Constitution* protects equality in section 12, sexual orientation or gender identity is not explicitly covered by that provision, and it is unclear whether those grounds are intended to fall within its purview considering the continuing criminalisation of same-sex consensual adult sexual activity within Sri Lanka. .
- 5.3 Discrimination, among other things, limits access to employment, housing and health services. There have been reports of LGBTI individuals being fired from jobs, refused accommodation or forced to leave, because of their real or perceived sexual orientation or gender identity.¹¹ In the workplace, it is up to organisations to enact non-discrimination policies but most do not refer to sexual orientation or gender identity. Furthermore, most

⁸ "Lanka for dialogue with gays", 25 June 2010, *Daily Mirror* at: <http://www.dailymirror.lk/index.php/news/4626-lanka-for-dialogue-with-gays.html>.

⁹ "Sri Lanka steps up anti-gay persecution", 8 September 2013, *GayNZ* at <http://www.gaynz.com/articles/publish/3/article_13923.php>; Coalition for Sexual Rights, Joint Universal Period Review Submission, Sri Lanka, November 2012 (*Joint UPR Submission*).

¹⁰ Democratic Socialist Republic of Sri Lanka, National HIV/AIDS Strategic Plan 2007-2011; National HIV/AIDS Strategic Plan 2013-2017.

¹¹ *WSG Shadow Report*, 4, 5. *EQUAL GROUND Shadow Report*, 8-9.

sexual harassment policies do not include harassment on the basis of sexual orientation or gender identity and expression.¹² Although Sri Lanka offers certain protection to people fired or displaced from their homes, or discriminated against in employment or housing, LGBTI individuals are unable to avail themselves of these protections.¹³

Discrimination in equality of legal recognition of gender identity.

- 5.4 There is no policy that provides for individuals to alter their sex classification on official documents or for individuals to identify as anything but male or female, nor is there an adequate legal framework for sex reassignment surgery.¹⁴ There is no legal process by which a person can change their sex on a birth certificate or national identity card. In practice, people appear to need to change their sex first on official documents (for which there is no process) before they can undergo sex reassignment surgery and a medical practitioner risks losing their license if they perform surgery on someone who has not altered their sex on official documents.¹⁵ This makes it difficult and effectively impossible for transgendered or intersex individuals to be legally recognised according to their gender identity, and therefore equal recognition before the law.¹⁶ This lack of recognition has also created problems for transgendered or transsexual individuals in situations where their gender appearance does not correspond to the sex on documentation (for example, at immigration departments).¹⁷

Discriminatory application of criminal laws

- 5.5 The failure to protect against discrimination has meant that individuals have no recourse to a remedy when particularly laws are utilised against LGBTI persons in a discriminatory manner. Such discrimination is further enabled and promoted by the continued criminalisation, and therefore stigmatisation, of LGBTI persons.
- 5.6 For example, section 399 of the *Penal Code* makes it an offence to cheat the public by impersonation. This has been used to charge women or men who do not conform to gender norms. Transgendered individuals have been arrested for 'misleading the public'.¹⁸ The *Vagrants Ordinance 1842* empowers authorities to detain people loitering in public; although this law is generally used to arrest sex workers,¹⁹ it has also been used to harass, arrest and detain individuals on the basis of their appearance or gender identity, particularly transgendered persons from lower socioeconomic backgrounds.²⁰ The transgender *nachchi*²¹ community has often been charged under this provision, especially as members of the community are often engaged in sex work.²²
- 5.7 The failure to protect individuals from such targeted practices is not only a violation of articles 2 and 26 of the ICCPR, but also amount to an arbitrary interference with privacy

¹² Women's Support Group, "Not Gonna Take It Lying Down": Experiences of Violence and Discrimination as Told by LBT Persons in Sri Lanka, March 2014, 23.

¹³ *EQUAL GROUND Shadow Report*.

¹⁴ Sri Lanka: Treatment of sexual minorities, including legislation, state protection, and support services, Immigration and Refugee Board of Canada, 13 January 2012, LKA103948.E; Urmila Pullat, "Transgendered in Sri Lanka: Gender Identity and the Law in Sri Lanka and India"; <http://ilga.org/ilga/en/article/mVIZe6b1iX>.

¹⁵ *Joint UPR Submission*, 9.

¹⁶ Under ICCPR and see also *Yogyakarta Principles: Principles on the application of international human rights law in relation to sexual orientation and gender identity* (2006).

¹⁷ Urmila Pullat, "Transgendered in Sri Lanka: Gender Identity and the Law in Sri Lanka and India".

¹⁸ *Joint UPR Submission*.

¹⁹ Concluding Observations of the Committee on the Elimination of Discrimination against Women, 8 April 2011, CEDAW/C/LKA/CO/7.

²⁰ *EQUAL GROUND Shadow Report*.

²¹ Transgendered men, who often cross-dress.

²² Andrea Nichols, 'Dance Ponnaya, Dance! Police Abuses Against Transgender Sex Workers in Sri Lanka' *Feminist Criminology* (2010) 5, 204.

under article 17, as well as a failure to protect the security of the person and prevent arbitrary detention under article 9.

Discrimination in health care

- 5.8 The discrimination and stigma surrounding LGBTI issues and criminalisation of conduct based on sexual orientation and gender identity significantly interferes with individuals' right to health.²³ There have been reports of abuse by health professionals towards LGBTI individuals through mechanisms such as forced institutionalisation or therapy, which has serious implications under the right to be free from arbitrary detention and also torture, cruel, inhuman and degrading treatment or punishment.²⁴
- 5.9 There is also a lack of awareness and information relating to the specific needs of LGBTI groups, such as sex reassignment operations. There is no legal framework within which sex reassignment surgery can be legally conducted by medical practitioners.²⁵ The criminalisation of sexual activity between same sex consenting adults can impede public health and education programmes with respect to HIV/AIDS prevention by discouraging many high-risk individuals (such as MSMs and transgendered people) from accessing treatment due to fear of disclosure or sanctions.

Recommendations

- 5.10 We recommend that Sri Lanka:
- 5.10.1 Include sexual orientation, gender identity and intersex status as prohibited grounds for discrimination under section 12 of the *Constitution*, and provide for a right to privacy within the *Constitution*
- 5.10.2 Enact national legislation and policies to protect against discrimination in various forms on the grounds of sexual orientation and gender identity
- 5.10.3 Ensure laws such as s 399 and the *Vagrants Ordinance* are not used discriminatorily and arbitrarily against sexual minorities
- 5.10.4 Enact legislation or policies that allow individuals to legally change their gender without the need for sex reassignment surgery first, and allow for the recognition of other genders.
- 5.10.5 Provide for awareness-raising strategies (as well as education and training) to combat stigma, prejudice and discrimination against LGBTI persons

6. RIGHT TO PRIVACY (ARTICLE 17)

Criminalisation of consensual same-sex sexual conduct

- 6.1 As noted above, Sri Lanka continues to criminalise adult consensual same-sex sexual conduct. Section 365 of the *Penal Code* makes it an offence to engage in "carnal

²³ Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, 27 April 2010, A/HRC/14/20.

²⁴ Women's Support Group, "The Status of Lesbians, Bisexual Women and Transgendered Persons in Sri Lanka" Shadow Report to the Committee on the Elimination of All Forms of Discrimination Against Women (January 2011), 6.

²⁵ Urmila Pullat, "Transgendered in Sri Lanka: Gender Identity and the Law in Sri Lanka and India".

intercourse against the order of nature". This provision is generally understood to be a prohibition on men having sex with men, even in private spaces.²⁶ Furthermore, section 365A of the *Penal Code* prohibits "any act of gross indecency with another person". This provision is intended to apply to same-sex relations and applies to women as well as men (following an amendment in 1995 which made the provision gender-neutral).²⁷ It was reported that the first draft of the Government's National Human Rights Action Plan 2011-2016 contained a provision for legalising homosexuality, which was subsequently taken out by the President.²⁸

- 6.2 In *Toonen v Australia*, the Human Rights Committee held that adult consensual sex in private was covered by article 17.²⁹ Provisions such as sections 365 and 365A authorise Sri Lankan officials to "investigate intimate details regarding private life"³⁰ and arbitrarily interfere with an individual's right to privacy. Furthermore, there is no right to privacy under the *Constitution*, which means that privacy is denied the status of being a 'fundamental right' granted to citizens.
- 6.3 The criminalisation of consensual same-sex sexual conduct also contributes to violations of other rights under the ICCPR. Although these provisions are 'rarely enforced' and have not led to any convictions to date,³¹ the laws nonetheless discriminate against individuals on the basis of their sexual orientation by outlawing only certain forms of sexual conduct (contrary to articles 2 and 26). The criminal laws also has the effect of interfering with the right to security of the person and freedom from arbitrary detention (article 9). The criminalisation of such conduct fuels stigmatisation and renders it difficult for LGBTI individuals to go to the authorities for legal protection under other legislation (such as the laws against domestic violence and rape) and effectively excludes LGBTI individuals from the right to rights and protection under other legislation, which is contrary to the right to equality before the law (article 26).
- 6.4 In its Concluding Observations in 2011, the Committee for the Elimination of Discrimination against Women (CEDAW) urged Sri Lanka to decriminalise consensual sexual relationships between adults of the same sex.³²

Recommendations

- 6.5 We **recommend** that Sri Lanka amend or repeal s 365 and s 365A to legalise consensual same-sex sexual activity between adults³³ and include the right to privacy as a fundamental right within the Constitution.

²⁶ Sri Lanka: Treatment of sexual minorities, including legislation, state protection, and support services, Immigration and Refugee Board of Canada, 13 January 2012, LKA103948.E.

²⁷ Human Rights Violations Against Lesbian, Gay, Bisexual and Transgender (LGBT) People in Sri Lanka: A Shadow Report, submitted at the 100th Session of the HRC, March 2014, Geneva. Prepared by EQUAL GROUND et al, December 2013, 2 (*EQUAL GROUND Shadow Report*).

²⁸ "MR vetoes Gay Rights", 11 September 2011, *Sunday Times* at: <http://sundaytimes.lk/110911/Columns/cafe.html>.

²⁹ *Toonen v Australia*, Communication No 488/1992, 31 March 1994, CCPR/C/50/D/488/1992, [8.2] (even when provisions not enforced).

³⁰ *EQUAL GROUND Shadow Report*, 4.

³¹ Cf "Two men fined for gross indecency", 16 November 2012, *Daily Mirror* at: <http://www.dailymirror.lk/news/23546-two-men-fined-for-gross-indecency-.html>.

³² Concluding Observations of the Committee on the Elimination of Discrimination against Women, 8 April 2011, CEDAW/C/LKA/CO/7. In the 2012 Universal Periodic Review of Sri Lanka, recommendations were made by Argentina and Canada to decriminalise same-sex relations and to eliminate all forms of discrimination on the basis of sexual orientation and gender identity, which were rejected by Sri Lanka: "Lanka rejects 98 recommendations at UPR", 5 November 2012, *The Sunday Leader* at <http://www.thesundayleader.lk/2012/11/05/lanka-rejects-100-of-210-recommendations-at-upr/>.

³³ See Human Rights Committee, *General Comment no 31: The nature of the General Legal Obligations Imposed on States Parties to the Covenant*, 29 March 2004, CCPR/C/21/Rev.1/Add.13, [13]: Where there are inconsistencies between domestic law and the Covenant, article 2 requires that the domestic law or practice be changed to meet the standards imposed by the Covenant's

7. PROHIBITION OF TORTURE AND CRUEL, INHUMAN AND DEGRADING TREATMENT (ARTICLE 7); RIGHT TO LIBERTY AND SECURITY OF PERSON (ARTICLES 9 AND 10); RIGHT TO LIFE (ARTICLE 6)

7.1 States are obligated under the ICCPR to prohibit cruel, inhuman and degrading treatment, prevent arbitrary arrest and detention, and prevent, investigate and punish such acts by public or private actors and institutions. This obligation also includes introducing measures such as proper training of officials and effective monitoring.³⁴

Failure to protect from harassment, abuse and assault

7.2 There is no anti-hate crime legislation in Sri Lanka to prevent LGBTI persons from harassment and acts of abuse (including physical, verbal or psychological). The Torture Act in Sri Lanka prohibits torture on grounds of discrimination, but does not specify the grounds of discrimination. Reports from local LGBTI groups indicate that hate crimes are a common occurrence in Sri Lanka, where the victims have been targeted on account of their sexual orientation, gender identity or expression. Examples of such incidents include death threats, sexual assault, rape, physical attacks, as well as emotional and psychological abuse by public and private actors. It must be noted that there is an absence of reported data which has resulted in the invisibility of the nature and forms of violence that can affect these communities.³⁵ It can be noted that LGBTI individuals from Sri Lanka have been granted asylum status on account of their sexual orientation and the recognised persecution of sexual minorities in Sri Lanka.³⁶

7.3 There have been reports of arbitrary arrests and detention by law enforcement officials and violent and abusive police behaviour. Although arrested LGBTI individuals have thus far not been charged or prosecuted, there have been reports of subsequent blackmail, extortion, violence or coerced sexual acts of individuals by police officers.³⁷ For example, in one reported cases two gay men were arrested by police in a public restroom in Colombo and taken to a police station. At the station, the police officers used derogatory terminology and accused the two men of having sex in the restroom. The police then drove the men to another location where the men were forced to pay a bribe to the police before being released.³⁸

7.4 The transgender *nachchi* community is especially vulnerable to such victimisation, abuse and exploitation.³⁹ The awareness that most LGBTI individuals will be unwilling and fearful to report such incidents and the subsequent lack of action by the State gives police officers the license to continue such practices.⁴⁰

substantive guarantees; [14]: A failure to comply with this obligation cannot be justified by reference to political, social, cultural or economic considerations within the State.

³⁴ Office of the UN High Commissioner for Human Rights, "Born Free and Equal: Sexual Orientation and Gender Identity in International Human Rights Law" (2012).

³⁵ *Joint UPR Submission*, 12.

³⁶ See, eg, USA and Australia: 071411578 [2007] RRTA 172; "Sri Lankan Gay man granted Asylum in the US", November 13 2009, *EQUAL GROUND*.

³⁷ *EQUAL GROUND Shadow Report*, 5.

³⁸ Colombo Fort incident in 2006, Sri Lanka, 11 September 2011, Youtube at: <https://www.youtube.com/watch?v=uGnw5KuELhk>.

³⁹ Andrea Nichols, 'Dance Ponnaya, Dance! Police Abuses Against Transgender Sex Workers in Sri Lanka' *Feminist Criminology* (2010) 5, 217.

⁴⁰ *EQUAL GROUND Shadow Report*, 6.

Hate speech and vilification

- 7.5 Hate speech and vilification of LGBTI communities by media and public officials is unfortunately common. There have also been articles directing hostility towards local LGBTI groups and organisers.⁴¹ Local news media (including State-owned and controlled media) has often published homophobic and transphobic articles perpetuating prejudice and negative stereotypes of LGBTI communities.⁴² In 2000, a local newspaper published a letter that recommended participants at a lesbian conference be raped to get a “taste of the zest relish of the real thing”. An organiser of the conference complained to the Press Council of Sri Lanka, a State body. The Press Council rejected the complaint, fined the complainant and referred to lesbianism as “an act of sadism and salaciousness”. Such comments, made by a State body, create an environment of State compliance with hate speech and fuel negative attitudes and discrimination against such individuals.

Domestic violence

- 7.6 The *Prevention of Domestic Violence Act 2005* grants cohabiting persons protection against domestic violence, but people in same-sex relationships are unable to access protections of the Act and due to the criminalisation of homosexuality.⁴³ Intimate partner violence can have a serious effect on a person’s mental and physical health, their personal security and can lead, in some cases, to death. The failure to protect against intimate partner violence for same-sex couples can therefore amount to a breach of the right to life and security of the person under Articles 6 and 9 of the ICCPR.

Recommendations

- 7.7 We **recommend** that Sri Lanka
- 7.7.1 Enact anti-hate crime laws and policies to protect LGBTI individuals against violence, abuse and harassment. This includes sanctions for individuals, anti-gay groups and media that incite prejudice or hatred towards LGBTI individuals
- 7.7.2 Ensure same-sex couples are able to enjoy the same legal protections and benefits as those granted to opposite-sex couples. This includes the ability to have their relationship recognised under law, protection against domestic violence and forced marriages, and other social and economic benefits granted to heterosexual couples.

8. VIOLENCE AGAINST WOMEN (ARTICLES 2, 3, 6, 7 AND 26)

- 8.1 Studies indicate that that lesbian, bisexual and transgender (LBT) women in Sri Lanka are at high risk of harassment, threats, abuse and violence, by public and private actors. In its Concluding Observations for Sri Lanka, the CEDAW Committee noted that it was crucial

⁴¹ EQUAL GROUND, ‘A Submission to the United Nations Human Rights Council UPR of Sri Lanka’, March 2012, 6 (*EQUAL GROUND Submission*).

⁴² “A homophobic editorial - professional negligence or genuine belief?”, 8 March 2010, *Groundviews* at <<http://groundviews.org/2010/08/03/a-homophobic-editorial-professional-negligence-or-genuine-belief/>>; *EQUAL GROUND Submission*, 6.

⁴³ Women’s Support Group, “‘Not Gonna Take It Lying Down’: Experiences of Violence and Discrimination as Told by LBT Persons in Sri Lanka”, March 2014.

to adopt comprehensive legislation to criminalise all forms of violence against women, including the arbitrary detention of women in police custody.⁴⁴

- 8.2 A local NGO, EQUAL GROUND has noted that: “The human rights of lesbian and bisexual women are challenged based on both gender identity and sexual orientation... influenced highly, by not only discriminatory laws, but also by religious and cultures in Sri Lanka, a society where women are seen as inferior to their male counterparts and homosexuality is viewed as not only unnatural but also un-Sri Lankan”.⁴⁵
- 8.3 LBT women have come forward with accounts of blackmail, rape and physical abuse once their sexual orientation or gender identity has been discovered by others within their community or family. Several women have been forced into heterosexual marriages (see below).⁴⁶ There have also been reports of suicides committed by women when they have been separated from their same-sex partners.⁴⁷ Sri Lanka is obligated to take steps to prevent these violations of the ICCPR.

9. RIGHT TO MARRY AND FOUND A FAMILY (ARTICLE 23)

Restriction of marriage and adoption to opposite-sex couples

- 9.1 Current laws regarding marriage and family exclude same-sex couples. The *Marriage (General) Ordinance* provides no recognition for other forms of unions beyond those between male and female. The *Adoption Ordinance* only allows a married couple to adopt; same-sex couples cannot adopt children or become official guardians.

Denial of rights granted to opposite-sex couples

- 9.2 There is currently no recognition of same-sex relationships, nor any economic or social protections for same-sex couples, similar to those provided to married couples. As such same-sex unions are not recognised for the purposes of citizenship, pension schemes, housing loans or the transfer of property following the death of a partner.⁴⁸ Therefore, the lack of recognition of same-sex unions and denial of rights of same-sex couples to adoption constitute violations of the right to marry and found a family.

Forced marriages

- 9.3 Sri Lankan law does not provide any protection against the forced marriage of LGBTI persons. EQUAL GROUND has received reports of several incidents where lesbians have been forced into heterosexual marriages once their sexual orientation or same-sex relationship has been discovered by their family or community.⁴⁹ Forcing LGBTI individuals into forced marriages constitutes a violation of article 23(3) which states that: "No marriage shall be entered into without the free and full consent of the intending spouses".

⁴⁴ Concluding Observations of the Committee on the Elimination of Discrimination against Women, 8 April 2011, CEDAW/C/LKA/CO/7.

⁴⁵ EQUAL GROUND, "Struggling Against Homophobic Violence and Hate Crimes", 5 September 2011

⁴⁶ EQUAL GROUND Shadow Report, 11.

⁴⁷ WSG Shadow Report, 4.

⁴⁸ Women's Support Group, "Not Gonna Take It Lying Down": Experiences of Violence and Discrimination as Told by LBT Persons in Sri Lanka, March 2014, 24; *Joslin v New Zealand* Communication No 902/1999, 17 July 2002, CCPR/C/75/D/902/1999: a denial of certain rights or benefits to same-sex couples that are available to married couples may amount to discrimination prohibited under article 26; see also *Young v Australia* Communication No 941/2000, 6 August 2003, CCPR/C/78/D/941/2000 and *X v Colombia*, Communication No 1361/2005, 13 January 2001, CCPR/C/89/D/1361/2005 where the denial of pension benefits to same-sex partners (while granted to unmarried heterosexual partners) was found to be a violation of art 26 of the ICCPR because it was not reasonable and objective.

⁴⁹ EQUAL GROUND Shadow Report, 11.

Recommendations

9.4 We **recommend** that Sri Lanka ensure same-sex couples are able to enjoy the same legal protections and benefits as those granted to opposite-sex couples. This includes the ability to have their relationship recognised under law, protection against domestic violence and forced marriages, and other social and economic benefits granted to heterosexual couples.

10. FREEDOM OF EXPRESSION, ASSEMBLY AND ASSOCIATION (ARTICLES 19, 21 AND 22)

10.1 The rights enshrined in arts 19, 21 and 22 are paramount to the functioning of a democratic society and to the work of human rights activists. In urban areas, events such as Colombo Pride have led to a growing exposure of LGBTI communities and opportunities for self-expression. However, a cause of concern is that organisations and individuals in them have been subjected to threats and harassment to suppress their efforts.⁵⁰ Furthermore, no active measures have been taken by the State to protect those organisations from interference with their activities. It was reported that prior to the Commonwealth Heads of Government Meeting in Sri Lanka, the Government banned gay activists from protesting, threatened local groups and refused visas to international LGBTI groups.⁵¹

10.2 In 2013, following an article in a newspaper that claimed that children were being brainwashed to be turned into homosexuals during a workshop on HIV/AIDS, officers from the Criminal Investigations Department visited the organisation and told them they could only continue with the workshop if they would not discuss homosexuality or section 365A.⁵² Such conduct has the effect of curtailing freedom of expression, assembly and association and constitute violations of articles 19, 21 and 22.

11. RIGHT TO AN EFFECTIVE REMEDY (ARTICLE 2)

11.1 States are obligated to prevent human rights violations, provide appropriate redress to victims of human rights violations and hold perpetrators of such violations accountable (this includes public officials). The failure to do so can give rise to a breach of the ICCPR.⁵³

11.2 As noted above, laws criminalising consensual same-sex sexual conduct have the effect of preventing individuals from recourse to domestic laws. Victims may be fearful to report incidents, leading to a “cycle of silence [which] makes them vulnerable to a range of abuses”.⁵⁴ In an Australian asylum case, the Court, while granting the Sri Lankan applicant asylum, noted that it was not possible for the applicant to seek or obtain adequate State protection in Sri Lanka and that the applicant was at risk from the authorities themselves,

⁵⁰ See "Former Commonwealth Head of Human Rights condemns Sri Lanka over gay harassment", 23 September 2013, *Pink News*; "Rights of sexual minorities still locked in the closet", 22 June 2010, *Hindustan Times*.

⁵¹ "Sri Lanka Gays Forced Underground as World Leaders gather for Summit", 14 November 2013, *Gay Star News* at: <http://www.gaystarnews.com/article/sri-lanka-gays-forced-underground-world-leaders-gather-summit141113>.

⁵² *EQUAL GROUND Shadow Report*, 7.

⁵³ See Human Rights Committee, *General Comment no 31: The nature of the General Legal Obligations Imposed on States Parties to the Covenant*, 29 March 2004, CCPR/C/21/Rev.1/Add.13.

⁵⁴ *EQUAL GROUND Submission*.

in particular, the police, and faced a real chance of persecution if returned to Sri Lanka, on account of his sexual orientation.⁵⁵

- 11.3 The broader exclusion of the rights of LGBTI persons within the national legal framework restricts their ability to obtain protection by the State and redress in the event of a human rights violation. For instance, although the NHRC can investigate complaints of human rights violations, the violations are restricted to those contrary to ‘fundamental rights’, being those protected by the Constitution. Furthermore, an application to the Supreme Court for a remedy can only be made for violations of those fundamental rights.⁵⁶

Recommendations

- 11.4 We **recommend** that Sri Lanka provide for a comprehensive framework to grant an appropriate remedy to LGBTI individuals whose human rights have been violated, investigate human rights violations and hold perpetrators accountable.

12. CONCLUSION AND RECOMMENDATIONS

- 12.1 The situation with relation to LGBTI rights in Sri Lanka is of great concern. Sri Lanka is in violation of several provisions of the ICCPR, by failing to grant equal rights to LGBTI persons and ensure non-discrimination of individuals on the basis of their sexual orientation or gender identity, and failing to combat stigma and prejudice as well as widespread abuse and harassment against LGBTI persons. Sri Lanka has also failed to provide a remedy for LGBTI victims of human rights violations. Absent legalisation of same-sex sexual conduct between consenting adults, comprehensive anti-discrimination and anti-hate laws to protect LGBTI persons, the current situation of persecution and discrimination of LGBTI people will continue in abeyance.

- 12.2 Therefore, we encourage the Committee to include in its Concluding Observations, recommendations that Sri Lanka:

- 12.2.1 Amend or repeal s 365 and s 365A to legalise consensual same-sex sexual activity.⁵⁷
- 12.2.2 Include sexual orientation and gender identity as prohibited grounds for discrimination under section 12 of the *Constitution*, and provide for a right to privacy within the *Constitution*.
- 12.2.3 Enact national legislation and policies to protect against discrimination in various forms on the grounds of sexual orientation and gender identity.
- 12.2.4 Ensure laws such as s 399 and the *Vagrants Ordinance* are not used discriminatorily and arbitrarily against sexual minorities.

⁵⁵ 071411578 [2007] RRTA 172.

⁵⁶ *Constitution of the Democratic Socialist Republic of Sri Lanka*.

⁵⁷ See Human Rights Committee, *General Comment no 31: The nature of the General Legal Obligations Imposed on States Parties to the Covenant*, 29 March 2004, CCPR/C/21/Rev.1/Add.13, [13]: Where there are inconsistencies between domestic law and the Covenant, article 2 requires that the domestic law or practice be changed to meet the standards imposed by the Covenant’s substantive guarantees; [14]: A failure to comply with this obligation cannot be justified by reference to political, social, cultural or economic considerations within the State.

- 12.2.5 Enact legislation or policies that allow individuals to legally change their gender without the need for sex reassignment surgery first, and allow for the recognition of other genders.
- 12.2.6 Enact anti-hate crime laws and policies to protect LGBTI individuals against violence, abuse and harassment. This includes sanctions for individuals, anti-gay groups and media that incite prejudice or hatred towards LGBTI individuals.
- 12.2.7 Provide for awareness-raising strategies (as well as education and training) to combat stigma, prejudice and discrimination against LGBTI persons.
- 12.2.8 Ensure same-sex couples are able to enjoy the same legal protections and benefits as those granted to opposite-sex couples. This includes the ability to have their relationship recognised under law, protection against domestic violence and forced marriages, and other social and economic benefits granted to heterosexual couples.
- 12.2.9 Provide for a comprehensive framework to grant a remedy to LGBTI individuals whose human rights have been violated, investigate human rights violations and hold perpetrators accountable.