

**SUBMISSION OF THE HUMAN RIGHTS COMMISSION OF SRI
LANKA TO THE THIRD UNIVERSAL PERIODIC REVIEW OF SRI
LANKA**

30 MARCH 2017



Overview of the Human Rights Commission

Recommendations 127.30 (Venezuela (Bolivarian Republic of)), 127.31 (Angola), 127.32 (Germany), 127.33 (Maldives) 127.34, (Mexico), 127.36 (Nepal), 127.37 (Malaysia), 127.38 (Norway), 127.39 (Republic of Korea), , 127.41 (Australia), 128.26 (New Zealand) of 2nd cycle review.

1. Following the nineteenth amendment to the Constitution in 2015, which established the Constitutional Council constituting members of political parties as well as civil society mandated to appoint members to the independent commissions, new members were appointed to the Human Rights Commission of Sri Lanka (HRCSL) in late October 2015.
2. In 2007 the HRCSL, which was established by Act No 21 of 1996, was downgraded to B status by the International Co-ordinating Committee of National Human Rights Institutions (ICC) for failure to adhere to the Paris Principles. Since the independence of the Commission was enhanced following the 19th Amendment to the Constitution, and the reasons for the downgrading are being addressed, the Commission is in the process of applying for A status.
3. The functions of the Commission are laid down in Section 10 of the Act and are as follows:
 - a. Inquire into and investigate complaints regarding procedures with a view to ensuring compliance with the provisions of the Constitution relating to fundamental rights and to promoting respect for, and observance of, fundamental rights,
 - b. Inquire into and investigate complaints regarding infringements or imminent infringements of fundamental rights, and to provide for resolution thereof by conciliation and mediation in accordance with the provisions hereinafter provided,
 - c. Advise and assist the government in formulating legislation and administrative directives and procedures, in furtherance of, the promotion and protection of fundamental rights,
 - d. Make recommendations to the Government regarding measures which should be taken to ensure that national laws and administrative practices are in accordance with international human rights norms and standards,
 - e. Make recommendations to the Government on the need to subscribe or accede to treaties and other international instruments in the field of human rights and,
 - f. Promote awareness and education of human rights.
4. In order to discharge its functions, the Commission is vested with a wide range of powers. These are laid down in Section 11 of the Act. They include power to:

- a. Investigate any infringement or imminent infringement of fundamental rights,
- b. Intervene in any proceedings relating to the infringement or imminent infringement of fundamental rights, pending before any court, with the permission of such court,
- c. Monitor the welfare of persons detained either by a judicial order or otherwise, by regular inspection of their places of detention, and to make such recommendations as may be necessary for improving their conditions of detention,
- d. Take such steps as it may be directed to take by the Supreme Court, in respect of any matter referred to it by the Supreme Court,
- e. Undertake research and promote awareness of human rights by conducting programmes, seminars, workshops and to disseminate and distribute the results of such research,
- f. Award an aggrieved person or a person acting on behalf of an aggrieved person, such sum of money as is sufficient to meet the expenses that may have been reasonably incurred by him in making a complaint to the Commission under section 14 of the Act,
- g. Do all such other things as are necessary or conducive to the discharge of its functions.

It is our view that consequent to the adoption of the nineteenth Amendment to the Constitution, the HRCSL is compliant with Paris Principles.

1. Overview of the Current Human Rights Situationⁱ

(a) Improvements:

1. The re-establishment of an independent judiciary as well as independent oversight commissions-- including the HRCSL--by the Nineteenth Amendment to the 1978 Constitution of Sri Lanka marks a critically important development in improving promotion and protection of human rights in the country. Judges of superior courts can be appointed by the President only after obtaining approval of the newly established Constitutional Council (CC). Members of independent commissions can be appointed by the President only upon recommendation of the CC. The CC consists of parliamentarians from varied political parties and three representatives of civil society.
2. Currently, the HRCSL observes a significant improvement in general in regard to the exercise of freedom of expression (including media freedom), freedom of association and freedom of assembly. The easing up of space for free expression could be observed after the Presidential Election held in January 2015. A variety of views and opinions are published/broadcast in the printed and electronic media across State-run and privately owned newspapers and radio/television channels in all language media (Sinhala, Tamil, English). Similarly, political demonstrations are regularly staged in Colombo and elsewhere. Violence against media personnel has vastly reduced.
3. The HRCSL has not received complaints of alleged enforced disappearances in 2015 and 2016.
4. The enactment of the Right to Information Act, No. 12 of 2016 is viewed by the HRCSL as a turning point in strengthening human rights protection in Sri Lanka.
5. There is expanded space for civil society activities at present, with improved enjoyment of freedom of expression, association and assembly. It is no longer necessary for civil society organizations to obtain special permission to work in the conflict-affected areas.
6. The HRCSL observes that Sri Lanka's ratification record of human rights treaties has improved since 2015 and at present there is greater openness of the government to engage with international human rights mechanisms, including special procedures. In August 2015 Sri Lanka ratified the Protocol to Prevent and Punish Trafficking in Persons, Especially Women and Children (Palermo Protocol), the Convention on the Rights of Persons with Disabilities in February 2016 and the Convention for the Protection of All Persons from Enforced Disappearances in May 2016. 127.1 (Egypt, Turkey); 127.2 (Philippines); 127.3 (Cambodia); 127.4 (Kenya); 128.1 (Tunisia); 128.2 (Uruguay); 128.3 (Costa Rica, Estonia); 128.4 (Latvia); 128.5 (Slovakia); 128.6 (Austria); 128.7 (Brazil); 128.8 (Maldives); 128.9 (Czech Republic); 128.10 (Turkey); 128.11 (Argentina); 128.12

(Belgium, Iraq); 128.13 (France); 128.14 (Spain); 128.15 (Sweden); 128.16 (Slovenia); 128.17 Philippines); 128.18 (Philippines); 128.71 (Sweden).

7. Sri Lanka increased its cooperation with UN Special Procedures by issuing a standing invitation in December 2015. A number of special mandate holders visited Sri Lanka during the review period- Special Rapporteur on the Rights of Internally Displaced Persons (December 2013), Special Rapporteur on the Human Rights of Migrants (May 2014), Working Group on Enforced and Involuntary Disappearances (November 2015), Special Rapporteurs on Torture, and the Independence of Judges and Lawyers undertook a joint mission (April-May 2016), and the Special Rapporteur on Minority Issues (October 2016). The Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-recurrence undertook two advisory visits - in April 2015 and January 2016. (128.50 (Belgium); 128.51 (Latvia); 128.46 (France, Uruguay); 128.48 (Chile)).
8. Since 2015 Sri Lanka began engaging with the Human Rights Council in a more constructive and non-confrontational manner. (127.44 (Angola); 128.43 (Burkina Faso))
9. In January 2016, HRCSL recommended the abolition of the death penalty (Annexure 1). In December 2016 Sri Lanka voted in favour of a global moratorium on executions.
10. In general, the HRCSL observes the existence of a more tolerant and receptive political environment to advocate gender justice and rights of marginalized communities. The HRCSL views the adoption of the Local Authorities Elections (Amendment) Act, No. 1 of 2016 reserving 1/3 additional seats exclusively for nominated female candidates in all local authorities as an important first step in ensuring greater representation for women in elected bodies.

(b) Concerns:

1. HRCSL continues to observe a widespread incidence of custodial violations, including torture. It documented its concerns in a report submitted to the UN Committee Against Torture in November 2016 when Sri Lanka's fifth periodic report was reviewed (Annexure 2).
2. The continued operation of the Prevention of Terrorism Act (PTA) has had a very negative impact on human rights. It allows prolonged administrative detention without judicial review and the admissibility of confessions, which creates space for torture. Based on statistics provided to the HRCSL by the Department of Prisons as of November 2016, of the one hundred and eleven (111) persons who still remain in remand custody under the PTA, twenty-nine have not been indicted. The longest period a person has been on remand without indictment is

fifteen years. The longest period a trial has been on-going is since 2002, i.e. fourteen years. Forty-one persons are appealing their sentences under the PTA with the longest period the person has been awaiting a decision being fourteen years.

3. HRCSL called for the revision of proposed amendments to the Code of Criminal Procedure Code, which would, in effect, limit access to detainees by lawyers (Annexures 3 & 4).
4. In general legal aid is limited. It is recommended that legal aid be expanded and greater financial and human resources be provided.
5. HRCSL has observed a growing phenomenon of hate speech, especially targeting religious minorities. Messages that incite hatred, and possibly violence against certain groups, openly circulate on the internet and social media with impunity. Some perpetrators are religious figures who openly advocate religious hatred and intolerance with impunity. Similarly, hate speech has targeted sexual minorities.
6. HRCSL has received some complaints from persons and civil society organisations in the North and East regarding individuals who have stated they are intelligence officers or members of CID/TID who have requested information about the complainants' organisations and activities, in particular after their participation in public demonstrations or events. Further, HRCSL received similar complaints from persons who appeared before the Consultation Task Force on Reconciliation Mechanisms.

2. Recommendations for Reform

(a) Constitutional Reform

7. The current constitutional reform process has presented a unique opportunity to adopt a comprehensive constitutional Bill of Rights which incorporates Sri Lanka's international human rights obligations and recognizes the principle of indivisibility of rights. The Report on Public Consultations on Constitutional Reform (2016) confirms public demands in that regard. HRCSL has presented its proposals for constitutional reform (Annexure 5) in which, *inter alia*, it calls for the recognition of supremacy of the constitution as a fundamental constitutional principle and also judicial review of legislation. The Commission endorses the framework of the Draft Bill of Rights recently presented by the Sub-Committee on Fundamental Rights of the Steering Committee of the Constitutional Assembly.
8. HRCSL is deeply concerned about opposition to incorporating economic and social rights as fully recognized justiciable constitutional rights. Such arguments negate public demands, the principle of indivisibility of rights and reverse

progressive developments on human rights by decades. The position of HRCSL on this issue is articulated in a public statement (Annexure 6).

(b) Acceptance of International Norms

9. Sri Lanka should improve its ratification record by ratifying all outstanding human rights treaties.

(c) Human rights and transitional justice

10. Although the government enacted the Office of Missing Persons (Establishment, Administration and Discharge of Functions) Act No 14 of 2016 in August 2016 as a transitional justice mechanism it is not yet operational. The HRCSL issued a statement on the elements to be incorporated when the OMP is established (Annexure 8).
11. It is important that victims be consistently consulted about their concerns and needs and the government undertake a sustained public education campaign to create public awareness on transitional justice issues and dispel prevailing fears and myths in this regard.

The government should fulfil its obligations vis-à-vis Human Rights Council Resolution A/HRC/RES/34/1 and A/HRC/RES/30/1.ⁱⁱ

(d) Legislative Reform & Related Matters

(i) National Security Legislation

12. In a statement the HRCSL called for the repeal of PTA and for the new security legislation being drafted to adhere to international human rights standards. (Annexure 7). There must be wide consultations on the proposed legislation, including with HRCSL, before the finalization of the draft law.

(ii) Rights of Detainees

13. The HRCSL reiterates that the government must guarantee the right of all persons deprived of liberty to access legal representation from the commencement of detention in a future constitutional Bill of Rights. Such a step should be accompanied by investing in improving police investigation methods.

(iii) Death penalty

14. Although from 1976, successive governments have not implemented the death penalty, courts continue to impose the death penalty under several statutes. Sri Lanka should ratify the Second Optional Protocol to the ICCPR and abolish the death penalty (Annexure 1).

(iv) Torture

128.60 (Australia), 128.61 (Czech Republic), 128.62 (Poland), 128.63 (Poland)

15. The HRCSL calls for the amendment of the definition of torture in Section 12 of the Convention Against Torture Act No 22 of 1994 to expand the definition of torture to include those acts causing severe suffering, in accordance with article 1 of the Convention Against Torture.
16. While the HRCSL notes continued human rights education programs for the police, which are also supported by the HRCSL, it recommends steps be taken to provide thorough training in modern methods of interrogation and investigation as a means of reducing custodial violations. The government should issue a strong and clear message to law enforcement authorities of its zero tolerance policy on torture, establish an independent unit to investigate complaints of torture against the police, and initiate timely prosecutions to stem impunity.

(v) Enforced Disappearances

128.65 (Australia), 128.73 (Belgium), 128.69 (Thailand), 128.66 (Germany), 128.68 (Mexico)

17. The government gazetted the International Convention for the Protection of All Persons from Enforced Disappearances Bill in February 2017. Although the Bill appears to be largely in line with the Convention, there are a number of elements of the Convention which have been excluded, such as Article 8 on statute of limitations which states it should be of long duration, and commences from the moment the offence ends taking into account the continuous nature of the offence.
18. It is important to view enforced disappearance as a continuous act, as stated in the General Comment issued by the UN Working Group on Enforced Disappearances (WGEID). The ‘continuance’ aspect gives institutions jurisdiction to consider the offence as a whole and not merely state omissions or acts that took place after acceptance by the state of the jurisdiction of the Convention.

(vi) Victim and Witness Protection

19. The Assistance to the Protection of Victims of Crime and Witness Act No 4 of 2015 was enacted in February 2015. The main shortcoming in the Act is that the Police itself is tasked with providing protection. Also, since there are limited internal relocation options within the country, feasible alternatives that foster public trust and ensure protection to victims and witnesses, such the establishment of a unit that is independent of the police have to be formulated. For that, support from government authorities at the highest levels is required.

(vii) Rights of Women

20. Despite very high social indicators relating to education and health, women are seriously under represented in parliament (5.8%)ⁱⁱⁱ, and other elected assemblies; the Cabinet of Ministers (4%) and senior management positions (e.g. 18% of Ministry Secretaries). There is low participation in the labour force (35.9 %)^{iv} and in technical education (20% in engineering schools as opposed to 60% female university entrants)^v. HRCSL agrees with CEDAW Concluding Observations on Lanka's eighth periodic report, in particular with recommendations that temporary special measures be adopted in such areas to achieve substantive equality between men and women and also non-discrimination in personal laws.^{vi} HRCSL welcomes the decision to establish a National Commission on Women and recommends that the Commission consist only of independent members and could supervise compliance with international human rights obligations.
21. Sri Lanka should take action to criminalise all forms of violence against women. (127.68 South Africa)

(viii) Hate speech (127.56 (Holy See))

22. HRCSL recommends that reform of existing law on hate speech should be in line with ICCPR standards (Annex 9). The government should send a strong and immediate message that hate speech and crimes will not be tolerated by arresting and prosecuting those responsible for such violations under existing laws pending law reform.

(ix) Rights of Persons with Disabilities

23. There have been numerous drafts of enabling legislation to give effect to the Convention on the Rights of Persons with Disabilities. The HRCSL wrote in March 2017 to the Minister of Social Empowerment and Welfare requesting a copy of the draft to ensure it is in line with the Convention.

(x) Sexual orientation and gender identity

128.53 (Argentina) & 128.24 (Canada)

24. Consensual sex between adults should not be criminalised. Therefore, sections 365 and 365A of the Penal Code, which criminalise same sex relations should be repealed. In its proposals on Constitutional Reform the HRCSL recommended that the non-discrimination clause be strengthened through the addition of, among others, the grounds of sexual orientation and gender identity. (Annexure 5).

(e) Ending impunity

25. There are current efforts to bring to account those responsible for the murder of and attacks on journalists such as Prageeth Ekneligoda and Lasantha Wickrematunge; and in the case of disappearance of five students from the suburbs of Colombo in 2008. Political will to end impunity must be accompanied by well-resourced, strong and independent democratic structures that can undertake investigations and prosecutions along with a strong victim and witness protection mechanism. To date, a number of cases, such as the killing of ACF employees and 5 students in Trincomalee, remain unresolved.

(f) Conditions of detention

127.74 (Thailand) & 128.76 (Spain)

26. The overcrowded condition of prisons and detention centres noted by HRCSL during its monitoring visits should be addressed to bring them in line with international standards. Medical facilities at prisons require considerable improvement, as do facilities available to those with severe psychological disorders. Prison Hospitals need to be provided adequate facilities in respect of emergency care and serious illnesses, and administrative delays in transferring patients to the National Hospital, especially beyond normal office hours, should be rectified. The government's modern prison built in Angunakolapelessa is a welcome step in the correct direction. It is also important to train prison officials on international norms and standards.

(g) Human rights defenders

128.89 (Slovakia)

27. Through policy and practice that recognise and guarantee the rights of human rights defenders, the government should ensure civil society and human rights

defenders are able to function without any surveillance, intimidation or harassment, especially by state security actors and law enforcement officers.

(h) Structural reforms

127.31 (Angola), 127.32 (Germany), 127.33 (Maldives), 127.34 (Mexico), 127.36 (Nepal), 127.37 (Malaysia), 127.38 (Norway), 127.39 (Republic of Korea), 127.30 (Venezuela (Bolivarian Republic of)), 127.41 (Australia), 128.26 (New Zealand)

28. All positive changes need to be consolidated through structural reform so that they are not contingent on political vagaries.
29. The independent commissions must be provided with adequate staff and facilities and should not be subject to dilatory bureaucratic procedures.
30. It is observed that the role of independent commissions in governance is yet to be fully recognised by authorities. The HRCSL is empowered by law to advise the Government on compliance with international human rights standards in passing legislation. However, this function cannot be discharged if draft legislation is not made available to HRCSL to ascertain compliance with human rights standards.
31. The authorities must take cognisance of the right of the Commissions to express their independent views on matters that fall within their jurisdiction, and also the fact that such independence contributes to greater democracy and good governance.
32. It is imperative that the Constitutional Council under the 19th amendment be strengthened so it could facilitate the proper functioning of independent commissions. There has to be clarity about its mandate and it should be provided with adequate human and other resources.
33. Although the nineteenth Amendment has bolstered independence of the judiciary, the stipulated appointment process must be transparent and be based on objective criteria. Similarly, the judicial impeachment process must be clearly stipulated providing for an inquiry to be conducted by an independent panel of experts, subject to appeal to an appropriate forum.
34. The independence of the Attorney-General's Department should be ensured and it should be provided required human resources to expedite cases and end the culture of impunity.

35. HRCSL welcomes the establishment of the National Police Commission. The Police has to be professional and function in a non-political, non-partisan manner. In this regard, HRCSL welcomes plans to establish a Police University.

ENDNOTES

ⁱ All recommendations mentioned in the report are those issued during the 2nd cycle review of Sri Lanka (14th session).

ⁱⁱ <https://documents-dds-ny.un.org/doc/UNDOC/LTD/G17/058/26/PDF/G1705826.pdf?OpenElement>;
<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G15/236/38/PDF/G1523638.pdf?OpenElement>

ⁱⁱⁱ Sri Lanka National Human Development Report 2014 on Youth and Development.

^{iv} Sri Lanka Labour Force Survey, Annual Report 2015, page 4.

^v Sri Lanka University Statistics 2015 – UGC, page 22.

^{vi} CEDAW/C/LKA/CO8, paras 20 -21.

ANNEXURE 1

1st January 2016

His Excellency Maithripala Sirisena
President of the Democratic Socialist Republic of Sri Lanka
Presidential Secretariat
Colombo 1

Your Excellency,

Recommendation to Abolish the Death Penalty in Sri Lanka

We extend to Your Excellency our warm wishes for the New Year.

We take this opportunity, on this auspicious day, to recommend the abolition of the death penalty in Sri Lanka in keeping with Sri Lanka's commitment to a more humane society consonant with human rights principles and values.

In terms of the Human Rights Commission of Sri Lanka Act No. 2L of 1996, the Human Rights Commission of Sri Lanka is required by Section 10 (c) and 10(d) of the said Act, among other things, to advise and assist the government in formulating legislation and administrative directives and procedures in furtherance of the promotion and protection of fundamental rights and to make recommendations to the Government regarding measures which should be taken to ensure that national laws and administrative practices are in accordance with international human rights norms and standards.

The Human Rights Commission wishes to bring to Your Excellency's and the Government's attention its recommendations regarding the abolition of the death penalty, which the Commission views is imperative for Sri Lanka in recognition of the growing global recognition that the death penalty seriously violates several human rights including the right to life and freedom from cruel and inhuman punishment| is an extreme and irreversible punishment and is ineffective as a deterrent to crime. Sri Lanka should demonstrate its commitment to the sanctity of life and fundamental human rights principles by joining the more than 100 nations in the world that have abolished the death penalty thus far. Another 60 countries do not carry out death sentences in practice.

International human rights obligations of Sri Lanka clearly discourage the death penalty. Article 3 of the Universal Declaration of Human Rights enshrines the sanctity of human life by affirming that everyone has the right to life, liberty and security of person, whilst Article 6 of the International Covenant on Civil and Political Rights strongly suggests that abolition of the death penalty is desirable.

Your Excellency's attention is drawn to the Second Optional Protocol to the International Covenant on Civil and Political Rights, adopted by the UN General Assembly by resolution

441728 of 15th December 1989 which calls for the abolition of the death penalty. Its Preamble declares that the abolition of the death penalty contributes to the enhancement of human dignity and progressive development of human rights. In keeping with Sri Lanka's commitment to improving human rights protection in the country we recommend that Sri Lanka accede to the Protocol and take steps to abolish the death penalty.

Whilst appreciating that from 1976, successive governments in Sri Lanka have not implemented the death penalty, the Commission notes that courts continue to impose the death penalty under several statutes which provide for the imposition of the death penalty, including the Penal Code and the Poisons, Opium and Dangerous Drugs Ordinance as amended by Act No. 13 of 1988

In view of international and comparative jurisprudence, the Commission agrees with the position that the death penalty amounts to cruel, inhuman and degrading punishment and fails to respect the sanctity of human life. The Supreme Court of Sri Lanka has held that although there is no express fundamental right to life, nevertheless that such a right is implied in the 1978 Constitution of Sri Lanka. Article 11 of the 1978 Constitution prohibits without any reservation torture as well as cruel, inhuman and degrading treatment or punishment. The Commission seeks to place before Your Excellency and the Government the following factors which should be considered in abolishing the death penalty:

i) Death Penalty as a deterrence to crime

Many proponents of the implementation of the death penalty have urged its implementation as deterrence to crime. However, it is our view that it is an effective justice system and a just social order that lead to a reduction in crime, as is seen in countries which have some of the lowest crime rates. There is no empirical data, to show that death penalty has caused a reduction in crime or has a deterrent effect on crime.

ii) The risk of miscarriage of justice and the irreversibility of capital punishment

Despite constitutional safeguards, including the appeals process and recommendations being called for from the trial judge, the Attorney General and Minister of Justice, it is the view of the Commission that there is always the risk of innocent persons being executed for crimes which they did not commit.

It is the view of the Commission that in view of the serious flaws which exist in the criminal justice system coupled with Sri Lanka, unlike other countries, not having a process permitting the reopening of a criminal case after exhaustion of the appeals procedures, there is a serious risk of a miscarriage of justice. Although due process in criminal proceedings are guaranteed by the Constitution and statutory law, there is always the possibility of human error distorting the final outcome.

The Commission wishes to place before Your Excellency that there have been several instances, in countries including those of the developed world, where also due to new investigation techniques and development of technology, fresh evidence has surfaced or doubts raised about the integrity of evidence many years after conviction. In the United States, Canada and the United Kingdom there have been several occasions where people wrongly convicted have been released from death row or prison decades later, the most recent being a U.S. man who was

released in November in Louisiana after serving 23 years in prison for several crimes, because the judge found he did not obtain a fair trial. The lead investigator and the judge in the original trial said they believe his conviction was a "miscarriage of justice". Similarly, the Commission notes there are allegations of prosecutorial misconduct leading to conviction of the innocent in Sri Lanka. Such an instance is highlighted in the Supreme Court Judgment of *Wijepala v Attorney General (2001) 1 SLR 42*.

iii) Accused not being properly defended

The Commission is also of the view that the chances are that accused from underprivileged circumstances would be more prone to be subjected to the death penalty than those who have the financial means to hire competent counsel. There is a possibility of certain accused being convicted not due to their guilt but due to being improperly defended. In the High Court where accused are financially unable to retain counsel, the State assigns counsel from the private bar at random, who often tend to be young, untrained, inexperienced and not sufficiently remunerate

For all of the above reasons the Human Rights Commission recommends that Sri Lanka ratifies the Second Optional Protocol to the ICCPR and abolishes the death penalty forthwith. The death penalty should be substituted with periods of imprisonment that befit the seriousness of each crime. Accordingly, we recommend that commutation of periods of imprisonment for such crimes also be done according to a national policy that takes into consideration the serious impact of such crime on society.

Dr.N.D.Udagama,
Chairperson.

Human Rights Commission of Sri Lanka

Cc: Hon. Prime Minister
Hon. Speaker
Hon. Leader of the Opposition
Hon. Minister of Justice

ANNEXURE 2



**REPORT OF THE HUMAN RIGHTS COMMISSION TO
THE COMMITTEE AGAINST TORTURE
REVIEW OF THE 5th PERIODIC REPORT OF SRI LANKA**

OCTOBER 2016

REPORT OF THE HUMAN RIGHTS COMMISSION TO THE COMMITTEE AGAINST TORTURE

REVIEW OF THE 5th PERIODIC REPORT OF SRI LANKA OCTOBER 2016

Introduction

1. Following the 19th amendment to the Constitution in 2015, which established the Constitutional Council constituting members of political parties as well as civil society mandated to appoint members to the independent commissions, new members were appointed to the Human Rights Commission of Sri Lanka in late October 2015.
2. In 2007 the Commission was downgraded to B status by the International Coordinating Committee of National Human Rights Institutions (ICC) for failure to adhere to the Paris Principles. Since the independence of the Commission was enhanced following the 19th amendment to the Constitution, and the reasons for the downgrading are being addressed, the Commission is in the process of applying for A status.
3. The Commission as the National Human Rights institution submits this report for the review of the fifth periodic report of Sri Lanka by the Committee Against Torture in response to the call by treaty bodies. This report is based on complaints received by the Commission, recommendations issued by the Commission, visit reports to places of detention and other state institutions where persons are deprived of liberty, studies undertaken by the Commission and state documents in the public domain, such as court records and judicial decisions.
4. Since being appointed twelve months ago the Commission has initiated a process of reviewing, re-structuring and reforming its institutional structures and processes, and strengthening its human resource capacity, which restricts its ability to submit a comprehensive report. Hence, this report responds to key issues arising from the Concluding Observations of the Committee issued in 2011, and the questions raised in the List of Issues by the Committee.
5. The Commission requires the full support of all relevant authorities to effectively respond to complaints of torture and work towards its eradication. The Commission is of the view that currently there is political space to critique existing laws, systems, processes and practices, and to make necessary interventions for required reform. The Commission has observed that consequent to making policy interventions on legislative reform the proposed legislation has been suspended. The Commission welcomes such responses and is of the opinion that in a vibrant democracy there should be space for public discourse and course correction when required on human rights issues, which are of public interest. In order for the Commission to effectively fulfil its mandate state institutions should

share information readily, including information about violations, proposed legislative reform and policy frameworks for vetting, and implement the recommendations of the Commission, to enable it to fulfil its statutory duties as per Section 10 of the parent Act.

Articles 1 and 4

6. The Commission calls for the amendment of the definition of torture in Section 12 of the Convention Against Torture Act and Other Cruel, Inhuman or Degrading Treatment or Punishment Act no 22 of 1994 to expand the definition of torture to all acts of torture, including those causing severe suffering, in accordance with article 1 of the Convention Against Torture.
7. The Human Rights Commission of Sri Lanka has requested information from the Attorney-General's Department on the number of indictments filed and convictions under the Convention Against Torture Act, but to date is yet to receive the requested information.
8. The Government ratified the Convention for the Protection of all Persons from Enforced Disappearances on 25 May 2016. Adoption of enabling legislation, which is required to give effect to the Convention at the national level, is still pending.

Article 2

9. The Commission following its appointment in late October 2015 found there have been long delays in dealing with torture complaints, with the sense these cases were not prioritised in the past, and has taken action to expedite investigations. Further, due to weak documentation and archiving systems, hamper its ability to provide greater breakdown of data. The Commission is streamlining its inquiry and investigation processes, including training for staff, mechanisms ensure staff accountability and formulating procedural manuals. To support effective inquiry and investigation the Commission is adopting measures to strengthen its documentation and archiving systems and procedures as well.
10. The Commission is in the process of establishing a 'Custodial Violations Unit' in its Investigations and Inquiries Division in order to build specialized capacity in that regard, and to also expedite investigations and inquires of such complaints. The Commission shall refer all findings of torture to the Attorney- General's Department for prosecution under the Convention Against Torture Act No 22 of 1994.
11. To mark the International Day in support of Victims of Torture, on 30 June 2016 the Commission organised a public campaign on the theme of "Stop Torture", that

was launched island wide with the objective of raising public awareness on the negative consequences of torture and to call for public rejection of torture. The regional offices of the Commission also held public events around the country to mark the campaign. His Excellency the President and Hon. Minister Law & Order participated in the march held in Colombo to mark the launch of the campaign. The march had wide participation including of the police, the military, school children, university students, and state officials.

12. Based on the statistics at the Commission's disposal, which are provided below, the Commission recognizes torture to be of routine nature that is practiced all over the country, mainly in relation to police detentions. The statistics of torture complaints received are as follows:

TABLE 1

Office	2010	2011	2012	2013	2014	2015	2016**
Head Office	369	358	389	380	329	315	160
Ampara	15	17	07	15	06	02	02
Anuradhapura	59	58	40	69	53	40	14
Badulla	04	12	01	19	11	-	01
Batticaloa	-	03	03	04	-	07	05
Kalmunai	02	04	07	07	09	03	03
Jaffna	02	03	04	-	02	-	02
Kandy	29	35	28	28	28	18	04
Matara	75	81	59	63	28	23	10
Trincomalee	05	07	02	10	02	02	03
Vavuniya	06	01	02	05	21	10	04
Total	566	579	542	600	489	420	208

**From 01.01.2016 to 31.08.2016

13. The complaints received by the Commission illustrate that torture is routinely used in all parts of the country regardless of the nature of the suspected offence for which the person is arrested. For instance, those arrested on suspicion of robbery, possession of drugs, assault, treasure hunting, dispute with family/spouse, have been subjected to torture. The prevailing culture of impunity where those accused of torture is concerned is also a contributing factor to the routine use of torture as a means of interrogation and investigation. Usually, complainants are from low-income groups. The Commission has received complaints of persons sometimes being arrested with family members, sometimes arrests being made due to mistaken identity, and torture used to elicit information or to punish. For example, in a case from Weligama in the Southern Province the complainant was beaten, threatened at gunpoint and taken to the police station by

three policemen dressed in civilian clothing in front of his family due to mistaken identity, which was revealed when his identity card was checked at the police station. The medico-legal report confirmed his injuries.

14. Some complaints refer to torture being used for settling personal scores by the police. For instance, a gem merchant from the Sabaragamuwa Province was threatened to pay a share of his earnings to the Officer-in Charge (OIC) of the police station as the officer had accepted money from the complainant and allowed him to engage in gem mining without a license from the relevant authority. Thereafter, the man was attacked by fifteen police officers by poles and by hand. The medical report found fifty-five bodily injuries of which thirty-seven were found to have been caused by being beaten with sticks made from the cinnamon tree, which are thick and strong. In another case, from Hanwella in the Western Province, the OIC and several police officers in civilian attire beat the victim and took him to the police station due to the complainant refusing to rent a restaurant he owned to the OIC. The OIC threatened him saying that he would place explosives in a building or vehicle belonging to the petitioner, and arrest him. The medical report corroborated the complainant's narrative.
15. Torture is used not only during the process of interrogation but also during the process of arrest. For instance, in Madawachchiya, North Central Province, the complainant intervened when he saw two persons in civilian attire beating his neighbour. Since the said persons had identified themselves as policemen, the petitioner asked for their identification documents. Thereafter, the so called policemen (who were later found to be police officers), threatened him by holding a weapon his neck, assaulted him and took him to custody along with two others and accused the petitioner of possessing illicitly brewed alcohol. The complainant's daughter was also verbally abused when she pleaded not take her father to police station. In another case from the Southern Province, two children – fourteen and sixteen years - were assaulted with a rifle and a thick, hard stick from the albeasia tree, which is used for fencing, on suspicion of damaging a three-wheeler and were instructed to run to the police station holding their bicycles. There was no complaint of assault while in the police station. Medical examination found the wounds were compatible with the given history.
16. Common methods of torture include, undressing the person and assaulting using the hand, foot, poles, wires, belts and iron bars, beating with poles on the soles of the feet (phalenga), denial of water following beating, forcing the person to do degrading acts, trampling and kicking, applying chilli juice to eyes, face and genitals, hanging the person by the hands and rotating/and or beating on the soles of the feet, crushing the person's nails and handcuffing the person for hours to a window or cell bar. An example is of an arrest in March 2016 by the Kalutara North police in the Western Province for possessing illegal drugs where the person was subjected to torture while blindfolded. He was assaulted all over the body, was thereafter hand cuffed to a window. The medical examination found twelve wounds including loss of front tooth, abrasion wound on wrist, and

- abrasion and contusion wounds on the body. Increasingly, physical torture is perpetrated using methods that cannot be easily detected by medical personnel.
17. Psychological torture includes, taunting and using expletives in the presence of the public and other police officers, and scaring them by threatening the well-being of family members, especially children. In the case of Sajith Suranga SC (FR) Application No: 527/2011, a seventeen year old was arrested in the Southern Province during a period when a phenomenon/persons called the grease devil were causing fear in rural communities and displayed to the crowd by the police as the grease yaka. He was thereafter taken to the police station and assaulted with batons on the face and chest and legs, after which his hands held around a pillar and he was assaulted again on various parts of the body for an hour. A book was placed on his head and it was repeatedly hit with a baton. He requested water but was not given any. The Supreme Court found, based on medical report which was a result of the Commission referring the complainant to a judicial medical examination, that the complainant exhibited many psychological consequences of trauma such as, recurrent distressing dreams, insomnia, hyper vigilance, social withdrawal reliving incident, depression and suicidal thoughts, and loss of self – esteem. This incident led to him dropping out of vocational training programme in which he was enrolled.
 18. In September 2015, where a four-year old girl was raped and murdered causing public uproar, the police arrested a seventeen-year old boy and a thirty-year old man, both of whom were subsequently released. However, both have complained of being subject to physical and mental torture by the police officers who arrested them. Both persons have instituted fundamental rights petitions before the Supreme Court. Subsequently another man who was arrested was reported by the police to have “confessed” to the rape and murder. However DNA tests exonerated him and eventually his brother was arrested and convicted for the rape and murder.
 19. A feature common to many complaints, and one regularly detected through the Commission’s investigations is the failure to follow due process during arrest, with one of the most common violations being failure to produce the person before a magistrate within twenty-four hours and altering the time of arrest in their official records. Under normal law, an arrested person can be detained only for twenty-four hours (with a few exceptions), after which the person has to be produced before a judicial officer. For example, recently our officers detected such instances in Peliyagoda (Western Province) and Jaffna (Northern Province). In the latter instance since the man’s whereabouts following arrest were unknown for six days the Commission informed the Inspector-General of Police and the Minister Law and Order of this case and requested an immediate inquiry be held and remedial action taken. To date the Commission has not received an update on the action taken.

20. A mechanism that currently exists which could contribute to responding rapidly to complaints of torture but which needs to be strengthened is the hotline that the public are supposed to access to make complaints after office hours. The hotline is hampered by the fact even when complaints are received, the officers are not able to visit the police station or prison immediately due to various administrative and logistical factors. To address this, the Commission is currently in the process of establishing a rapid response unit that will be able to act immediately in relation to complaints of custodial violence. Recognizing the technical limitations of the hotline, the Commission is in the process of upgrading it.
21. Given the law is rigid and the periods of detention are lengthy and without judicial review, which creates the context to encourage abuse and torture the Commission has focused special attention on the Prevention of Terrorism (Temporary Provisions) Act no 48 of 1979. On 18 May 2016 the Human Rights Commission issued Directives on Arrest and Detention under the PTA following the spate of arrests under the PTA beginning April 2016. This was done as the Commission received complaints both from detainees and their families that due process was not being followed during arrest and detention. These Directives were incorporated in the Directives issued by His Excellency the President. Following the issuance of the Directives by the President, the Commission was informed by the Director, Terrorism Investigation Department (TID) under oath, that it had not yet received said Directives and that he was unaware of the same. The Commission has written to His Excellency the President requesting that Directives be given to the police in order to operationalize them.

Since April 2016 the Commission has received complaints from family members, as well as those arrested and detained under the PTA, and in some instances has found that that due process was not followed, which creates space for torture- this included failure of officers to:

- a. identify themselves
- b. wear uniforms
- c. inform the person of the reason for the arrest
- d. issue an arrest receipt or receipts were issued in a language not understood by the detainee or his/her family.
- e. inform the family the place to which arrested person was being taken
- f. use official vehicles
- g. issue receipts for seizure of private property

The Commission has received complaints of persons being held at detention centres that are not gazetted, which creates opportunity for torture, which the Commission brought to the attention of all relevant authorities. Upon inquiry it was revealed the places at which persons were held for at least twelve hours were offices of the TID but not gazetted detention centres. The TID has only three gazetted places of detention - Boosa, TID Vavuniya and TID Colombo. Some

detainees mentioned they were told to sign forms and statements, which were in a language they did not understand.

Thirteen persons arrested under the PTA since April 2016 have complained of ill-treatment and torture, either at the time of arrest and/or during initial interrogation following arrest. Methods of ill-treatment and torture reported to the Commission include beating with hands, plastic pipes and sticks, being asked to strip and genitals being squeezed using plastic pipes, forced to bend and beaten on the spine with elbows, being strung upside down on a hook/fan and beaten on the soles of the feet, being pushed to the ground and kicked and stepped on, inserting pins on genitals, burning parts of the body with heated plastic pipes, handcuffing one hand behind the back and the other over the shoulder, inserting a stick between the handcuffs and pulling the hands apart. Detainees also stated they were handcuffed and blindfolded when transported to detention facilities and during this period, which could amount to at least six to eight hours, were not allowed to use sanitation facilities.

The TID has been informing the Commission of those arrested under the PTA as per section 28 (1) of the Human Rights Commission Act. Since May 2016 transfers of detainees between places of detention has also been informed to the Commission.

Persons held in administrative detention under the PTA, as well as lawyers have complained of difficulties of lawyers visiting and being able to consult with detainees in private. Lawyers have stated they have to submit written requests to the Director TID to seek permission to visit a detainee and while some are granted access, a number of others state they have never received a response despite sending repeated requests.

In response to the Committee's question regarding those who remain in detention, based on the statistics at the disposal of the Commission obtained from the Department of Prisons, as at May 2016, of the one hundred and eleven (111) persons who still remain in remand custody under the PTA, twenty-nine have not been indicted. It should be noted this does not take into account those arrested and remanded thereafter when there were a spate of arrests under the PTA. The longest period a person has been on remand without indictment being filed is fifteen years. The longest period a trial has been on-going is since 2002, i.e. fourteen years. Forty-one persons are appealing their sentences under the PTA with the longest period the person has been awaiting a decision being fourteen years.

22. Owing to difficulties experienced by suspects in accessing lawyers, the Inspector General of Police made rules under the Police Ordinance cited as Police (Appearances of Attorneys-at-Law at Police Stations) Rules 2012 recognising the right of a lawyer to represent his/her client at a police station and requiring the officer in charge of the police station to facilitate such representation. The Rules

were adopted as a result of a settlement reached in the Supreme Court in a Fundamental Rights Application. These rules effectively recognised the right which all persons including suspects have to access their Attorneys-at-law at any time, including the period immediately after arrest and while being in detention. However, despite these rules difficulties have been experienced by those detained by the TID and Criminal Investigation Department. In 2016 August the Government Gazetted a Bill proposing to amend the Criminal Procedure Code, allowing a suspect access to his lawyers after the statement of the suspect are recorded.

Since the right to legal representation is integral to ensuring torture does not take place, the Commission requested the Government to withdraw the Bill proposed amendment deprives suspects of access to lawyers between the time of arrest until the time of the conclusion of the recording of a statement. The Commission has pointed out that the amendment would pave the way for increasing possibilities of torture in custody and is in violation of Sri Lanka's obligations under the International Covenant on Civil and Political Rights (ICCPR). This also adversely impacts the right of persons to fair trial. Since the issuance of the statement of the Commission the government has delayed the passage of the Bill. However, no definitive announcement has been made with regard to continuing the status quo that permits the right to legal representation immediately after arrest.

23. Though the state provides legal aid through the Legal Aid Commission it does not do so for criminal cases. Although the courts assign counsel in cases which are tried on indictment in the High Court and in appeal when a suspect cannot afford legal representation, there is no system to monitor whether the case is being given due regard by the counsel. Often assigned counsel are relatively inexperienced and junior lawyers resulting in indigent accused not being afforded adequate legal representation. Due to long delays in trials many persons are often unable to sustain legal representation, and hence do not receive the best defence. In general, many persons do not have the financial means to pay for legal representation and are not always aware how to obtain legal aid. In particular, based on statements of PTA detainees, it appears this is also due to an impression amongst lawyers that when persons are arrested under the PTA and a detention order (DO) is issued, until the person is shifted from administrative detention to fiscal custody, i.e. until s/he is remanded, no interventions can be made by lawyers. Detainees have for instance stated their families were told by lawyers nothing could be done until the person was shifted to fiscal custody.
24. There is a shortage of Tamil interpreters in the justice system as well as at police stations, which can adversely impact upon the due process and fair trial rights of detainees.
25. Where independent medical examinations by Judicial Medical Officers are concerned, although there are sixty-five allocated vacancies for Judicial Medical to date there are only thirty-five JMOs, with only three consultants based in

Colombo. The others are Medico-legal officers who have not specialised in the subject area but have been given one month training. It has come to the attention of the Commission that since junior officers are on duty after hours often the police bring persons for examinations during this period. Although every person who is examined by a JMO is provided a receipt with the reference number, name of the examining officer and date of examination, PTA detainees in particular often did not possess this receipt. Even though persons are produced before the JMO by the police upon the request of the Commission, it is not always done within twenty-four hours of the request. Given time is of the essence where recording torture injuries are concerned this hampers the ability of the Commission to conduct an effective investigation.

The Commission has had a very positive and fruitful discussion with the Chief JMO Colombo, and will be establishing a collaborative relationship with the College of Forensic Pathologists with the aim of engaging actively with them to address custodial torture.

Article 3

26. The Commission calls for the ratification of the Convention relating to the Status of Refugees and the Protocol relating to the Status of Refugees, the Convention relating to the Status of Stateless Persons and the Convention on the Reduction of Statelessness.

Article 10

27. The Commission recognises that laws alone are not adequate to end impunity and reiterates the need for quality and effective training for the police, which could be pursued further with the support of the independent National Police Commission.

Article 11

28. With the aim of safeguarding the rights of detainees, the Commission undertakes unannounced monitoring visits to police stations and detention centres. In the past twelve months upon receipt of complaints, the Commission has undertaken special visits to prisons as well. The Commission will soon expand these visits to include prisons and other state institutions where persons are deprived of liberty. Details of visits undertaken from 2010- 2016 are as follows:

Visit to Police Stations, Detention Centres, Child Care Centres & Other Places

	2010		2011		2012		2013		2014		2015		Total
	Head Office	Regional Office	Head Office	Regional Office	Head Office	Regional Office	Head Office	Regional Office	Head Office	Regional Office	Head Office	Regional Office	
Police Stations	63	1099	72	1309	63	1388	41	1121	49	1532	75	1804	8616
CID & TID	5	--	6	--	1	--	2	--	3	1	--	1	19
Navy Camps	1	--	--	--	--	--	--	--	--	--	--	--	1
Prison/Detention Centres	--	24	2	29	4	36	2	29	2	50	2	36	216
Rehabilitation Centre	--	--	--	33	--	6	--	8	--	--	--	2	49
Child Care Centres	--	1	--	16	--	5	--	51	--	67	--	33	173
Welfare Centres	--	--	--	--	--	2	--	--	--	2	--	--	4
Others	2	11	3	2	2	1	1	7	2	20	--	13	64

* The Inquiries & Investigation Division of HRCSL carries out unannounced visits to police stations, prisons and other government authorized places where persons are deprived of liberty. The police stations are located on 14 categorized routes (a route consist of 8 -12 police stations). A total of 159 police stations are covered by the officers, in addition to visits to other detention places such as prisons, CID,TID etc.

The numbers denoted under Head Office columns represent the number of visits made to a particular route. Since each route includes 8 – 12 police stations, the number of route visits will have to be multiplied by the average number of police stations per route to determine the exact number of police stations visited.

**Visit to Police Stations, Detention Centres, Child Care Centres & Other Places
01.01.2016 to 30.09.2016**

Serial No		Head Office	Regional Centres	Total
1	Police Stations	373	1458	1831
2	TID	9	6	15
3	Army Camp	--	1	1
4	Prison	7	43	50
5	Boosa	2	10	12
6	Rehabilitation Centers	--	5	5
7	Child Care Centers	--	33	33
8	Elders Home	--	13	13

29. In response to the Committee's question on the condition of prisons and detention centres, prisons are overcrowded and conditions do not meet international standards. For instance, death row prisoners are held at Welikada at the Chapel ward where cells are seven feet by five feet, and some times house three prisoners per cell. The only light is via a small glass panel of two feet by two feet, and ventilation is solely via the cell gate, which opens to the corridor. Prisoners sleep on the ground with no bedding, and they are also not allowed outside during night-time to use the sanitation facilities. Therefore, they have to use plastic buckets to relieve themselves. The sanitary condition of prisons is generally poor.
30. The medical facilities at prisons also require to be considerably improved. For instance, the prison hospital at Welikada prison there is a shortage of staff-although there are eighteen cadre positions for nurses there are only four currently employed. There is also shortage of prison employees. The hospital does not have adequate, separate transport facilities either. The environment is not sanitary with cockroaches, bed bugs, mosquitos, pigeons and rats being commonly found. There is also a shortage of cleaning material and equipment. The surrounding area is also unsanitary with plastic bottles and other garbage, and the drains were clogged. When prisoners/remandees have to be transferred to the Colombo General Hospital or other specialist hospitals for further treatment it has been reported there are excessive delays that adversely impact the health of the person. The facilities available to those with severe psychological disorders are also inadequate and requires improvement. The Prison Hospitals do not possess adequate facilities in respect of emergency care and serious illnesses and there are administrative delays in transferring patients to the National Hospital, especially beyond normal office hours. A recommendation issued by the Commission to the Commissioner-General Prisons in 2012 found that despite court orders to transfer prisoners to the National Hospital, at times the authorities failed to abide by court orders. It further stated that conflict regarding administrative issues between the

- prison administration authorities and prison hospital authorities adversely impacted the well-being of prisoners.
31. The Commission has a positive working relationship with the Commissioner-General of Prisons, who has been very responsive in providing requested information, and making interventions to resolve complaints received by the Commission from remandees and prisoners and their families.
 32. Another example is the cells at TID Colombo measuring five feet by four feet and detainees have to bring their own mats, pillows and other personal effects. The cells have very little natural light and ventilation. While the cells are larger at Boosa there is virtually no ventilation or natural light and cells are dark even during the day. Detainees at Boosa stated locked in the cells most of the day and allowed to go outside only during mealtimes. If they wish to use the sanitation facilities they stated they have to call out to the officer on duty or bang on their doors. At night they are reportedly not allowed to use the sanitation facilities. Detainees at TID Colombo mentioned that following interventions by the Commission they are being provided adequate and nutritious meals at regular times. They also stated they are allowed to meet family members and converse with them freely.
 33. There is no separate facility for women detainees at TID Colombo, with a woman detainee being held in different office rooms during her period of detention.
 34. There continue to be reports of deaths of suspects in police custody. In 2012 the Commission received nine complaints, three in 2013, eight in 2014, seven in 2015 and in 2016 two complaints to date. When a death of a suspect in custody is reported investigations are often conducted by the very same police station where the suspects have been held in custody. Prior to 2015, there have been numerous instances of deaths in police custody under suspicious circumstances. In certain instances the authorities have not conducted independent investigations of custodial deaths. In order to prevent a recurrence of these suspicious deaths, there is a need to establish an independent investigation unit within the Police Department, which can immediately investigate custodial deaths. It is also advisable that in such instances the Post Mortem Examination be conducted outside the area in which death occurred as there have been instances of collusion between medical personnel and culpable police officers.
 35. With regard to the special needs of children in detention, there is no clear demarcation of services provided by different types of institutions and many were compelled to take on multiple roles due to a dearth of services in the district or province. For instance, Remand Homes function as a space for children accused of crimes, but it also function as a Safe House for children who were survivors of child abuse, until the judicial process is completed. Certified Schools functioned both for the rehabilitation of children convicted of crimes, as well as for survivors of abuse. In one institution the Commission visited, children (16-21 years) were

not segregated from adult prisoners who were also resident at the same institution due to inadequate infrastructure.

There are several shortcomings in the admission procedures and recommendations made by the Department of Probation and Child Care Service, such as failure to undertake medical and psychological assessments when children are admitted. In one of the Centres the Commission visited, a child had an injury as the police had hit the child with a baton. It seemed that there was no medical attention given to the child during the two weeks since the child was brought into the Centre. This in turn has resulted in children having physical injury without any medical attention given.

Children who are less than twelve years are also being admitted to detention and remand homes. In one case an eleven-year-old boy was being held in an institution. His father is in prison as he was suspected of raping a girl from the neighbourhood. The family need four thousand rupees (Rs. 4000) to pay his bail, but his mother is a housewife and has no income. He can sing well so he started singing in public bus to earn money for the family and secure his father's release on bail. He was arrested by the police one day while singing in a bus, held at the police station for a day and was sent from there to a Remand Home. In a number of instances children are also transported with adult prisoners.

There are no clear guidelines provided for staff on disciplinary methods for children. This in turn has resulted in abusive methods of discipline. There were instances where children were physically hit by staff and at times by janitorial staff and security guards.

Young offenders who are housed the Suneetha Pasala in the Western Province, which is within the prison compound have some facilities for schooling. Though the option of schooling was available, children were not emotionally ready to go back to school due to the reasons they were sent to the prison. Children at the centre are treated like prisoners as they have to stand in line to get food and had to also wear the uniform of prisoners.

36. With reference to the Committee's questions regarding rehabilitation under the Prevention of Terrorism Act, since 2011 persons being held at detention centres such Boosa (maximum period of detention eighteen months), and remand prisoners (remand can be extended indeterminately) have been transferred to rehabilitation centres. There have also been instances of persons who were held at rehabilitation centres (maximum period of detention twenty-four months) being transferred to detention centres, such as Boosa, and prisons. Such transfers result in the extension of the period an individual is held in prolonged, indefinite administrative detention.

In 2015 and 2016 it was found the rehabilitation process was being used to "reform" persons who were thought to not passed security checks required for

certain state employment, such as Grama Niladari officers (village officers). In May 2015 and March 2016, sixteen and six GN officers respectively in the North were informed by the Ministry of Home Affairs, which according to the law has no authority to order persons to rehabilitation, they would have to undergo rehabilitation. In total eleven persons completed this programme and were released after three months- seven women and four men. Of the seven women, one woman had a baby three months ago prior to being sent to rehab and hence her baby along with her mother lived with her at Poonthotam.

It has been brought to the notice of the Commission that those on remand under the PTA without being indicted are being requested whether they are willing to go to rehabilitation and upon signing consent letters are sent to rehabilitation. In these instances, if there is no credible evidence against the person to indict, the criteria upon which the persons are being sent to rehabilitation are unclear. In a number of other cases court records reveal the TID has stated in court that the Attorney-General (AG) had ordered the person to rehabilitation although in law the AG is not the decision-making authority in this regard. In this regard too it appears the person's consent was not obtained, as there have been many cases where persons have refused in court to be sent to rehabilitation.

Although rehabilitation is within the purview of the Ministry of Resettlement, the power to determine the period of rehabilitation lies with the Secretary, Ministry of Defence. The Officer- in-Charge of the rehabilitation centre is a military officer and all other staff too appear to be military officials. Additionally, the Attorney-General's Department and other entities such as the Ministry of Home Affairs are also making decisions regarding rehabilitation. Hence, there is lack of clarity regarding the making authority responsible for the implementation of the process. Poonthottam is the only remaining rehabilitation centre where as at 15 October 2016, 18 men were being held.

Articles 13

37. In relation to the Committee's request to provide information on legislation on victim and witness protection, the main concern expressed regarding the Victim and Witness Protection Act No 4 of 2015 has been that the Police is tasked with providing protection. This has created a lack of trust amongst the public regarding the effectiveness of the mechanism. This coupled with the fact there are limited internal relocation options within the country, feasible alternatives that foster public trust and ensure protection to victims and witnesses have to be formulated. In order to do this adequate resources as well as support from government authorities at the highest levels is required.

Article 15

38. In response to the Committee's questions on persons being compelled to confess to a crime under torture with specific reference to the PTA, the Commission recognises the PTA does not adhere to international human rights standards and while calling for the repeal of the Act issued a statement calling upon the government to ensure national security legislation which is reportedly being drafted include certain core elements to ensure it adheres to international human rights standards. The statement reiterated the need for judicial review of detention, the importance of the right to fair trial, and the dangers of enabling the admissibility of confessions made to police officers of senior ranks which, coupled with prolonged periods of administrative detention, creates space for torture and ill-treatment. The Commission has requested the government thrice to share the draft national security legislation with the Commission to enable it to fulfil its mandate as per sections 10 (c) and (d) but is yet to receive it.

Article 16

39. With regard to the Committee's questions relating to the harassment and intimidation of civil society and human rights defenders, the Human Rights Commission has received complaints from civil society organisations regarding persons who have stated they are intelligence or officers of the CID/TID and have requested information about the organisations and their activities, particularly when these persons are engaged in or following their participation in public demonstrations or events. Further, the Commission has received complaints from persons who have appeared before the Consultation Task Force on Reconciliation Mechanisms that they have been subjected to surveillance and intimidation. For instance, Ruki Fernando, a human rights activist was detained at the airport on 1 October 2016 where he was questioned by the TID about cases pending against him, destination of travel, purpose of travel, his work and personal details, including addresses and phone number, details of family members etc. One of his lawyers who was also travelling with him requested to be allowed to be with him during the questioning but was refused. He was not told the reason for the detention and interrogation.
40. The Commission has received complaints of corporal punishment with both principals and teachers being those who administer the punishment. The most common methods used are caning and hitting the ear or cheek by hand for a variety of reasons. For example, a seventeen year old boy was hit by a teacher for having long hair in Colombo, Western Province, and in another instance in Sabaragamuwa Province the student was beaten on the back by a teacher with a wooden javelin for making a mistake during sports practices. This also resulted in fracture of his hand when he attempted to defend himself. In two cases in which the Commission issued recommendations in 2016, in one instance a nine-year old girl in Veyangoda, Western Province, was dragged by the hand and caned for failing to obtain the signature of parents on a teacher's note for failing to do her

homework. This resulted in shoulder tissue injuries and seven cane marks, which were confirmed by the medical report. In the other case a seventeen-year old boy from Colombo, Western Province was assaulted by the vice-principal for no apparent reason.

ANNEXURE 3

21st September 2016

Hon. Ranil Wickremesinghe, MP
Prime Minister of the Democratic Socialist Republic of Sri Lanka
Temple Trees
Colombo 3

Honorable Prime Minister,

**Proposed Amendment to the Code of Criminal Procedure Act Depriving Suspects of
Access to Lawyers until their Statements are Recorded**

The Human Rights Commission of Sri Lanka is gravely concerned, that the Bill published in the Gazette on the 12th of August 2016, proposing to amend the Criminal Procedure Code, will deprive suspects arrested and detained by the Police of access to Attorneys-at-law, prior to the recording their statement, and will adversely impact on the constitutionally guaranteed rights of persons including the citizens of Lanka.

The Bill proposes to introduce a new section 37A to the Criminal procedure Code. The proposed Section 374(1) states that *"any person who has been arrested and detained in custody, shall have the right to retain and consult on Attorney-at-law of his choice at his own expense, after the recording of his statements in terms of the provisions of subsection (1) of the section 770 and prior to being produced before a Magistrate."*

Although this section purports to give a right to arrested suspects to retain and consult an Attorney at-law, such right is granted only after a statement is recorded from the suspect. Between the time of arrest and until the time of the conclusion of the recording of a statement, the suspects are deprived of access to their Attorneys-at-law.

The new Bill derogates from the rights already guaranteed by the State under Rules made by the inspector General of Police under the police Ordinance.

The Human Rights Commission notes that as a result of a settlement reached in the Supreme Court in a Fundamental Rights Application, the inspector General of Police made rules under the police Ordinance cited as Police (Appearances of Attorneys-at-Law at Police Stations) Rules 2012," recognizing the right of a lawyer to represent his/her client at a police station and requiring the officer in charge of the police station to facilitate such representation. These rules effectively recognize the right which all persons including suspects have to access their Attorneys-at-law at any time, including the period immediately after arrest and while being in detention.

The Human Rights Commission has observed that many instances of torture as well as cruel, inhuman treatment of suspects at police stations occur between the period of arrest and the conclusion of the recording of their statements. As such depriving suspects under arrest and detention of access to their lawyers until the conclusions of their statements will result in a greater risk of suspects being subject to torture, cruel and inhuman treatment as well as illegal arrest and detention by errant police officers.

The passage of the new Bill will hinder the efforts of the Government which has expressed its determination to stop torture in Sri Lanka.

The Human Rights Commission is equally concerned that the new provision will impinge on Fundamental Right of a fair trial guaranteed to an Accused under Article L3(3) of the Constitution' The right to a fair trial begins from the time of investigation. The lack of a fair and impartial investigation will result in the deprivation of a fair trial to an accused. The new provision, depriving suspects of access to lawyers during a crucial stage of the investigation will result in eventually the accused being deprived of a fair trial as a result of an unfair and partial investigation.

Furthermore, granting access to lawyers after the suspects' statements are recorded and just before them being produced before a Magistrate is of little consequence.

The new Bill is contrary to the accepted international standards of human rights which Sri Lanka is obliged to guarantee to its people. The attention of the Government of Sri Lanka is drawn to the relevant provisions of the International Covenant on Civil and Political Rights (ICCPR). It has been observed that the right to liberty and security of persons and the right of due process established by law requires the State to permit access to ;counsel from the inception of the detention and that there ought to be **prompt and regular access to lawyers.**

The Supreme Court of Sri Lanka has upheld that the Right to a fair trial includes the accused being granted adequate time and facilities for the preparation of the defence and to communicate with counsel of one's own choosing. This is also reflected in Article 14 of the ICCPR. Sri Lanka's Code of Criminal Procedure has been criticised by international bodies including the UN Committee Against Torture of lacking '*fundamental legal safeguards, such as the right to have o lawyer present during any interrogation on...the right to confidential communication between lawyer and client.*'

As such, it is necessary to strengthen, not weaken, the right of suspects to have access to lawyers. Especially when Sri Lanka has embarked on a constitutional reform process, including the drafting of a new Chapter on Fundamental Rights that should accord with the highest international and national human rights standards, the presentation of this Bill is all the more problematic.

In the above circumstances, the Human Rights Commission of Sri Lanka calls upon the Government of Sri Lanka to withdraw the aforesaid amendment to the Code of Criminal Procedure and to continue to recognize and enhance the rights of suspects to have access to their lawyers.

Dr. N D. Udagama

Chairperson

Human Rights Commission of Sri Lanka

cc: Hon. Speaker

Hon. Minister of Justice

Hon. Minister of Law & Order

ANNEXURE 4

14 March 2017

Hon. Ranil Wickremasinghe
 Prime Minister of the Democratic Socialist Republic of Sri Lanka
 Temple Trees
 Colombo 3

Hon. Prime Minister,

Proposed Amendment to the Code of Criminal Procedure (Special Provisions) Act, No. 2 of 2013

We write to express the deep concern of the Human Rights Commission of Sri Lanka regarding proposed legislation that in effect whittles down the rights of detainees in police custody to have unimpeded access to lawyers.

1. Previously, by letter dated 21 September, 2016 we urged the government to withdraw a legislative Bill that sought to amend the Code of Criminal Procedure Act (gazetted on 12 August, 2016) to provide for the right of a detainee in police custody to access his/her lawyer on condition that such access could be had only after the first statement is recorded. The recommendation was made as such a limitation would have serious implications for the detainee's right to be free from torture and also the right to a fair trial, both under the Constitution of Sri Lanka and the ICCPR (letter attached for easy reference).
2. We were pleased that the said Bill was not proceeded with. We anticipated that a future Bill that sought to guarantee the right of detainees to legal representation would take into consideration the concerns expressed by the HRCSL and other stakeholders such as the Bar Association of Sri Lanka. It would have been ideal if the government consulted the HRCSL in formulating legislation on this matter thereby enabling the commission to fulfill its mandate as per sections 10 (c) and (d) of the Human Rights Commission Act, No. 21 of 1996 to advise the government on ensuring legislative compliance with fundamental rights standards and Sri Lanka's international legal obligations.
3. By letter dated 27.01.2017 we wrote to the Minister of Justice requesting a copy of draft legislation replacing the previous Bill so that we may make necessary recommendations. However, we did not receive a response.
4. We are now in possession of a Bill gazetted on 03 March, 2017, the stated aim of which is to amend the Code of Criminal Procedure (Special Provisions) Act, No. 2 of 2013. We find some provisions in the Bill to be as problematic as the impugned provisions in the previous Bill.
5. While stating that the objective of the amendment is to provide for the right of an Attorney-at-Law to access a person in police custody (not the right of a detainee to access a lawyer), the proposed s. 6 (A) (6) introduced by the Bill nevertheless limits the right of a lawyer to access a detainee held in a police station as such a right is granted "unless such access is prejudicial to the investigation being conducted". It is not stipulated who decides on the matter nor does it set out objective criteria upon which such a determination would be made. There is also no right to appeal to a higher authority if access is refused. Similarly, we take exception to proposed s. 6 (A) (2) of the Bill which declares that "the right of an Attorney-at-Law, to have access to the police station, and to make representations, shall not affect the investigations that may be conducted in respect of the person being represented".

6. The right of a lawyer to access a detainee determines the right of the latter to obtain adequate legal representation. The rights of a detainee, both under the Constitution of Sri Lanka and international law, are based on the presumption of innocence of a suspect. Hence, in some jurisdictions those arrested have the right to remain silent (e.g. Miranda Rule in the USA). Such a guarantee is made in order to ensure justice regardless of the level of crime in a country. In a fair system, justice must be guaranteed both to the victim as well as to the suspect. Natural justice requires that both parties be given an equal hearing.
7. If the proposed amendment is premised on police entertaining suspicions about lawyers changing the course of investigations through advice given to their clients, such suspicions cannot be resolved at the expense of the right of a detainee to have access to legal representation. We are of the opinion that long term investments must necessarily be made by the government in providing better facilities and training to the police to carry out effective investigations in a manner that does not undermine the rights of detainees. Currently, the police appear to rely heavily on the first statement of a suspect in order to investigate crimes. The Commission's observation is that torture is often used from the point of arrest until the first statement is obtained.
8. We recommend that the proposed s. 6 (A)(2), and the phrase "unless such access is prejudicial to the investigation being conducted" contained in proposed s.6 (A) (6) of the Bill be removed if the Bill is to proceed further.
9. The government must guarantee the right of all persons deprived of liberty to access legal representation from the commencement of detention in a future constitutional Bill of Rights. Such a step should be accompanied by investing in improving police investigation methods" Such combined measures would go a long way in improving Sri Lanka's human rights record.

Further, we urge the government to provide the Commission access to draft legislation on a regular basis in order to ensure legislative compliance with human rights standards (s. 10 (c) and (d) of the Human Rights Commission of Sri Lanka Act, No 21 of 1996).

Thank you.

Dr. D. Udagama
Chairperson

Human Rights Commission of Sri Lanka

ANNEXURE 5

Human Rights Commission of Sri Lanka **PROPOSALS FOR CONSTITUTIONAL REFORM**

Preface

The HRCSL is of the view that deepening constitutional protection of human rights requires much more than the incorporation of a substantively rich constitutional Bill of Rights into a future constitution. Two critically important dimensions that require attention in the reform process is:

- a) the guaranteeing of a sound system of separation of powers and checks and balances and
- b) strong regulation of the public security regime

Specific Proposals

1. Constitutional Principles

Foundational constitutional principles must be articulated either in the preamble to the constitution or as a substantive provision:

- Sovereignty of the people should be foundation of governance
- Transparency and accountability of governance
- Supremacy of the constitution
- Respect for pluralism, equality of dignity and inherent human rights of the people as individuals and as groups, respect for religious freedom of all.
- Respect for social justice
- Power sharing
- Protection of the rights of future generations with special emphasis on environmental protection including protection of all animal species

2. Bill of Rights:

The HRCSL endorses the Draft Charter of Rights (attached) drafted by a Sub-Committee appointed by Minister Mahinda Samarasinghe the Chair of then Inter-Ministerial Committee on Human Rights in 2006 and completed in 2009. It is endorsed subject to the following amendments and those necessitated by the repeal of the 1978 Constitution:

- Further strengthen the non-discrimination clause by adding the ground of sexual identity. The HRCSL received many representations in regard to the need to include 'sexual orientation', 'sexual identity' and 'disability' as prohibited grounds of discrimination. The first and the last and many other grounds such as 'age' and 'maternity' have already been included in the Draft

Charter. The clause should be clearly articulated in an open manner as required by our international obligations—“...no discrimination shall be permitted on grounds **such as**”...

- Recognize the right to be free from enforced disappearances.
- Recognize the right to legal aid or the broader right of access to justice
- Include a positive obligation of the State to introduce affirmative action measures in instances of historical injustice and underrepresentation in various sectors of public life
- Horizontal obligations of private parties for abuse of fundamental rights in appropriate situations
- Fundamental rights jurisdiction must be decentralized to appropriate regional courts to make access to justice easy
- ICCPR Act, No. 56 of 2007 must be repealed and rights therein must be incorporated into a future. All rights guaranteed by the Bill of Rights must be entrenched. The diminution (lessening) or revocation (removal) of any of such rights should require a referendum in addition to adoption by a special majority in parliament. An alternative is to recognize a constitutional Basic Structure Doctrine that does not permit the amendment of fundamental rights. Bill of Rights. There must be no gradation of human rights.
- Interpretation of the Bill of Rights should give primacy to protection of human dignity and equal rights; should necessarily take into account the spirit and objectives of International Human Rights Law; and Directive Principles of State Policy.

3. Ensure a strong system of checks and balances

- The Constitutional Council shall consist of a majority of members from among respected citizens than of political representatives; social diversity must be represented on the Council.
- Independence of the judiciary must be enhanced by strengthening the Judicial Services Commission. The JSC must have among its members respected retired justices and retired members of the official and unofficial Bar and also academics.
- Providing for specific procedure by legislation for removal of judges that complies with principles of natural justice
- Ensuring judicial review of legislation is essential. Review should be with prospective (future) effect. Pre-legislative review also should be retained.

4. International Human Rights Treaties

- The HRCSL recommends a process for human rights treaty ratification in accordance with its mandate, while recognizing that the recommendation could be of general application.
- The executive must inform Parliament of its intention to ratify international human rights treaties. Parliament must approve by resolution such ratification. Such resolution must be deemed to be an undertaking by Parliament of its intention to approve enabling legislation.
- The government must be bound to present enabling legislation within three months of ratification. If enabling legislation is not adopted within a year of ratification, courts should be authorized to give judicial recognition to the substantive rights in the ratified treaty.

5. Human Rights Commission of Sri Lanka

- The Commission is set up under Act No. 21 of 1996. However, the appointment of Commissioners is dealt with under the Nineteenth Amendment to the 1978 Constitution. It is recommended that the HRCSL (as should all independent Commissions) be recognized in a future constitution as a constitutionally established body. Its powers and functions and the duty of public authorities to comply with its recommendations should be stipulated in the Constitution.
- The HRCSL is currently studying its current legal framework in order to make recommendations for improvement.

6. Linguistic Accessibility

- The HRCSL strongly recommends that the future Constitution be drafted and translated using simple language so as to enable the citizenry to read and access its provisions easily. It is a right of the citizens to know what their Basic Law says. That is of fundamental importance to constitution-building and in legitimizing constitutional governance.

The Draft Charter of Rights

The HRCSL endorses the incorporation of the attached Draft Charter of Rights into a future constitution subject to the amendments recommended and to the removal of references to the 1978 Constitution.

The Draft Charter of Rights was formulated between 2006-2009 by a Committee appointed on the initiative of Minister Mahinda Samarasinghe, then Chair of the Inter-Ministerial Committee on Human Rights. The Committee included academics specialized in human rights, civil society advocates, legal practitioners and representatives of the Legal Draftsman's Department. Dr. Deepika Udagama, current Chairperson of the HRCSL was appointed as a member of the Committee and also served as the Chair of its Sub-Committee on Economic, Social and Cultural Rights. Dr. Jayampathy Wickramaratne, P.C. chaired the Committee.

The Committee deliberated on the framework and the substantive provisions of the Draft Charter for nearly two years, drawing from Sri Lanka's international human rights obligations and also from comparative constitutions, in particular the Constitution of India and the Constitution of South Africa.

The Draft Charter was meant to be presented as the Eighteenth Amendment to the 1978 Constitution. The ending of the 26 year civil war in Sri Lanka in 2009 was an opportune moment for its release for public deliberations and eventual adoption. However, it was not officially released to the public for public debate and adoption by Parliament.

DRAFT BILL OF RIGHTS

CONTENTS

10 Freedom of thought, conscience and religion

10A Right to human dignity

10B Inherent right to life

10C Right to recognition as a person before the law.

11 Freedom from torture

11A Security of the Person

12 Right to equality and freedom from discrimination

13 Freedom from arbitrary arrest, detention and punishment and prohibition of retroactive penal legislation

14 Freedom to hold opinions

14A Freedom of speech and expression including publication and freedom of information

14B Right of access to information

14C Freedom of peaceful assembly

14D Freedom of association

14E Trade union rights

14F Freedom to manifest religion

14G Right to enjoy and promote culture and use of language

14H Freedom to engage in any lawful trade, occupation, profession, business or enterprise

14I Freedom of movement

14J Freedom to return to Sri Lanka

14K Right to privacy and family life

14L Right to ownership of property

14M Family rights

14N Rights of children

14O Right to education

14P Freedom from Exploitation

14Q Labour rights

14R Right to health

14S Social rights

14T Right to an adequate environment

14U Responsibility of the State to respect, secure and advance fundamental rights

15 Protection of fundamental rights in times of public emergency

16 Existing written law and unwritten law

17 Remedy for infringement of fundamental rights by State action

17 Rights of non-citizens permanently and legally resident

17B Interpretation of fundamental and language rights provisions

35 Immunity of President from suit

126 Fundamental rights and language rights jurisdiction and its exercise

10 Freedom of thought, conscience and religion

(1) Every person is entitled to freedom of thought, conscience and religion, including the freedom to have or to adopt a religion or belief of his choice.

(2) No restrictions shall be placed on the exercise of the fundamental right declared and recognized by this Article.

10A Right to human dignity

(1) Every person has inherent dignity and the right to have his or her dignity respected and protected.

(2) No restrictions shall be placed on the on the right declared and recognized by this Article.

10B Inherent right to life

(1) Every person has inherent right to life and no person shall be arbitrarily deprived of life.

(2) No person shall be punished with death.

(3) Every person against whom a sentence of death has been pronounced before the coming into force of the Eighteenth Amendment to the Constitution, shall have such sentence commuted to one of rigorous imprisonment for life.

(4) No restrictions shall be placed on the on the rights declared and recognized by this Article.

10C Right to recognition as a person before the law

(1) Every person shall have the right to recognition as a person before the law.

(2) No restrictions shall be placed on the right declared and recognized by this Article.

11 Freedom from torture

(1) No person shall be subject to torture or to cruel, inhuman or degrading treatment or punishment.

(2) No restrictions shall be placed on the exercise of the fundamental right declared and recognized by this Article.

11A Security of the Person

(1) Every person has right to-

- (a) bodily and psychological integrity; and
- (b) not to be subjected to medical or scientific experiment without such person's informed consent.

(2) No restrictions shall be placed on the on the right declared and recognized by this Article.

12 Right to equality and freedom from discrimination

(1) All persons are equal before the law and are entitled to the equal protection of the law.

(2) (a) No person shall be arbitrarily discriminated against on any ground including on the ground of such as race, gender, sex, sexual orientation, maternity, marital status, caste, ethnic or social origin, colour, age, disability, religion, conscience or belief, political or other opinion, culture, language, place of birth, and place of residence.

(b) It shall be lawful to require a person to acquire within a reasonable time sufficient knowledge of any national language as a qualification for any employment or office in the service of the State or in the service of any public corporation, Provincial Public Service or local government service where such knowledge is reasonably necessary for the discharge of the duties of such employment or office.

(c) It shall be lawful to require a person to have sufficient knowledge of any language as a qualification for any such employment of office where no function of that employment or office can be discharged otherwise than with knowledge of that language.

(3) No person shall, on any of the grounds referred to in subparagraph (a) of paragraph (2) (a) of this Article, be arbitrarily subject to any disability, liability, restriction or condition with regard to access to shops, public restaurants, hotels, places of public entertainment and places of public worship of the person's own religion.

(4) Nothing in this Article shall prevent special measures being taken by law, subordinate legislation or executive action where necessary for the sole purpose of the protection or advancement of disadvantaged or underprivileged individuals or groups including those that are disadvantaged or underprivileged because of ethnicity, gender, sex, age or mental or physical disability.

(5) No restriction shall be placed on the exercise of the rights declared and recognized by this Article other than such restrictions prescribed by law as are necessary in a democratic society for the protection of national security, public order or the protection of public health or for the purpose of securing due recognition and respect for the rights and freedoms of others.

13 Freedom from arbitrary arrest, detention and punishment and prohibition of retroactive penal legislation

- (1) No person shall be arrested, imprisoned or otherwise physically restrained except in accordance with procedure prescribed by law.
- (2) Every person arrested, held in custody, or otherwise deprived of his or her liberty shall be treated with respect for the inherent dignity of the human person.
- (3) Save as otherwise provided by law, no person shall be arrested except under a warrant issued by a judicial officer causing such person to be apprehended and brought before a competent court in accordance with procedure prescribed by law.
- (4) Every person arrested shall be informed, in a language which the person appears to understand, of the reason for the arrest and of the person's rights under paragraphs (5) and (6) of this Article.
- (5) Every person arrested shall have the right to communicate with any relative or friend of the person's choice, and, if the person so requests, such person shall be afforded means of communicating with such relative or friend.
- (6) Every person arrested shall have the right to retain and consult an attorney-at-law. The State shall afford all reasonable facilities to enable the effective representation of the arrested person.
- (7) Every person arrested shall not be detained in custody or confined for a longer period than under all the circumstances of the case is reasonable, and shall, in any case, be brought before the judge of a competent court within twenty-four hours of the arrest, exclusive of the time necessary for the journey from the place of arrest to such judge, and no person shall be detained in custody beyond such period except upon, and in terms of, the order of such judge made in accordance with procedure established by law.
- (8) Every person detained in custody or confined, has the right to be released on bail or upon the execution of a bond unless otherwise provided by law. The amount of bail and the amount of every such bond shall be fixed with due regard to the circumstances of the case and shall not be excessive.
- (9) Every person suspected of committing an offence shall be charged or indicted or released without unreasonable delay, having regard to the facts and circumstances of the case.
- (10) Every person charged with or indicted for an offence shall be entitled to be heard in person or by an attorney-at-law of the person's own choosing and shall be so informed by the judge.
- (11) (a) Every person charged with or indicted for an offence shall be entitled to be tried –
 - (i) without undue delay;
 - (ii) by a competent court;
 - (iii) at a fair trial; and
 - (iv) subject to sub-paragraph (b) of this paragraph, at a public hearing.
- (b) A judge may, at the judge's discretion, whenever the judge considers it necessary, in proceedings relating to sexual matters or where the interests of juveniles so require or for the protection of national security or public order necessary in a democratic society or in the interests of order and security within the precincts of such court, exclude there from, persons who are not necessary for the purposes of those proceedings.

(12) (a) Every person shall be presumed innocent until the person is proved guilty.

(b) Nothing contained in any law shall be held to be inconsistent with sub-paragraph (a) of this paragraph to the extent that such law imposes upon an accused the burden of proving particular facts.

(13) No person shall be compelled to testify against himself or herself or to confess guilt.

(14) (a) No person shall be held guilty of, or punished for, an offence on account of any act or omission which did not, at the time of such act or omission, constitute an offence, except for any act or omission which, at the time it was committed, was criminal according to the principles of public international law.

(b) No penalty shall be imposed for an offence more severe than the penalty in force at the time when an offence was committed.

(15) Every person who has been convicted or acquitted of an offence in accordance with law by a competent court shall not be liable to be tried for the same offence save on the order of a court exercising appellate or revisionary jurisdiction.

(16) (a) No person shall be punished with imprisonment except by order of a competent court and in accordance with procedure established by law.

(b) The arrest, holding in custody, detention or other deprivation of personal liberty of a person –

(i) pending investigation or trial shall, if not unreasonable having regard to the circumstances, not constitute punishment;

(ii) by reason of a removal order or a deportation order made under the provisions of the Immigrants and Emigrants Act or other such law as may be enacted in substitution therefor, shall not be a contravention of this paragraph.

(17) (a) No restrictions shall be placed on the rights declared and recognized by paragraph (2), paragraph (10), items (ii) and (iii) of sub-paragraph (a) of paragraph (11), paragraph (14), paragraph (15) and paragraph (16) of this Article.

(b) No restriction shall be placed on the rights declared and recognized by paragraphs (1), (3), (4), (5), (6), (7), (8), (9), items (i) and (iv) of sub-paragraph (a) of paragraph (11) and paragraphs (12) and (13) of this Article other than such restrictions prescribed by law as are necessary in a democratic society for the protection of national security, public order, or for the purpose of securing due recognition and respect for the rights and freedoms of others.

14 Freedom to hold opinions

(1) Every person shall have the right to hold opinions without interference.

(2) No restriction shall be placed on the rights declared and recognized by paragraph (1) of this Article.

14A Freedom of speech and expression including publication and freedom of information

(1) Every person is entitled to the freedom of speech and expression including publication and this right shall include the freedom to express opinions and to seek, receive and impart information and ideas, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium.

(2) No restrictions shall be placed on the right declared and recognized by this Article other than such restrictions prescribed by law as are necessary in a democratic society for the protection of national security, public order, the protection of public health or morality, racial and religious harmony or in relation to parliamentary privilege, contempt of court, defamation or incitement to an offence or for the purpose of securing due recognition and respect for the rights and freedoms of others.

14B Right of Access to Information

(1) Every person shall have the right of access to –

(a) any information held by the State, including Provincial authorities; and

(b) any information held by any other person and that is required for the exercise or protection of the person's rights.

(2) Parliament shall by law make provision to give effect to this right.

(3) No restrictions shall be placed on the right declared and recognized by this Article other than such restrictions prescribed by law as are necessary in a democratic society in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or the rights of others, privacy, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

14C Freedom of peaceful assembly

(1) Every person is entitled to the freedom of peaceful assembly.

(2) No restrictions shall be placed on the exercise of the right declared and recognized by this Article other than such restrictions prescribed by any law as are necessary in a democratic society for the protection of national security, public order, racial or religious harmony, the protection of public health or for the purpose of securing the due recognition and respect for the rights and freedoms of others.

14D Freedom of association

(1) Every person is entitled to the freedom of association.

(2) No restrictions shall be placed on the exercise of the rights declared and recognized by this Article other than such restrictions prescribed by law as are necessary in a democratic society for the protection of national security, public order, racial or religious harmony, national economy the protection of public health or morals or for the purpose of securing due recognition and respect for the rights and freedoms of others.

14E Trade Union Rights

(1) Every person is entitled to the freedom to form and join a trade union of the person's choice and for such trade union to function without undue hindrance.

(2) Every person is entitled to the right to participate in trade union action, including strike, provided that the right is exercised in conformity with law.

(3) No restrictions shall be placed on the exercise of the rights declared and recognized by this Article other than such restrictions prescribed by law as are necessary in a democratic society for the protection of national security, public order, racial or religious harmony or for the purpose of securing due recognition and respect for the rights and freedoms of others.

14F Freedom to manifest religion

(1) Every person is entitled to the freedom, either alone or in association with others, and either in public or in private, to manifest the person's religion or belief in worship, observance, practice, propagation and teaching.

(2) In the exercise of the rights declared and recognized by paragraph (1) of this Article, no person shall have the right to impair or otherwise restrict any other person's freedom to have or to adopt a religion or belief of that other person's choice.

(3) No restriction shall be placed on the rights declared and recognized by paragraph (1) of this Article other than such restrictions prescribed by law as are necessary in a democratic society for the protection of national security, public order, or for the purpose of securing due recognition and respect for the rights and freedoms of others including the freedom declared by paragraph (2) of this Article.

14G Right to enjoy and promote culture and use of language

(1) Every person is entitled alone or in association with others to enjoy and promote such person's culture and, to use the language of such person's choice.

(2) Persons belonging to a cultural or linguistic community shall not be denied the right, with other members of that community, to enjoy their own culture or to use their own language.

(3) No restriction shall be placed on the exercise of the rights declared and recognized by this Article other than such restrictions prescribed by law as are necessary in a democratic society for the protection of public order, racial or religious harmony, the protection of public health or morality, the protection of the environment or for the purpose of securing due recognition and respect for the rights and freedoms of others.

14H Freedom to engage in any lawful trade, occupation, profession, business or enterprise

(1) Every person is entitled to the freedom to engage alone or in association with others in any lawful occupation, profession, trade, business or enterprise.

(2) No restrictions shall be placed on the exercise of the rights declared and recognized by this Article other than such restrictions prescribed by law as are necessary in a democratic society for the protection of the national economy, national security, public order, protection of public health or morality, the protection of the environment or for the purpose of securing due recognition and respect for the rights and freedoms of others or in relation to –

(a) the professional, technical, academic, financial and other qualifications necessary for practising any profession or carrying on any occupation, trade, business or enterprise, and the licensing and disciplinary control of a person practising a profession or carrying on an occupation, trade, business or enterprise in the exercise of such fundamental right; and

(b) the carrying on by the State, a State agency, a company fully owned by the State or a public corporation of any trade, business, industry, service or enterprise, whether to the exclusion, complete or partial, of citizens or otherwise.

14I Freedom of movement

(1) Every person lawfully resident within the Republic is entitled to the freedom of movement within the Republic and of choosing such person's residence within the Republic.

(2) Every person shall be free to leave the Republic.

(3) No restrictions shall be placed on the exercise of the rights declared and recognized by this Article other than such restrictions prescribed by law as are necessary in a democratic society for the protection of national security or public order or national economy or the protection of public health or morality or for the purpose of securing due recognition and respect for the rights and freedoms of others or for the extradition of persons from the Republic.

14J Freedom to return to Sri Lanka

(1) Every citizen shall be entitled to return to the Republic.

(2) No restrictions shall be placed on the exercise of the right declared and recognized by this Article.

14K Right to privacy and family life

(1) Every person has the right to privacy, the right to be protected from arbitrary interference with family life, the inviolability of the home, correspondence and communications and shall not be subjected to unlawful attacks on such person's honour and reputation.

14L Right to ownership of property

(1) Every citizen is entitled to own property alone or in association with others subject to the preservation and protection of the environment and the rights of the community.

(2) No person shall be deprived of property except as permitted by law.

(3) No property shall be compulsorily acquired or requisitioned save for a clearly described public purpose or for reasons of public utility or public order and save by authority of law which provides for the payment of fair compensation having regard to the prevalent market value of the property at the time of such acquisition.

14M Family rights

(1) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

(2) Every man or woman of marriageable age shall be entitled to marry and to found a family and the rights of men and women within the family shall be equal.

(3) No marriage shall be entered into without the free and full consent of the intending spouses.

(4) The State shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution, in which instance provision shall be made for the necessary protection of any children.

14N Rights of the Child

(1) Every child shall have the right -

- (a) to have his or her birth registered and to have a name from his or her date of birth;
- (b) to acquire nationality;
- (c) to be protected from maltreatment, neglect, abuse or degradation;
- (d) to family care or parental care or to appropriate alternative care when removed from the family environment;
- (e) to basic nutrition, shelter, basic health care services and social services;
- (f) to have legal assistance provided by the State at State's expense in criminal proceedings affecting the child, if substantial injustice would otherwise result;
- (g) not to be detained except as a measure of last resort, in which instance, the child may be detained only for the shortest appropriate period of time, and has the right to be –
 - (i) kept separately from detained persons over the age of 18 years; and
 - (ii) treated in a manner, and kept in conditions, that take account of the child's age;
- (h) Not to be used directly in armed conflict and to be protected in times of armed conflict.

(2) No child shall be discriminated against on the ground of the child's or his or her parent's or legal guardian's race, colour, sex, sexual orientation, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status including the marital status of parents.

(3) Every child shall have the right to grow up in an environment protected from the negative consequences of the consumption of addictive substances harmful to the health of the child and, to the extent possible, from the promotion of such substances.

(4) Every child shall have the right to free education provided by the State.

(5) A child shall not be employed in any hazardous activity, shall be protected from exploitative labour practices and shall not be required or permitted to perform work or provide services that-

- (a) are inappropriate for a person of that child's age;

(b) places at risk, the child's wellbeing, education, physical or mental health or spiritual, moral or social development.

(6) The rights recognized by this Article shall be in addition to and not in derogation of any other right to which a child is entitled as a citizen or person under this Chapter.

(7) For the purposes of this Article "child" means a person under the age of eighteen years.

(8) In all matters concerning children, whether undertaken by institutions of state or public or private social welfare institutions, the best interest of the child shall be of paramount importance.

14O Right to education

(1) Every person has the right to education which shall be directed to full development of the human personality and the sense of its dignity, and to the strengthening of respect for human rights and fundamental freedoms.

(2) Primary education shall be compulsory and available to all.

(3) Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, including by free education provided by the State.

(4) Higher education shall be made available to all on the basis of capacity and equitable opportunity, by every appropriate means, including by free education provided by the State b.

(5) Basic education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education.

(6) Nothing in this Article shall exclude the right of a lawful guardian of a child, acting on that child's behalf, or of any adult to select an education provided by a private institution of education whether denominational or otherwise.

14P Freedom from Exploitation

(1) No person shall be subjected to trafficking, slavery or forced labour.

(2) "Forced labour" as used in paragraph (1) of this Article shall not include performance of labour pursuant to a sentence of a court of competent jurisdiction or any work or service which forms a part of normal civic obligations.

14Q Labour rights

Every citizen has the right to the enjoyment of just and favorable conditions of work which ensures, in particular:

- (a) remuneration which provides fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work;
- (b) safe and healthy working conditions;

- (c) equal opportunity for everyone to be promoted in employment to an appropriate higher level, subject to no considerations other than those of competence and appropriate qualifications including seniority and experience where relevant; and
- (d) rest, leisure and reasonable limitation of working hours and periodic holidays with pay.

14R Right to health

(1) Every citizen has the right to enjoy the highest attainable standard of physical and mental health and to have access to preventive and curative health-care services including through free health services provided by the State to all who require such services.

(2) No person may be denied emergency medical treatment.

14S Social rights

- (1) Every citizen has the right to have access to –
 - (a) sufficient food and water;
 - (b) adequate housing; and
 - (c) appropriate social assistance including social security when unable to support the citizen and the citizen's dependents.

(2) No person shall be evicted from the person's home or have the home demolished, except as permitted by law.

14T Right to an adequate environment

- All persons have the right to an environment that is –
- (a) not harmful to their health or well being; and
 - (b) protected for the benefit of present and future generations.

14U Responsibility of the State to respect, secure and advance Fundamental Rights

In giving effect to Article 4(d) of this Constitution, all organs of State shall take all necessary measures including the enactment and implementation of necessary legislation and the adoption and implementation of appropriate policies and programmes for the full realization of the rights declared and recognized by this Chapter.

15 Protection of fundamental rights in times of public emergency

(1) Where a Proclamation has been duly made pursuant to the provisions of Chapter XVIII, and subject to paragraphs (2) and (3) of this Article, measures may be prescribed by law derogating from the exercise and operation of the fundamental rights declared and recognized in this Chapter to the extent strictly required by the exigencies of the situation and necessary in a democratic society, provided that such measures do not involve discrimination on grounds recognized under paragraph (2) of Article 12 and for the purpose of this Article "law" includes regulations made under the law for the time being in force relating to public security.

- (2) In prescribing measures under paragraph (1) of this Article, there shall be no derogation -
 - (a) from any of the rights declared and recognized by Articles 10, 10A, 10B, 10C, 11, 11A, 14, 14M, 14N (except 14N(1) (e)), and 14P;

(b) from the right declared and recognized by Article 13(7) unless at the same time legal provision is made requiring –

- (i) the Magistrate of the area in which such arrest was made to be notified of the arrest; and
- (ii) the person arrested to be produced before any Magistrate, within such time as is reasonable in all the circumstances of the case.

(3) In prescribing measures under paragraph (1) of this Article, the State shall have a minimum core obligation to ensure the satisfaction of minimum essential levels of the rights recognized by Articles 14N (1) (e), 14O, 14Q, 14R 14S and 14T and in discharging such obligation the State shall not discriminate solely on any of the grounds set out in Article 12 (2).

16 Existing written law and unwritten law

All written and unwritten laws in force at the time of coming into force of the Eighteenth Amendment to the Constitution shall be read subject to the provisions of Chapter III and IV and in the event of a court declaring that any such law is inconsistent with any such provision, such law shall be deemed to be void to the extent of such inconsistency.

17 Remedy for infringement of fundamental rights by State action

(1) Subject to following paragraphs of this Article, every person shall be entitled to apply to the Supreme Court as provided by Article 126 in respect of the infringement or imminent infringement by State action of a fundamental right to which such person is entitled under the provisions of this Chapter;

(2) Where the person aggrieved is unable to make an application under Article 126 owing to reasonable cause, an application may be made on behalf of such a person, by any relative or friend of such person, if the person aggrieved raises no objection to such application.

(3) An application may also be made in respect of any group or class of persons affected, in the public interest, by any person or by any incorporated or unincorporated body of persons, acting bona fide.

(4) Notwithstanding anything to the contrary in the Constitution, every person shall be entitled to apply to the Supreme Court as provided by Article 126 for a declaration that any law, statute of a Provincial Council or a provision thereof is inconsistent with a fundamental right under the provisions of this Chapter.

(5) For the purposes of this Article and Article 126, "State action" includes legislative action, executive or administrative action and judicial action.

17A Rights of non-citizens permanently and legally resident

A person who, not being a citizen of any country, has been permanently and legally resident in the Republic on the date on which the Eighteenth Amendment to the Constitution comes into force and continues to be so resident, shall be entitled to all the rights declared and recognized by this Chapter, to which a citizen of Sri Lanka is entitled.

17B Interpretation of fundamental and language rights provisions

(1) In interpreting the rights declared and recognized by Chapter III and Chapter IV, a court, tribunal or other body -

- (a) shall promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
- (b) shall have regard to the international legal obligations of the Republic and other sources of international law; and
- (c) may have regard to foreign law.

(2) When interpreting any written or customary law, every court, tribunal or other body shall promote the spirit, aims and objects of this Chapter and Chapter IV.

(3) The rights declared and recognized in this Chapter and in Chapter IV do not derogate from any other rights or freedoms that are recognized or conferred by common law, customary law or legislation, to the extent that they are consistent with Chapter III and Chapter IV .

35 Immunity of President from suit

(1) While any person holds office as President, no proceedings shall be instituted or continued against him in any court or tribunal in respect of anything done or omitted to be done by him either in his official or private capacity.

(2) Where provision is made by law limiting the time within which proceedings of any description may be brought against any person, the period of time during which such person holds the office of President shall not be taken into account in calculating any period of time prescribed by that law.

(3) The immunity conferred by the provisions of paragraph (1) of this Article shall not apply to any proceedings in the Supreme Court under Article 126 or to any proceedings in any court in relation to the exercise of any power pertaining to any subject or function assigned to the President or remaining in his charge under paragraph (2) of Article 44 or to proceedings in the Supreme Court under paragraph (2) of Article 129 or to proceedings in the Supreme Court under Article 130 (a) relating to the election the President or the validity of a referendum or to proceedings in the Court of Appeal under Article 144 or in the Supreme Court, relating to the election of a Member of Parliament:

Provided that any such proceedings under Article 126 and proceedings in relation to the exercise of any power pertaining to any such subject or function shall be instituted against the Attorney-General.

126 Fundamental rights and language rights jurisdiction and its exercise

(1) The Supreme Court shall have sole and exclusive jurisdiction to hear and determine any question relating to the infringement or imminent infringement by State action or any question relating to the inconsistency of any law, any statute made by a Provincial Council or provision thereof with any fundamental right or language right declared and recognised by Chapter III or Chapter IV.

(2) The jurisdiction of the Supreme Court under this Article may be invoked by any person or body of persons referred to in Article 17 in accordance with such rules of Court as may be in force. Any such person or body of persons may apply to the Supreme Court by way of petition in writing addressed to such Court praying for relief or redress in respect of such infringement or imminent infringement or for a declaration that any law, statute of a Provincial Council or any provision thereof is inconsistent with any fundamental right or language right declared and recognised by Chapter III or Chapter IV. Such application may be proceeded with only with leave to proceed first had and obtained from the Supreme

Court, which leave may be granted or refused as the case may be by not less than two Judges of such Court.

(3) Where in the course of hearing in any Court, of an application for orders in the nature of a writ of habeas corpus, certiorari, prohibition, mandamus or quo warranto, it appears to such Court that there is prima facie evidence of an infringement or imminent infringement of the any fundamental right or language right declared and recognised by Chapter III or Chapter IV by a party to such application, such Court shall forthwith refer such matter for determination by the Supreme Court.

(4) Where in the course of hearing in any court a question of the inconsistency of any law, any statute made by a Provincial Council or provision thereof with a fundamental right or language right declared and recognised by Chapter III or Chapter IV is raised by a party, such court shall forthwith refer such matter for determination by the Supreme Court. Such matter may be proceeded with only if the Supreme Court grants leave to proceed with the matter and such leave may be granted or refused as the case may be by not less than two Judges of such Court.

(5) The Supreme Court shall have power to grant such relief or make such directions as it may deem just and equitable in the circumstances in respect of any petition or reference referred to in this Article or refer the matter back to the Court making the reference if, in its opinion, there is no infringement of a fundamental right or language right or there is no inconsistency of a law or statute with any fundamental or language right declared and recognised by Chapter III or Chapter IV.

Provided that in the case of an infringement or imminent infringement of a fundamental right or language right by judicial action, no order for compensation or costs shall be made against a judicial officer who had acted bona fide and the Supreme Court may, in lieu thereof, order the State to pay any compensation or costs.

(6) Notwithstanding anything to the contrary in the Constitution, the Supreme Court shall have power to make-

- (a) a declaration that any law, any statute made by a Provincial Council or provision thereof that is inconsistent with any fundamental or language right declared and recognised by Chapter III or Chapter IV is invalid to the extent of the inconsistency; and
- (b) any order that is just and equitable, including –
 - (i) an order limiting the retrospective effect of the declaration of invalidity; and
 - (ii) an order suspending the declaration of invalidity for such period and subject to such conditions as would enable Parliament or a Provincial Council to take steps to make the impugned law or statute cease to be inconsistent with the provisions of this Chapter.

(7) Where at the hearing of a petition or reference referred to in this Article there are any disputed questions of fact, the Supreme Court may refer such questions to the Human Rights Commission of Sri Lanka, the Official Languages Commission or other appropriate body or person for inquiry and report.

(8) The Supreme Court shall hear and finally dispose of any petition or reference under this Article as expeditiously as possible and in any event, not later than three months of the filing of the petition or the making of the reference, as the case may be. In computing the period of three months, any period taken for inquiry and report by the Human Rights Commission of Sri Lanka, the Official Languages Commission or any other body or person referred to in paragraph (7) 0 2

(9) Where the State action complained of is that of a Judge or Judges of the Supreme Court, leave to proceed shall be granted or refused and the matter shall be heard, if leave to proceed is granted, by a

Bench comprising all the Judges of the Supreme Court save those whose action is complained of and any Judge who does not wish to participate.

ANNEXURE 6

Human Rights Commission of Sri Lanka



The Need to Incorporate Economic, Social and Cultural Rights in the Future

Constitution of Sri Lanka

The Human Rights Commission of Sri Lanka (HRCSL) calls on HE the President to give leadership in calling for, and the Hon. Prime Minister and all members of the Constitutional Assembly to ensure, the incorporation of economic, social and cultural rights in the future constitutional chapter on rights as fully protected rights. The HRCSL is deeply concerned by moves by some to prevent the inclusion of such rights in violation of the principle that human rights are all inter-connected and cannot be divided. The constitution-making process must necessarily recognize the views articulated by the public in the public consultations process (2016) demanding the constitutional protection of rights such as the right to education, an adequate standard of health, housing and fair conditions of labour in the future Constitution. Failure to do so is also a violation of legal obligations undertaken by Sri Lanka, particularly under the International Covenant on Economic, Social and Cultural Rights (1966). Sri Lanka's improving human rights record will be sullied by such a failure and would seriously undermine public confidence in the future Constitution.

The HRCSL is deeply concerned by attempts made by some quarters closely associated with the current constitution-making process to prevent the inclusion of economic, social and cultural rights (ESC rights), such as the right to education and an adequate standard of health, from the constitutional Bill of Rights as full-fledged rights for which judicial remedies are available. It has been argued that only civil and political rights should be guaranteed as full rights.

The HRCSL, the primary institution charged with the protection and promotion of human rights in the country, rejects this artificial division of human rights. It calls on the Constitutional Assembly to ensure that the people's rights are fully guaranteed in the future Constitution. Failure to do so would seriously impede full protection of human rights and undermine the legitimacy of the new Constitution in the eyes of the public. It is the opinion of the HRCSL that such a move would also amount to a violation of international human rights obligations undertaken by Sri Lanka.

In March of this year, the HRCSL made submissions before the Public Representations Committee on its proposals for constitutional reform. The proposals were sent to the Hon. Prime Minister and the Hon. Speaker and were made available to the public in Sinhala, Tamil and English. In its proposals, the HRCSL, endorsed the Draft Charter of Rights completed in 2009 for inclusion in the new constitution of Sri Lanka. The Charter, formulated by a group of experts appointed by an inter-ministerial committee guarantees not only civil and political rights but also economic, social and cultural rights as full-fledged rights capable of attracting judicial remedies.

The HRCSL proposals also emphasized the need to, among other things; recognize the promotion of social justice as a fundamental constitutional principle. It reiterated the importance of incorporating a strong system of checks and balances, including judicial review of legislation to ensure the effective protection of people's rights. Above all, the need to recognize the principle of supremacy of the constitution was underscored.

The HRCSL proposals were made fully conscious of the unique opportunity this moment presents for Sri Lanka, especially as a post-war society, to acquire a modern constitution that addresses concerns of its people within a strong democratic State structure. This is a moment to right the wrongs of the past, and forge ahead to create a new Sri Lanka that is humane and just, as much as it is prosperous. Protection of the rights of the people in a strong and holistic manner is critical to achieving those goals. The post conflict constitutions of South Africa, Kenya and Nepal, for example, are illustrative of such efforts. Sri Lanka too should follow suit and not miss out on this unique opportunity.

1. Human rights are recognized in order for people to live in dignity realizing their full potential. As much as all aspects of human life are inter-connected, so also are human rights. It would be futile to divide rights and selectively protect only some of them. Today, the idea of indivisibility of rights is a firmly established principle recognized by the community of nations. The Vienna Declaration and Program of Action adopted by consensus by 171 States participating in the World Conference on Human Rights held in Vienna in June 1993 declare that 'All human rights are universal, indivisible and interdependent and interrelated'.
2. The unique feature of the current constitution-making process in Sri Lanka is the importance attached to public consultations. Such a process was missing in the making of the first two republican constitutions. The basis of constitution-making must be the will of the people in whom sovereignty lies. No entity is more powerful than the people in a democracy. The Constitution is for the people and must necessarily be by the people.

According to the detailed report of the Public Representations Committee on Constitutional Reform (May

2016), public representations had strongly demanded the strengthening of the existing constitutional chapter on rights by including rights such as the right to education, an adequate standard of health, housing and just conditions of work (Chapter 12). It is clear that such rights are no longer viewed by the people as welfare entitlements. They are recognized as human rights. It is worthy of note that the representations place strong emphasis on social justice in shaping the nature of the State. The demand is clearly not for cosmetic entitlements, but for fully fledged rights.

3. The need to secure social justice in a post-war society cannot be emphasized more. It is the glue that could hold a fractured society together by building trust. People need to believe that the State is empathetic to their critical needs such as housing, food security, livelihoods, schooling for children and healthcare. Experiences in post-conflict societies everywhere, more recently in countries such as South Africa, Kenya, Nepal and Colombia, have proved that a constitutional commitment to social justice is needed to bring about political stability and instill credibility in governance.
4. It is significant that recent public representations have referred to Sri Lanka's international human rights obligations in articulating their demands (Report on Public Representations on Constitutional Reform (2016), Chapter 12). Reference has been made, among others, to legal obligations under the International Covenant on Economic, Social and Cultural Rights (ICESCR) which Sri Lanka ratified way back in 1980.
5. States that have ratified the ICESCR are under an obligation to realize the rights through 'progressive realization utilizing the maximum of available resources' (Article 2). The State has to demonstrate that available resources are used maximally to realize ESC rights of the people. The State must ensure equal access to services. The State must ensure that the qualitative nature of services is commensurate with available resources, The economic development model of the State is irrelevant for those purposes. What is important is that the State discharges its obligations and demonstrates results.

Often, what is at issue is not the unavailability of resources but the failure to use available resources in a responsible and reasonable manner to realize the rights of the people. International human rights obligations compel States to utilize resources in a disciplined and accountable manner for public benefit.

6. 'Where there is a right, there is a remedy' (*ubi ius ibi remedium*) is a sacred legal maxim. Critics of full recognition of ESC rights argue that canvassing such rights before courts would permit unelected judges to pronounce upon policy matters involving allocation of public resources and, therefore, should not be constitutionally recognized as rights for which judicial remedies would be available. That position is unacceptable for conceptual reasons and is also in violation of the international obligations of Sri Lanka.

Judges would not be called on to initiate policy making in that regard, but are called on to review questionable policies. That is an essential feature of any functional democracy. The ICESCR

obligates Sri Lanka to provide remedies, including judicial remedies, for violation of ESC rights (Committee on Economic, Social and Cultural Rights, General Comment No.9 on 'Domestic Application of the Covenant', E/C.LL/ L998124 (1993)). The UN Committee on Economic, Social and Cultural Rights, which supervises the implementation of ICESCR, has declared that it is no longer possible to deny remedies, including judicial remedies, in regard to ESC rights.

Human rights discourse at both national and international levels has moved on to new frontiers, recognizing that ESC rights as well as civil and political rights entail positive as well as negative State obligations and that the realization of all rights have financial implications for the State.

In fact, the right to vote and the right to a fair trial (civil and political rights) are two of the most expensive rights entailing the formulation and implementation of complex policies. That does not mean, therefore, such rights should be denied judicial remedies. However, skeptics argue that the right to education and right to health, for example, should not have judicial remedies as they entail both State resources and policy implications. Therefore, such matters should be left to the whims of the political branches without judicial review. The HRCSL finds such a position to be illogical and internally contradictory. As the ESC rights Committee points out, such reasoning negates the linkage between rights (indivisibility of rights) and seriously curtails the possibility of courts to protect the rights of the most vulnerable and disadvantaged in society (General Comment No.9 (above), Para 10).

7. Reluctance to fully recognize ESC rights has much to do with one's economic policy orientations. Human rights of the people cannot be contingent on the shifting vagaries of the market or official economic policy priorities that may change from time to time.
8. The Responsibility of private economic actors to respect human rights is also increasingly recognized both at national and international levels. The UN Guiding Principles on Business and Human Rights (Ruggie Principles) (2011) recognize that States are obligated to enforce laws that require private business entities to respect human rights. The much respected Constitution of South Africa (1996) extends human rights obligations to private actors as well.

In Sri Lanka too public representations have been made to that effect (Report of the Public Representations Committee (2016), p L271. HRCSL proposals on constitutional reform have recommended that human rights obligations be extended to private actors. The right to property and the right to engage in an occupation of one's choice should be balanced with obligations to larger society. Rather than be deterred by such obligations, private business entities should welcome the opportunity to earn public goodwill and credibility. Many are discovering that socially responsible business practices are good for business. It is evidenced by the 8000 + companies that have joined the UN Global Compact.

9. It is also argued that full constitutional recognition of ESC rights would encroach on devolved powers. Devolution of power is not a license to violate or diminish people's rights, but is a means to better protect rights. Recognized human rights norms recognize minimum standards that should be respected and protected by all constituent units of a State.

The world is watching the reform agenda in Sri Lanka with great anticipation, especially in regard to deepening of democratic governance and protection of human rights. Regression of the kind proposed by the critics of ESC rights would be a serious rolling back of progressive constitutional trajectories established by more recent constitutions such as those of South Africa, Kenya and Nepal. It would be a black mark against Sri Lanka's improving human rights record. Not only should the people of Sri Lanka make use of this unique opportunity to secure a strong constitution for themselves, but also ensure that a healthy precedent is established for other countries to emulate.

Accordingly, the HRCSL calls on His Excellency the President to give leadership in this regard. We urge the Hon. Prime Minister and all members of the Constitutional Assembly to ensure that the ongoing constitutional reform process ensures the inclusion also of ESC rights in the future constitutional chapter on rights as fully protected rights capable of vindication by courts, respecting the principle of indivisibility of rights that would enable the full enjoyment of human rights by the people of Sri Lanka.

The HRCSL calls on concerned citizens and civil society organizations to step up advocacy for full constitutional recognition of all human rights so that there will be no future regrets on missed.

Dr. Deepika Udagama,
Chairperson

Human Rights Commission of Sri Lanka

ANNEXURE 7

PUBLIC STATEMENT

22 JUNE 2016

The Human Rights Commission welcomes the Directives issued by His Excellency President Maithripala Sirisena on the arrest and detention of persons under the Prevention of Terrorism Act No 48 of 1979 (PTA) and a state of emergency when in force. The Directives would facilitate the Commission exercise its powers, functions and duties in this regard and would without doubt reinforce the protection afforded to persons subject to arrest and detention under extraordinary laws.

The Commission also welcomes the government's decision to repeal the PTA and wishes to bring to the attention of the government the need to ensure that the national security legislation, which is being proposed to replace the PTA, adheres to international human rights standards.

In this regard the Commission recommends the following elements that have been identified by the UN Special Rapporteur on Protecting and Promoting Human Rights While Countering Terrorism (hereinafter the Special Rapporteur), which should be an integral part of any future national security legislation that is drafted. These recommendations are contained in the Rapporteur's various reports that are available at <http://www.ohchr.org/EN/Issues/Terrorism/Pages/Issues.aspx>

Those recommendations have been shared with the Hon. Prime Minister in the hope the Commission will be able to engage in dialogue with, and extend its support to, the government to ensure national security laws adhere to international human rights standards and policies:

1. Definition of terrorism: terrorism means an action or attempted action where:

i. The action:

- (a) Constituted the intentional taking of hostages; or
- (b) Is intended to cause death or serious bodily injury to one or more members of the general population or segments of it; or
- (c) Involved lethal or serious physical violence against one or more members of the general population or segments of it; and

ii. The action is done or attempted with the intention of:

- (a) Provoking a state of terror in the general public or a segment of it; or
- (b) Compelling a Government or international organization to do or abstain from doing something; and

iii. **The action corresponds to:**

- (a) The definition of a serious offence in national law, enacted for the purpose of complying with international conventions and protocols relating to terrorism or with resolutions of the Security Council relating to terrorism; or
 - (b) All elements of a serious crime defined by national law.
2. **Burden of proof** - if, 'under the most exceptional circumstances, a present, direct and imperative threat is invoked to justify the detention of persons... the burden of proof lies on States parties to show that the individual poses such a threat and that it cannot be addressed by alternative measures, and that burden increases with the length of the detention.'
 3. **Judicial review of detention:** review by a court of such detention in a prompt and regular manner is imperative to prevent any violation of the detainee's rights. In this regard, a court must always have the power to assess the merits of the case based on legal criteria and decide whether the detention is justified, and if not, should be empowered to release the detainee. Judicial review of detention would be integral to preventing enforced disappearances.
 4. **Right to fair trial-** the right to fair trial, including right of access to courts of the detainee should be recognised and respected fully. It should be noted that in addition to being recognised in human rights conventions, the right to a fair trial is recognized in international humanitarian law, international criminal law, counter- terrorism conventions and customary international law.
 5. **Use of capital punishment for terrorist offences:** Since there is no evidence to demonstrate capital punishment acts as a deterrent, any future security law should not impose the death penalty as a punishment for terrorist offences. It should be noted the death penalty could not be imposed under the PTA. The HRCSL has already called for the abolition of the death penalty.
 6. **Admissibility of confessions:** enabling the admissibility of confessions coupled with prolonged periods of administrative detention creates space for torture and ill-treatment. Hence, any confession or statement obtained in violation of Article 7 of the International Covenant on Civil & Political Rights (ICCPR), i.e. prohibition against torture, should not be used as evidence in any legal proceeding. Only confessions voluntarily made to a judicial officer should be admissible in evidence.
 7. **Access to independent legal representation:** it is imperative to ensure detainees have access to independent legal counsel, and are able to have private and unmonitored consultations with the legal counsel.

8. **Disclosure of evidence:** the state should also disclose to the detainee at the minimum the crux of the evidence on which the decision to detain him/her was made.

It should be kept in mind recognizing the need to protect human rights during states of emergencies is not unique to international human rights law and is found in Sri Lanka jurisprudence as well. For instance, the Supreme Court in *Sunil Kumar Rodrigo v. Chandrananda de Silva* (Supreme Court minutes of 19 August 1997) held that the right of a person to be informed of reasons for arrest at the time of arrest, and the right of a detainee to be produced before a judicial authority within a reasonable period of time, had to be respected even in cases of detention under emergency regulations.

In conclusion, the Commission reiterates the need to be guided by the principle that any limitation on rights should adhere to the tests of necessity and proportionality, and should be subject to judicial review when drafting national security legislation.

Dr Deepika Udagama
Chairperson

Human Rights Commission of Sri Lanka

ANNEXURE 8

HUMAN RIGHTS COMMISSION OF SRI LANKA RECOMMENDATIONS TO THE GOVERNMENT ON THE ESTABLISHMENT OF THE OFFICE ON MISSING PERSONS

The Human Rights Commission of Sri Lanka welcomes and commends the adoption of Office on Missing Persons (Establishment, Administration and Discharge of Functions) Act (hereinafter OMP). We note, however, that the legal framework of the OMP would have had greater legitimacy if it was enacted after the on-going public consultations process so that the insights and concerns of the affected families could have been incorporated. We reiterate the importance of ensuring future mechanisms incorporate and reflect the concerns and insights of victims and affected persons, and urge the government to undertake a transparent and inclusive process to establish these mechanisms.

While the text of the Act is not yet available with the amendments, the Commission takes this opportunity to reiterate a number of important elements that have to be given serious consideration if the OMP is to be victim-centred and function effectively to provide redress to families of the disappeared.

- There is an urgent need for a public awareness campaign to dispel rumours and counter misleading and inaccurate information being placed in the public domain regarding the OMP. Hence, a concerted effort is required to create understanding and a sense of ownership amongst the public in this regard. Further, the OMP has to reach out to families of the disappeared and provide them information about the institution through multiple means to ensure they are able to access the OMP. Hence, an effective communication strategy in all three languages is essential.
- The effective functioning of the OMP is dependent on financial resources that will allow the Office to build a strong institution and hire competent, qualified and committed staff.
- An important means of ensuring accessibility as well as create public ownership is to establish regional offices of the OMP.
- The membership of the OMP should reflect the pluralistic nature of Sri Lanka, including meaningful gender as well as regional representation. Members should be persons of unimpeachable integrity and competence
- When establishing the office particular attention has to be paid to the recruitment of staff to ensure they are persons of unimpeachable integrity, have no prior allegations of human rights violations against them, and have the ability to be

- empathetic to the needs and concerns of victims and the families of the disappeared. In this regard too adequate gender, ethnic, and regional representation should be ensured as well as language proficiency since the ability to serve the various communities in a language they understand is critically important.
- The staff should be provided training in gender sensitivity, since most of the complainants are women, as well as how to deal with victims who have suffered trauma and loss.
 - To ensure transparency the OMP has to formulate and widely publicise information on its methods of operations and procedures to which it adheres, including rules regarding confidentiality, guidance to families on how to approach the OMP and their rights in relation to obtaining information regarding progress of their complaint. Communication with victims should be in a language they understand.
 - The OMP should have personnel who are qualified to provide on-site psycho-social support to those who require it, for instance, during or after making statements to the OMP. Every effort should be made to avoid re-traumatisation of the victims.
 - Where the issuance of the Certificate of Absence (COA) is concerned, the families have to be made aware of their rights in this regard. Given previous reports of families of the disappeared being coerced to apply for death certificates, it is important to ensure they are in no way subject to any form of coercion to opt for a death certificate instead of a COA. The COA should be valid for a reasonable period of time to allow for the investigation of the disappearance and the person's fate. If investigations are on-going the COA should be valid until investigations conclude. Since both the OMP Act as well as the proposed Registration of Deaths (Temporary Provisions) Bill refer to the COA, it should be ensured the definitions and processes set out in both laws are consistent and provide maximum benefit to families of the disappeared.
 - The OMP Act envisages a Victims of Crime and Witness Assistance and Protection Division. When establishing the Division, given limited internal relocation options within the country whether public skepticism that they will receive protection from existing mechanisms, the OMP should find feasible alternatives that foster public trust and ensure protection to victims and witnesses. In order to do this the OMP will require adequate resources as well as support from government authorities at the highest levels.
 - The OMP should establish an internal mechanism to address grievances of complainants regarding shortcomings in the functioning of the Office, which will enable the Office to strengthen its methods, functions and service to the public.

- Attention should be paid to archiving and establishing databases to document and preserve the work and records of previous commissions of inquiry as well as from diverse reliable sources after verification of facts to consolidate data on the disappeared and construct a single database. Where data that has never been made public is concerned, the OMP should formulate and strictly adhere to protocols that preserve the integrity of the data and also protect the provider of the information who may be vulnerable to threats, including to physical integrity.

Dr Deepika Udagama

Chairperson

Human Rights Commission of Sri Lanka

22nd August 2016

ANNEXURE 9

15th December 2015

Hon. Ranil Wickramasinghe
Prime Minister
Prime Minister/s Office
No.58, Sir Ernest De Silva Mawatha
Colombo 07

Hon. Prime Minister,

Proposed Amendment to the Penal Code on Hate Speech

As you are aware, a primary function of the Human Rights Commission of Sri Lanka is to advise the Government on making laws and procedures in accordance with fundamental rights and international human rights norms and standards (s. 10 (c) and (d) of HRCSL Act, No. 21 of 1996).

It has come to the attention of the Human Rights Commission of Sri Lanka that the Government of Sri Lanka intends to table a legislative Bill in Parliament in the near future to criminalize hate speech through an amendment to the Penal Code. While ensuring harmony among the various communities is a vital function of a democratic State, the Commission's concerns stem from the overly broad manner in which the proposed amendment is formulated making it susceptible to future abuse.

The Commission wishes to recommend to the Government that it be substituted by a formulation which has already been adopted by the Parliament of Sri Lanka in the International Covenant on Civil and Political Rights (ICCPR) Act, No. 57 of 2007 which is in accordance with fundamental rights and our international human rights obligations.

The proposed formulation to criminalize hate speech (contained in the Gazette of November 6, 2015) reads as follows:

Whoever, by the use of words spoken, written or intended to be read, or by signs, or by visible representation, or otherwise, intends to cause or attempts to instigate acts of violence, or to create religious, racial or communal disharmony, or feelings of ill-will or hostility, between communities or different racial or religious groups, shall be punished with imprisonment of either description for a term which may extend to two years.

That formulation is almost identical with s. 2 (1) (h) of the Prevention of Terrorism Act, No.48 of 1979. The broad wording in the PTA provision did pave the way for abusive applications which resulted in the chilling of free expression. A prime example is the prosecution of journalist Tissanayagam.

In the ICCPR Act of 2007, our legislature adopted the following provision criminalizing hate speech:

No person shall propagate war or advocate national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence. (s. 3.1)

That formulation is in accordance with Sri Lanka's international human rights obligations on free speech and permits prosecution only when there is proof of incitement.

Therefore, we recommend that the Government withdraw the proposed amendment to the penal Code and substitute it with the above provision.

Moving that provision in the ICCPR Act to the Penal Code is an advisable step. The Commission is of the view that the ICCPR Act should be abrogated in the future and all the human rights recognized therein should be incorporated into a future constitutional Chapter on Fundamental Rights.

We would be pleased to be of further assistance in this regard.

Dr. N. D. Udagama
Chairperson

Human Rights Commission of Sri Lanka

cc: Hon. Speaker
Hon. Minister of Justice
Hon. Minister of Media/Chief Government Whip