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இலங்கை மனித உரிமைகள் ஆணைக்குழு
Human Rights Commission of Sri Lanka

Hon. Harshana Nanayakkara
Minister of Justice and National Integration
19 Sri Sangaraja Mawatha,
Colombo 01

Hon. Minister,

Follow up on Recommendation on Sections 365 and 365A of the Penal Code

Further to our letters to your Ministry dated 22 November 2023 and 13 August 2024, we once again write to you with reference to sections 365 and 365A of the Penal Code (Chapter 19). The said sections of the Penal Code relate to 'unnatural offences' and 'acts of gross indecency between persons' and has been used for criminalising sexual activity between persons of the same sex.

We reiterate our endorsement of the Women Empowerment Act, No. 37 of 2024 and welcome measures to fully implement the Act. According to section 2(d) of the Act, one of the objects of the Act is 'to protect women from all forms of discrimination based on gender and *sexual orientation*' (emphasis added). Therefore, a person's right to non-discrimination on the grounds of sexual orientation has been formally recognised in Sri Lanka's legal framework. Additionally, the Assistance to and Protection of Victims of Crime and Witnesses Act, No. 10 of 2023 recognises 'sexual orientation' as a factor that may determine the vulnerability of a victim of crime or witness.

The mention of 'sexual orientation' as a ground for non-discrimination in the Women Empowerment Act comes in the wake of a recent Supreme Court determination on the constitutionality of a Private Member's Bill to amend section 365 and repeal section 365A of the Penal Code. The Court opined that 'decriminalisation of sexual activity amongst consenting adults irrespective of their sexual orientation only furthers human dignity...' (SC SD 13/2023 *et al*, p. 31). The Court also determined that 'the removal of criminalisation of intimate acts between consenting adults, which was a crime based on moral imperatives of a bygone Victorian era, would be in conformity with Article 12(1) [of the Sri Lankan Constitution] and would uphold the dignity of human beings' (SC SD 13/2023 *et al*, p. 36).

We recall that the said Private Member's Bill clarifies that the legislative intent behind it is the amendment of provisions in the Penal Code that make sexual orientation a punishable offence.

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Observations on Sri Lanka (26 April 2023), observed that the continued criminalisation of same-sex activity under sections 365 and 365A of the Penal Code violated articles 2 and 26 of the ICCPR. It also observed that such continued criminalisation, the arrest and detention of persons under these sections, and the ill-treatment of suspects, violated the right to freedom from torture or cruel, inhuman or degrading treatment (article 7), the right to liberty and security of persons (article 9), and the right to privacy (article 17) guaranteed under the ICCPR. It accordingly recommended the repeal of sections 365 and 365A of the Penal Code.

We also wish to recall that, at its Third Universal Periodic Review in 2017, Sri Lanka voluntarily pledged 'to ensure and strengthen respect for fundamental rights of all persons, including those from the LGBTIQ community, and address concerns raised in that regard'. Sri Lanka then recalled this pledge in its National Report submitted during its Fourth Universal Periodic Review in 2023. In these circumstances, we encourage the Government of Sri Lanka to fulfil this pledge and introduce necessary amendments to the Penal Code to bring it in accordance with international human rights standards and norms, including those contained in the ICCPR.

The recent passage of the Women Empowerment Act is a step in the right direction in terms of statutorily recognising a limited right to non-discrimination on the grounds of sexual orientation. Parliament, by enacting such a provision, has clearly indicated that such a right is consistent with Sri Lanka's Constitution and the past determinations of the Supreme Court. This legislative development also makes the continued retention of sections 365 and 365A in the Penal Code incongruous.

We are deeply concerned by the continued prevalence of hostile and discriminatory discourse against the LGBTIQ community. A recent campaign featuring physical demonstrations, targeted hate campaigns, and digital propaganda, driven by organised groups, has created an atmosphere of fear, intimidation, and discrimination that is fundamentally at odds with the principles of dignity, equality, and non-discrimination enshrined in both our Constitution and international human rights law. As noted in our previous letter to your ministry in August 2024, hostile discourses popularised by organised groups often features disinformation that the abovementioned Private Member's Bill legalises same sex marriage, when in fact the Bill does not amend the law in any manner apart from decriminalising certain sexual acts between consenting adults.

We note that while the right of all citizens to the freedom of expression includes the right to make expressions that shock, offend, or disturb portions of the population, the freedom of expression is not an absolute right. This right may be restricted on the grounds of protecting the rights and freedoms of others, including the right to non-discrimination, provided such restriction is reasonable, necessary, and proportionate.

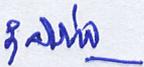
Article 20(2) of the ICCPR does not explicitly refer to 'sexual orientation' when prohibiting the advocacy of hatred that constitutes incitement to discrimination, hostility, or violence. However, permitting incitement against persons on the basis of their sexual orientation remains incompatible with international law given the broad acceptance of sexual orientation as a prohibited ground of discrimination.

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In this context, we wish to reiterate our previous recommendation that your Ministry considers adopting the said Private Member's Bill as a government legislative proposal to ensure its expeditious passage.

We thank you in advance for your Ministry's cooperation and look forward to constructively engaging your Ministry on important legislative reform that impacts human rights in Sri Lanka.

Sincerely,


Ranjith Uyangoda,
Secretary, **Ranjith Uyangoda**
Human Rights ^{Secretary} Commission of Sri Lanka.
Human Rights Commission of Sri Lanka

Sgd/- Justice L.T.B. Dehideniya,
Chairman,
Human Rights Commission of Sri Lanka.

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