

Annex 2
Observations and Recommendations on the Draft Gender Equality Bill

Pursuant to the mandate of the Human Rights Commission of Sri Lanka under section 10(c) of the Human Rights Commission of Sri Lanka Act, No. 21 of 1996, the Commission submits the following observations and recommendations with respect to the draft Bill.

Preamble and Clauses 2 and 3

1. The Preamble of the Bill provides: 'the State ensures equal opportunity to all persons irrespective of differences in sex, gender identity or sexual orientation in the National Policy on Gender Equality', and Clause 2(b) provides that one of the objects of the Bill is 'to ensure that every person enjoys, without discrimination based on sex, gender identity or sexual orientation the fundamental rights and freedoms guaranteed by the Constitution'. Clause 3 provides that, 'Every person shall have the right to gender equality and no person shall be denied of such right.'
2. The Commission observes that Article 12(2) of the Sri Lankan Constitution guarantees the right to non-discrimination on the grounds of race, religion, language, caste, sex, political opinion, place of birth or any one of such grounds.
3. While the phrase 'any one of such grounds' has not been explicitly defined, we note that the Government of Sri Lanka has, in the past, clarified its own interpretation of the phrase. For instance, in the State Party Report submitted by Sri Lanka in the Third Universal Periodic Review cycle in 2017, the State acknowledged that prohibited grounds of discrimination expressly included in Article 12(2) of the Constitution are not exhaustive, and that the guarantee of equality and equal protection of the law under Article 12(1) of the Constitution is not subject to any exception. Moreover, in 2019, in its Periodic Report with respect to the International Covenant on Civil and Political Rights, the Sri Lankan State clarified that 'the prohibited grounds of discrimination under article 12(2) of the Constitution are non-exhaustive, and discrimination on the grounds of sexual orientation is implicitly prohibited.'
4. It is, therefore, reasonable to maintain that the introduction of a statutory right to non-discrimination on the grounds of gender identity or sexual orientation is compatible with Article 12(2) of the Constitution. In line with this interpretation, it is observed that the inclusion of grounds of non-discrimination such as gender identity and sexual orientation in the Bill will not be inconsistent with Article 12(2) of the Constitution.
5. It is also noted that the Supreme Court of Sri Lanka, in its determination in SC (Special Determination) No. 13 of 2023 *et al* on the constitutionality of a proposed amendment to the Penal Code to decriminalise certain sexual acts, determined that the amendment was consistent with the Sri Lankan Constitution. Although the relevant sections of the Penal Code, i.e., sections 365 and 365A, have not been repealed or amended to date, the Commission is of the view that necessary action must be taken to do so in view of the Supreme Court's determination. In this context, the broad purpose of the Bill in advancing non-discrimination

on the grounds of gender and sexual orientation is in line with the Supreme Court's endorsement of the amendments to the Penal Code.

Clause 4

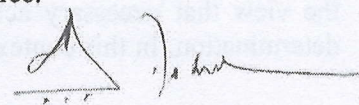
6. Under Clause 4(1)(f) of the Bill, the Minister is empowered to issue directions and guidelines to 'other institutions and organisations'. While it may be assumed that such institutions and organisations are of the same class as 'Ministries, Departments, statutory bodies', this power is broadly framed, and may amount to interference with mandates of independent commissions.
7. **It is recommended that the powers of the Minister to issue directions and guidelines be confined to ministries, departments, and other government institutions, and not extended to statutory bodies, or other institutions and organisations.**

Clause 6

8. Clause 6 of the Bill sets out the procedure for the appointment of members of the Gender Equality Council ('the Council'). Clause 6(a) provides that five such members would be *ex officio* members who are secretaries to specific ministries, and the Inspector General of Police (or his representative). Clause 6(b) provides that the remaining four members are to be appointed by the Minister.
9. It is observed that the composition of the Council does not adequately guarantee institutional independence from political interference.
10. **It is recommended that Clause 6 be revisited to ensure that the members of the Council are appointed through a mechanism that guarantees their political independence. For example, appointments may be on the recommendation of the Constitutional Council.**

Clauses 9 and 11

11. Clause 9(3) of the Bill provides that the Minister may remove the Chairperson of the Council from office for reasons assigned. Meanwhile, Clause 11 provides that the Minister may remove an appointed member from office for reasons assigned, and that such a member shall not be eligible for reappointment as a member of the Council or to serve the Council in any other capacity.
12. The Commission notes that the procedure for removing the Chairperson or a member of the Council does not include adequate safeguards to ensure the political independence of the Council.
13. **It is recommended that the removal process with respect to the Chairperson of the Council be revisited to ensure greater political independence.**



Justice L.T.B. Dehideniya
Judge of the Supreme Court (Retired)
Chairman
Human Rights Commission of Sri Lanka

Clauses 17 and 18

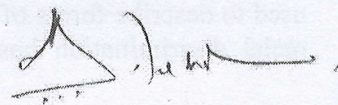
14. Clause 17 provides for the appointment of a Gender Focal Point. However, it is observed that there are no qualifications or requirements for the Gender Focal Point included in the provision, and it is recommended that this lacuna be rectified.
15. Clause 18(a) states that, the Gender Focal Point shall 'be responsible for mainstreaming gender issues in the policies and programmes of the concerned Ministry'. It is unclear as to what is meant by the 'concerned Ministry'. If the Clause refers to the mainstreaming of gender in all ministries, it should indicate the provision of facilities and resources to carry out such a task.
- 16. It is recommended that this provision be revisited to ensure greater clarity and effectiveness of the Gender Focal Point.**

Clause 23

17. Clause 23 pertains to the declaration of secrecy, which must be signed by every member of the Council and all officers and employees of the Council prior to assuming duties under the Bill.
18. Given that the Council is not an institution that will receive complaints, there is no requirement for a declaration of secrecy as such. While generally maintaining confidentiality and respecting privacy are vital, particularly to safeguard personal information of citizens who may engage the Council, it is observed that this obligation, if framed in the broad language of 'secrecy', may impede whistle-blowers who disclose information in the public interest.
- 19. Accordingly, it is recommended that the requirement for a declaration of secrecy be removed from the Bill.**

Clause 25 and Clause 26

20. Clause 25 of the Bill includes a range of offences including a specific offence on the failure to comply with an order or directive of the 'Commission'. It is assumed that the reference to 'Commission' is in fact a reference to the Council. Additionally, it is observed that the Council does not possess powers to issue orders and directives under Clause 7 of the Bill. Clause 26 meanwhile provides for vicarious liability with respect to these offences.
- 21. It is recommended that both Clause 25 and 26 be omitted, as it is inadvisable to include offences in a Bill that does not contemplate orders, directives, or any investigative powers or powers of inquiry.**



Clause 27

22. Clause 27 of the Bill empowers the Minister to make Regulations. The Minister is empowered under Clause 27(2)(b) to issue Regulations containing guidelines to relevant authorities, specifying 'social measures'. The Ministry can also issue Regulations under Clause 27(2)(c) 'to identify matters to be addressed in relation to socio-economic gender balance between persons of different gender identities and sexual orientations', and under Clause 27(2)(d) to 'establish support systems for assisting persons of different gender identities and sexual orientations to obtain redress for gender-based violence and discrimination'. It is observed that these provisions are imprecise and can be strengthened to clarify the legislative intent behind them.
23. **It is recommended that this provision be revisited to ensure greater clarity, particularly in respect of terms such as 'social measures', 'socio-economic gender balance', and 'support systems'.**

Clause 29

24. It is observed that Clause 29 of the Bill, which is the interpretation clause, does not contain a definition for the term 'sexual orientation'. It is also observed that the definition for 'gender identity' needs to be strengthened to be in line with international human rights standards.
25. The Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender identity defines sexual orientation as 'each person's capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender.'
26. Moreover, the Yogyakarta Principles and the United Nations Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity defines 'gender identity' as 'each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms.'
27. **It is recommended that a definition for 'sexual orientation' in line with international human rights standards be included. It is further recommended that the definition for 'gender identity' be revised to bring it in line with international human rights standards.**
28. It is observed that Clause 2(c) of the Bill refers to gender-based discrimination inclusive of 'direct, indirect, intersectional and multiple discrimination. However, Clause 29 does not provide a definition for 'intersectional discrimination' and 'multiple discrimination' as contemplated under the Bill. Moreover, these Clauses do not deal with 'structural discrimination', which can also be a form of discrimination. Such terminology is commonly used to describe forms of discrimination that are structural in nature. For instance, structural racial discrimination has been described by the United Nations Special Rapporteur on

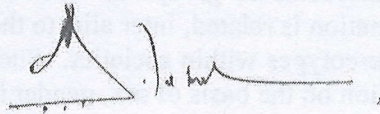
Contemporary Forms of Racism, Racial Discrimination, Xenophobia and related Intolerance as ‘...intolerant patterns of behaviour and attitudes within societal structures that target specific individuals or groups of individuals...The existence of such “societal” structural ...discrimination is related, inter alia, to the persistence of deeply rooted racial prejudice and negative stereotypes within societies.’ Such a definition may be adapted to define structural discrimination on the basis of sex, gender identity or sexual orientation, in the Bill.

29. It is observed that the definition for ‘direct discrimination’ does not refer to sexual orientation. Moreover, the definition for ‘indirect discrimination’ can be further strengthened to bring it in line with international human rights standards. For instance, the following definition, offered by the Committee on the Elimination of Discrimination Against Women in *General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, may be adapted to frame the relevant definition in the Bill: ‘Indirect discrimination...occurs when a law, policy, programme or practice appears to be neutral as it relates to [persons], but has a discriminatory effect in practice on [persons on the basis of their sex, gender identity or sexual orientation], *because pre-existing inequalities are not addressed by the apparently neutral measure*’ (emphasis added).
30. It is recommended that definitions for ‘intersectional discrimination’, ‘multiple discrimination’, and ‘structural discrimination’ be included in the Bill. Moreover, the definition for ‘direct discrimination’ should refer to sexual orientation, and the definition for ‘indirect discrimination’ should be further strengthened to bring it in line with international human rights standards.

General Observations and Recommendations

31. It is observed that the Bill does not contain any provision specifically addressing the harassment of individuals on the basis of sex, gender identity or sexual orientation, including the phenomenon of online harassment and cyber-bullying.
32. It is recommended that the mandate of the Gender Equality Council be strengthened to specifically deal with the phenomenon of harassment alongside the phenomena of discrimination and violence and that the term ‘harassment’ be included within the object found in Clause 2(d) of the Bill.
33. The Commission observes that there are substantial similarities in the provisions and legislative intent behind the draft Gender Equality Bill, the draft National Women’s Commission Bill, and the draft Women’s Empowerment Bill.
34. It is recommended that the amalgamation of the Gender Equality Bill and the Women’s Empowerment Bill be considered under the title “The Gender Equality and Women’s Empowerment Bill.” With reference to the institution that will be established under this Bill, we recommend that the Gender Equality Council be housed in the new department to which the Women’s Bureau will be upgraded. We recommend that such an

an amalgamation be considered to minimise overlap and resource wastage. We recommend that the naming of the department as the 'Department for Gender Equality' be considered in view of such a change.



Justice L.T.B. Dehideniya
Judge of the Supreme Court (Retired)
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