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இலங்கை மனித உரிமைகள் ஆணைக்குழு
Human Rights Commission of Sri Lanka

Hon. Dr. Wijeyadasa Rajapakshe
Minister of Justice, Prison Affairs and Constitutional Reforms
Ministry of Justice, Prison Affairs and Constitutional Reforms
19, Sri Sangaraja Mawatha,
Colombo 10

Hon. Minister,

**Observations and Recommendations on the Bill to Amend Sections 363 and 364 of the
Penal Code (Chapter 19)**

We write to you with reference to the Penal Code (Amendment) Bill published in the Official Gazette on 13 February 2024.

We have reviewed the said Bill and wish to share our observations and recommendations on the Bill in terms of our mandate under section 10(c) of the Human Rights Commission of Sri Lanka Act, No. 21 of 1996. The said provision empowers the Commission to 'advise and assist the government in formulating legislation...in furtherance of the promotion and protection of fundamental rights'.

We offer these observations and recommendations in view of revising the Bill to ensure its compatibility with the fundamental rights chapter of the Sri Lankan Constitution and Sri Lanka's international human rights obligations, including under the Convention on the Rights of the Child and the Convention on the Elimination of All Forms of Discrimination Against Women.

At the outset, we observe that other countries in the South Asian region have sought to strengthen the protection of children from sexual abuse and exploitation by increasing the age of sexual consent. In India, for instance, the enactment of the Protection of Children from Sexual Offences Act of 2012 increased the age for consenting to sexual activities from sixteen to eighteen years under section 375 of the Indian Penal Code. It is generally recommended that the government prioritize the best interests of the child when defining the scope of and punishment for the offence of 'rape'. We accordingly recommend that the age of the offender in the proviso to section 364(2) of the Penal Code be retained as 'under eighteen years', and not increased to 'under twenty-two years'.

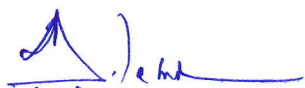
We also note the particular vulnerability of women to the offence of 'rape' and urge the government to refrain from diluting the law's special recognition of such vulnerability. It is accordingly recommended that the current scope of section 363 of the Penal Code be retained, and a new section be introduced to define the scope of 'rape' with respect to all other persons.

Additionally, we encourage the government to seize the opportunity to criminalize 'rape' regardless of any marital relationship between the victim and offender. We accordingly welcome the proposed removal of the phrase 'unless the woman is his wife who is over twelve years of age and is not judicially separated from the man' from section 363(e) of the Penal Code.

We enclose herewith our detailed observations and recommendations on the specific provisions of the Bill (Annex 1). The Commission invites your Ministry to consider and incorporate these observations into the Bill prior to placing the Bill on the Order Paper of Parliament. We also request that the Ministry engage in broad and meaningful consultations with all relevant stakeholders, including civil society representatives, prior to finalising the Bill.

Please be assured that the Commission is prepared to offer its continued advice and support in strengthening the Bill.

Sincerely,



Justice L T B Dehideniya
Chairman

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

Human Rights Commission of Sri Lanka

Cc: The Hon. Attorney General
Attorney General's Department
Colombo 12.

Annex 1
Observations and Recommendations on the Bill to Amend Sections 363 and 364 of the Penal Code (Chapter 19)

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 Bill.

Clause 2 of the Bill

1. The Commission is of the view that the specificity of section 363 to women, as currently framed in the Penal Code, should be retained to recognise the special vulnerability of women to the offence of 'rape'. The legislative intent to expand the scope of the offence of 'rape' to include persons of all genders is, however, acknowledged.

It is recommended that the current scope of section 363 of the Penal Code be retained (i.e., where its applicability is confined to male offenders and female victims), and that the margin note of the section be amended to state: 'Rape of a Woman'. Meanwhile, a new section (for example, 'section 363A') may be introduced to define the scope of 'rape' with respect to all other persons.

Clause 2(2)(b) of the Bill

2. The Commission notes that the Bill does not remove the qualification found in section 363(a) of the Penal Code, i.e., a man commits 'rape' against his wife **only** where she does not consent to sexual intercourse **and** 'she is judicially separated from the man'. The failure to remove this qualification is a missed opportunity to explicitly introduce 'marital rape' to the scope of the offence of 'rape'. It is noted that several countries in Asia including Singapore and Thailand have made marital rape a punishable offence. Such criminalisation is also currently being considered in India.

It is recommended that the phrase 'and she is judicially separated from the man' be deleted from section 363(a) of the Penal Code.

Clause 2(2)(f) of the Bill

3. The Commission welcomes the amendment of section 363(e) of the Penal Code to delete the phrase 'unless the woman is his wife who is over twelve years of age and is not judicially separated from the man'. The Commission observes that the age of sexual consent ought to be sixteen years regardless of a marital relationship between the offender and victim under any law.

Clause 3 of the Bill

4. The Commission observes that this clause replaces *inter alia* the proviso to section 364(2) of the Penal Code. The existing provision (i.e., section 364(2) of the Penal Code) provides:

Provided however, that where the offence is committed in respect of a person **under sixteen years of age**, the court may, where the offender is a person **under eighteen**

years of age and the intercourse has been with the consent of the person, impose a sentence of imprisonment for a term less than ten years (emphasis added).

5. The said clause of the Bill replaces the above provision with the following:

Provided however, where an offence under section 363 is committed in respect of a victim **of or above fourteen years but under sixteen years of age**, by an offender who is **under twenty-two years of age** at the time of the commission of such offence,

- (a) where it appears to the satisfaction of the court that the sexual penetration had been with the consent of the victim, the court upon conviction may impose a sentence of imprisonment for a term less than ten years:

Provided however, the court may, in **appropriate circumstances** suspend the term of imprisonment imposed under this paragraph, subject to the provisions of section 303 of the Code of Criminal Procedure Act, No. 15 of 1979 (emphasis added).

6. The existing provision of the Penal Code provides that a court may consider the 'consent' of a victim under the age of sixteen years if the offender is a person under the age of eighteen years. At the outset, we note that the existing provision of the law is deeply problematic, as a person under the age of sixteen years, according to section 363(e) of the Penal Code, should be accepted as being incapable of consenting to sexual relations.
7. The said clause of the Bill amends the existing provision in two ways. First, it permits a court to consider the consent of the victim only where the victim is between the ages of fourteen and sixteen years. This amendment fixes the relevant age at which a court may consider the so-called 'consent' of a person for the limited purpose of sentencing an offender. This relevant age would be fourteen years. The Commission is of the view that there should be no reference to the so-called 'consent' of a victim under the age of sixteen years, as such reference would undermine the principle in section 363(e) of the Penal Code, i.e., that a person under the age of sixteen years is incapable of consenting to sexual relations.
8. Second, the clause increases the relevant age of the offender from eighteen years to twenty-two years. The Commission observes that this second amendment is deeply problematic, as the rationale of the existing proviso to section 364(2) is to protect children, i.e., persons under the age of eighteen years, from harsh sentences. If this threshold of protection is increased to twenty-two years, this rationale is lost and **adult offenders** who engage in sexual relations with children below the age of sixteen years would stand to benefit from lenient sentencing. For example, under the proposed amendment, an adult of the age of twenty-one years who engages in sexual relations with a fourteen-year-old child would in certain circumstances stand to receive a suspended sentence if convicted of statutory rape.
9. The Commission is of the view that the provisions of section 364 should only be amended bearing the best interests of the child in mind. Such a standard is required by section 5(2) of the International Covenant on Civil and Political Rights Act, No. 56 of 2007, which provides: 'In all matters concerning children, whether undertaken by public or private social welfare institutions, courts, administrative authorities or **legislative bodies**, the best interest of the child shall be of paramount importance' (emphasis added). This standard is also found in the

Convention on the Rights of the Child and the Convention on the Elimination of All Forms of Discrimination Against Women.

It is accordingly recommended that any reference to the 'consent' of a victim in the proviso to section 364(2) of the Penal Code be deleted in order to reinforce the principle that the age of consent to sexual relations is sixteen years. The age of the offender in the proviso should be retained as 'under eighteen years', and not increased to 'under twenty-two years'. Accordingly, only an offender who is seventeen years of age or below may benefit from the statutory scheme of lenient sentencing.

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