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இலங்கை மனித உரிமைகள் ஆணைக்குழு
Human Rights Commission of Sri Lanka

Hon. Mr. Ali Sabry, PC,
Minister of Justice, Prison Affairs and Constitutional Reforms,
19, Sri Sangaraja Mawatha,
Colombo 10.

Hon. Minister,

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

Further to our letter to your Ministry dated 22 November 2023, 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 have been used for criminalising sexual activity between persons of the same sex.

We are pleased to note the recent enactment of the Women Empowerment Act, No. 37 of 2024, which was certified by the Hon. Speaker on 2 July 2024. We observe that 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, for the first time in Sri Lanka’s legislative history, a person’s right to non-discrimination on the grounds of sexual orientation has been formally recognised. Previously, the Assistance to and Protection of Victims of Crime and Witnesses Act, No. 10 of 2023 recognised ‘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 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). We recall that 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). The said observations were made in the Court’s determination on the constitutionality of a Private Member’s Bill to amend section 365 and repeal section 365A of the Penal Code.

We recall that the said Bill clarifies that the legislative intent behind it is the amendment of provisions in the Penal Code that make sexual orientation a punishable offence. We are of the view that the passage of the Bill would ensure full compliance with Sri Lanka’s obligations

under international law, including under the International Covenant on Civil and Political Rights (ICCPR), which under Articles 2 and 26 guarantees the right to non-discrimination. The Human Rights Committee, the treaty body tasked with supervising the implementation of the ICCPR, has observed that the right to non-discrimination includes non-discrimination on the grounds of sexual orientation. The Committee, in its Concluding 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 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. We accordingly 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 the 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 wholly incongruous.


We are deeply concerned by the recent upsurge in hostile and discriminatory discourse against the LGBTIQ community. Such discourse has also featured 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. 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.

We note that 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 is arguably incompatible with international law given the broad acceptance of sexual orientation as a prohibited ground of discrimination. The Commission does not at this juncture recommend the expansion of criminal law to further prohibit expressions – primarily due to the potential for abuse of such law. We urge your Ministry, however, to disregard any

hostile, discriminatory and misleading discourse when considering necessary and salutary legislative reform.

We accordingly reiterate our recommendation that your Ministry support the enactment of the said Private Member's Bill and consider adopting the Bill as a government proposal to ensure its expeditious passage. We thank you for your Ministry's continued cooperation and engagement.

Sincerely,



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

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

Cc: H.E. Ranil Wickremesinghe,
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