



Women and Media Collective
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Discrimination of Lesbians, Bisexual Women and Transgender Persons in Sri Lanka

Shadow Report

**Presented to the 66th Session of the
Committee for the Elimination of All Forms of Discrimination Against
Women (CEDAW)
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Submitted by The Women and Media Collective, Sri Lanka

This report was prepared by the Women and Media Collective a non-governmental, non-profit organization working on women's rights in Sri Lanka through a consultative process with women and LBT organisations, including Venasa Transgender Network. It was prepared by Kumudini Samuel with assistance from Sermal Wijewardene, Subha Wijesiriwardene, Thenu Ranketh, Thiloma Munasinghe and Evangeline de Silva. The consultative process and the writing of this Shadow Report and its submission to the CEDAW Committee was supported by OutRight Action International.

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KEY RECOMMENDATIONS

We request the CEDAW Committee to call upon the Sri Lankan State to undertake the following recommendations:

- Decriminalise sexual relationships between consenting adults of same sex, and abide by the obligation of non-discrimination under the Convention.
- Repeal or amend discriminatory laws that infringe on human rights of lesbian, bisexual and transgender (LBT) persons, including Sections 365, 365A and 399 of the Penal Code and the Vagrants Ordinance, irrespective of the Constitution reform process.
- Amend Article 12 of the Constitution to state explicitly that sexual orientation and gender identity are prohibited grounds for discrimination. And strengthen measures to protect against violations of LBGTI rights and strengthen awareness-raising and training measures on such rights.
- Repeal Article 16 of the Constitution and replace it with an Article that recognises the supremacy of the Constitution and allows for the review and repeal of all discriminatory legislation including past and present laws, and post enactment in the future, that violate the fundamental right to equality and other fundamental rights.
- Recognise the specific concerns of LBT persons in policy formulation and legal reform in key areas such as employment, housing, provision of health services, representation in decision making processes and access to justice.
- Ensure the “Policy Framework and National Plan of Action to address Sexual and Gender-based Violence (SGBV) in Sri Lanka 2016-2020”; and the “National Action Plan for the Promotion and Protection of Human Rights 2017-2021” provides a comprehensive approach to prevent and address discrimination and gender-based violence against women from the LBT community in all its forms and manifestations.
- Establish an independent commission on women that will also include in its mandate the gendered concerns of LBT persons.
- Undertake research to determine the levels of underrepresentation or disadvantages faced by LBT persons in areas of decision making and put in place affirmative measures to redress this situation for women of diverse gender identities and sexual orientation.
- Undertake educational reforms to sensitize children of school-going age, as well as parents, teachers, administrative staff and principals about gender and sexuality in terms of diversity, rights and non-discrimination.
- Enhance the quality of life of LBT persons by ensuring LBT friendly and non-discriminatory healthcare services and availability of knowledgeable and non-prejudiced healthcare providers.
- Ensure disaggregated data for lesbians, bisexual women, transgender women and transgender men when conducting studies on health risks, health services, or health factors.
- Incorporate sexual orientation and gender identity concerns directly to the government’s transitional justice and reconciliation mechanisms.

INTRODUCTION

This shadow report was prepared in consultation with members of the lesbian, bisexual women and transgender community, women's rights and human rights advocates in Sri Lanka. Our shadow report follows up on the questions in relation to decriminalisation of same-sex relationships and other relevant issues posed to the Sri Lanka government by the CEDAW Committee at the pre-session (CEDAW/C/LKA/Q/8). This shadow report highlights LBT issues that come under the CEDAW Convention but remain un-addressed by the Sri Lanka government.

Sri Lanka has been cited by international human rights review mechanisms for persisting with laws that discriminate on the basis of sexual orientation and gender identity. Recommendations and concerns made to Sri Lanka at the 2008 and 2012 Universal Periodic Review process, by CEDAW Committee in 2011, and the Human Rights Committee in 2014, have called for the removal of Section 365 and Section 365A of the Penal Code that criminalise adult consensual same sex relationships (including lesbian relationships); the Vagrancy Ordinance of 1842 which permits the arbitrary detention of anyone suspected of 'loitering'; and Section 399 (Cheating by Personation) of the Penal Code which is used against persons with non-conforming gender identity.

As stated by the CEDAW Committee, "the criminalisation of same sex relationships results in women being completely excluded from legal protection" and allows law enforcement officers to "arbitrarily detain them". Although the Committee has called on the State to decriminalise sexual relationships between consenting adults of same sex, and abide by the obligation of non-discrimination under the Convention (CEDAW/C/LKA/CO/7, para. 25(g), Sri Lanka has resisted taking action to repeal and reform these laws, instead using legal interpretation as a tool to defend against accusations of discrimination and to appear to be complying with the Committee's recommendations made at review process.

The main strategy of the State has been to deflect its responsibility to remove or amend Section 365 and 365A of Sri Lanka's Penal Code by claiming that Article 12 of the Constitution guarantees protection from discrimination on the grounds of sexual orientation or sexual identity. Article 12 states that "*No citizen shall be discriminated against on the grounds of race, religion, language, caste, sex, political opinion, place of birth or any such grounds*". However, the Attorney General's Department of Sri Lanka has said, "Sections 365 and 365A do not target any particular group but are there to protect public morality".

The continued criminalisation of same-sex relations between consenting adults reinforces direct discrimination of LBT persons and prevents equal treatment guaranteed by the Constitution of Sri Lanka, despite claims to the contrary by the Sri Lankan State in its 8th Periodic Report to CEDAW. The State report is also silent on the discrimination suffered by LBT persons and on the lack of legal protection available to them, indicating that they are among the most invisible, under-documented, and under-recognized groups in society.

I. EQUALITY AND NON-DISCRIMINATION OF LBT (Articles 1-4, GR 28, GR 33)

The application of substantive equality and an intersectional approach to sexual orientation and gender identity based discrimination are essential, since sexual orientation and gender identity do not exist in isolation but are co-constructed by race, class, ethnicity, caste, health, disability, and other factors.

LBT persons continue to be fearful and reluctant to seek legal protection and gain access to justice through Constitutional provisions even if these are available. This fear is justified when the presence of Section 365 and 365A continue to be used by many actors at different levels ranging from State Official to family members to threaten, intimidate, and blackmail LBT persons when their sexual orientation and gender identity is discovered or revealed.¹

The State often fails to take measures to prevent, investigate and punish any violations of the principles enshrined in CEDAW vis-a-vis LBT persons. The operative laws act as a muzzle on complaints, the State has failed to take any positive measures to ensure redress for victims, and State Officials who don't exercise due diligence or in dealing with victims or are perpetrators of violence are not held accountable.²

In addition to facing direct discrimination, LBT persons are rarely recognised in policy formulation or legal reform in many key areas such as employment, housing, and provision of health services, as well as being excluded from representation in decision-making processes and access to justice.

In the current Constitutional reform process, members of Sri Lanka's LGBT, women's rights and human rights organisations have raised their concerns about discrimination and the lack of legal protection on grounds of sexual orientation and gender identity with the Public Representations Committee on Constitutional Reform (PRCCR). The PRCCR has noted in its May, 2016 report: "The rights of the LGBTQI community to equality, dignity and non-discrimination should be provided for in the new constitution". The PRCCR recommended: "sexual and gender orientations" along with "race, religion, caste and sex" should be "included in the clauses on "equality and non-discrimination".³ The Sub-Committee on Fundamental Rights of the Constitutional Assembly has also included this recommendation in its report to the Assembly.⁴ However media reports on the Cabinet deliberations on the recommendations indicate strong dissent and a move to reject decriminalising of same sex relationships.⁵

¹ "All Five Fingers Are Not the Same" *Discrimination on Grounds of Gender Identity and Sexual Orientation in Sri Lanka*, Human Rights Watch, Sri Lanka (2016).

² Ibid.

³ *Report on Public Representations on Constitutional Reform*, Public Representations Committee on Constitutional Reform, Sri Lanka, 2016. (p. 112)

⁴ See tri-lingual report at <http://english.constitutionalassembly.lk/images/pdf/01-Fundamental-Rights-ste.pdf>

⁵ <http://www.dailymirror.lk/122311/Cabinet-rejects-moves-to-decriminalize-homosexuality> 18 January 2017

Sri Lanka is also in the process of drafting a National Action Plan for the Promotion and Protection of Human Rights 2017-2021. The current draft of the National Action Plan contains provisions to decriminalise homosexuality and repeal of Section 365A. However, media reports indicate that these provisions would be dropped and we have fears that this recommendation may not be included in the final plan despite the prominent call for decriminalisation.

Many women's groups and LGBT groups making submissions before the PRCCR, stressed that Article 16 must be repealed and replaced with an Article which recognizes the supremacy of the Constitution and allows for the review and repeal of all discriminatory legislation including past and present laws and post enactment in the future that violate the fundamental right to equality and other fundamental rights. However potential provisions for such review and repeal have been challenged on the grounds of political sensitivities in relation to personal and customary laws.

We request the CEDAW Committee to ask the Sri Lanka government to:

- Decriminalise sexual relationships between consenting same sex adults and abide by the obligation of non-discrimination under the Convention.
- Repeal or amend discriminatory laws that infringe on human rights of LBT persons, including Sections 365 and 365A irrespective of the outcome of the Constitutional reform process.
- Ensure the 2017-2021 National Action Plan for the Promotion and Protection of Human Rights provides a comprehensive approach to prevent and address discrimination and gender-based violence against women from the LBT community in all its forms and manifestations.
- Establish an independent commission on women that will include in its mandate the concerns of LBT persons.
- Given the uncertainties of the Constitutional process, review and repeal all existing written and unwritten laws that are discriminatory.

II. STATE'S FAILURE TO DOCUMENT LBT DISADVANTAGES

The CEDAW Committee has requested the Sri Lanka government to “demonstrate studies undertaken “to determine areas in which women are underrepresented or disadvantaged” (CEDAW/C/LKA/Q/8, para.13.).

The State has not undertaken any studies to determine the levels of underrepresentation or disadvantages faced by LBT persons in areas of decision-making. No political party has actively engaged with the LBT community to increase their representation in politics. Women in general have been historically under-represented at all levels of government and LBT women have been completely invisible in the political arena. No affirmative action has been taken to redress this situation for women of diverse gender identities and sexual orientation.

We request the CEDAW Committee to ask the Sri Lanka government to:

- Recognise the specific concerns of LBT persons in policy formulation and legal reform in key areas such as employment, housing, provision of health services, representation in decision making processes and access to justice.
- Undertake research to determine the levels of underrepresentation or disadvantages faced by LBT persons in areas of decision making and put in place affirmative measures to redress this situation for women of diverse gender identities and sexual orientation.
- Incorporate sexual orientation and gender identity issues directly to the government's transitional justice mechanisms such as within the truth-seeking mechanisms.

III. STEREOTYPES AND HARMFUL PRACTICES TOWARDS LBT (Article 5)

Lesbians, bisexual women and transgender persons in Sri Lanka are singled out for unequal treatment because they fail to conform to social or cultural norms on sexual orientation and gender. Research on violence faced by LBT persons in Sri Lanka conducted by the Women's Study Group, an organisation which provided support and advocacy for LBT persons notes, "LBT people were also viewed as 'people who have some kind of sexual or psychological disorder, who cannot live in a normal way'..."⁶

Social media networks are rife with anti-LGBT hate-groups, who see the LGBT community as an aberration, a western import, and un-Sri Lankan. These groups too are mostly fuelled by false stereotypical ideas. Many lesbians, bisexual women and transgender persons say they experience online abuse on a daily basis.

While repealing legislation that criminalises adult consensual same-sex relationships and gender non-conformity may not appear to have a direct correlation to the eradication of stereotyping practices, it can often be seen that collective social attitudes are shaped by culture, and culture is in turn shaped by a nation's legislation and vice versa. Repealing discriminatory laws will have a significant impact on reversing stereotyping practices and transforming social attitudes towards LBT persons.

We request the CEDAW Committee to ask the Sri Lanka government to:

- Ensure that all state institutions be urged to prevent dissemination of harmful ideas, including in education curricula and media, and instead to encourage and teach tolerance and acceptance.
- Undertake educational reforms to sensitize children of school-going age, as well as parents, teachers, administrative staff and principals about gender and sexuality in terms of diversity, rights and non-discrimination.

⁶ "Not Gonna Take it Lying Down": Experiences of Violence and Discrimination as told by LBT persons in Sri Lanka, Women's Support Group, Sri Lanka. 2014. (p. 15)

IV. GENDER-BASED VIOLENCE AGAINST LBT (Articles 1-4, 6, GR 19)

The Action Plan to combat gender-based violence against women—titled “Policy Framework and National Plan of Action to address Sexual and Gender-based Violence (SGBV) in Sri Lanka 2016-2020” that was approved by the Sri Lanka Cabinet in June 2016 and launched publicly in November 2016 is silent on violence perpetrated against LBT persons. The policy framework and plan fails to include measures to protect LBT women who are subject to gender-based violence and intersecting forms of discrimination on the basis of their sexual orientation and gender identity.

The invisibilizing of LBT vulnerabilities and protections leaves LBT persons who experience violence, including physical and sexual violence, domestic violence and threats of physical harm too fearful to report violations, therefore preventing LBT persons from seeking protection from the law. For example, the Human Rights Watch reports that Nithura, a 31-year-old Sri Lankan lesbian, who was repeatedly harassed and subjected to death threats by her girlfriend’s father, Did not report to the police. She said, “I’m a criminal in this country. What’s the point wasting time saying something when the laws are unequal and unjust? I just don’t want to be illegal”.⁷

The Women’s Support Group study found that more than half of the 33 LBT persons interviewed had experienced physical and sexual violence, 12 of whom spoke of on-going physical violence in their lives. Perpetrators included immediate family members, strangers, peers, partners, ex-partners employers, supervisors, co-workers and neighbours.⁸ Roshmi, a 39-year old lesbian interviewed for the study, reported, “My partner’s family forcibly tried to give her pills and medicine to cure her. They tried very hard to change her into a heterosexual... [T]wice she was subjected to electric shock therapy”.⁹ Another interviewee, Chamila, a 36-year old woman who lives with her parents said that her mother “had taken her to a mental health professional to try and ‘cure’ her gender non conformity and her lesbianism”.¹⁰

All 33 LBT respondents in this study had experienced some form of emotional violence, including: gender norm enforcement, restrictions on socialization, physical and emotional neglect, family ostracism, and constant pressure to enter into (heterosexual) marriage.¹¹ Mallika, a lesbian in her early 40s said: “I think the biggest discrimination for me was from my family. Emotionally and verbally they have discriminated [against] me - their denial that I am a lesbian and the refusal to accept anything other than me being with a man as being ok...They at best hide my sexuality or refuse to acknowledge it. So the problems are actively from them and it continues still”.¹²

⁷ “All Five Fingers Are Not the Same” *Discrimination on Grounds of Gender Identity and Sexual Orientation in Sri Lanka*, Human Rights Watch, Sri Lanka, 2016. (p. 17)

⁸ “Not Gonna Take it Lying Down”: *Experiences of Violence and Discrimination as told by LBT persons in Sri Lanka*, Women’s Support Group, Sri Lanka. 2014. (p. 29)

⁹ Ibid (p. 1)

¹⁰ Ibid (p. 24)

¹¹ Ibid (p. 21)

¹² Ibid (p. 1)

Twenty-one of the LBT people interviewed said they suffered verbal insults, derogatory comments, and threats of physical harm by family members, neighbours, ex-partners, employers and prospective employers. Physical violence such as slapping and punching accompanied verbal threats in 15 cases. A Tamil bisexual woman explained that she was threatened by “people who say that they will castrate [my] friends. That they would beat us up with hockey sticks, set us on fire, those kinds of things have been told”.¹³

The cumulative impact of violence that LBT persons experienced was depression and long-term anxiety, and attempted suicide. LBT suicides were in fact reflected in Sri Lankan newspaper reports from 2010 to 2013.

Sri Lanka’s legislation for the prevention of domestic violence does not seem to be used by LBT persons because they lack of knowledge on how to use the law, fear criminal repercussions if they are charged under Section 365 and 365A or 399, and lack services such as counselling, legal assistance and sheltering that is sensitive to the needs of LBT persons in crisis.

We request the CEDAW Committee to ask the Sri Lanka government to:

- Ensure the Policy Framework and National Plan of Action to address Sexual and Gender-based Violence in Sri Lanka 2016-2020 is reflective of violence and discrimination against LBT persons in its implementation.

V. HEALTH (Articles 11, 12; General Recommendation 19, 24)

While the basic health needs of LGBT people and the general population are the same, their sexual orientation and gender identity and expression is a barrier to LGBT individuals accessing health related entitlements. LBT women in Sri Lanka continue to face challenges in exercising their basic right of access to health care, including reproductive health and avoid or delay receiving health care or receive inappropriate or inferior care in general and health care settings. The high visibility of LGBT persons in HIV prevention intervention programmes is considered to pose a barrier to recognizing their need for services for general and reproductive health problems as for the general population.

Data disaggregated by sexual orientation and gender identity to elucidate these problems is currently lacking as demographic and health data that drives delivery of evidence based healthcare in Sri Lanka, is generated almost entirely in the male-female binary, except in the instance of HIV prevention. The reasons include real or perceived discriminatory attitudes related to sexual orientation and gender identity, inadequate knowledge of service providers about LBT health and health needs, fears of LBT persons to disclose their sexual orientation and gender identity, and poor understanding of their own health risks.

¹³ Ibid (p. 27)

The many goals of the National Policy on Maternal and Child Health, Sri Lanka (2012) are collectively directed at providing a continuum of care for “promoting and maintaining optimal health of women and their partners throughout the lifecycle commencing with the pre-pregnancy phase”. Maternal and child health, reproductive health and family planning service delivery are driven by the patriarchal definition of the ‘family’¹⁴ that has strong overtones of heteronormativity and motherhood. Reproductive health and family planning service providers need to acknowledge the likelihood that a pregnant woman may be a lesbian or bisexual and recognize her right to avail services without prejudice.

LBT women are not visible in Sri Lanka’s network of State Well Woman Clinics¹⁵ that provide screening for breast and cervical cancer, diabetes and hypertension. It is likely that the strong overtones of heteronormativity and motherhood that surround the patriarchal definition of family that drives the Sri Lanka Ministry of Health and Sexual and Reproductive Health services, creates environments that are less safe, sensitive, and comfortable for non-heterosexual women.

Members of the transgender community report complete disregard and lack of concern for protecting the confidential details of their medical histories by State run healthcare facilities. Information has been shared with non-medical hospital personnel such as cleaners and security staff. Some transgender persons report intimidation and harassment by hospital staff. In one case, a doctor sexually harassed a transwoman seeking medical assistance at a government hospital. In another incident a transgender man reported having his genitals examined when he was under sedation for surgery not related to his sexual organs. There are also reports indicating that transwomen who go to government healthcare facilities have faced discrimination, such as their cases being delayed and their appointments being pushed to the back of the queue. Transmen (female to male) are often left out of HIV awareness programmes since often only transwomen are categorised as men having sex with men by HIV service providers.

Such mistreatment has deterred transgender persons from seeking treatment from government healthcare facilities that offer healthcare services at no cost, and has compelled them to opt for expensive health care from the private sector which they often cannot afford.

The current response to the health needs of LBT people is largely within a narrow framework of HIV prevention that not only exacerbates their experiences of social rejection, but is a barrier to the generation of data for comprehensive rights-based holistic and gender inclusive health policy and services.

¹⁴ The *Eligible Family* is defined as a family either legally married or living together where the woman is between 15 to 49 years of age and/or having a child under 5 years. A family with a pregnant or co-habiting woman irrespective of marital status and age, and single women (widowed, divorced, and separated) are also considered under eligible family. *Annual Health Report on Family Health Sri Lanka*. Family Health Bureau, Ministry of Health, Sri Lanka. 2012.

¹⁵ *Annual Report on Family Health Sri Lanka 2012*. Family Health Bureau, Ministry of Health, Sri Lanka (2012).

We request the CEDAW Committee to ask the Sri Lanka government to:

- Enhance the quality of life of LBT persons by ensuring LBT friendly and non-discriminatory healthcare services and availability of knowledgeable and non-prejudiced healthcare providers.
- Ensure appropriate penalties for government sector healthcare providers who violate confidentiality of patients regardless of their sexual orientation and gender identity.
- Ensure disaggregated data for lesbians, bisexual women, transgender women and transgender men when conducting studies on health risks, health services, or health factors.

CONCLUSION

The lived experience and research of LBT persons in Sri Lanka shows that they suffer discrimination, violence, and marginalisation in multiple and intersecting ways. The criminalisation of consensual adult same sex behaviour and relationships makes LBT individuals vulnerable to abuse at many levels and prevents them from seeking redress for fear of penal repercussions. They are also reluctant to seek assistance when they suffer crimes, regardless of severity and type of crime. LBT people are therefore unable to exercise or enjoy full citizenship.